

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   CITY OF LOS ANGELES,                   :

4                   Petitioner                   :

5           v.                                   :   No. 00-799

6   ALAMEDA BOOKS, INC., ET AL.       :

7   - - - - -X

8                                   Washington, D.C.

9                                   Tuesday, December 4, 2001

10                   The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:02 a.m.

13 APPEARANCES:

14 MICHAEL L. KLEKNER, ESQ., Deputy City Attorney, Los  
15 Angeles, California; on behalf of the Petitioner.

16 JOHN H. WESTON, ESQ., Los Angeles, California; on behalf  
17 of the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 00-799, the City of Los Angeles v. Alameda  
5 Books, Inc.

6 Mr. Klekner.

7 ORAL ARGUMENT OF MICHAEL L. KLEKNER

8 ON BEHALF OF THE PETITIONER

9 MR. KLEKNER: Mr. Chief Justice, and may it  
10 please the Court:

11 Following its 1977 pioneering study, the City of  
12 Los Angeles enacted a, in 1978 a comprehensive zoning  
13 ordinance regulating the location of all types of adult  
14 business activities in the city. The ordinance defined  
15 eight business activities and required that they each be  
16 separated from each other by 1,000 feet.

17 Notwithstanding the clear intent of the city's  
18 ordinance in 1978, it became apparent that the ordinance  
19 could and was being interpreted to permit more than one  
20 adult business in the same building. This has been  
21 described by plaintiffs as a drafting error inadvertent  
22 loophole, but it was an ambiguity, and it became necessary  
23 to amend the ordinance in 1983 to remove that ambiguity,  
24 thereby --

25 QUESTION: Do we know if, at the time the

1 ordinance was enacted -- 1977?

2 MR. KLEKNER: '78, sir.

3 QUESTION: '78. Do we know if, at that time,  
4 there were businesses like the one at issue here, i.e., a  
5 place where they have both sale and rental and viewing --

6 MR. KLEKNER: I presume --

7 QUESTION: Do we know if those businesses  
8 existed in that form in 1978?

9 MR. KLEKNER: I believe they did. I don't  
10 believe --

11 QUESTION: All right.

12 MR. KLEKNER: -- that the study specifically  
13 analyzed specific combinations in one building.

14 QUESTION: All right.

15 MR. KLEKNER: That wasn't the purpose of the  
16 study.

17 QUESTION: Well, your clients didn't have  
18 businesses like that. Your clients just had one or the  
19 other, wasn't it? What did they start off with?

20 QUESTION: I'm sorry. I'm sorry. I'm sorry.

21 MR. KLEKNER: Our clients are innocent.

22 (Laughter.)

23 QUESTION: The businesses regulated here did not  
24 offer both. Which did they offer when the ordinance was  
25 initially passed?

1 MR. KLEKNER: I'm sorry, I did not hear the  
2 question entirely, sir.

3 QUESTION: When the ordinance was initially  
4 passed, which of the two types of business did they offer?

5 MR. KLEKNER: Well, these businesses started in  
6 the late eighties, early 1990's, either as a bookstore or  
7 as an adult arcade.

8 QUESTION: That's what I'm asking, which --  
9 which?

10 MR. KLEKNER: But it was well after the adoption  
11 of the ordinance.

12 QUESTION: Which did they start as, a bookstore,  
13 or as an arcade?

14 MR. KLEKNER: My recollection is that each -- I  
15 think it was Highland Books started as a adult arcade, and  
16 the reverse was true for Alameda Books. It started as a  
17 bookstore.

18 QUESTION: Did your evidence in '78 or any  
19 evidence since then specifically address the question of  
20 whether the combination of more than one form of business  
21 at one location has any measurable effect on, you know,  
22 the deleterious effect that you measured?

23 MR. KLEKNER: No. The studies did not  
24 specifically look at combination of adult businesses in  
25 one place, or in one building. They looked at the

1 clustering effect in the city's various communities.

2 QUESTION: Am I wrong in thinking that the study  
3 which you rely on, the 1977 study, did have as one  
4 category bookstore/arcade. It had as discrete entities  
5 the massage parlors, the adult theaters, and the adult  
6 motels, but it was my understanding that the arcade plus  
7 bookstore, or video sales shops, that those were together  
8 in that 1977 study.

9 MR. KLEKNER: The answer is yes and no. That  
10 phrase appears several times in the study and in certain  
11 conclusions, but if you look at the -- at certain of the  
12 questionnaires that were sent out to various businesses,  
13 community groups, the individual businesses were  
14 separately identified. In other words, a bookstore, peep  
15 shows, movie theaters, theaters, massage parlors.

16 QUESTION: Well then, is there nothing to what  
17 we're told, that the -- this combination of video sales  
18 plus viewing is common and, indeed, an arcade can't  
19 survive as a stand-alone business, that the combination  
20 of, you can see it, and if you want it you can buy it, was  
21 common?

22 MR. KLEKNER: Well, the issue of separateness,  
23 and whether a business, an arcade and a bookstore can,  
24 could, or should survive separately is off the table. It  
25 was not part -- there was a stipulation that the -- that

1 that would not be considered. That's not before the  
2 Court. As the record now stands, I guess the Court would  
3 have to presume, as did the trial court and the court of  
4 appeals, that survivability, economic viability of  
5 separate businesses or combined isn't an issue for this  
6 Court' --

7 QUESTION: Well, each of these businesses was  
8 one or the other of those things and operated on that  
9 basis alone for how long?

10 MR. KLEKNER: Several years. I can't --

11 QUESTION: Do you know whether they operated at  
12 a profit or at a loss?

13 MR. KLEKNER: We never did any discovery on  
14 that, so the answer is, we have no way of knowing.

15 QUESTION: But they did it for a couple of  
16 years, anyway?

17 MR. KLEKNER: Correct.

18 QUESTION: They were only an arcade and there  
19 was no selling going on when they were initially launched?

20 MR. KLEKNER: It's my understanding that they  
21 might have sell -- excuse me, sold some books, or what-  
22 have-you, but their primary business was having a series  
23 of video booths where you could watch adult movies.

24 QUESTION: I get the opposite impression. Maybe  
25 I was misled by the briefs. I thought they had always

1 operated as a combined business. You say that's wrong?

2 MR. KLEKNER: Not based upon the facts as I  
3 understand them, sir.

4 QUESTION: Pardon?

5 MR. KLEKNER: Not based upon the facts as I  
6 understand them, that -- and I believe in 1991 it was  
7 Alameda Books that became both, and it was I think 1992  
8 that Highland Books became both. I might be off by a year  
9 or so, but there was a point in time where both -- where  
10 each location became both adult business activities.

11 QUESTION: I'd like to ask you -- I'll assume  
12 with you for the moment you don't need any evidence. I  
13 suppose you don't imagine -- forget the evidence question.  
14 All right, I take it that this ordinance -- and I'm also  
15 assuming it, assuming this, you could have a particular  
16 place, 5,000 feet of books, or you could have 5,000 cubic  
17 feet of books, or you could have 5,000 cubic feet of  
18 arcade, but you couldn't have 5,000 cubic feet of both,  
19 all right. Now, my question is, what's the theory behind  
20 that?

