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The First Amendment In Chaos: How The Law Of Secondary Effects Is Applied And Misapplied By The Circuit Courts

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The law of secondary effects is a mess. Every federal circuit and the various states seem to be on slightly different pages. That body of law is supposed to govern when and to what extent the First Amendment right of free speech can be limited in the context of sexually explicit communications. In more vernacular terms: How far can local governments go to prevent or restrict the operation of strip clubs, adult bookstores, and the like? The present state of the law is both confused and intellectually dishonest; the federal circuits are split on issues both large and small, and the guidance offered to lower courts resembles instructions for operating a Ouija board. Forgive us a bit of editorializing at the beginning of this Article, but partisan commentary seems appropriate given the political and legal turmoil accompanying sexually explicit speech.[1]

We learned in civics class that our society must tolerate a great deal of public harm arising from controversial speech in order to safeguard the larger principles of the First Amendment. For instance, we prefer to allow white supremacists to spout their odious ideology while the rest of us elect the first African American to the presidency. We are taught to believe that anything short of "fighting words" must be endured if our "market place of ideas" is to function.[2] Reality is less sanguine than

† The authors wish to acknowledge the substantial assistance of their friend and colleague, Bradley Shafer, East Lansing, Michigan. Mr. Shafer wrote the Petition for Certiorari in the case of *Commonwealth v. Jameson*, 215 S.W.3d 9 (Ky. 2006), *cert. denied*, 128 S. Ct. 190 (2007), which in turn served as the template for the authors' petition in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1246 (2008). Those petitions formed the basis for this Article.

1. In the interest of full disclosure, the authors of this Article are very much partisans in the ongoing secondary-effects wars. Gary S. Edinger, Esq., Gainesville, Florida is National Chairman and immediate past President of the First Amendment Lawyers' Association (FALA); Daniel R. Aaronson, Esq., Benjamin & Aaronson, P.A., is National Secretary of FALA; and James S. Benjamin, Esq., Benjamin & Aaronson, P.A., Fort Lauderdale, Florida is Chairman Emeritus and past President of FALA; all concentrate their practice in First Amendment Constitutional litigation matters.

2. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." (footnote omitted)),

civics class. While the Supreme Court has repeatedly said that sexually explicit speech is entitled to protection under the First Amendment,[3] the Court has upheld many regulations just short of an outright ban so long as local governments can demonstrate that the speech has an "adverse secondary effect" on society. The purpose of this Article is not to debate the legal underpinnings of the secondary-effects doctrine, but to review the current difficulty in evaluating what quantum of evidence is sufficient to prove the existence of adverse secondary effects and to discuss what "evidence" means in this context.

The doctrine of secondary effects was first mentioned in a footnote appearing the Supreme Court case of *Young v. American Mini Theatres, Inc.*[4] That case is particularly important because a plurality of the Supreme Court Justices considered for the first time the argument that zoning restrictions targeting adult businesses were content-based rather than content-neutral.[5] Curiously, however, the Court did not devote much of the opinion to that central theoretical issue. Instead the Court focused on the theatre's vagueness and equal-protection claims and paid relatively little to the secondary-effects issue. That analysis was relegated to a footnote and a brief comment that the local government had made a factual determination "that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime."[6]

The Court expanded on this brief comment in *City of Renton v. Playtime Theatres, Inc.*,[7] which was the first Supreme Court case to focus on the nature of the evidence that might qualify as proof of secondary effects. The Court found that a variety of zoning tools could be employed to limit adult businesses so long as those restrictions targeted the secondary effects and were not being used as a tool to censor the speech directly.[8] The government could meet its burden of showing a content-neutral purpose by showing that it relied on "studies" demonstrating a link between adult businesses and such social ills as reduction in property values, increases in crime, and the spread of communicable diseases. The test was purposely designed to be easy for government to meet, since the locality was not required to conduct its own independent

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with Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

3. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000); City Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (plurality opinion).

4. 427 U.S. 50 (1976).

5. *See id.* at 63–73 (plurality opinion).

6. *Id.* at 71 n.34.

7. 475 U.S. 41 (1986).

8. *See id.* at 50.

studies but could rely on the experiences of other communities.[9] The standard adopted is nominally an objective one:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.[10]

Since *Renton*, the Supreme Court has extended the secondary-effects doctrine to apply to restrictions other than zoning. In particular, prohibitions against nude dancing have been upheld by some Justices on several occasions based on a perceived or potential link to secondary effects.[11] In addition, lower courts have expanded the list of social ills associated with adult businesses to include such diverse problems as litter,[12] traffic congestion,[13] and tax evasion.[14] The authors expect that climate change and the recent financial crisis will shortly join the list of secondary effects uniquely caused by the adult industry. This may simply be by hyperbole, but as will be shown below, accuracy and logic are not components of the secondary-effects analysis.

One difficulty faced in applying these three cases—particularly

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9. *Id.* at 50–51.

10. *Id.* at 51–52.

11. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563, 567–68 (1991) (plurality opinion).

12. *See, e.g.*, World Wide Video of Wash., Inc. v. City of Spokane, 368 F.3d 1186, 1195 (9th Cir. 2004) (approving a restriction of speech based on litter). Yet, approving a restriction on speech based on the possibility of litter would seem especially dubious in light of abundant Supreme Court precedent stating that the First Amendment is more important than the occasional bit of trash. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 799 n.7 (1989); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808–09 (1984); Schneider v. New Jersey, 308 U.S. 147, 162 (1939). *World Wide Video* is a particularly good example of the mental contortions engaged in by some courts to uphold restrictions on sexually explicit speech.

