No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ASSOCIATION OF CLUB EXECUTIVES OF DALLAS, INC., *et al.*,

*Petitioners,*

v.

CITY OF DALLAS, TEXAS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. The secondary effects doctrine of *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), provides that regulations adopted for the content-neutral purpose of mitigating the claimed adverse secondary effects associated with businesses offering sexually oriented expression are subject to intermediate scrutiny. Does that doctrine survive *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *City of Austin v. Reagan National Advertising of Austin, LLC*, ___ U.S. ___, 142 S.Ct. 1464 (2022), which hold that facially content-based laws are subject to strict scrutiny, regardless of their content-neutral justifications?

2. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), is a plurality decision addressing the evidentiary burdens under the secondary effects doctrine, which the lower courts have struggled to apply. In this case, Petitioners presented extensive evidence challenging the City's rationale for an ordinance requiring sexually oriented businesses to close between 2:00 a.m. and 6:00 a.m. The district court found that evidence to be compelling and granted a preliminary injunction. The Fifth Circuit vacated the injunction, holding that the district court held the City to too high a standard. Thus, if the secondary effects doctrine survives, the question presented is what quantum of evidence is sufficient to cast doubt on a municipality's rationale for such an ordinance, under the plurality opinion in *Alameda Books?*

3. Justice Kennedy provided the fifth vote for reversal in *Alameda Books*, and the lower courts have uniformly held his concurring opinion is controlling under *Marks v. United States*, 430 U.S. 188 (1977).

Under his test, a city must show "that its regulation has the purpose and effect of suppressing secondary effects while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449 (Kennedy, J., concurring). Here, the district court found that the evidence established that the City's Ordinance failed that test as well, but the Fifth Circuit also rejected that conclusion. Thus, the further question presented is whether an ordinance requiring the closure of speech businesses during certain hours, on a record showing a substantial reduction of speech, violates Justice Kennedy's effect on speech test?

## PARTIES TO THE PROCEEDING

Petitioners Association of Club Executives of Dallas, Incorporated, a Texas non-profit Corporation; Nick's Mainstage Inc.– Dallas PT's, doing business as PT's Mens Club; Fine Dining Club, Incorporated, a Texas Corporation, doing business as Silver City; TMCD Corporation, a Texas Corporation, doing business as The Men's Club of Dallas; 11000 Reeder, L.L.C., a Texas Limited Liability Company, doing business as Bucks Wild; AVM-AUS, Limited, a Texas limited partnership, doing business as New Fine Arts Shiloh were the Plaintiffs in the district court and the Appellees in the court of appeals.

Respondent is the City of Dallas, which was the Defendant in the district court and the Appellant in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Fine Dining Club, Inc.'s parent corporation is RCI Hospitality Holdings, Inc., a publicly traded corporation that holds 10% or more of Fine Dining Club, Inc.'s stock. None of the other Petitioners have a parent company, and no publicly traded company owns 10% or more of their stock.

## RELATED CASES

*Association of Club Executives, Inc., et al. v. City of Dallas, Texas*, No. 3:22-cv-00177-M, U.S. District Court for the Northern District of Texas. Preliminary Injunction issued May 24, 2022.

*Association of Club Executives, Inc., et al. v. City of Dallas, Texas*, No. 22-10556, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 12, 2023. Petitions for rehearing and rehearing *en banc* denied November 7, 2023.

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## PETITION FOR A WRIT OF CERTIORARI

Association of Club Executives of Dallas, Incorporated, Nick's Mainstage Inc.– Dallas PT's, Fine Dining Club, Incorporated, TMCD Corporation, 11000 Reeder, L.L.C., and AVM-AUS, Limited, petition the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The decision of the Court of Appeals is published at 83 F.4th 958 (5th Cir. 2023), and is reproduced at App. 1-20. The order of the Fifth Circuit Court of Appeals denying Petitioners' separate petitions for panel rehearing and rehearing en banc is set forth in the Appendix at App. 73-74. The Memorandum and Opinion of the District Court is published at 604 F. Supp.3d 414 (N.D. Tex. 2022), and reproduced at App. 21-69. The district court's order granting the preliminary injunction is set forth at App.70-71. Its order denying the motion for a temporary restraining order is set forth at App. 72.

## JURISDICTION

The Court of Appeals entered its judgment on October 12, 2023. It denied Petitioners' petitions for rehearing and for rehearing en banc on November 7, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First and Fourteenth Amendments to the Constitution are reproduced at App.75-77. Dallas Ord.

32125 is reproduced at App. 78-85. Pertinent parts of Chapter 41A, Dallas City Code, are reproduced at App. 86-94.

## STATEMENT OF THE CASE

When this Court decided *Reed v. Town of Gilbert,* 576 U.S. 155 (2015), it was described as "a blockbuster,"[1] "a sea change,"[2] and "a missile" shot "into [the Court's] own reasoning."[3] *Reed* held that regulations of expression that, on their face, make distinctions based on content, are subject to strict scrutiny, regardless of a "benign motive [or] content-neutral justification." *Id.* at 165. In *City of Austin v. Reagan National Advertising of Austin, LLC*, ___ U.S. ___, 142 S. Ct. 1464 (2022), the Court reaffirmed that core holding of *Reed*, while concluding that the ordinance before it was facially content neutral and, therefore, subject only to intermediate scrutiny.

While "injecting some much-needed clarity into

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[1] Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015) (quoting Floyd Abrams)

[2] *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293, 1332-33 (11th Cir. 2017) (en banc) (Tjoflat, J., dissenting)

[3] Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After* Reed v. Town of Gilbert, 57 Santa Clara L. Rev. 385, 413 (2017).