21 MR. KLEKNER: The theory is the solution, not  
22 the facts. If you go from jurisdiction to jurisdiction,  
23 the facts tend to support the same conclusion, that  
24 concentrations of adult businesses cause secondary  
25 effects. How do you solve that problem? And the city's



1 decision was, because of the clustering effect, we termed  
2 it like a farmer's market type of effect for adult  
3 businesses, that dispersal was the solution.

4 Square footage, you could have 5,000 square feet  
5 of this, or maximum, is a different solution, based upon,  
6 New York did that in their solution. They decided that  
7 the space limitation, square foot limitation was  
8 appropriate for New York. That was not part of the  
9 solution for Los Angeles. It was a complete dispersal  
10 of --

11 QUESTION: All right. Now, if, in fact, there  
12 is no space limitation, I would repeat my question, that  
13 it seems a fortiori if you can have a bookstore of  
14 gigantic size, or an arcade of gigantic size, but you  
15 can't have the two together, even of a little size, so I  
16 don't -- I'm not talking about evidence. I'm assuming,  
17 though, you have to have some theory, and the theory has  
18 to be a reasonable one, and it can't just be we want to  
19 censor everything, so what's the theory?

20 MR. KLEKNER: The theory is simply the solution  
21 adopted by the city of Los Angeles was to disperse. If,  
22 in fact, we were faced with the megastore concept that,  
23 you know, the Wal Mart of adult bookstores, then that  
24 would be a different problem, that we could address in the  
25 future, at least as I understand this Court's precedent,

1 but that's what we were faced with in 1977. We were faced  
2 with the need to protect the city's neighborhoods from a  
3 lot of smaller businesses, if you will, and the solution  
4 was, we'll trade size, if you will, for dispersal. New  
5 York, for example, said 500 --

6 QUESTION: But it still doesn't answer the  
7 question, exactly. If the city wanted to address the  
8 concentration of adult businesses, certainly the 1977  
9 study likewise addressed that, didn't it?

10 MR. KLEKNER: Correct.

11 QUESTION: But now we're talking about an  
12 ordinance that doesn't focus on the concentration of adult  
13 businesses but, rather, the combination, because the city  
14 doesn't want the business to break into two parts, even  
15 though it tried to operate as one business, and I guess  
16 the 1977 study didn't address the combination, the effects  
17 of a combination of focuses in a single business, whereas  
18 your ordinance does.

19 MR. KLEKNER: Well --

20 QUESTION: As opposed to a concentration of  
21 businesses.

22 MR. KLEKNER: There are several responses to the  
23 question. The first is that, as you -- as I understand  
24 how you use the term, business, you're talking about a  
25 corporate organization or a single proprietorship. That

1 is not what the city's ordinance deals with.

2 QUESTION: -- operated as a single store, a  
3 single business.

4 MR. KLEKNER: From the city's perspective, it is  
5 illogical, or not reasonable to say, for the city council  
6 to say, you know we have a problem here, on LaSeneca  
7 Boulevard, because we have too many adult businesses  
8 together, so we're going to require them to disperse.  
9 There is no issue as to how we define these adult  
10 businesses. That's not before the Court.

11 QUESTION: Well, what if the ban were, you can  
12 sell adult VHS tapes but not Beta tapes in the same store?

13 MR. KLEKNER: We haven't done that, and --

14 QUESTION: Well, it's the same thing. Can you  
15 break it down any way you want and say, it's fine because  
16 we're concerned about the --

17 MR. KLEKNER: Because we are concerned with the  
18 overall effect we have broken down the ordinance to its  
19 local components. We have not tried to somehow slice and  
20 dice definitions so that you have several different types  
21 of retail adult establishments.

22 QUESTION: Do all of the categories that you  
23 have in the ordinance exist in the real world out there,  
24 video arcades only?

25 MR. KLEKNER: Yes. They did in 1977. They did

1 in 1991.

2 QUESTION: Adult bookstores only --

3 MR. KLEKNER: Correct.

4 QUESTION: -- without arcades in them --

5 MR. KLEKNER: Correct.

6 QUESTION: -- and so forth, every one of the  
7 categories, adult movies only?

8 MR. KLEKNER: Correct. Each of these  
9 definitions, if you will --

10 QUESTION: When you started out, though, there  
11 weren't all that many tapes. There were books, adult  
12 bookstores. Now, isn't the video much more prevalent  
13 today --

14 MR. KLEKNER: Actually, it's my under --

15 QUESTION: -- and you seem to say that the  
16 combination of this list, you think of a bookstore,  
17 nowadays one can browse, one can even go to a cafe and  
18 have coffee, and all that, or go to a record shop and  
19 listen to the tape and then buy it. That combination of,  
20 I view it and then buy it or not, that seems to be a  
21 natural combination, unlike having half of my  
22 establishment a massage parlor and the other half a book  
23 shop.

24 MR. KLEKNER: The problem with your real-world  
25 description of a Barnes and Noble is, it doesn't exist in

1 the adult entertainment world. The evidence that was  
2 before the trial court was that the books, the magazines,  
3 the sex toys, the novelties, are all shrink-wrapped. You  
4 cannot go into an adult bookstore, sit down and have your  
5 Starbucks, and browse through the material.

6 QUESTION: And you don't prevent them -- you  
7 don't prevent these stores from allowing customers to  
8 preview the films before they decide whether to buy them,  
9 the stores that sell adult films. The ordinance doesn't  
10 prevent them from allowing customers, at no charge, to  
11 view the films before they buy them, does it?

12 MR. KLEKNER: If I understand the correct -- the  
13 question correctly, no.

14 QUESTION: Under the ordinance, can a customer  
15 come in and say, before I buy this film, I would like to  
16 see it, and the store manager says sure, go ahead, look at  
17 it first, then you can decide whether to buy it?

18 MR. KLEKNER: For free?

19 QUESTION: For free.

20 MR. KLEKNER: Yes.

21 QUESTION: The ordinance permits that anyway,  
22 doesn't it?

23 MR. KLEKNER: We are talking about --

24 QUESTION: But they want to charge for it.

25 MR. KLEKNER: And the machines that allow you to

1 view up to 60 clips, if you will, from various adult  
2 movies, or you go to another machine in another booth, you  
3 can -- I want to see that entire movie right there, as  
4 opposed to the clips.

5 QUESTION: What is your principal argument in  
6 opposition to the rationale in the court of appeals? I  
7 have the feeling we're not letting you make the principal  
8 argument here that you wanted to make.

9 MR. KLEKNER: The principal problem with the  
10 court of appeals decision is, of course, how it  
11 requires -- what it requires, the use of secondary effects  
12 and how it discounts, if you will, or disregards this  
13 Court's precedent, is effectively what the court of  
14 appeals has said. Not only must we have empirical  
15 evidence of secondary effects in general, which the city  
16 does have, but you must also show that in this particular  
17 case this combination contributes to that secondary  
18 effects, which I submit is going to be, on an empirical  
19 basis, next to impossible to do. The third --

20 QUESTION: If it's next to impossible to do, why  
21 should you be allowed, under the First Amendment, to do  
22 it? I mean, it sounds as though you're kind of making an  
23 argument from spectral evidence here. You're saying,  
24 well, the evidence that we've got doesn't demonstrate the  
25 problem that we're addressing, but we ought to be able to

1 address it anyway. I mean, isn't that what it boils down  
2 to?

