IMBALANCE BETWEEN SPEECH & HEALTH: HOW UNSUBSTANTIATED HEALTH CLAIMS IN SECONDARY EFFECTS REGULATIONS OF SEXUALLY ORIENTED BUSINESSES THREATEN FREE SPEECH

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ABSTRACT

In 2013, Vivid Entertainment, a leader in the adult film industry, sought to invalidate Los Angeles County's Safer Sex in the Adult Film Industry Act, a local ordinance that requires pornography actors to use condoms while producing sex scenes. Vivid's claim failed when the U.S. Court of Appeals for the Ninth Circuit deemed the law constitutional because, though content-based, the law targeted the secondary effects of speech—transmission of sexually transmitted diseases among actors and the public.

This case is the most recent in a line of secondary effects doctrine cases that targets a particular type of speech because of its alleged secondary health effects. Sexually Oriented Businesses (SOBs), like the pornography industry, are often the target of this type of, supposedly, content-neutral form of regulation. However, such regulation requires evidence to prove that local and state governments intend to place mere time, place, and manner restrictions on SOBs for the benefit of the public. This study argues that the evidence local and state governments typically use to support their claims against these SOBs tend to be both broad and unsubstantiated in their support of public health, thus creating an imbalance between the protection of speech and the protection of health. The conclusions drawn from this analysis provide recommendations on how to improve the secondary effects doctrine to restore balance between protecting speech and protecting health.

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I. INTRODUCTION

In November 2012, the citizens of Los Angeles County, California, passed the Safer Sex in the Adult Film Industry Act.[1] This local ordinance, commonly known as "Measure B," set new requirements for adult films produced within the county.[2] The law requires that persons who act in pornographic films wear condoms while producing sex scenes.[3] Proponents of the law, such as the AIDS Healthcare Foundation, advocated for condom usage in the adult film industry to protect actors—and, in turn, the public—from sexually transmitted diseases.[4] Though the law champions public health interests on its face, it was highly contested by members of the adult film industry and by free expression advocates.[5]

Opponents of the law argued the requirements infringed on the First Amendment rights of speech and expression of actors and filmmakers in the industry. Moreover, members of the adult film industry argued that the requirements imposed by the law would lead to changes in their production and income. This would force film production out of Los Angeles County and result in massive loss of tax income for the area.[6] When the law passed, leaders of the adult film industry challenged the law on constitutional grounds,[7] but the challenge ultimately failed, and the law remains active in Los Angeles County.[8]

At its core, Measure B is internally conflicted between the protection of speech and the protection of health. Measure B

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[1] L.A. CTY. CODE, CAL., tit. 11, div. 1, ch. 39, (Nov. 6, 2012) [*hereinafter* Measure B].
[2] *Id.*
[3] *Id.* § 090 ("The use of condoms is required for all acts of anal or vaginal sex during the production of adult films to protect performers from sexually transmitted disease.").
[4] *Los Angeles Porn Actors Required to Wear Condoms Act*, *Measure B*, BALLOTPEDIA, https://ballotpedia.org/Los_Angeles_Porn_Actors_Required_to_Wear_Condoms_Act,_Measure_B_(November_2012) (last visited Mar. 1, 2019).
[5] Actors and representatives of the adult film industry, such as the Freedom of Speech Coalition (FSC), spoke out against the condom mandate. For example, in response to the decision by the 9th Circuit Court of Appeals to uphold the mandate, the CEO of the FSC, Diane Duke, stated "While this intermediate decision allows that condoms may be mandated, it doesn't mean they should be. We have spent the last two years fighting for the rights of adult performers to make their own decisions about their bodies, and against the stigma against adult film performers embodied in the statute. Rather than protect adult performers, a condom mandate pushes a legal industry underground where workers are less safe. This is terrible policy that has been defeated in other legislative venues." *FSC: 'Measure B Decision Will Hurt Performers',* AVN, https://avn.com/business/articles/legal/fsc-measure-b-decision-will-hurt-performers-582729.html (Dec. 15, 2014).
[6] *Los Angeles Porn Actors Required to Wear Condoms Act*, *Measure B*, *supra* note 4.
[7] Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1121–22 (2013).
[8] Vivid Entm't, LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014) (dismissing Vivid Entertainment's argument that the law was an unconditional infringement on pornography actors' and film producers' First Amendment rights to freedom of speech and expression).

sacrifices a degree of protection for a form of speech and expression to increase protections for public health. This type of public health regulation on speech is common: In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act, requiring warning labels on food and drugs,[9] and in 1970 broadcast advertisements for cigarettes were banned as a means of discouraging the use of tobacco.[10]

Despite the general similarities, Measure B differs from previous public health regulations of this nature. Previous regulations compel and control messages, but Measure B controls how speech is made. It eliminates personal rights of the actors to choose how they protect themselves from sexually transmitted diseases (STDs), and it dictates how filmmakers must produce their films. Measure B is content-based on its face due to its focus on a specific type of expression (condom usage in adult films). However, the U.S. Court of Appeals for the Ninth Circuit deemed Measure B's mandated condom use provision as content-neutral because the law is aimed at the *secondary effects* of speech at issue rather than controlling speech.[11] Regulations of this nature are not unique: secondary effect-based regulations are common for sexually oriented businesses ("SOBs"), such as adult bookstores[12] or nude dancing clubs.[13] Typically, these regulations deal with zoning and crime prevention, based on the argument that the presence of SOBs will lead to a rise in crime in surrounding areas. In contrast, Measure B's primary objective is to protect health.