13. *See, e.g.*, Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 996, 1002 (9th Cir. 2007) (holding that an adult business had failed to rebut the government's reliance on "traffic and noise").

14. *See, e.g.*, SOB, Inc. v. County of Benton, 317 F.3d 856, 863 (8th Cir. 2003).

Barnes v. Glen Theatre, Inc.[15] and *City of Erie v. Pap's A.M.*[16]—is the fact that the decisions are fractured so badly that it is often difficult even to identify the plurality opinion.[17] It is little wonder, then, that the lower courts have fractured along the same fault lines, applying the Supreme Court precedent in a seemingly random development of the law. At best, the law that developed after *Barnes* and *Erie* may be described as dysfunctional.

In the Eleventh Circuit, the court has both upheld and stricken laws that prohibited the sale of alcoholic beverages in the presence of nude dance. In *Sammy's of Mobile, Ltd. v. City of Mobile*, the court upheld such a restriction even in light of a recent Supreme Court case holding that the Twenty-First Amendment did not grant local government additional authority to regulate nude-dance performances.[18] In contrast, in *Krueger v. City of Pensacola*, the Eleventh Circuit struck a very similar ordinance because that ordinance had not been supported by any evidence of adverse secondary effects[19]:

> Where such fundamental interests as the right to free speech are at issue, however, we require more than simply an articulation of some legitimate interest that the city could have had. . . . The government must also show that the articulated concern had more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of the legislation.[20]

In yet another departure, the court approved a district-court deci-

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15. 501 U.S. 560.

16. 529 U.S. 277.

17. Legal commentators have been unanimous in pointing out the near impossibility of applying these fractured opinions to actual cases. *See, e.g.*, Roger Enriquez et al., *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 AM. U. J. GENDER SOC. POL'Y & L. 1, 39 (2006) ("The post-*Alameda* jurisprudence makes it clear that courts are struggling with the issue of 'quantum and quality' of evidence necessary to establish an association or link between sexually oriented businesses and negative secondary effects."); Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1212 (2002) ("*Alameda Books*, on the other hand, represents a missed opportunity for the Court to come to a decision on the intricacies of secondary effects analysis, which would be useful once the Court begins applying the analysis consistently outside the area of adult entertainment regulations. It seems clear that the evidentiary burdens and legislative motivations are not entirely clear from the fractured nature of many of the recent secondary effects opinions and the different discussions and rationales that are provided throughout these opinions."); Christy A. Fisher, Comment, *Nude Dancing*, 6 GEO. J. GENDER & L. 335, 335 (2005) ("Restrictions on nude dancing implicate the First and Fourteenth Amendments of the U.S. Constitution. Courts have issued vague and contradictory opinions on the topic, making the conflict between constitutional protections of erotic expression and public decency laws even more confusing.").

18. 140 F.3d 993, 996–97 (11th Cir. 1998).

19. 759 F.2d 851, 855 (11th Cir. 1985).

20. *Id.*

sion that precluded adult businesses from even offering evidence to challenge a secondary-effects finding. The district court noted,

> *Evidence about secondary effects or, rather, the lack of them, is also clearly foreclosed.* It is now established as a matter of law by Supreme Court jurisprudence culminating in *Barnes,* that secondary effects of proscribed conduct may be taken into consideration by a court in evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.[21]

That decision would seem to have ignored a large body of literature and case law finding that adult businesses do not invariably cause adverse secondary effects in a community.[22]

The same court ruled six years later that Fulton County's adult ordinance was unconstitutional because the purported legislative purpose in combating secondary effects was completely belied by a local study performed by that very government showing that adverse secondary effects did not occur in the local adult clubs.[23] The court held that a local legislator could not rely on foreign studies conducted in other jurisdictions at other times when those studies were shown to be inapplicable to actual local conditions:

> We do not think that Defendants had any reasonable justification for amending Section 18–76 when the county's own studies negated the very interests it purportedly sought to prevent. . . . We recognize that a governmental entity is not required to perform empirical studies. However, having done so, the Board cannot ignore the results. Local studies, including those commissioned by the county itself, revealed that the Clubs had less, up to half, the incidence of crime than establishments that did not offer nude dancing, property values had increased in the Clubs' surrounding neighborhoods, and the physical maintenance of surrounding buildings showed no quantifiable blight. Accordingly, we find that it was unreasonable for Defendants to rely

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21. Cafe 207, Inc. v. St. Johns County, 856 F. Supp. 641, 645 (M.D. Fla. 1994) (emphasis added), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995).

22. *See, e.g.*, Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1268–69 (11th Cir. 2003); Flanigan's Enters., Inc. of Ga. v. Fulton County, 242 F.3d 976, 986 (11th Cir. 2001) (per curiam); Enriquez et al., *supra* note 17, at 34; Daniel Linz et al., *An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC'Y REV. 69, 89 (2004); Daniel Linz et al., *Peep Show Establishments, Police Activity, Public Place, and Time: A Study of Secondary Effects in San Diego, California*, 43 J. SEX RES. 182, 190 (2006); Daniel Linz et al., *Testing Supreme Court Assumptions in* California v. LaRue*: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?*, 7 COMM. L. REV. 23, 42 (2007).