3 MR. KLEKNER: The problem we were addressing  
4 was, is there a correlation, to use the term you used, the  
5 word you used in Barnes --

6 QUESTION: Yes.

7 MR. KLEKNER: -- between the adult businesses  
8 and secondary effects, do they cause a problem. We have  
9 documented that.

10 QUESTION: And you've documented it, but as I  
11 understand it, you've documented it with reference to  
12 adult businesses which were not at the time defined or  
13 identified as necessarily being businesses that offered  
14 only one service, as opposed to a business like these,  
15 that offers two, so that the evidence, as I understand it,  
16 did not address the issues that is before us now.

17 MR. KLEKNER: But it did address that issue,  
18 because it is not reasonable to assume that if you have  
19 two businesses side by side in the same block, causing  
20 secondary effects, that it can require them to disperse,  
21 which is entirely --

22 QUESTION: Yes, but we're -- I think we're  
23 playing with words. You're talking about two businesses  
24 side by side, and you were measuring the effects back in  
25 '78 of businesses side-by-side. This is one business.

1 It's not side-by-side. It's one business that sells two  
2 things within the same storefront.

3 MR. KLEKNER: But there's no evidence one way or  
4 the other --

5 QUESTION: Isn't that your problem?

6 MR. KLEKNER: I don't believe it is -- it should  
7 be a problem.

8 QUESTION: You measured -- you measured the  
9 effect of a video store -- what do you call these, arcade  
10 store, and a bookstore side-by-side, and you found that  
11 that was deleterious, and the problem is that you did not  
12 measure what the different effect would be if you knocked  
13 down the wall between them. Is there any reason to  
14 believe that that would make a difference?

15 MR. KLEKNER: That's the whole point that the  
16 city's been trying to make all along. There's no  
17 difference in effect. You can't assume --

18 QUESTION: Well, you don't know --

19 MR. KLEKNER: -- less or more.

20 QUESTION: How do you know that, any more than I  
21 know it? I mean, I see your point when you say, look, if  
22 there are two different entrepreneurs on a block, each of  
23 them doing whatever they can to draw in clientele, the  
24 odds are they're probably going to draw in a greater  
25 concentration of people than one. I mean, I will accept



1 that, as at least intuitive.

2 Here, we're talking about one entrepreneur, and  
3 what seems at least intuitively arguable in the first  
4 place doesn't seem to be so obvious in the second  
5 instance.

6 MR. KLEKNER: But you are describing this in  
7 terms of business organization.

8 QUESTION: Yes.

9 MR. KLEKNER: Which is not how the city's zoning  
10 ordinance works. The zoning ordinance does not really  
11 care whether you're an L.L.P., a corporation on-shore or  
12 off-shore, or a sole proprietorship. Under the reasoning  
13 that you're putting forward, I could open up at a location  
14 just because I have one company, as many adult businesses  
15 as I wish, or alternately, in order to get around the  
16 city's ordinance, the two side-by-side companies,  
17 businesses form a new corporation, they merge, now we have  
18 one corporate entity, ergo, we're home free. That's  
19 not --

20 QUESTION: And the -- but the likelihood that  
21 your 1978 evidence is going to bear on these various  
22 possibilities depends on more specific facts. If the two  
23 side-by-side entities that merge are, on the one hand, a  
24 massage parlor and a bookstore, it seems sensible to say  
25 they're going to be drawing the same concentrations of

1 people that they would have as separate entities.

2 But when you're talking about combinations like  
3 books and video, it isn't obvious that you're going to be  
4 drawing different concentrations of people, and I think  
5 what we're stuck with here is that your evidence, through  
6 no fault of Los Angeles in '78, but your evidence just  
7 doesn't address the question as specifically as we have it  
8 before us now.

9 MR. KLEKNER: If you look at the nature of the  
10 businesses, you come to an arcade to stay there and look,  
11 and when you leave that arcade, you have a different frame  
12 of mind than if you went to the bookstore, got your  
13 shrink-wrapped magazine, put it in a brown paper bag, and  
14 went home, so that's one logical deduction you can make  
15 from all of the evidence that's before you.

16 QUESTION: Isn't it an equally logical deduction  
17 that by looking at the cover of the shrink-wrapped  
18 magazine and watching part of a video clip, or a video  
19 clip of something that you ultimately buy, you're going to  
20 be left in about the same frame of mind in either case?

21 MR. KLEKNER: No. I think after watching 60  
22 clips from adult business, from adult videos, as opposed  
23 to the cover of a shrink-wrapped magazine -- the only  
24 reason --

25 QUESTION: Aren't the -- maybe the magazine

1 covers are dull, but I --

2 (Laughter.)

3 QUESTION: -- assumed they were pretty racy, and  
4 if you look at 60 covers and 60 clip -- I don't know,  
5 that's cutting it pretty fine.

6 MR. KLEKNER: Justice Souter, they're not live  
7 action.

8 QUESTION: Mr. Klekner --

9 MR. KLEKNER: That's the difference.

10 QUESTION: Mr. Klekner, your question presented  
11 seems to be quite narrow. It says, is a city zoning  
12 ordinance which prohibits the operation of more than one  
13 adult entertainment business at a single location,  
14 including an adult bookstore and an adult arcade, invalid  
15 because the city did not study the negative effects of  
16 such combination?

17 MR. KLEKNER: Correct.

18 QUESTION: It seems to assume the city did not  
19 study the combination but, rather, relied on judicially  
20 approved statutory precedent from other jurisdictions. I  
21 assume that's some reference to the Hart case from the  
22 Carolinas.

23 MR. KLEKNER: Correct, North Carolina.

24 QUESTION: Because the Ninth Circuit said that  
25 wasn't suitable reliance, is that right?

1 MR. KLEKNER: Well, basically what the --

2 QUESTION: The Ninth Circuit, I thought, thought  
3 that wouldn't do it because Hart addressed the health  
4 effects --

5 MR. KLEKNER: No, what the Ninth --

6 QUESTION: -- of the arcades, rather than the  
7 effects on crime.

8 MR. KLEKNER: What the Ninth Circuit effectively  
9 said was, there was some doubt whether Hart would survive  
10 scrutiny under this Court's Renton decision, but we are  
11 certainly confident that under Ninth Circuit precedent  
12 it's not a valid law. The purpose of Hart --

13 QUESTION: I don't know, it just struck me in  
14 reading the question that it was pretty much limited to  
15 whether they were right about whether you could rely on  
16 the Hart decision.

17 MR. KLEKNER: Hopefully not. The city in 1983  
18 specifically relied on its findings in 1977, the study  
19 that led up to the original ordinance, which as I said is  
20 not at issue. That ordinance is reasonably --  
21 comparatively reasonable, according to plaintiffs.

22 The problem is -- well, the issue with Hart is,  
23 Hart was decided in 1979. It said that the city's '77  
24 study, just as we --

25 QUESTION: Before the adoption of this

1 amendment?

2 MR. KLEKNER: That's correct, that in 1979, our  
3 study supported a North Carolina statute prohibiting more  
4 than one adult business in the location, that that was a  
5 sufficient evidentiary basis. Confirming what the city  
6 council thought --

7 QUESTION: The Ninth Circuit thought that Hart  
8 relied on the negative health effects of the arcade.

9 MR. KLEKNER: We are less -- we, the city, is  
10 less concerned with the factual differences than with the  
11 legal reasoning and the fact that it fully supports, and  
12 should have been considered for that purpose by the Ninth  
13 Circuit, as validating the intent and purpose of the  
14 original ordinance and '83's amendment.