First Amendment jurisprudence,"[4] *Reed* and *City of Austin* have left a number knotty questions in their wake. This case presents one of them: Does the secondary effects doctrine of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), survive *Reed* and *City of Austin?* That doctrine holds that content-based regulations, enacted for the content-neutral purpose of mitigating the adverse secondary effects claimed to be associated with businesses offering sexually oriented expression, are to be reviewed under intermediate, rather than strict, scrutiny.

If this Court determines that the secondary effects doctrine does survive *Reed* and *City of Austin*, then this case raises two other important questions on which courts have struggled since the Court decided *City of Los Angeles v. Alameda Books, Inc*, 535 U.S. 425 (2002), over two decades ago: What quantum of evidence offered by a challenger suffices to cast doubt on a city's rationale for a secondary effects ordinance, under Justice O'Connor's plurality opinion, and how does an ordinance pass or fail the test set forth in Justice Kennedy's controlling, concurring opinion that it have the "purpose and effect of suppressing secondary effects, while leaving the quantity and accessability of speech substantially intact." *Id.* at 449 (Kennedy, J., concurring).

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[4] *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015) (Mannion, J., concurring); *See also* Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, And the Rise of the Anticlassificatory First Amendment*, 2016 Sup. Ct. Rev. 233, 234.

Introduction

Dallas is a late night city and has a vibrant late-hours entertainment and art presence. This includes adult entertainment at late night clubs and twenty-four hour adult bookstores, which are extremely popular and well patronized by citizens who choose that type of constitutionally protected expression. These adult businesses, their employees, entertainers and others depend upon those late-night hours for their success and livelihoods.

Dallas passed an Ordinance closing, during the hours of 2:00 a.m. to 6:00 a.m., not all entertainment venues or retail outlets or restaurants, gas stations, drug stores, grocery stores or other late night enterprises, but only businesses offering erotic dance performances protected by the First Amendment and retail outlets offering constitutionally protected books, magazines, DVDs, movies and videos with a sexually oriented content. Petitioners challenged the Ordinance. They argued it was a content-based ordinance that was subject to, but could not satisfy, strict scrutiny.

They argued the Ordinance failed intermediate scrutiny as well, under both the framework of the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and Justice Kennedy's controlling concurring opinion in that case. They built a record, under the burden shifting approach in Justice O'Connor's plurality opinion. That opinion requires a city's evidence to fairly support its rationale, which in this case was that crime around the adult businesses was substantial and problematic during the late night hours, and that closing these businesses during those

hours would further a substantial government interest in reducing crime and conserving police resources. The plurality opinion allows a plaintiff to cast direct doubt on that rationale by demonstrating that the city's evidence does not fairly support its rationale or by offering evidence disputing the municipality's findings.

Petitioners presented an extensive evidentiary record, found by the district court to make a compelling case that the City's evidence did not fairly support its rationale for the Ordinance. In addition, they offered evidence and argument, also credited by the district court, that the Ordinance failed Justice Kennedy's test that a law of this kind must have the purpose and effect of reducing secondary effects while leaving the quantity and accessibility of speech substantially intact.

The district court issued a factually intensive opinion, leading to its conclusion that Petitioners had demonstrated a likelihood of success on the merits of their First Amendment claim, regardless of whether the Ordinance was tested under strict or intermediate scrutiny. It, therefore, entered a preliminary injunction against the enforcement of the ordinance.

On the City's appeal, the Fifth Circuit vacated that decision. It concluded that the Ordinance should be analyzed as a content neutral law under intermediate, rather than strict, scrutiny, holding "it would be a mistake to interpret [*Reed* and *City of Austin*] as silently spelling" the demise of the secondary effects doctrine. App. 9. It added:

> More to the point, whether to overrule or modify *Renton* is the High Court's business,

> not ours. 'Our job, as an inferior court, is to adhere strictly to Supreme Court precedent, whether or not we think a precedent's best days are behind it.'" *United States v Vargas*, 74 F.4th 673, 683 (5th Cir. 2023)(en banc)(citing *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct 2028, 2038 (2023).

App. 9.

It then faulted the district court's application of intermediate scrutiny. While it did not state that any of the district court's factual findings were clearly erroneous, it determined that the district court had "held the City's evidence to a standard of exactitude not required by the Supreme Court's precedents." App. 10. Concluding that Petitioners did not have a likelihood of success on the merits of their First Amendment claims, it vacated the district court's preliminary injunction.

Procedural History

On January 26, 2022, the Dallas City Council adopted Ord. 32125 ("the Ordinance"), which amended Chapter 41A of the Dallas Codified Ordinances governing sexually oriented businesses. The Ordinance requires sexually oriented businesses to close between the hours of 2:00 a.m. and 6:00 a.m. The justification advanced for the Ordinance was that it would reduce crime and preserve police resources.

That same day, the Petitioners filed a verified complaint and motion for a temporary restraining order and preliminary injunction challenging the Ordinance under the First and Fourteenth

Amendments, invoking the district court's federal question jurisdiction under 28 U.S.C. §1331, and bringing suit pursuant to 42 U.S.C. §1983.

The district court denied the motion for a temporary restraining order based on the understanding the ordinance would not be enforced before the preliminary injunction hearing. App. 72. The City later agreed to withhold enforcement until the district court ruled on the preliminary injunction motion. ROA. 9919.[5]

The district court issued its opinion and order granting a preliminary injunction on May 24, 2022. The City appealed and the Fifth Circuit vacated its decision on October 12, 2023. On November 7, 2023, it denied Petitioners' petitions for rehearing and rehearing en banc.