23. *Flanigan's*, 242 F.3d at 986–87.

> on remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions.[24]

The Eleventh Circuit continues to cite all of these cases as if they were entirely consistent and can be reconciled within a sensible legal framework. Those sort of mental gymnastics are beyond the poor ability of these authors.

In light of the conflict between the courts over the "easy" issues, it should not be surprising that the courts fail to agree where the facts and issues are more subtle. There is no consensus, for instance, regarding the quality or quantity of evidence necessary to prove that the city's factual justification—whether local or foreign—amounts to "shoddy data." Neither does there seem to be any agreement as to what actually constitutes a secondary effect. Few people would disagree with the principle that preventing crime and maintaining property values through responsible zoning are important governmental interests.[25] However, many people would disagree with the idea that speech rights should be forfeited to prevent litter or the theoretical possibility of tax evasion. Nevertheless, the courts accept all of these justifications without questioning whether the supposed benefit to society is worth the loss of First Amendment rights.

A sea change in the law of secondary effects appeared to take place in 2002 when the Supreme Court decided the case of *City of Los Angeles v. Alameda Books, Inc.*[26] The Court seemingly rejected a wholly deferential approach to local legislation when it adopted both procedural and substantive standards for evaluating whether a government has adequately supported its restrictions on adult-entertainment with proof of secondary effects. A plurality of the Court held that adult businesses must be provided an opportunity to cast "direct doubt" on the factual predicate underlying adult entertainment restrictions.[27] The Court suggested two ways by which the legislative predicate could be challenged: by showing that the government's "evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings."[28] Justice O'Connor, the author of the plurality decision, gave

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24. *Id.* at 986 (citation omitted).

25. While some would argue that those substantial governmental interests should not trump the First Amendment, the question seems to be well settled by the Supreme Court in favor of the government's ability to regulate against secondary effects. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

26. 535 U.S. 425 (2002).

27. *Id.* at 438–39 (plurality opinion).

28. *Id.* at 439.

substantive content to what had previously been a vague test under *Renton*:

> We held that 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 *Renton*. 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.[29]

The Eleventh Circuit adopted and expanded on Justice O'Connor's formulation of the secondary-effects standards and procedures—if only temporarily—in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*.[30] Under *Peek-A-Boo Lounge*, a local government "may rely upon any evidence that is 'reasonably believed to be relevant' to its interest in preventing secondary effects."[31] However, the city "cannot rely on 'shoddy data or reasoning' and its 'evidence must fairly support [its] rationale.'"[32] If the government comes forward with evidence in support of a substantial governmental interest, the challenging citizens must be given the opportunity to "cast direct doubt on this rationale" with evidence of their own.[33] If the adult-business owner succeeds in doing so, "the burden shifts back to the [city] to supplement the record with evidence renewing support for a theory that justifies its evidence."[34]

The determination of whether a local government's evidence consists of shoddy data would seem to be relatively straightforward. One might naturally equate "shoddy data" with unscientific or unreliable information of the kind routinely rejected by the courts following *Daubert* hearings or even a lesser standard that requires a modicum of accuracy or truth. *Daubert* hearings evaluate whether expert testimony is scientifically sound and generally accepted as reliable in the relevant professional community.[35] It is commonly recognized that *Daubert* anal-

29. *Id.* at 438–39 (citations omitted) (quoting *Renton*, 475 U.S. at 51–52).
30. 337 F.3d 1251 (11th Cir. 2003).
31. *Id.* at 1269 (quoting *Renton*, 475 U.S. at 51–52).
32. *Id.* (quoting *Alameda Books*, 535 U.S. at 438 (plurality opinion)).
33. *Id.*
34. *Id.* (quoting *Alameda Books*, 535 U.S. at 439 (plurality opinion)).
35. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–94 (1993).

ysis is simply a codification of the court's traditional role as the "gatekeeper" of record testimony.[36] The courts have long evaluated sociological evidence in all types of litigation from desegregation to abortion cases.[37] The Eleventh Circuit has recognized the utility of sociological studies and statistics for many years:

> Historically, beginning with "Louis Brandeis' use of empirical evidence before the Supreme Court . . . persuasive social science evidence has been presented to the courts." The Brandeis brief presented social facts as corroborative in the judicial decisionmaking process. The Brandeis brief "is a well-known technique for asking the court to take judicial notice of social facts." It does not solve the problem of how to bring valid scientific materials to the attention of the court. . . . Brandeis did not argue that the data were valid, only that they existed. . . . The main contribution . . . was to make extra-legal data readily available to the court."
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> This Court has taken a position that social science research does play a role in judicial decisionmaking in certain situations, even in light of the limitations of such research.[38]

Like these other cases in which sociological data is relevant, evidence of adverse secondary effects should be subject to quantitative proof: Do property values in the neighborhood actually decrease when an adult business opens? Does crime really increase? What happens to the incidence of HIV in the community? The doctrine of secondary effects appears to contemplate an objective test of "reasonable belief," similar to the "reasonable man" standard lying at the very foundation of the common law. One would expect, therefore, that a traditional trial would be an entirely appropriate forum to consider secondary-effects issues. Furthermore, the traditional burden of proof based on a preponderance of the evidence would seem to fit neatly with the burden-shifting framework created by *Alameda Books* and *Peek-A-Boo Lounge*. In practice, however, secondary-effects trials are rare to non-existent, and the actual treatment of secondary-effects theory is a far cry from the Supreme Court's proclamations.