15 QUESTION: Well, what we're getting down to is  
16 just how precise a particular study or a particular  
17 decision has to be. I mean, does it have to be word for  
18 word what the city is talking about, or can the city draw  
19 reasonable inferences, if it affects A, it also affects B?

20 MR. KLEKNER: That's what hopefully the -- well,  
21 that's what the city has been trying to do, but again, it  
22 goes back to, you know, if you look at your precedents,  
23 when a city has these problems, the logical -- the logical  
24 thing for the city to do is say, ban them. We can't.  
25 It's a violation of the Constitution. We accept that.

1 That's what Renton says. If you can't ban them, you  
2 should be entitled to a reasonable opportunity to  
3 experiment.

4 QUESTION: And where I'm a little confused is,  
5 at the beginning of this segment of the argument, when we  
6 began focusing on this question, I thought you said  
7 something to the effect that we can't show this  
8 empirically, and I was surprised. I thought you would  
9 say, look, this isn't rocket science. If you have just a  
10 shoe store, and the shoe store all of a sudden starts to  
11 sell clothes, you're going to get more people. That's the  
12 end of it.

13 MR. KLEKNER: But --

14 QUESTION: I thought that's what you were going  
15 to tell, but you --

16 MR. KLEKNER: When you -- well, maybe I  
17 misspoke, but when you want to get into the empirical  
18 evidence of, are you a bad actor, this particular business  
19 is a bad actor, it's a very detailed nuisance type of  
20 analysis, and when you have these combinations of adult  
21 businesses, or side-by-side adult businesses, and you try  
22 to do that same analysis, the immediate thing that is  
23 going to occur, the first thing that is going to occur,  
24 it's not me, it's my neighbor, it's not me, it's this  
25 other part of the business.

1           We can't be expected to provide for a  
2 legislative scheme that detailed particularization of each  
3 possible permutation and combination of the problem.  
4 That's exactly what Young and Renton stand for.

5           QUESTION: Let me ask you --

6           QUESTION: Why doesn't --

7           QUESTION: Go ahead.

8           QUESTION: No, please.

9           QUESTION: Let me ask you just one general  
10 question. We often have said, the cities can rely on  
11 general experience of other cities and other studies, and  
12 so forth and so on. Are there a lot of ordinances out  
13 there that follow the pattern of this particular  
14 ordinance, that would prohibit a single business from  
15 operating both a video arcade and a bookstore in the same  
16 location?

17           MR. KLEKNER: There are some, Justice Stevens.  
18 There are others that would permit such combinations,  
19 depending upon how the city that's -- a particular  
20 jurisdiction analyzed the solution.

21           QUESTION: But there are a substantial number  
22 who are similar to the one that we're talking about today?

23           MR. KLEKNER: I won't use an adverb to describe  
24 the amount. There are some. I don't know if it's  
25 substantial or not.

1 QUESTION: That's an adjective.

2 MR. KLEKNER: Excuse me, yes.

3 QUESTION: May I go back to Justice O'Connor's  
4 question, because she asked how the Hart facts could help  
5 you. As I understand it, the facts in that -- number 1,  
6 the basis for municipal action in that case was public  
7 health, and it was public health based on the sexual  
8 activities that were going on inside the booths, and as I  
9 understand it, Los Angeles in effect has an ordinance that  
10 requires open booths, lights on, freely seen -- the booths  
11 can be freely seen from the front of the store, and so on,  
12 so it seems to me that Los Angeles has taken steps to  
13 preclude the health problem that that earlier case  
14 addressed and, if that's so, how could that earlier case  
15 support the Los Angeles ordinance?

16 MR. KLEKNER: Well, again, the Hart reading of  
17 facts in that decision, again go to the fact that these  
18 combinations cause problems, and that the city's  
19 ordinance -- excuse me, the city's study supported the  
20 inference that it's okay to -- the solution is to separate  
21 these businesses.

22 QUESTION: Yes, but the Hart -- as I under --  
23 maybe I'm wrong, but I thought the basis for the  
24 governmental action in Hart was public health based on the  
25 activity that was going on in these booths.



1 MR. KLEKNER: In part, yes.

2 QUESTION: Yes, so it seems to me that it's off  
3 point for you.

4 MR. KLEKNER: If there are no further questions,  
5 I'd like to reserve the remainder of my time. Thank you.

6 QUESTION: Very well, Mr. Klekner.

7 Mr. Weston, we'll hear from you.

8 ORAL ARGUMENT OF JOHN H. WESTON

9 ON BEHALF OF THE RESPONDENTS

10 MR. WESTON: Mr. Chief Justice, may it please  
11 the Court:

12 At the time we filed our briefs, we knew of no  
13 ordinances similar to Los Angeles prohibiting the  
14 simultaneous inclusion of an arcade and retail sales  
15 within one establishment, other than the one that was in  
16 Hart v. Edmisten. At the time the city adopted it, it  
17 itself -- let me rephrase that. At the time the city  
18 adopted it, the only one that apparently existed in the  
19 United States was the one in North Carolina and,  
20 subsequent to the city's adoption, as far as we knew,  
21 there were no additional ones throughout the United  
22 States. This is an enormously unique and unusual approach  
23 to a problem apparently not supported or shared by the  
24 experiences of other cities.

25 QUESTION: Do you know of any other cities that

1 had the experience of businesses such as the two involved  
2 here, which were originally involved in one sex pandering  
3 activity, and then, after the ordinance was passed, went  
4 into a second one instead of opening up a separate store?

5 MR. WESTON: Justice Scalia, you'll --

6 QUESTION: I mean, you know --

7 MR. WESTON: You'll --

8 QUESTION: -- they may be unique, but the  
9 situation that they confronted may be unique as well.

10 MR. WESTON: You'll pardon me for not adopting  
11 the reference of the Court in phrasing the nature of the  
12 business, but in fact the opposite is quite true.  
13 Respondent's businesses at all times, as is made clear in  
14 the joint appendix at pages 19 and 20, as discussed at  
15 great length at page 6 of respondent's brief, particularly  
16 in footnote 6, at all times operated their arcades in  
17 addition to retail distribution, retail dissemination on  
18 the premises, in the same establishment of sexually  
19 oriented materials.

20 QUESTION: That's not how I read those pages.  
21 Shall we turn to them, page 20 of the appendix?

22 MR. WESTON: Please.

23 QUESTION: Highland Book was issued a picture  
24 arcade police permit. Prior to June of 1991 the only  
25 adult type of business use of Highland Books was its

1 picture arcade, which at all times exhibited exclusively  
2 adult video tapes.

3 MR. WESTON: Right.

4 QUESTION: This is the affidavit of the owner of  
5 both of these businesses.

6 MR. WESTON: That's correct.

7 QUESTION: Mr. Wiener, right?

8 MR. WESTON: Yes, that's correct, Justice  
9 Scalia, but the point, the use of the term, adult  
10 business, was in the way that Los Angeles defined a use,  
11 and that if the Court will continue a little bit  
12 further --

13 QUESTION: But that's the only thing that's  
14 relevant here.

15 MR. WESTON: No, with all respect, Your Honor.  
16 Up until sometime in 1989 -- well, let me phrase it this  
17 way. For a considerable period of time in California, law  
18 existed such that the term, substantial numbers of retail  
19 materials -- that was the operative term which separated  
20 a -- an adult bookstore from a nonbookstore. In other  
21 words, if one -- one could operate the bookstore and carry  
22 a certain amount of adult material and not be denominated  
23 adult.