Statement of Facts

Petitioners, Association of Club Executives of Dallas, Inc., ("ACE"), a trade association whose members include adult cabarets and adult bookstores/arcades located in the City of Dallas, and individual members of ACE that operate licensed sexually oriented businesses in the City of Dallas, have, for many years, as a part of the city's energetic late night culture, offered constitutionally protected sexually oriented expression during the late night hours to their patrons. Indeed, Petitioners' businesses are extremely popular and well patronized by citizens

[5] "ROA" refers to the pagination of the record on appeal in the Fifth Circuit.

who, for many years, have chosen to view that type of constitutionally protected expression.

Petitioner 11000 Reeder, LLC, dba Bucks Wild, is a 15,000 square foot adult cabaret that does not sell or serve alcohol, but allows customers to bring in their own alcoholic beverages until 2:00 a.m. (BYOB). Before the enforcement of the Ordinance, it was open until 4:00 a.m. Sunday through Thursdays, 5:00 a.m. on Fridays and 6:00 a.m. on Saturdays. ROA. 9480, 9483.

Petitioner TCMD Corp., dba The Men's Club of Dallas, is an upscale, 19,000 square foot adult cabaret that has operated for 30 years. It holds a liquor license from the Texas Alcohol Beverage Commission ("TABC"), and is open until 2:00 a.m. Sunday through Thursday, and was open until 4:00 a.m. on Friday and Saturday before the enforcement of the Ordinance. ROA. 9508, 9509.

Petitioner AVM-AUS, Ltd., dba New Fine Arts Shiloh, is an adult bookstore/arcade that has been in business since the 1960s. ROA. 1093. It was open twenty-four hours a day before the Ordinance was enforced. ROA. 1095.

Petitioner Nick's Mainstage, Inc.-Dallas PT's, dba PT's Mens Club ("PT's"), is a BYOB adult cabaret that has operated for the past 40 years. It is open from 11:00 a.m. until 2:00 a.m. on Monday through Wednesday, and on Thursdays through Sundays, it was open until 4:00 a.m. before enforcement of the Ordinance. ROA. 1092, 1094.

Petitioner Fine Dining Club, Inc., dba Silver City is an adult cabaret that holds a license from the TABC.

It operates from 11:00 a.m. to 2:00 a.m., on Sunday through Thursday, and stayed open until 4:00 a.m. on Friday and Saturday until the Ordinance was enforced. ROA. 1092, 1094.

Petitioner Association of Club Executives of Dallas, Inc., is a trade association comprised of adult cabarets and adult bookstores/arcades that hold sexually oriented business licenses from the City of Dallas. ROA. 9524, 9527. The adult cabaret members licensed by the TABC present topless dance performances to their patrons, while the BYOB adult cabaret members, who do not hold liquor licenses, present nude dance performances to their patrons. ROA. 9467, 9476, 9482, 9495, 9529, 9950.

Like New Fine Arts Shiloh, the adult bookstore/arcade members of the Association have a business model and brand under which they operated twenty-four hours a day, seven days a week. ROA. 9528.

Chapter 41A of the Dallas City Code governs sexually oriented businesses such as Petitioners, and defines those businesses by the content of the expression that they present or disseminate to patrons. App. 87. Section 41A-2(3) defines an "Adult Bookstore or Adult Video Store," in pertinent part, as

> a commercial establishment that as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following: (A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, DVD's, video cassettes or video reproductions, slides,

> or other visual representations, that depict or describe "specified sexual activities" or "specified anatomical areas."

App. 86.

Section 41A-2(4) defines an "adult cabaret" as a "commercial establishment that regularly features the offering to customers of adult cabaret entertainment." App. 86-87.

"Adult cabaret entertainment" in turn, is defined in Section 41A-2(5) as "live entertainment that: (A) is intended to provide sexual stimulation or sexual gratification; and (B) is distinguished by or characterized by an emphasis on matter depicting, simulating, describing, or relating to "specified anatomical areas" or "specified sexual activities." App. 87.

Section 41A-2(2) defines an "Adult Arcade" as

> any place to which the public is permitted or invited wherein coin- operated 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 or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas.

App. 86.

"Specified anatomical areas," and "specified sexual activities" are also terms of art. "Specified anatomical areas," is defined in Section 41A-2(33) as

> (A) any of the following, or any combination of the following, when less than completely and opaquely covered: (i) any human genitals, pubic region, or pubic hair;(ii) any buttock; or (iii) any portion of the female breast or breasts that is situated below a point immediately above the top of the areola; or (B) human male genitals in a discernibly erect state, even if completely and opaquely covered.

App. 92.

"Specified sexual activities" is defined in Section 41A-2(34) as including:

> any of the following: (A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts; (B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (C) masturbation, actual or simulated; or (D) excretory functions as part of or in connection with any of the activities set forth in Paragraphs (A) through (C) of this subsection.

App. 92-93.

The Ordinance threatens the livelihoods of the more than 1,000 employees and independent contractor performers who work at Dallas' sexually oriented businesses during the late night hours, and the

continued viability of the businesses themselves. ROA. 9530-32. During the course of the evidentiary hearing, an exotic dance performer at Bucks Wild testified that her ability to work during the late night hours four days a week allows her to care for her disabled father, a veteran, during the day, and to stay home with her two year old son and put him to bed at night. ROA. 9466, 9468, 9470. Were she unable to continue to work during the late night hours, she testified that she would probably have to find another job, and move in with other family members. ROA. 9469. Other entertainers at Bucks Wild, she explained, choose to perform during those late night hours for similar reasons. ROA. 9470.