The authors are aware of only a single case in the United States where secondary effects have been the subject of a full evidentiary proceeding.[39] In *Daytona Grand, Inc. v. City of Daytona Beach*, Lollipop's

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36. *See* Wendie Ellen Schneider, Case Note, *Past Imperfect*, 110 YALE L.J. 1531, 1539 (2001) ("*Daubert* places increased responsibility on judges to serve as gatekeepers . . . .").

37. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 161 (1973); Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

38. McCleskey v. Kemp, 753 F.2d 877, 888 (11th Cir. 1985) (en banc) (alterations in original) (citations omitted), *aff'd*, 481 U.S. 279 (1987).

39. Most cases have been decided on the basis of summary judgments. One recent case was decided on a motion to dismiss, with the court going so far as to say that discovery was not even

challenged two Daytona Beach ordinances prohibiting nudity in general and in proximity to establishments that serve alcohol.[40] The effect of those two ordinances was to require performers at Lollipop's to wear more clothing than they, and their customers, might otherwise prefer. Curiously, the City of Daytona Beach did not rely on the usual list of foreign studies and reported cases to support its legislation. Instead, the City relied almost entirely on past and present testimony from law-enforcement officers who thought that adult businesses caused an increase in prostitution and were generally undesirable.[41] Some of the evidence was over twenty-years-old.[42]

At the district-court level, the club introduced evidence at a nonjury trial that demonstrated that the city had relied on shoddy data when it enacted zoning and nudity laws impacting adult businesses. The trial court also found as a matter of fact that studies of actual local conditions, focusing primarily on crime, showed that there was no evidence of secondary effects associated with adult businesses in Daytona Beach:

> Plaintiffs have succeeded in their attempt to cast direct doubt on the City's rationales for its ordinances. As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless."[43]

The district court continued:

> The evidence the City offered at trial to renew support for a theory justifying its ordinances suffers from the same flaws as its pre-enactment evidence. Owing perhaps to a stubborn refusal to accept the evolution in the law effected by *Alameda Books* and *Peek-A-Boo*, the City's post-enactment evidence, like its pre-enactment evidence, consists of either anecdotal evidence or opinions based on highly unreliable data. As Dr. Fisher observed, the City fails, once more, to compare any of its data of incidents occurring in and around nude

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needed to conclude that secondary effects existed. *See* Deja Vu of Nashville, Inc. v. Metro. Gov't, 466 F.3d 391, 398 (6th Cir. 2006) ("Deja Vu is not entitled to discovery regarding secondary effects. We have followed the Supreme Court in deferring to local governments' conclusions regarding whether and how their ordinances address adverse secondary effects . . . .").

40. 490 F.3d 860, 862, 869 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1246 (2008).

41. *See id.* at 878.

42. *See id.* at 878 & nn.27–28.

43. Daytona Grand, Inc. v. City of Daytona Beach, 521 F. Supp. 2d 1264, 1279 (M.D. Fla. 2006), *aff'd in part and rev'd in part*, 490 F.3d 860, *cert. denied*, 128 S. Ct. 1246.

> dancing establishments with data of such incidents occurring in and around similarly situated establishments.
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> In failing to renew support for a theory justifying its ordinances, the City leaves the Court with only one option: to declare Ordinances 81-334 and 02-496 unconstitutional and strike them accordingly. To reach a contrary result would be at clear odds with the plain import of *Peek-A-Boo* that gone are the days when a municipality may enact an ordinance ostensibly regulating secondary effects on the basis of evidence consisting of little more than the self-serving assertions of municipality officials.[44]

The Eleventh Circuit utterly rejected the district court's factual findings,[45] as well as the standard of proof employed at trial. "We do not agree, however, with Lollipop's claim that either *Alameda Books* or *Peek-A-Boo Lounge* raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies."[46] The Eleventh Circuit continued:

> Here, Lollipop's argument that the City's evidence is flawed because it consists of "anecdotal" accounts rather than "empirical" studies essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is unreasonable. This was not the law before *Alameda Books*, and it is not the law now. [47]

The panel upheld Daytona Beach's anti-nudity ordinances without requiring the government to produce any "empirical evidence," even in the face of scientific proof that adult businesses do not cause adverse secondary effects such as crime or urban blight in the community. [48] The Eleventh Circuit declared that "anecdotal" evidence is sufficient to sustain an adult ordinance and that empirical studies are not required or necessary to support such a law: "Rather, the City of Daytona Beach could reasonably rely upon '[c]ommon sense,' 'its own experiences,' 'the experiences of . . . other cities,' or city officials' local knowledge."[49]

There is no question that the Court adopted an intentionally deferential approach as it tells us that is exactly what it had in mind. "Our

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44. *Id.* at 1280.

45. It is clear that the Eleventh Circuit gave no deference to the trial court's findings of fact. Instead, the review was effectively de novo as to both the law and the underlying facts. *See Daytona Grand*, 490 F.3d at 870–71. That being said, the primary factual critique concerned the use of "CAD" (Computer Automated Dispatch) or "CFS" (Calls for Service) data instead of "UCRs" (Uniform Crime Report), which Lollipop's experts used. *Id.* at 882–83.

46. *Id.* at 880.

47. *Id.* at 881.

48. *See id.* at 880–82.