24 QUESTION: Was he considered really another  
25 business?

1 MR. WESTON: That's correct.

2 QUESTION: It was ancillary to the other  
3 business?

4 MR. WESTON: That's correct.

5 QUESTION: Right.

6 MR. WESTON: Up until a very recent time in Los  
7 Angeles history, one could carry up to 49 percent of  
8 materials in one store and not be deemed to be an adult  
9 bookstore.

10 QUESTION: This was a Los Angeles County  
11 ordinance --

12 MR. WESTON: No --

13 QUESTION: -- you're referring to now?

14 MR. WESTON: No, what I'm referring to is  
15 California court decisions which had interpreted the  
16 phrase, substantial number, amount of retail stock in  
17 trade.

18 QUESTION: In the county ordinance? We're not  
19 talking about a State law, we're talking about a county  
20 ordinance?

21 MR. WESTON: It wasn't a law, Your Honor. In  
22 other words, the California courts of appeal had construed  
23 the term, substantial portion of the stock in trade, to  
24 mean anything less --

25 QUESTION: Why did they -- why were they -- why

1 did they construe that term? Where did the term come  
2 from?

3 MR. WESTON: The term came -- was an identical  
4 terminology utilized in many, many, ordinances throughout  
5 the State of California. There was a vagueness challenge  
6 brought to it, and the court construed the term to mean a  
7 preponderance, more than 50 percent of stock in trade in  
8 order to avoid the vagueness. That --

9 QUESTION: This was a phrase used in a number of  
10 different city and county ordinances --

11 MR. WESTON: Absolutely, Your Honor.

12 QUESTION: -- in California?

13 MR. WESTON: Absolutely, and in fact it's  
14 interesting to note, because we've spoken about Hart this  
15 morning, that the North Carolina statute in Hart was one  
16 that pegged the definition of a retail bookstore as a  
17 preponderance. In other words, unless the store carried  
18 51 percent of its stock in trade as adult materials in  
19 Hart itself, it would not qualify as an adult bookstore,  
20 and --

21 QUESTION: And that's what you think Mr. Wiener  
22 meant when he said in his affidavit, prior to June of 1991  
23 the only adult type of business, the only adult type of  
24 business use at Highland Books was its picture arcade  
25 which at all times exhibited exclusively adult videotapes?

1 MR. WESTON: Yes, Your Honor.

2 QUESTION: And you think he had in mind that no  
3 more than 49 percent of other business was --

4 MR. WESTON: If I may read --

5 QUESTION: That's what the next sentence says.

6 MR. WESTON: Yes. Thank you, Justice Stevens.  
7 The next sentence, Justice Scalia, prior to June of 1991,  
8 the majority of items available for retail sale at  
9 Highland Books were of a nonadult variety.

10 QUESTION: That's why the only adult business he  
11 was doing there was the other one. They were of a  
12 nonadult variety.

13 MR. WESTON: But that's --

14 QUESTION: He's not saying we were selling adult  
15 books, but selling less than 50 percent of adult books.  
16 He said the only other business we had was a nonadult  
17 business.

18 MR. WESTON: Justice Scalia, forgive me, I can  
19 only tell you what the circumstances were. The  
20 phraseology that was utilized tried to use the  
21 terminology, the confusing terminology that Los Angeles  
22 used in terms of its description of what a use is, and Mr.  
23 Wiener at the time sold and displayed vast quantities of  
24 sexually oriented retail materials in the same stores, but  
25 under the L.A. ordinance at the time, it did not

1 constitute an adult use.

2 QUESTION: Well, I appreciate your testimony to  
3 that effect, but what his affidavit clearly says is that  
4 the only adult business he did prior to 1991 was the  
5 exhibition of adult videotapes. The majority of the items  
6 available for retail sale were of a nonadult variety.

7 MR. WESTON: Forgive me, Justice Scalia, I don't  
8 want to belabor the point --

9 QUESTION: Okay.

10 MR. WESTON: -- but that's not a fair reading of  
11 it. Prior to June of 1991, the only adult type of  
12 business use, the type of business use at Highland Books  
13 was its picture arcade. That is defined exclusively, that  
14 term refers exclusively to 1270 of the Los Angeles zoning  
15 ordinance which defined a use and labeled a use a  
16 business, and the only way that one became an adult  
17 business and therefore a separate use was if one's stock  
18 in trade was 51 percent or more adult.

19 Mr. Wiener's was not. It was substantial, but  
20 it was not a preponderance, and therefore the notion that  
21 this existed as an arcade bereft of and separate from any  
22 retail use is simply neither accurate factually nor  
23 supported by the declaration that was offered.

24 QUESTION: I don't understand what this 51-49  
25 pertains to. Does it pertain --

1 MR. WESTON: Stock in trade of the retail  
2 establishment.

3 QUESTION: Well, and it means that if 49 -- if  
4 less than 51 percent is adult material, you're not --

5 MR. WESTON: It's not -- at the time, in Los  
6 Angeles, it was not characterized as an adult use --

7 QUESTION: As an adult business.

8 MR. WESTON: Adult use or business, that's  
9 correct.

10 QUESTION: Right, okay, but it doesn't mean that  
11 if you have 51 percent in one adult business and 49  
12 percent in another adult business, the 49 percent is not  
13 an adult business? Does it mean that as well?

14 MR. WESTON: That is correct. The 49 percent of  
15 adult retail material did -- acted to -- let me -- if I  
16 may phrase it the other way. 51 percent of stock in trade  
17 at a business in Los Angeles, if it was adult, made that  
18 store adult, even if it was 20,000 total items, and  
19 virtually, and nearly 10,000 of them had nothing to do  
20 with sexually oriented material.

21 QUESTION: Mr. Weston, I understand that that  
22 division, that that was by inventory not by sales.

23 MR. WESTON: That's correct, Justice Ginsburg.

24 QUESTION: Because one of the problems was, you  
25 had lots of books, dull books that nobody was going to



1 buy, and that you had -- that was what you had for 51  
2 percent, and then you had the stuff that people bought,  
3 and that was the 49 percent.

4 MR. WESTON: The record does not reflect that,  
5 Justice Ginsburg. That may have been the fact although,  
6 of course, the opposite may have also been true.

7 QUESTION: But it's true that it would not have  
8 been considered an adult bookstore so long as they  
9 maintained that 51-49.

10 MR. WESTON: That's correct, and if I may, as in  
11 Hart, Mr. Wiener's initial businesses, as they were  
12 initially constituted, did not conflict with the multiple  
13 use provision, notwithstanding the fact that 100 percent  
14 of the videotapes viewed in them were adult, and 49  
15 percent or up to 49 percent of the retail items available  
16 for sale were also adult.

17 QUESTION: But can I --

18 MR. WESTON: That did not constitute two adult  
19 uses under California law at that time, and that is  
20 exactly what the law was in Hart, that it was perfectly  
21 permissible to have 100 percent adult arcade material, and  
22 49 percent retail books, videos and so forth, and that  
23 would not have conflicted with the prohibition in Hart.