The owner of Buck's Wild testified that enforcement of the Ordinance would cause the club to lose approximately 45% of its employees and independent contractor performers, and suffer a similar loss of its revenues. ROA 9489. The operator of The Men's Club of Dallas testified that club would be forced to cut approximately 25% of its staff if the Ordinance were to be enforced. ROA. 9516.

The vice-president of the Association gave an overall view of the effect of the law on its members and testified that losses resulting from the enforcement of the Ordinance could not only force some of the businesses to close, but that the business' employees and the independent contractor performers would also suffer. The BYOB adult cabarets would be particularly hard hit, he testified, because their business model is built on being open after hours. ROA. 9531.

## REASONS FOR GRANTING THE WRIT

### I. THE SECONDARY EFFECTS DOCTRINE, ON WHICH THE COURT OF APPEALS BASED ITS DECISION, IS IRRECONCILABLE WITH THE COURT'S DECISIONS IN *REED V. TOWN OF GILBERT*, 576 U.S. 155 (2015), AND *CITY OF AUSTIN V. REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC*, 142 S. CT. 1464 (2022).

*Reed v. Town of Gilbert*, 576 U.S. 155 (2015), fundamentally refocused the analysis in determining whether a regulation of speech is content based, and therefore, subject to strict scrutiny, or content neutral and subject to intermediate scrutiny. *Reed* held that the Town's facially content-based sign code was subject to strict scrutiny– notwithstanding its content-neutral justification. *Id.* at 2224, 2228, 2231.

*Reed's* impact was swiftly noted by the courts of appeals. *Free Speech Coalition, Inc. v. Attorney General United States,* 825 F.3d 149, 160 n.7 (3rd Cir. 2016)("*Reed* represents a drastic change in First Amendment jurisprudence").

The Fourth Circuit Court of Appeals concluded that *Reed* had abrogated its First Amendment precedent holding that content-based regulations justified by a content-neutral purpose were subject to intermediate scrutiny. *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015); *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016); *Lucero v. Early*, 873 F.3d 466, 471 (4th Cir. 2017).

The Sixth Circuit similarly recognized that *Reed* required a different mode of analysis than it had

previously used to assess content neutrality: "The Supreme Court has flatly confirmed the requirement to apply *Reed's* strict-scrutiny standard, after this court had applied intermediate scrutiny by using a less stringent "'practical' test for assessing content neutrality. . . ." *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 706 (6th Cir. 2020), *quoting Wagner v. City of Garfield Heights*, 577 F. App'x 488, 494 (6th Cir. 2014), *cert. granted, judgment vacated*, 576 U.S. (2015).

The Seventh Circuit likewise recognized that "*Reed* understands content discrimination differently." *Norton v City of Springfield*, 806 F.3d. 411, 412 (7th Cir. 2015).

The Fifth Circuit's decision reviewed by this Court in *City of Austin v. Reagan National Advertising of Austin, LLC*, __ U.S. ___, 142 S. Ct. 1464 (2022), agreed that *Reed* represented a "sea change" in First Amendment law because now, at the first step of the analysis of deciding whether a law is content based or content neutral, the government's justification or purpose in enacting the law is irrelevant. *Reagan National Advertising of Austin, Incorporated v. City of Austin*, 972 F.3d 696, 710 (5th Cir. 2020), *rev'd on other grounds sub nom., City of Austin v. Reagan National Advertising of Austin, LLC*, __ U.S. ___, 142 S.Ct. 1464 (2022)("*Reagan I*").

In that decision, the Fifth Circuit considered the effect of *Reed* on its prior cases and concluded that it was wrong to have applied intermediate scrutiny to content based laws enacted in furtherance of a content-neutral purpose:

> This circuit has yet to take inventory of our pre-*Reed* cases. We do so now. We had previously held that "[a] statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech .... Content-neutrality has continued to be defined by the justification of the law or regulation, and this court has consistently employed that test." *Asgeirsson v. Abbott*, 696 F.3d 454, 459–60 (5th Cir. 2012) (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." (citation omitted))). The *Asgeirsson* case predates *Reed* and cites to *Ward*, which the Supreme Court addressed in *Reed*.

*Id.* at 703.

As a consequence it held:

> In the wake of *Reed,* our *Asgeirsson* precedent must be revisited. Like the Ninth Circuit, our pre-*Reed* case law ascribed to an incorrect understanding of the test for content-neutrality given in *Ward. See Asgeirsson*, 696 F.3d at 459–60. Therefore, *Asgeirsson* and any portion of a case that relies on *Asgeirsson*'s content-neutrality

analysis must be abrogated.

*Id.* In a footnote, it gave as examples nine of its previous cases that had to be abrogated. *Id.* n.3. Four of those decisions involved sexually oriented business regulations that had been justified as being aimed at ameliorating secondary effects and evaluated under intermediate scrutiny. *Id.*

In this case, Petitioners urged the court below to follow the panel opinion in *Reagan I*, because *City of Austin* had reaffirmed the core holding of *Reed*. The panel below however, retreated from the position set out in *Reagan I* and concluded otherwise, reasoning that "Any shadow cast on the secondary effects doctrine by our *Reagan I* opinion has been dispelled by *City of Austin*." App. 8.

To the contrary, this Court's decision in *City of Austin* reaffirmed *Reed's* central holding that "[a] regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'– that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Id.* at 1471, *quoting Reed*, 576 U.S. at 163. A law that defines "regulated speech by particular subject matter" is content based and subject to strict scrutiny. *Id.* at 1474, *quoting Reed* at 576 U.S. at 163.