49. *Id.* at 881 (alterations in original) (citations omitted).

review is designed to determine whether *the City's* rationale was a reasonable one, and even if Lollipop's demonstrates that another conclusion was also reasonable, we cannot simply substitute our own judgment for the City's." [50]

Arguably, the *Daytona Grand* decision should have been impossible under the Eleventh Circuit's earlier pronouncements in *Flanigan's Enterprises, Inc. of Georgia v. Fulton County*[51] and *Peek-A-Boo Lounge*. However, the *Daytona Grand* panel did not take issue with either of those earlier decisions, and they remain good law.

Some might argue that *Daytona Grand* has superseded *Flanigan's* and *Peek-A-Boo Lounge* and is now the controlling case for all secondary-effects challenges in Florida, Georgia, and Alabama. However, that cannot be the case as one three-judge panel cannot overrule a prior three-judge panel decision in the Eleventh Circuit.[52]

Since *Daytona Grand*, *Flanigan's* and *Peek-A-Boo Lounge* all remain legally viable, it becomes necessary to try to reconcile them despite the apparently divergent views on secondary-effects evidence. Reconciliation is possible—but only just.

Depending upon the individual facts of each new case, the practitioner needs to pigeon-hole those facts into one of three categories corresponding to one of the three leading cases. For example, if the legislative record includes local anecdotal testimony and that record is challenged with local scientific studies, *Daytona Grand* would appear to control and the ordinance would survive a First Amendment challenge. If the legislature has relied only on foreign "Renton" studies and the adult industry submits evidence of local scientific studies, it would seem that *Flanigan's* would apply to strike the adult ordinance. In situations where the legislature has failed to support its law with either anecdotal testimony or foreign studies, the law will be unconstitutional if local evidence refutes the existence of adverse secondary effects. That is the outcome required by *Peek-A-Boo Lounge*.

Daytona Grand would seem to have thrown our circuit into complete turmoil when examined in light of prior decisions such as *Flanigan's* and *Peek-A-Boo Lounge*. How then, does *Daytona Grand*

50. *Id.* at 882 (citing Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1273 (11th Cir. 2003)).

51. 242 F.3d 976 (11th Cir. 2001).

52. *See, e.g.*, United States v. McKinnies, 165 F. App'x 851, 853 (2006) ("A prior panel decision is binding precedent that only can be overturned by our Court sitting *en banc*."). Lollipop's filed a Petition for Rehearing En Banc suggesting that the *Daytona Grand* decision had effectively overruled *Peek-A-Boo Lounge* even though the panel had no authority to do so. The petition was denied. Daytona Grand, Inc. v. City of Daytona Beach, 255 F. App'x 501, 501 (11th Cir. 2007).

compare to decisions in other circuits? By now, the reader should not be surprised to learn that the circuits are split and that the case law is all over the place.

Some Courts follow the Eleventh Circuit's deferential approach and find that the merest hint of a shred of anecdotal story-telling is sufficient to sustain an adult ordinance. Indeed, several courts have gone so far as to entirely disclaim any interest in actually finding out whether secondary effects are present or likely to occur in the future. In *Commonwealth v. Jameson*, Kentucky's highest court had the audacity to declare that "it is *irrelevant* whether the local government is *actually wrong* regarding the extent of all the secondary effects that have actually occurred or may occur in the future."[53] That sentiment was shared by the Seventh Circuit in *DiMa Corp. v. Town of Hallie*, where the court opined that "DiMa's contradictory evidence would be highly probative *if our task were to discover the objective truth.*"[54] That court ultimately held that the district-court judge "properly rejected" expert testimony and other evidence demonstrating that there was no correlation between the plaintiff's establishment being open twenty-four hours a day and crime "because it merely contradicts other evidence that the Hallie Board could have reasonably relied upon."[55]

The Seventh Circuit seems to share the same detachment from logic as the court in *Daytona Grand.* In *G.M. Enterprises, Inc. v. Town of St. Joseph*, the court ruled that a local study which established that the surrounding county "[h]ad not experienced any major problems with adult entertainment establishments,"[56] an affidavit stating that property values near the club had increased over time, an affidavit that established that the majority of police calls regarding incidents at the club were generated during hours when no nude or semi-nude dance entertainment was

53. 215 S.W.3d 9, 32 (Ky. 2006) (emphasis added).

54. 185 F.3d 823, 831 (7th Cir. 1999). It could be argued that blind deference to local legislators in the face of evidence that a secondary-effects justification is factually untrue is *less* stringent than review under the rational-basis test. *Cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (striking a law as irrational because "mere negative attitudes, or fear, unsubstantiated by" proper zoning-proceeding factors "are not permissible bases for" discriminating); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); Eisenstadt v. Baird, 405 U.S. 438, 449–50 (1972) ("[W]e . . . cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply *gives away* a contraceptive to *20* times the *90-day* sentence of the offender himself. The very terms of the State's criminal statutes, coupled with the *de minimus* effect of §§ 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.").

55. *DiMa Corp.*, 185 F.3d at 831.