24 QUESTION: Could you -- can you explain -- I'm  
25 just trying to get back to the main point here, at least

1 as I understand it, which may --

2 MR. WESTON: Yes, Justice Breyer.

3 QUESTION: And don't assume I know a lot of the  
4 detail that you know. I want to start this naively, so I  
5 take it what they're saying is, look, we have a zoning  
6 ordinance. We have to have some way of defining what's a  
7 single business. If it were a liquor ordinance and we  
8 said, selling liquor wholesale is one thing, selling it at  
9 a bar is another, so that's two uses, not one. If it were  
10 a meat store which said, over-the-counter is one thing, at  
11 the restaurant is another -- of course we could do it a  
12 million ways.

13 MR. WESTON: Certainly.

14 QUESTION: But we have to do it some way, and so  
15 forget whether there's evidence or not. Just let us do  
16 what's reasonable here, and this is one, and by the way,  
17 if it were a different kind of ordinance, if it were a  
18 cubic foot limitation, the fact that they counted it as  
19 two separate things rather than one, would cut in your  
20 favor, but here it happens to cut against you.

21 MR. WESTON: Well --

22 QUESTION: But they say, either way, we're just  
23 trying to have a reasonable definition. All right, now  
24 your response is what?

25 MR. WESTON: Well, initially. I think Your

1 Honor -- Justice Breyer, you have characterized fairly in  
2 some sense the city's position, because the city basically  
3 says, so logistically, if it's an adult business it  
4 generates secondary effects, and if there is secondary  
5 effects and there is adult business regulation not  
6 amounting to a ban, we can do anything we want, and courts  
7 are directed not to look meaningfully at it, and it simply  
8 gets dealt with as a valid ordinance.

9 But the problem with what Los Angeles has done  
10 is that, unlike what would be logical, or unlike what most  
11 zoning agencies do, which is to take a combined business  
12 such as Your Honor posits and zone it according to the  
13 most intense of the combined uses, Los Angeles, for  
14 example, makes reference to the fact that it deals with  
15 service stations and auto repair places differently, but  
16 the remedy that Los Angeles selects for that is not to  
17 say, an auto repair place must be here, and 1,000 feet  
18 away there must be a place where you -- I've said it  
19 poorly, but that you cannot have an auto repair place  
20 here, combined with a place that pumps gas, even though  
21 there are separate uses. What Los Angeles logically does,  
22 as every city does, is permit the combination and then  
23 zone the combination use according to the most intense of  
24 the combined uses.

25 QUESTION: No, but that's a bad analogy, because

1 auto places are not -- try liquor. Try thinking of it  
2 liquor, and probably they could. They'd say, we only want  
3 one liquor license in 1,000 feet, and if you have a bar  
4 you don't have a shop, and it then becomes less obviously  
5 unreasonable on its face.

6 MR. WESTON: Let's take a --

7 QUESTION: So let's assume it in their favor  
8 that way, and then argue against it.

9 MR. WESTON: Sure. Let's take a look at that  
10 one. But what does Los Angeles do? It doesn't ban the  
11 combined use, it simply again -- I don't mean Los Angeles.  
12 In your hypothetical, in the bar-restaurant, the zoning  
13 regulation would be appropriate for the more intense use,  
14 I assume --

15 QUESTION: But this whole question is something  
16 that's secondary. I thought the question before me is  
17 whether or not Los Angeles is reasonable in saying that  
18 the combined use draws more people without having a study.  
19 I fully understand that you have an objection to the  
20 Government bifurcating your business. Leave that off the  
21 table, so the only question is whether or not this whole  
22 business draws more people, and whether or not there's an  
23 empirical basis for it. Isn't that what I'm supposed to  
24 decide here?

25 MR. WESTON: I'm not quite sure about drawing

1 more people. I don't think that that was what the -- that  
2 was not the focus of what Los Angeles was concerned --

3 QUESTION: You mean, you had the arcade because  
4 it didn't draw any more people?

5 MR. WESTON: No, it wasn't more people, it was  
6 the notion for a variety of reasons, and if we return to  
7 Young v. American Mini Theatres, there is at least --  
8 there's some indication in Young that it's not simply a  
9 question of people, but rather, what is the perception  
10 from the outside world?

11 QUESTION: Well, but not simply a question of  
12 people, but surely the kind of secondary effects that have  
13 been spoken of in cases depend upon people's activities,  
14 and the people aren't 10 miles away, they're somehow  
15 associated with the business.

16 MR. WESTON: Certainly. I -- that's  
17 unquestionably reasonable, Mr. Chief Justice, but the  
18 articulation by Los Angeles in its statement of  
19 legislative purpose, which appears at -- it's at page 74  
20 of the appendix to the petition for certiorari, and I'm  
21 truncating it, but two or more adult entertainment  
22 businesses, operated as a single commercial enterprise.  
23 This concentration of adult entertainment businesses tends  
24 to have an adverse impact on the neighborhood in which  
25 they are located.

1           The hypothesis, the asserted harm, was from a  
2 combination of adult businesses, and what was the evidence  
3 on which Los Angeles relied for this proposition? The  
4 sole evidence was a study that measured not, as has been  
5 brought out earlier, whether there were harms unique,  
6 there were special harms that developed from a combination  
7 of two businesses within a single unitary establishment,  
8 but rather, whether there were secondary effects that  
9 resulted from the clustering of a dozen, or 15 or 20  
10 unrelated adult businesses.

11           QUESTION: At some point, Mr. Weston, don't you  
12 think the legislature is entitled to draw what might be  
13 common sense inferences from the studies that it made, and  
14 that it doesn't have to have empirical evidence for every  
15 single thing that it does in the ordinance?

16           MR. WESTON: Of course not, Your Honor, and for  
17 example, if the city, as it suggests, which we do not  
18 agree with, really thought -- I don't mean to cast  
19 aspersions on the city. If, in fact, the city's sense  
20 that this adult bookstore-arcade combination was so unique  
21 and so unusual, even though there's no evidence in the  
22 record of an arcade standing alone anywhere in the United  
23 States, except as part of an adult bookstore, but if it  
24 was so unique that they really hadn't dealt with it, one  
25 could understand that it would be appropriate, as the city

1 has, to accord zoning treatment to this combined use,  
2 which is exactly what was done here.

3 The combined use is not free from the zoning  
4 requirements of the City of Los Angeles. This combined  
5 use is 1,000 feet away from any other adult use. It's 500  
6 feet from any of the protected sensitive areas, and it is  
7 within the limited commercial zones which the city says it  
8 has to be.

9 QUESTION: Mr. Weston, incidentally on the other  
10 point, I reviewed your footnote. I tend to read footnotes  
11 quickly. You were right on our other point.

12 MR. WESTON: Thank you, Justice Scalia.

13 QUESTION: On --

14 MR. WESTON: I'm going to go home now.

15 (Laughter.)

16 MR. WESTON: I thank the Court for its courtesy.

17 (Laughter.)

18 MR. WESTON: This is a memorable day for me.

19 QUESTION: It seems to me that if you're  
20 objecting to the municipality's use of this other study,  
21 which didn't treat combined stores, you -- it seems to me  
22 you have to tell us why it would be likely that combining  
23 the diverse businesses under one roof could make any  
24 difference. I mean, you have situation 1. You have a  
25 whole block full of adult businesses, a video store, a

1 movie house, a bookstore, blah, blah, blah, okay, the  
2 whole block full.