In concluding that the distinction between off premise and on premise signs in the Austin ordinance at issue was not such a law, the Court explained:

> Unlike the regulations at issue in *Reed*, the City's off-premises distinction requires an

> examination of speech only in service of drawing neutral, location-based lines. *It is agnostic as to content*.

*Id.* at 1471 (emphasis added).

The Court made the same point later in its opinion: "Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here *do not single out any topic or subject matter for differential treatment*." *Id.* at 1472 (emphasis added). Accordingly, it reversed and remanded the case for a determination whether the Austin ordinance survives intermediate scrutiny.

Dallas's Ordinance here does precisely what the Court in *City of Austin* stated a content based law does– it applies to expression based on its topic and subject matter and singles it out for differential treatment.

A look at the secondary effects doctrine bears out its irreconcilability with both *Reed* and *City of Austin*. The doctrine had its genesis in *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), and was reaffirmed in *Alameda Books*. In each case, the Court held that, because the zoning ordinance at issue had been adopted to address adverse secondary effects claimed to be associated with the presence of sexually oriented businesses, the Court treated the laws as content neutral and subjected them to intermediate, rather than strict, scrutiny, because they were "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48. (citations omitted). *See also Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring).

*Reed* and *City of Austin*, however, rejected that approach. The Court in *Reed* explained, in determining whether a regulation is content based or content neutral, a court must first look at "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys"; if it does, that ends the inquiry. *Id.* at 163 (citation omitted).

Turning to the ordinance before it, the Court found:

> On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

*Id.* at 164-65.

The court of appeals in *Reed* had reasoned, however, that Gilbert's ordinance was content neutral because of its content-neutral justifications and the town's lack of hostility toward the regulated speech–the very particulars on which the secondary effects doctrine is also premised. *Id.* at 162. The Court rejected that approach:

> But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. *A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech.*

*Id.* at 165 (citation omitted)(emphasis added).

The Court found the lower court's reliance on *Ward v. Rock Against Racism*, 491 U.S. 781(1989), to justify its use of intermediate scrutiny, was misplaced:

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban....But *Ward's* framework "applies only if a statute is content neutral."...Its rules thus operate to "protect speech," not "to restrict it."

*Reed*, 576 U.S. at 166-67 (emphasis original) (citations omitted).

Criticism of the inconsistency between the secondary effects doctrine and the central premise recognized in *Reed*, that facially content-based regulations are to be reviewed under strict scrutiny, regardless of their content-neutral justifications, is not new. *See* Geoffrey R. Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46, 115 (1987) (describing *Renton* as "disturbing, incoherent, and unsettling" and "threaten[ing] to undermine the very foundation of the content-based/content-neutral distinction"); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (And What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 553 (2000) ("[T]he doctrine of secondary effects obliterates the content-based doctrine, the doctrine to

which the doctrine of secondary effects was meant to be a mere exception."); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U.ILL.L. REV. 783, 797 (2007) ("The secondary effects doctrine is an extremely odd one, as it seems clearly inconsistent with the Court's approach to content neutrality elsewhere in its First Amendment jurisprudence....").

And following the decision in *Reed*, scholars have noted the irreconcilability of the secondary effects doctrine with it. Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 URB. LAW. 569, 598-99 (2015)("The secondary effects doctrine is at odds with both the *Reed* majority's 'on its face' rule and the concerns about limiting disfavored messages underlying that rule. . . .Moreover, the secondary effects doctrine contradicts the *Reed* majority's rationale underlying the 'on its face" rule.'"); Anthony Lauriello, *Panhandling Regulation after Reed v. Town of Gilbert*, 116 Colum. L. Rev. 1105, 1140-41 ("[A]fter *Reed*, it is still an open question if the secondary-effects doctrine remains relevant in determining content-based speech regulations.")

While *Reed* and *City of Austin* provided clarity in holding that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech," *Reed*, 576 U.S. at 165, the Court did not address how that holding affects the status of the secondary effects doctrine.

Indeed, the court below stated that, since neither

*Reed* nor *City of Austin* said anything about the secondary effects doctrine, the doctrine has not been abrogated, and continues to exist, and in doing so, rejected the conclusion of the Fifth Circuit panel in *Reagan I* that strict scrutiny applies to laws regulating sexually oriented businesses. App.7-10.

Other courts, too, have recognized the disconnect between the secondary effects doctrine and *Reed*'s methodology, but have concluded that the doctrine still exists. *See, e.g., Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 703 F. App'x 929, 935 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 2623 (2018) ("There is no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine."); *BBL, Inc. v. City of Angola,* 809 F.3d 317, 326 n.1 (7th Cir. 2015) (recognizing that *Reed* "clarified the concept of 'content-based' laws but noting that it did not "think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment."); *Free Speech Coalition*, 825 F.3d 149, 161 n.8 ("Although we do not reach the issue, we agree with the dissent that it is doubtful that *Reed* has overturned the *Renton* secondary effects doctrine."); *id.* at 174 ("The secondary effects doctrine thus seems logically irreconcilable with *Reed*.")(Rendell, J., dissenting).

But if the core holding of *Reed*, approved in *City of Austin*, stands, that a content based regulation of speech that defines its applicability by specific subject matter and topic (which is what a regulation of sexually oriented businesses does) is subject to strict scrutiny, then the secondary effects doctrine cannot stand.