56. 350 F.3d 631, 636 (7th Cir. 2003).

offered, and a statement by the local sheriff that the volume of police calls generated by the club was unrelated to nude dancing,[57] were all irrelevant because "*Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body."[58] The Seventh Circuit also completely ignored the "shoddy data" analysis of *Alameda*. In *Gammoh v. City of La Habra*, the Ninth Circuit ignored proffered expert testimony that the studies on which the city relied were "flawed and irrelevant" and did not conform to the methodological criteria suggested by the appellants' expert, as that was "simply not the law."[59]

Likewise, in *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, the district court found that evidence challenging the reliability and probity of the reports upon which the city relied, empirical studies conducted in other municipalities that found no connection between adult uses and adverse secondary effects, and a compilation of police data showing no local increase in crime did not disprove the theory that ordinance may reduce criminal activity.[60]

Other circuits would clearly come to a different result. One prime example can be found in *Abilene Retail # 30, Inc. v. Board of Commissioners*.[61] In that case, the appellate court reversed a summary judgment that upheld the county's zoning ordinance against a challenge brought by a local "adult bookstore."[62] The Tenth Circuit found that there were substantial issues on the record as to whether the legislative body had adequate evidence of secondary effects before it when it passed the new ordinance.[63] In particular, the studies cited in the ordinance preamble all related to urban environments, and no evidence related those studies to the decidedly rural environment in which this bookstore functioned.[64] Most importantly, the Tenth Circuit held that deferential review of the

57. *Id.* at 636.

58. *Id.* at 639.

59. 395 F.3d 1114, 1126 (9th Cir. 2005).

60. 209 F. Supp. 2d 672, 679–80 (W.D. Ky. 2002).

61. 492 F.3d 1164 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1762 (2008).

62. *Id.* at 1175–76.

63. *See id.*

64. *Id.* at 1175. Interestingly, the Tenth Circuit panel seemed particularly swayed by the evidence of the plaintiff's expert, Dr. Dan Linz. *See id.* at 1187 (Ebel, J., concurring, joined by McWilliams & Lucero, JJ.) ("Dr. Linz has bolstered this opinion with an academic, peer-reviewed article that he wrote with others challenging the validity of the County's studies."). He is the same expert whose opinions and methodology were savaged in *Daytona Grand*. *See* Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 863 n.33 (11th Cir. 2007) ("[A]t least three other circuits have rejected . . . attempts by plaintiffs to use studies based on CAD data to cast doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the City of Daytona Beach . . . . Interestingly, Daniel Linz, one of the experts hired by Lillipop's, also co-authored the studies found to be insufficient in the two of these cases." (citations omitted)), *cert. denied*, 128 S. Ct. 1246 (2008). The courts apparently reach different conclusions even when they hear the same thing from the same experts.

local government's decision did not mean that the Court must rubber stamp any legislative pronouncement:

> We are mindful that judicial review of an ordinance that implicates the First Amendment "is not a license to reweigh the evidence *de novo*, or to replace [legislators'] factual predictions with our own." However, the Supreme Court has instructed that such deference to the legislative policymaking role nevertheless "does not foreclose our independent judgment of the facts bearing on an issue of constitutional law." Our role is to "assure that, in forming its judgments [the legislature] has drawn reasonable inferences based on substantial evidence."[65]

It is also noteworthy that the Tenth Circuit was entirely aware of the fact that it reached a decision contrary to that of other circuits. In the reported en banc decision, a dissenting judge specifically emphasized the fact that the circuits were irreconcilably split:

> Legally, the significance of this case is illustrated by the fact that it opens not one, but two, splits with our sister circuits on important questions of law concerning the amount of judicial deference due legislative judgments. First, the panel opinion sets a new and much higher burden for municipalities under *Alameda Books* Step 1 than has any other circuit court, and in the process creates a circuit split with the Fifth Circuit. Second, unlike our sister circuits which afford substantially more judicial deference to legislative judgments, the concurrence's treatment of *Alameda Books* Steps 2 and 3 effectively allows a jury to "veto" legislation whenever it concludes, by a preponderance of the evidence (that is, = 50.0001%), that the legislature's chosen path is erroneous.[66]

Other circuits have reached decisions that echo the Tenth Circuit's ruling in *Abilene Retail*. In *R.V.S., L.L.C. v. City of Rockford*, the Seventh Circuit rejected the notion that a local government can rely exclusively on common sense or common experience to support a secondary-effects finding:

> While it is true that common experience may be relied upon to bolster a claim that a regulation serves a current governmental interest, the experience in this case falls short of satisfying the minimal evidentiary showing required by *Alameda Books*. Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an "if they say so" standard.[67]

A district judge in Minnesota reached a similar conclusion on similar

65. *Abilene*, 492 F.3d at 1174 (alterations in original) (citations omitted).

66. Abilene Retail # 30, Inc. v. Bd of Comm'rs, 508 F.3d 958, 959 (10th Cir. 2007) (Gorsuch, J., dissenting) (footnote omitted) (citations omitted).

67. 361 F.3d 402, 411 (7th Cir. 2004).

evidence in *22nd Avenue Station, Inc. v. City of Minneapolis*.[68]

> Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood.[69]

What do the courts agree on in the wake of *Alameda Books*? The lower courts seem to agree that, if there is no evidentiary record at all in support of an ordinance, the law will fail under *Alameda Books*.[70] The courts also appear to agree that the evidence relied on by local government both in enacting adult-business regulations and defending them in court need not be scientific or of *Daubert*-quality.[71] This is true even if the studies and testimony introduced by an adult business challenging the regulation *is* of *Daubert* quality.[72] Beyond that point, the cases find no agreement and no meaningful guidance from the Supreme Court. This conflict among the circuits is not limited to just the *weight* of evidence that is necessary to "cast direct doubt" on legislative findings, but also the form of evidence that is even *relevant* to meeting these standards.