Measure B is, thus, unique to the law and the legal literature. While there is a vast body of literature on secondary effect regulations, little of it addresses secondary effect regulations that are driven by public health concerns.

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[9] Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75–717, 52 Stat. 1040 (1938).
[10] Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87 (1970).
[11] *Vivid Entm't*, 965 F. Supp. 2d at 1125. "Secondary effects" refer to adverse side effects of certain forms of speech or expression. In some cases, the Secondary Effects Doctrine is employed by law-makers as a means of regulating specific types of speech under a content-neutral guise. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 87 (1976). Secondary effects have been the subject of debate ever since: in *Barnes v. Glen Theatre, Inc.*, Justice Souter was the voice for morality when the Court determined the constitutionality of an ordinance prohibiting nudity. Souter agreed with the majority that the law was content neutral, but differed from the majority in that he felt the law was content-related—just not to the extent that the law was unjustified. Rather, Souter considered nude dancing akin to prostitution and sexual violence, deeming them the "secondary effect" of the nude dancing. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585–86 (1991) (Souter, J., concurring).
[12] *See* Young v. Am. Mini Theaters, Inc. 427 U.S. 50, 55 (1976) (showing that as early as the 1970s, zoning restrictions on SOBs were implemented for the purposes of protecting property value and reducing crime).
[13] *Id.*

Specifically, there is little information about the arguments supporting public health-driven regulations of this nature or their substantiating evidence. As a result, it is unknown what impact, or potential threat, these types of arguments and lack of evidence pose to SOBs and the freedom of speech, generally.[14] This is problematic, as public health-driven regulations are on the rise for SOBs. For example, since 2016, five states have declared pornography a "public health crisis" and passed resolutions calling for research on and regulation of adult entertainment.[15] Thus, as these regulations continue to emerge, information and scholarly recommendations on these types of regulations are needed.

This study analyzes cases where SOBs challenged public health-driven secondary effect regulations. Specifically, the analysis identifies the health claims against SOBs and the substantiating evidence used to support such claims. These findings were compiled to draw conclusions about the balance between protecting health and protecting speech.

Part II of this Article provides the history and development of the secondary effects doctrine. Part III is a discussion on the related legal research. Part IV details the study's methodology. Part V contains the case analysis, including the identification of the health claims and their substantiating evidence within the cases, and a discussion on what this information suggests about the balance between speech and health.

II. DEVELOPMENT OF THE SECONDARY EFFECTS DOCTRINE

The Secondary Effects Doctrine deems facially content-based restrictions content-neutral because the objective of these regulations is not to control speech, but to control the related or resulting conduct that stems from the targeted speech.[16] For the Secondary Effects Doctrine to apply, a regulation cannot directly suppress the message of the speech, only the "secondary effects"

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[14] Regulations may target concerns for public health and safety together, but this study is only concerned about the secondary effect regulations that target public health as these are potentially an impermissible basis for restriction.

[15] The five states are Arkansas (H.R. 1402, 91st Gen. Assemb., Reg. Sess. (Ark. 2017)), South Dakota (S.C.R. 4, 92nd S., Reg. Sess. (S.D. 2017)), Tennessee (S.J.R. 35, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017)), Virginia (H.J. Res. 549, 2017 Gen. Assemb. (Va. 2017)), Utah (S.C.R. 9, 2016 Gen. Sess. (Utah 2016)). *See also Here Are the States That Have Passed Resolutions Declaring Porn a Public Health Issue,* FIGHT THE NEW DRUG (Nov. 28, 2017), https://fightthenewdrug.org/here-are-the-states-that-have-passed-resolutions/ (last visited Oct. 13, 2018). *These 11 U.S. States Passed Resolutions Declaring Porn a Public Health Issue*, FIGHT THE NEW DRUG (Dec. 13, 2018), https://fightthenewdrug.org/here-are-the-states-that-have-passed-resolutions/.

[16] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986).

associated with the speech; must serve a substantial government interest; and cannot limit access to the speech.[17] To demonstrate a substantial interest, the government must provide evidence that shows the SOB causes—or is associated with—the asserted secondary effects, and that the proposed regulation is a reasonable measure that will reduce those particular effects.[18] If the presence of secondary effects and the efficiency of a regulation has been proven to effectively target the specific conduct that a local or state government seeks to address, it may simply cite the findings of research conducted by other districts to satisfy this requirement.[19]