Otherwise, the central holding of *Reed*, as reaffirmed in *City of Austin*, that strict scrutiny applies to a facially content based regulation of speech regardless of a content neutral purpose and lack of hostility to the speech, will be subject to broad exceptions which will swallow the rule enunciated in that case.

This case squarely presents the opportunity to resolve the fundamental inconsistency between *Reed* and *City of Austin* on the one hand, and the secondary effects doctrine on the other.

## II. IMPORTANT QUESTIONS, ON WHICH COURTS HAVE STRUGGLED, ARE PRESENTED UNDER *ALAMEDA BOOKS*: 1) WHAT QUANTITY OF EVIDENCE MUST A CHALLENGER SUBMIT TO CAST DIRECT DOUBT ON A CITY'S RATIONALE FOR A SECONDARY EFFECTS ORDINANCE, UNDER THE PLURALITY OPINION; AND, 2) DOES A CLOSING HOURS ORDINANCE, ON A RECORD SHOWING A SUBSTANTIAL REDUCTION OF SPEECH, VIOLATE THE EFFECT ON SPEECH TEST OF JUSTICE KENNEDY'S CONTROLLING, CONCURRING OPINION.

Justice O'Connor's plurality opinion in *Alameda Books* set out a burden-shifting framework in considering a challenge to a law aimed at curbing the secondary effects claimed to be associated with sexually oriented businesses. She explained:

> [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. This 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 [*City of*] *Renton* [*v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986)]. 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.

*Id.* at 438 (internal citations omitted).

Justice Kennedy provided the fifth vote for reversal in *Alameda Books* and the lower courts, including the Fifth Circuit in this case, have uniformly held that his concurring opinion represents the controlling one under the rule of *Marks v. United States*, 430 U.S. 188 (1977). Justice Kennedy explained that government cannot address the adverse secondary effects claimed to attend adult speech by reducing the speech itself and cautioned:

> [A] city may not regulate the secondary effects of speech by suppressing the speech itself.... [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.... The rationale of the ordinance must be that it will suppress secondary effects and not by suppressing speech.

*Id.* at 445, 449-50. He went on:

> It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

*Id.* at 450.

It has been 22 years since *Alameda Books* was decided. As the Seventh Circuit observed in one of its three opinions that ultimately struck down an ordinance restricting the hours of operation of adult bookstores, the decision in *Alameda Books* has provided little guidance to lower courts:

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

*Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460, 466 (7th Cir. 2009), *appeal after remand*, 624 F.3d 368 (7th Cir. 2010),740 F.3d 1136 (7th Cir.), *cert. denied*, 574 U.S. 820 (2014).

This case presents the perfect vehicle to clarify both the burden shifting approach of the plurality and the effect on speech test of the concurrence.

> Petitioners met Their Burden Under Both the Plurality and Concurring Opinions in *Alameda Books*.

In this case, over the course of a three day hearing, Petitioners offered abundant evidence to cast doubt on the rationale for the Ordinance and to demonstrate that the data on which the law was adopted was "shoddy." They also demonstrated that the Ordinance would have the effect of reducing and suppressing speech. The district court considered that evidence, and made detailed factual findings, consuming twenty-one pages of its thirty-nine page opinion, explaining how, on this record, Petitioners had met their burden under the plurality opinion in *Alameda Books*, as well as under Justice Kennedy's controlling concurring opinion

in that case.

The Fifth Circuit vacated that decision, however, without any meaningful discussion of those factual findings, or concluding that any of them were clearly erroneous. Without exhaustively reciting all of the evidence Petitioners mustered, some examples of the evidence they offered to meet their burden follow, and demonstrate that this case is a perfect vehicle for elucidation of the tests set forth in *Alameda Books* that courts have struggled to apply.

A. The Information Offered to Support the Ordinance

The Ordinance was adopted at the request of the Dallas Police Department ("Department") following presentations it made to two City Council committees in December 2021, and presentations to the entire City Council on January 5 and January 14, 2022.

Lieutenant Stephen Bishopp, one of the City's Rule 30(b)(6) deposition witnesses, holds a Ph.D. in Criminology and is trained in statistical analysis and research design. ROA. 9344. He is the commander in charge of the data collection process for crime statistics and information for the City of Dallas. ROA. 9776. He collected data of crime incidents, arrests, and calls for service between the hours of 10:00 p.m. to 6:00 a.m. within a 500 foot radius of 35 locations where there were sexually oriented business licenses in place over the three year period 2019-2021.[6] The 35 locations

[6] Although the data actually covered 34 1/2 months, both the presentations to Council and the

consisted of:

9 adult bookstores/arcades

10 alcohol licensed topless adult cabarets

9 BYOB nude adult cabarets

7 not operating sexually oriented business.

He then put that information into various slides and bar graphs that were presented to Council comparing crime data between the hours of 10:00 p.m. and 2:00 a.m., and the hours of 2:00 a.m. to 6:00 a.m. to support the Ordinance requiring closure during those latter hours. ROA. 9345, 9352, 9942-75, 9976-9987.

B. The Evidentiary Record About the Ordinance

He readily acknowledged there were limitations to his presentation. It was not a crime study, nor was it an academic study of the kind he was familiar with in connection with his doctoral training. Indeed, he was not asked to do such a study. Rather, the information he presented was simply a report, an exploratory look at the crime data. ROA. 9770-01.

Lieutenant Bishopp acknowledged there were many other late night businesses open between the hours of 2:00 a.m. and 6:00 a.m. in Dallas, including convenience stores, gas stations, drugstores, retail

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parties referred to it as a three year period. ROA. 9708, 9725.

shops, grocery stores, hotels and motels, non-adult nightclubs, and restaurants. But, no data about crime within 500 feet of those businesses during the late night hours was collected. ROA. 9361-63.