3 Situation 2, you have the same block. They're  
4 just not different stores. It's just one big -- you know,  
5 it's just Adult, Inc., and on one side there's the, you  
6 know, the arcade, and then the next part of the store  
7 there's the movie house, and so forth. Why in the world  
8 would there be any difference in the two situations as far  
9 as its impact upon the community is concerned?

10 MR. WESTON: There are a number of responses to  
11 that, and they require a bit of articulation. They're a  
12 little bit different, and as I was starting to say before  
13 in terms of Young v. American Mini Theatres, the sole  
14 evidence, essentially, in Young v. American Mini Theatres  
15 was an affidavit submitted by a man by the name of Mel  
16 Ravitz.

17 In that case, one of the things that Ravitz  
18 stressed -- and this was, of course, the first  
19 concentration zoning, the first case that upheld  
20 discriminatory zoning in a sense of motion picture  
21 theaters according to the nature of the content of the  
22 materials exhibited there, and the basis was, of course,  
23 that the reason for the legislation was not because of the  
24 materials but, rather, because of some unique secondary  
25 effects associated with them, and this was a very unusual



1 ordinance. It was an anti-Skid Row ordinance originally  
2 to which Detroit, long after the original ordinance had  
3 been adopted, added adult businesses, and Ravitz' point  
4 was this, that there's a self-fulfilling prophecy that  
5 develops in a neighborhood when residents or prospective  
6 new residents or business people or whatever come into a  
7 neighborhood and they see lots and lots and lots of  
8 different storefronts, let's say soup kitchen, a rescue  
9 mission, pawn shops, adult bookstore, Sam's Adult Arcade,  
10 or even your excellent idea, the adult emporium --

11 (Laughter.)

12 MR. WESTON: -- and as a result, this then  
13 becomes a self-fulfilling prophecy of the imminent decline  
14 of a neighborhood.

15 So from the Young perspective, from the sense of  
16 declining property values, it becomes very different from  
17 having the eight or nine adult businesses to which Your  
18 Honor referred to close proximity in one block, or two  
19 blocks, which all of a sudden says tenderloin, or red  
20 light district, or whatever, as opposed to one single  
21 storefront that says, Highland Books, and which does not  
22 cause the visual --

23 QUESTION: But it doesn't have to say that. I  
24 mean, they're entitled to, you know, to divide the  
25 storefront into each of its components and have a sign on

1 one that says, you know, adult videos, and then in the  
2 next bay have a sign that says, movies, and then the next  
3 bay, adult books, and so forth.

4 MR. WESTON: But that's no different --

5 QUESTION: I don't see any difference between --

6 MR. WESTON: But that's no different, Justice  
7 Scalia, from a single 7-11 store that says, bananas for  
8 sale, 99 cents today, rutabagas a dollar and a half, and  
9 Coca-Colas on sale here. It's --

10 QUESTION: Mr. Weston, in that respect, would  
11 you be making the same argument that you are now making  
12 for tapes plus arcade, sales of tapes plus arcade, if the  
13 combined uses were a massage parlor and an adult hotel?

14 MR. WESTON: That's a very fair and good  
15 question, and I've been thinking about that one for a  
16 long, long time, and I think the easy answer to it is  
17 simply that with respect to the massage parlor there would  
18 be no First Amendment interest to protect, and therefore  
19 it wouldn't raise the question. Now, that's a cute  
20 lawyer's answer. It doesn't really help, I know, what  
21 you're, obviously what, Justice Ginsburg --

22 QUESTION: Well, I guess you'd say the same  
23 thing about the adult motel.

24 MR. WESTON: Absolutely, and --

25 QUESTION: Although some people might consider

1 that expression.

2 MR. WESTON: Absolutely, and in fact I did say  
3 that in FW/PBS v. City of Dallas, when one of the three  
4 components was an adult motel, but interestingly -- and  
5 I'll try to address the combination question, but  
6 interestingly, and this is one of the things that makes  
7 the L.A. study suspect to begin with, is that of the 88  
8 adult uses that were focused on by the police department  
9 and the planning department in Hollywood, 41 of them -- I  
10 beg your pardon. Of the 9 -- of the 88 uses, 41 of them  
11 were either massage parlors or adult motels.

12 QUESTION: Well, I don't think that question is  
13 fairly subsumed in the question presented. I mean, I  
14 don't think there was any challenge below to the validity  
15 of the '77 study so far as it went.

16 MR. WESTON: No, you're exactly right, Mr. Chief  
17 Justice, there wasn't a challenge specifically to it, but  
18 as we --

19 QUESTION: There wasn't a challenge specifically  
20 to it. Are you suggesting there was some unspecific  
21 challenge to it?

22 MR. WESTON: The specific challenge that was  
23 made was whether the study supported the city's stated  
24 purpose that combining a bookstore and an arcade in one  
25 establishment, in one physical structure, caused the kinds

1 of problems, the only problems which the study evaluated  
2 and found and, in fact, in the city's own papers it makes  
3 clear, and we set this forth in page 2 of the respondent's  
4 appendix, we note to it, rather, in joint appendix 109,  
5 that on the contrary, the --

6 QUESTION: Respondent's --

7 MR. WESTON: I beg your pardon. I've been  
8 confusing.

9 QUESTION: The red brief, in page 2?

10 MR. WESTON: Forgive me, Mr. Chief Justice.  
11 I've misspoken. At joint appendix, the beige document,  
12 page 109, there is language from the study that points out  
13 several respondents commented that the adverse effects,  
14 secondary effects, are related to the degree of  
15 concentration, and that one freestanding business may  
16 have no effect, and that's really what we're talking  
17 about.

18 Justice Ginsburg, with respect to your question,  
19 could there be some issues with respect to combined uses,  
20 our great fear in terms of the parsing argument that we  
21 have made is that if the city's novel and rather  
22 adventurous piece of legislation is upheld, that the next  
23 step, as inevitably as night follows the day, will be to  
24 parse these business into smaller and smaller kinds of  
25 subcomponents that --

1           QUESTION: But you gave an answer that I didn't  
2 think was just a glib lawyer's answer. You said books,  
3 tapes, those come under the First Amendment.

4           MR. WESTON: Yes, Your Honor.

5           QUESTION: Messages don't.

6           MR. WESTON: Right, and I --

7           QUESTION: Yes, but what about combining a  
8 motion theater and a bookstore?

9           MR. WESTON: I would -- one would think that the  
10 same kind of analogy as we have offered here would be  
11 present, that with a motion picture theater and a  
12 bookstore there would appear to be no logical suggestion  
13 that the two of them would generate any greater secondary  
14 effects than the motion picture theater alone. When we  
15 got into area --

16          QUESTION: Well, look at it a little  
17 differently. I understand your argument about arcades and  
18 bookstores being functionally connected, but with  
19 bookstores and motion pictures, I think the outburst  
20 argument has quite a lot of appeal. If you had them  
21 separately owned and it would violate the ordinance, why  
22 should it not violate the ordinance if you combine them?