In practice, the issue that most divides the lower courts is the sufficiency-of-the-governmental-interest prong. Under *Renton* and its progeny, a city or state need not conduct new studies or produce evidence independent of that already generated by other municipalities before enacting a secondary-effects-based law, "so long as whatever *evidence* the [government] relies upon is *reasonably believed to be relevant* to the problem that [it] addresses."[73] But how a court determines if this standard is met is not self-apparent.

One of the most fundamental of these issues is the weight to be given recent local scientific studies as compared to anecdotal accounts or reports compiled many years ago in other jurisdictions which may or may not have much in common with the community at issue. In *Renton*, the Supreme Court determined that communities need not conduct their

68. 429 F. Supp. 2d 1144 (D. Minn. 2006).

69. *Id.* at 1150.

70. *See, e.g.*, Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1268–69 (11th Cir. 2003); Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 515–16 (4th Cir. 2002).

71. *See, e.g.*, *Peek-A-Boo Lounge*, 337 F.3d at 1268.

72. *See* Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 996, 1002 (9th Cir. 2007).

73. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986) (emphasis added).

own studies, but are free to rely on foreign studies, case opinions, and the like.[74] However, that does not fully answer the factual questions allowed by *Alameda Books*.

What happens, for instance, when a community has actual experience with adult entertainment establishments operating for many years and reliable data are available that show conclusively—to a scientific certainty—that those businesses cause no unique harms in their communities? Can foreign studies trump actual local experience measured with reliable statistics? Or put in the terms of *Renton* analysis, can foreign studies and anecdotal information ever be "reasonably believed" in light of local scientific evidence of *Daubert* quality showing that the government's information is factually incorrect?

As was seen above, that question has been answered differently even within our own circuit. In *Flanigan's Enterprises, Inc. of Georgia v. Fulton County*, both the county and adult businesses commissioned studies, which found that local adult clubs were not associated with adverse secondary effects.[75] The Eleventh Circuit found it was not reasonable for Fulton County to "rely on remote, foreign studies concerning secondary effects when the county's *own current, empirical data* conclusively demonstrated that such studies were not relevant to local conditions."[76] In contrast, in the *Daytona Grand* decision, the same court found that anecdotal information was perfectly acceptable even in light of empirical, local data that cast significant doubt on the reliability of that information.[77] In *Jameson*, the Kentucky Supreme Court expressly rejected the Eleventh Circuit's suggestion that local studies had any particular value in evaluating secondary-effects claims: "We thus decline to adopt the rationale offered by the eleventh circuit in *Peek-A-Boo Lounge* wherein the court concluded that 'the constitutionality of an ordinance will depend on local conditions.'"[78] The *timing* of secondary-effects evidence has also hopelessly divided the Courts. That issue revolves around when the evidence must be adduced by the government—at the time the ordinance is enacted or at the time of trial?

Many courts have concluded that evidence in support of the government's position can be introduced at any time and at any stage of the proceedings. Furthermore, there need not be any showing that the local legislators were even aware of or concerned about the later-acquired evi-

74. *Id.* at 51.

75. 242 F.3d 976, 986 (11th Cir. 2001).

76. *Id.* at 986 (emphasis added).

77. *See* Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 881 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1246 (2008).

78. Commonwealth v. Jameson, 215 S.W.3d 9, 33 (Ky. 2006) (quoting Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1272 (11th Cir. 2003)).

dence. In extreme cases, the evidentiary support for an adult ordinance seems to have been discovered for the first time *on appeal.* That seems to have been true in the case of *Fantasyland Video, Inc. v. County of San Diego*, where the evidence at trial focused on the alleged association between late-night crime and adult entertainment.[79] While traffic and noise were cited by the city as justification for the ordinance, it is apparent that neither side devoted much attention to this issue at trial and that this issue did not serve as the foundation for the district court's decision. Nonetheless, the appellate court seized on "noise and traffic" as the basis for its conclusion that the plaintiff had failed to rebut the claimed secondary effects.[80] Other Courts have reached a similarly extreme conclusion.[81]

Other courts, however, come to the conclusion that in order for a speech-restrictive law to be upheld, the secondary-effects record must be made at the time of legislative enactment (in view of *Renton*'s command that the government must "rely" upon evidence reasonably believed to be relevant to the problems that it is attempting to address).[82]

Accordingly, in those jurisdictions that allow post-enactment secondary-effects substantiation, a litigant can appropriately "cast doubt upon" those secondary effects articulated in a bill's legislative preambles but nevertheless find himself losing the constitutional challenge when a novel secondary effect is used in court for the first time to justify the law. This affords an opportunity for both government and deferential courts to come up with justifications that would strain the reasonable beliefs of even the most credulous of legislators.

A neutral observer might conclude that adult businesses are not litigating on a level playing field and that the usual rules of evidence and burdens of proof have been ignored to fit law to policy. Surely, the courts' interest in promoting due process and fundamental fairness might be questioned where one litigant can ambush another with an

79. 373 F. Supp. 2d 1094, 1108 (S.D. Cal. 2005), *aff'd*, 505 F.3d 996 (9th Cir. 2007).

80. *See Fantasyland*, 505 F.3d at 1002.