Thus, the data he presented did not compare crime around the adult businesses to crime around appropriate control sites, even though he agreed he could have selected proper control sites with which to make that comparison. ROA. 9365. *See also* ROA. 9770-01, 9428, 9432. Indeed, he admitted that he did not apply any sort of methodological research design in evaluating the crime data he collected, and did not perform a multi-variate regression analysis of the data to control for variables. ROA. 9770-01.

Consequently, Lt. Bishopp admitted that he had no way of knowing whether crime within 500 feet of the sexually oriented businesses was less, more or the same as crime within a 500 foot radius of other late night enterprises. ROA. 9365, 9428, 9432. In fact, in answer to a question by the court, he acknowledged that "it's possible that those same statistics apply to crime generally in Dallas during those hours." ROA. 9711.

Similar shortcomings led the Seventh Circuit to hold that an Indianapolis ordinance requiring adult bookstores to close between midnight and 10 a.m., and all day on Sunday was unconstitutional:

> 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 convenient stores, that are not subject to the closing hours imposed on bookstores. . . .

*Annex Books, Inc. v. City of Indianapolis, Ind.*, 740 F.3d 1136, 1138 (7th Cir.), *cert. denied*, 574 U.S. 820 (2014).

Petitioners showed there were other problems with the Dallas's crime data as well, not the least of which was that of the 35 addresses used to compile the crime data, according to Lt. Bishopp, seven of them – fully 20%– did not have an operating sexually oriented business on it. ROA. 9353. By including locations without an operating adult business, Dallas's crime data were suspect *ab initio*. App. 52. *See also* ROA. 9355, 9360, 9977.[7] What is more, violent crime actually increased, from 7 incidents to 13 incidents, within 500 feet of those seven vacant locations between the hours of 2:00 a.m. and 6:00 a.m., compared to the hours of 10:00 p.m. to 2:00 a.m., undermining the rationale for the Ordinance that shutting the adult businesses during those hours would reduce crime. ROA. 9397.

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[7] Dallas acknowledged that three of the seven locations were non-operational during the entire three year period. It suggested, however, that some of the other locations had an operating adult business on it during part of the three year period. ROA. 9616-19.

The City's data showed that when property crime and violent crime data within 500 feet of the 35 locations were examined across 2019, 2020 and 2021, there were *fewer* combined property crimes and violent crimes within 500 feet of the sexually oriented business locations between the hours of 2:00 a.m. and 6:00 a.m., the hours the Ordinance closes the businesses, than between the hours of 10:00 p.m. and 2:00 a.m.

Petitioners also established that the number of arrests for violent crime within 500 feet of the sexually oriented businesses during the hours of 2:00 a.m. to 6:00 a.m., were low. There were just 11 violent crime incidents, between 2:00 a.m. and 6:00 a.m.,within 500 feet of the nine adult bookstores over the course of the three years, an average of one incident every three months within 500 feet of one of the nine retail outlets, while none occurred during that same period at the other eight. ROA. 9780-81.

The 66 violent crime incidents reported over three years within 500 feet of the nine BYOB nude adult cabarets averages to a single incident around one cabaret every 16.5 days, and none at the remaining eight. And the 45 reported violent crime incidents within 500 feet of the ten topless cabarets with liquor licenses over the course of three years means that, on average, just one incident occurred every 24 days within 500 feet of one of those locations, and none at the others. ROA. 9395-96.

Petitioners also showed that arrests for violent crimes within 500 feet of the sexually oriented businesses between 2:00 a.m. and 6:00 a.m. were exceedingly rare from 2019-2021: two near the adult

bookstores, eleven near the BYOB adult cabarets and just seven within 500 feet of the topless cabarets.

Viewed more broadly, the crime incidents within 500 feet of the adult businesses represented a minuscule portion of crime in Dallas. Petitioners catalogued all crimes in Dallas for the years 2020 and 2021, and the City acknowledged that the data were similar for 2019. ROA. 9830-32, 9834-35, Exhibits 9, 10, 13 and 14.

From 2019-2021, there were more than 316,000 crimes reported in the City of Dallas. ROA. 10602. The 399 total crime incidents within 500 feet of the 35 sexually oriented business locations between 2:00 a.m. and 6:00 a.m., during that same time frame however, represents just 0.0012623– 12/100 of 1%– of the crime in Dallas. ROA. 10602. Violent crimes reported within 500 feet of the sexually oriented businesses, when compared to the number of violent crimes throughout the City, were an equally tiny percentage, 38/100 of 1%. ROA. 9837, 10604.

Petitioners also established that from 2019 to 2021, custodial arrests within 500 feet of the adult businesses were lower between the hours of 2:00 a.m. and 6:00 a.m., the hours the Ordinance requires the businesses to close, as compared with the hours of 10:00 p.m. to 2:00 a.m.

Dallas's reliance on the calls for service data to support the law was undermined and cast doubt on the Ordinance's rationale when Petitioners showed that the calls did not have to come from the sexually oriented business itself, or relate to the business; if a call for service came from a convenience store that

happened to be within 500 feet of one of the 35 sexually oriented business locations used by the City, that particular call for service would be included in the data reported. ROA. 9800. No analysis was done to determine how many of the Priority 1 calls, the most serious calls, actually emanated from an event that took place at the sexually oriented businesses, as opposed to some location within 500 feet of one of them. ROA. 9800.