23          MR. WESTON: Well, I'm not sure that the  
24 separate ownership is what constitutes the vice aimed at  
25 at the ordinance. It's rather that by the city's unusual

1 definitional situation of calling different media  
2 presentations or different uses different businesses, in  
3 the same sense like at a 7-11 the dairy section is a  
4 business and the --

5 QUESTION: It seems to me if you have a 7-11 and  
6 an A&P next door, it's the same problem as if they're  
7 owned by the same owner. I don't follow the argument when  
8 you get to motion pictures and bookstores.

9 It seems to me that those two businesses  
10 operated by separate owners would have precisely the same  
11 secondary effect as a single business operating both a  
12 motion picture and a bookstore. Why am I wrong on that?

13 MR. WESTON: I'm not aware of any data that  
14 would suggest that the combination would -- the  
15 combination in, Justice Stevens, in your hypothetical that  
16 a theater and a bookstore together, I'm not aware of any  
17 data that would lead one to reasonably conclude that the  
18 combination of a retail use in a motion picture theater  
19 would generate more secondary effects than what I assume  
20 would be the more intense use, the motion picture theater  
21 operating alone.

22 QUESTION: Well, you conceded a moment ago --

23 QUESTION: That may be true -- go ahead.

24 QUESTION: Go ahead. You --

25 QUESTION: That may be true if you interpreted

1 secondary effects as just this look that the neighborhood  
2 has by having the businesses strung along the block, but  
3 secondary effects is also the number of people come who  
4 loiter, who drive around, who concentrate outside. Then  
5 that is a secondary effect that it seems to me would be  
6 increased by the two uses.

7 MR. WESTON: I think that's fair, Justice  
8 Kennedy. Certainly, if secondary effects is nothing more  
9 than patronage, then I'm not sure that I could argue, but  
10 that's not what the identified and hypothesized secondary  
11 effect is on the part -- from the city, and in analyzing  
12 these ordinances, as I understand the Court's doctrine,  
13 one looks at the specific legislation and the asserted  
14 stated purpose, asserted statement of purpose, which in  
15 this case is whether the concentration of -- I should say,  
16 the combination of adult businesses within a single  
17 unitary establishment causes the same kinds of secondary  
18 effects found by a clustering of 12 or 15 or 20 unrelated  
19 adult businesses in a very small area in terms of the  
20 neighborhood. That was the city's hypothesized,  
21 hypothesis.

22 QUESTION: Yes, but isn't one way to pose that  
23 question to pose it the way Justice Kennedy did? The  
24 question is, does the particular combination increase the  
25 degree of clientele, because we know that the greater the

1 clientele, the greater the crime rate is going to be, so  
2 there seems to me to be a factual basis for saying that  
3 the clientele is a kind of a surrogate measure for those  
4 very effects that the city can legitimately try to  
5 counteract.

6 MR. WESTON: With all respect, Justice Souter, I  
7 must question the hypothesis that it is the clientele that  
8 will cause the problems. I would --

9 QUESTION: The amount of clientele is associated  
10 with the problems. It may be that that clientele is  
11 preyed upon by other people who come in, but the fact is,  
12 I think, that the study shows an association between the  
13 number of people concentration to come to these businesses  
14 and the secondary effects of crime, et cetera, that the  
15 city can do something to prevent.

16 MR. WESTON: I --

17 QUESTION: That's the hypothesis that I'm --

18 MR. WESTON: I really don't think so in this  
19 instance, because if that were, in fact, the hypothesis of  
20 the city, surely, with all of the thought that they have  
21 given to this, there would have been an absolute size  
22 limitation or a square footage limitation that was part of  
23 the legislation to deal just with that problem, but they  
24 haven't. As one of the questions before inquired, suppose  
25 it was a 50,000 square adult bookstore or an arcade or a



1 cabaret.

2 QUESTION: Maybe they could do that. You know,  
3 we have a one-step-at-a-time principle, that the State  
4 doesn't have to do everything it possibly could in order  
5 to validate what it has done. Maybe it should prohibit  
6 any more than 250 arcades showing sex videos at one place.  
7 It just hasn't done that yet. It will get there when that  
8 becomes a problem, I assume.

9 MR. WESTON: And I suppose we'll be back here  
10 then having to address that.

11 QUESTION: You seem to be arguing that we should  
12 decide this case on the assumption that the city's  
13 evidence, as it now exists, would not be a sustainable  
14 basis for an ordinance saying, you can't have two -- you  
15 can't have 25 different adult uses in one arcade. Do you  
16 want us to decide -- are you saying that you're going to  
17 go for broke, that we've either got to sustain that  
18 proposition, or you lose? Because I'm suggesting -- I  
19 mean, my question was mean to suggest that there's a  
20 factual difference in degree. It may be very intuitively  
21 obvious that if you put 20 of these uses in one business,  
22 you're going to bring in a lot of people, going to have a  
23 lot of problems.

24 It may not be intuitively obvious, and you may  
25 need some specific evidence simply by combining videos and

1 books, it may not be intuitively obvious that that is  
2 going to create the problem, so I'm suggesting a  
3 difference of degree. Do you reject that?

4 MR. WESTON: Not at all, Justice Souter. Of  
5 course there may be --

6 QUESTION: Thank you, Mr. Weston.

7 Mr. Klekner, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF MICHAEL L. KLEKNER

9 ON BEHALF OF THE PETITIONER

10 MR. KLEKNER: Thank you.

11 In our reply brief we cite heavily -- in our  
12 reply brief we cite from the appellee's brief in Young v.  
13 American Mini Theatres. Footnote 7 to our brief quotes  
14 the purpose for clustering, which is to attract people.  
15 Basically, you're attracting unattended males on a frolic  
16 on their own.

17 Mr. Wiener, in his, one of his declarations at  
18 joint appendix 230, why does he combine businesses? To  
19 attract patrons. Typically, unattended males on a frolic  
20 on their own. There is no qualitative or quantitative  
21 difference in the effect.

22 QUESTION: Well, if you combine buying, they get  
23 out of the store. If you have only the arcade, they'll  
24 linger longer.

25 MR. KLEKNER: Well, that's -- they're -- you

1 cannot expect an ordinance to solve everything in --

2 QUESTION: I'm just questioning whether there's  
3 going to be more of a problem if you have the stand-alone  
4 arcade, where to see the film to the bitter end you have  
5 to stay there, but you really like it, so you buy it, and  
6 you get out quicker.

7 MR. KLEKNER: Well, but that's an argument to  
8 getting rid of the arcades. The purpose of these  
9 ordinances is to spread out --

10 QUESTION: But you can't --

11 MR. KLEKNER: -- spread out the patronage, to  
12 make sure that you don't have this clustering, this magnet  
13 effect. You know, if you want your sex toys and your  
14 videos and your books you go to Third and Alameda because  
15 that's where everybody goes.

16 You want to avoid that. That's the whole  
17 purpose of this, so it makes no difference, inferentially,  
18 one way or the other if they're side by side or in the  
19 same building, and inferences in this Court's precedent  
20 doesn't require that we have conclusive evidence,  
21 empirical evidence. Paris Adult Theaters, Nixon v.  
22 Shrink, case after case says you can rely on inferences,  
23 and if the issue is fairly debatable -- this is a  
24 debatable issue, you draw -- you give deference to the  
25 legislative judgment because you can draw different

1 inferences from the same evidence.

2 That is what's been done here. We are -- thank  
3 you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
5 Klekner. The case is submitted.

6 (Whereupon, at 11:02 a.m., the case in the  
7 above-entitled matter was submitted.)

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