81. *See, e.g.*, Fantasy Ranch Inc. v. City of Arlington, 459 F.3d 546, 560 (5th Cir. 2006); Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 515 (4th Cir. 2002); Essence, Inc. v. City of Federal Heights, 285 F.3d 1272, 1284–85 (10th Cir. 2002); Deja Vu of Nashville, Inc. v. Metro. Gov't, 274 F.3d 377, 393 n.4 (6th Cir. 2001); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 829–30 (7th Cir. 1999); Farkas v. Miller, 151 F.3d 900, 905 (8th Cir. 1998); Mitchell v. Comm'n on Adult Entm't Establishments, 10 F.3d 123, 136–37 (3rd Cir. 1993).

82. *See, e.g.*, Illusions-Dallas Private Club, Inc. v. Steen, 482 F.3d 299, 314–15 (5th Cir. 2007) (noting that legislature must actually rely on the evidence when enacting law); White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 171–72 (2d Cir. 2007) ("Defendants argue that they may rely on 'any evidence' of secondary effects, regardless of whether they reviewed such evidence before or after enacting the Ordinance. We disagree."); *Peek-A-Boo Lounge*, 337 F.3d at 1267 ("This Court has held that *Renton* requires at least *some* pre-enactment evidence." (citing Ranch House, Inc. v. Amerson, 238 F.3d 1273, 1283 (11th Cir. 2001))).

entirely new theory at trial or even on appeal. That is precisely what happens when a local government is allowed to rely on "new" secondary effects claims and previously undisclosed evidence after the adult business has completed its case in chief. That is a puzzling procedure not found elsewhere in the law.

Further divisions appear all across the country on every issue related to secondary-effects proofs. For example, the courts split over whether the generally relied-upon secondary-effects reports examining adult bookstores and live entertainment venues can be used to justify regulations of "take-out" only facilities where there is no viewing of adult entertainment on the premises.[83]

There is even a conflict among the circuits on an issue as seemingly narrow as whether secondary effects can justify a governmental interest in regulating a *single* instance of expressive nudity.[84]

The lack of clarity from the Supreme Court on these issues has led to a point where there appears to be little or no scrutiny given to whether an articulated governmental problem can truly be tied to "adult" entertainment and where, irrespective of the Supreme Court's comments in *Pap's* and *Alameda Books*, there really is little ability to challenge the mere pretext *assertion* of the governmental interest of adverse secondary effects.

The culmination of this judicial trend was reached in two recent cases. In *5634 East Hillsborough Avenue, Inc. v. Hillsborough County*,[85] a district judge, expanding on the *Daytona Grand* decision, determined that a litigant can never overcome the government's record as long as there is any evidence – no matter the quality.

> Once the County relied on evidence it reasonably believed to be relevant to the problem of adverse secondary effects, the burden shifted to the Plaintiffs to "cast direct doubt" on the County's reasoning. This cannot be accomplished, however, by simply providing reports and testimony reaching a contrary conclusion such as those prepared and given by Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, all experts retained by the Plaintiffs. *Daytona Grand* made it clear that given the existence of different conclusions based on studies, either empirical or anecdotal, the Court may not substitute its judgment for

83. *Compare* Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 295 (5th Cir. 2003) (per curiam) (cannot justify), *with* Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 687 (10th Cir. 1998) (can justify), *and* ILQ Invs., Inc. v. City of Rochester, 25 F.3d 1413, 1418 (8th Cir. 1994) (can justify).

84. *Compare* BZAPS, Inc. v. City of Mankato, 268 F.3d 603, 606–07 (8th Cir. 2001) (they can), *with* Tollis Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (they cannot).

85. No. 8:06-cv-1695-T-26EAJ, 2007 WL 2936211, at *1 (M.D. Fla. Oct. 4, 2007), *aff'd*, 294 F. App'x 435 (11th Cir. 2008).

the Board.[86]

This trend has reached its zenith in *Deja Vu of Nashville, Inc. v. Metropolitan Government*,[87] where the adult businesses were precluded from even seeking discovery regarding secondary effects.

> Deja Vu is not entitled to discovery regarding secondary effects. We have followed the Supreme Court in deferring to local governments' conclusions regarding whether and how their ordinances address adverse secondary effects of adult-oriented establishments. It is clear, for instance, that a local government does not need localized proof of adverse secondary effects in order to regulate adult establishments. Similarly, all that is needed to justify a regulation is a reasonable belief that it will help ameliorate such secondary effects. Deja Vu offers no authority entitling it to undermine this deference through discovery.[88]

Other courts, out of principle or simple confusion, have completely sidestepped all of these issues by refusing to "specify the methodological standards to which [a litigant's] evidence must conform"[89] in order to successfully challenge the stated secondary-effects basis for the enactment of a speech-restrictive law. Things are pretty bad when a federal court explicitly decides a case by not deciding.[90]

That leaves this Article where it started. The law of secondary effects is a mess, and no amount of analysis will reconcile these cases or bring the slightest amount of certainty or predictability to pending litigation. Arguably, the Supreme Court's fractured decisions in *Barnes*, *City of Erie*, and *Alameda Books* have only made the situation worse. One could hope for better guidance in an area of the law directly affecting fundamental First Amendment rights.

86. *Id.* at *7 (footnote omitted).
87. 466 F.3d 391 (6th Cir. 2006).
88. *Id.* at 398 (citations omitted).
89. *See* Gammoh v. City of La Habra, 395 F.3d 1114, 1127 (9th Cir. 2005).
90. *See, e.g.*, City of Chicago v. Pooh Bah Enters., Inc., 865 N.E.2d 133, 159 (Ill. 2006).