More significantly, as Lt. Bishopp acknowledged, the theory of the Ordinance is that closing the businesses between 2:00 a.m. and 6:00 a.m. will reduce calls for service and conserve police resources by reducing crime. Under that rationale, he agreed that he would expect the alcohol licensed cabarets, which were closed between 2:00 a.m. and 6:00 a.m., five days a week, to have fewer Priority 1 calls for service than the BYOB cabarets, which were open after 2:00 a.m. most days of the week, and the adult bookstores, which were open twenty-four hours. But the data showed that the topless clubs, which were closed beteen 2 am and 6 am five days a week, had more Priority 1 calls for service than the BYOB cabarets and the adult bookstores during those hours. ROA 9800-02.

Petitioners also cast doubt on the City's crime data generated by a police task force that stepped up enforcement for a period of time in the Northwest police district, an area of Dallas where a number of adult businesses are located. App. 55-56; ROA. 9345, 9352, 9942-75, 9976-9987. More specifically, the police department formed the Northwest Task Force after six homicides took place in 2020 and 2021 in the Northwest police district, an area of Dallas where a

number of sexually oriented businesses are located. Two of the six homicides had no connection to the sexually oriented businesses, while three or four had some nexus to an adult nightclub. ROA. 9566, 9992-94. Those three or four homicides represent a tiny fraction of Dallas's homicides in 2020 and 2021– citywide there were a total of 530 homicides in that two year period. ROA. 10538.

The vast majority of the citations and arrests made by the Northwest Task Force– which added an additional 8 officers to patrol the area during the late night hours– were the result of routine traffic stops for going through a red light, turning right on red without stopping, expired license plates, and similar offenses, and were *not* the result of incidents at the City's sexually oriented businesses. ROA. 9411.

Those traffic stops, in turn, led to arrests for individuals with outstanding warrants for offenses that had taken place in the past or, if probable cause to search a stopped vehicle was present, an arrest for contraband in the vehicle. ROA. 9411. And of those arrests and the citations the Task Force issued, there was no evidence, other than proximity, of a nexus between those events and any of the sexually oriented businesses in the area. ROA. 9953, 9416-18, 9385. Indeed, as the City admitted, adding eight additional officers to step up enforcement would lead to increased stops and arrests that otherwise would not have taken place, regardless of where in the City and the time of day the stepped up enforcement occurred. App. 55-56; ROA. 9412.

In addition, contrary to the City's claim, the City's

own crime statistics showed that the Northwest District, where many of the sexually oriented businesses are located, is not a high crime area in the city. It ranked sixth lowest of the seven police districts in homicides in 2021, and fifth lowest in 2020. ROA. 10601. It was sixth in the number of crimes against persons both in 2020 and in 2021. ROA. 10598. And, it ranked sixth when robberies were combined with crimes against persons during those two years. ROA. 10599.

When homicides, aggravated assaults, sexual assaults and robberies were combined, the Northwest District ranked fifth out of the seven in both 2020 and 2021. ROA. 10600. *See also* ROA. 9833-34.

Moreover, there were fewer arrests around the adult bookstores during the hours that the City wants them to close than between the hours of 10:00 p.m. and 2:00 a.m. The number of violent crime arrests within 500 feet of the nine bookstores was low to begin with, but dropped to just two arrests between the hours of 2:00 a.m. and 6:00 a.m., over a three year period when compared to the five arrests that occurred between 10:00 p.m. to 2:00 a.m. ROA. 9979.

The five hundred 911 calls within 500 feet of the nine bookstore locations between 2:00 a.m. and 6:00 a.m., cited by the Fifth Circuit, represents just 17 more calls than between 10:00 p.m. and 2:00 a.m. over the course of three years, or less than a single additional call every two months within 500 feet of one store and none around the other eight.

Finally, Lt. Bishopp, the City's representative,

acknowledged that none of the three academic studies cited in the slide presentations addressed an hours of operation law, and that he would not use them as a basis to support the hours of operation regulation that the City adopted. ROA. 9812-13.

This case presents the perfect vehicle to clarify the burden shifting approach, as Petitioners offered abundant evidence over a three day evidentiary hearing casting doubt on the Dallas's rationale for its law, which the district court found as a factual matter sufficient to have met that burden.

It is also an appropriate vehicle for the Court to address the application of Justice Kennedy's controlling, concurring opinion in *Alameda Books*.

The district court found, as fact, that a substantial number of patrons visit the sexually oriented businesses after 2:00 a.m.; that clubs earn a significant portion of their revenue after that time; and, that many of the dancers employed by Petitioners work other jobs or have child care obligations, which means they can only perform during the late night hours, including after 2:00 a.m. As a result, the quantity and accessibility of speech was not left substantially intact. App. 66. The Fifth Circuit concluded, however, that the Ordinance had to force Petitioners out of business to violate the First Amendment. So long as they have a reasonable opportunity to operate their businesses, the Ordinance withstood Justice Kennedy's proportionality test. App. 19.

Its reasoning on that score again conflicts with the Seventh Circuit's final decision in *Annex Books,* which held Indianapolis's closing law unconstitutional under

Justice Kennedy's opinion:

> 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, 122 S.Ct. 1728 (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.

740 F.3d at 1138.

It rejected Indianapolis's argument– the position taken by the Fifth Circuit— that speech was not reduced because "customers are free to patronize stores during the hours they are allowed to be open." *Id.*

This case presents an ideal vehicle to clarify what it means for a law to have "the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact," and what a challenger must show under that test.

## CONCLUSION

For the foregoing reasons, Petitioners request that the Court grant their petition for a writ of certiorari.

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