This doctrine was first discussed by the United States Supreme Court in *Young v. American Mini Theatres, Inc.*[20] In *Young*, the City of Detroit implemented two zoning ordinances that prohibited adult theaters from opening within certain distances of residential districts and city buildings.[21] The city claimed the ordinances were enacted in the name of neighborhood preservation.[22] A chain of local adult film theaters, American Mini Theatres, contested the ordinances as unlawful, arguing that they infringed upon the company's First Amendment rights.[23] The Court determined that the erotic material in question could not be completely suppressed but deemed the ordinances constitutional because they did not directly suppress the message of the speech, only the secondary effects associated with the speech.[24] Moreover, the Court found that the ordinances served a substantial government interest and did not limit access to the speech.[25] The Court ruled that sexual expression may be regulated and, further, that subsequent regulations attempting to minimize the secondary outcomes

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[17] *Id.*

[18] Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 462 (7th Cir. 2009) (citing City of Los Angeles v. Alameda Books, 535 U.S. 425, 435 (2002)). The plurality opinion in *Alameda Books* reasserted the *Renton* standard, where a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. *Id.*

[19] *Playtime Theatres*, 475 U.S. at 51–52.

[20] 427 U.S. 50, 71 n.34 (1976).

[21] The ordinances specified that "an adult theater may not be located within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." *Id.* at 52. The term "regulated uses" includes ten different kinds of establishments in addition to adult theaters, including adult bookstores, cabarets, bars, taxi dance halls, and hotels. *Id.* at 52 n.3.

[22] *Id.* at 54.

[23] *Id.* at 55.

[24] *Id.* at 70.

[25] *Id.* at 71–73.

from sexual speech would be subject to the Secondary Effects Doctrine.[26]

Over the next decade, similar zoning regulations against SOBs continued. The next major challenge came in 1986 in the case of *City of Renton v. Playtime Theaters, Inc.*[27] In *Renton*, the Court ruled on the constitutionality of a city zoning ordinance that regulated adult movie theater locations in the name of curbing the secondary effects associated with the adult film industry.[28] Like in *Young*, the Court ruled in favor of the city. This time, however, the Court provided crucial reasoning that explained a facially content-based regulation on speech can be assessed as content-neutral where the speech restriction is "justified without reference to the content of the regulated speech,"[29] so long as the ordinance in question does not "contravene the fundamental principle" that government may not limit speech based on content or message it finds unfavorable.[30] In addition, the *Renton* Court stated the government need not substantiate its interest with evidence or research specific to the geography and adult business for which the ordinance(s) applies, noting:

> [T]he First Amendment does not require a city, before enacting [a zoning ordinance regulating SOBs], 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.[31]

Fifteen years passed before the Court addressed the Secondary Effects Doctrine again. In 2002, the Court heard *City of Los Angeles v. Alameda Books, Inc.*,[32] a case involving another city zoning ordinance on SOBs. In *Alameda Books*, the respondents—adult bookstores—sought injunctive relief against

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[26] *Id.* at 70–71 ("[T]he State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.").
[27] 475 U.S. 41 (1986).
[28] *Id.* at 43 (upholding an ordinance prohibited "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school").
[29] *Id.* at 48 (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).
[30] *Id.*
[31] *Id.* at 51–52.
[32] 535 U.S. 425 (2002).

a Los Angeles municipal ordinance that prohibited SOBs within 1,000 feet of other SOBs and within 500 feet of any school, public park, or religious institution.[33] The Court held that a local or state government cannot rely on "shoddy data or reasoning" to support its ordinances and that "evidence must fairly support the municipality's rationale for its ordinance."[34] However, the Court ruled in favor of the city, stating that because the city based its ordinance off of a previous study that linked the presence of SOBs with "higher rates of prostitution, robbery, assaults, and thefts in surrounding communities," it had presented substantive evidence to support the law.[35]

Since *Alameda Books,* there has not been another Supreme Court case to impact the application of the Secondary Effects Doctrine. However, the doctrine has been the subject of much debate among legal scholars. In the following section is a review of the notable critiques of the doctrine.

III. LITERATURE REVIEW

A. An Overview of the Criticisms of the Secondary Effects Doctrine

Scholarly criticisms of the Secondary Effects Doctrine range from frustrations about a lack of a clear definition of "secondary effects" to outcry that the doctrine could undermine the First Amendment. In his assessment, John Fee criticizes the Court for not providing a clear or consistent distinction between primary effects and secondary effects.[36] In an effort to find the distinction between these two types of effects, and provide practitioners with a clear definition of secondary effects, Fee determined that four possible definitions of "secondary effects" emerge from the Court's First Amendment jurisprudence, none of which fully encompasses all the ways the Court has applied the doctrine.[37] Fee, in turn, argues that the Court likely utilizes different conceptions of "secondary effects" to fit contextual factors of a case: "[p]erhaps the term secondary effect is convenient only because it is capable of more than one meaning

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[33] *Id.* at 430.
[34] *Id.* at 438 (plurality opinion).
[35] *Id.* at 430. "The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime." *Id.* The Court referenced *Renton*, noting that in that case it "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. 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." *Id.* at 438.
[36] John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291 (2009).
[37] *Id.* at 306.

while appearing to be objective, and can therefore easily mask a subjective balancing process."[38]

Other scholars take issue with the classification of the Secondary Effects Doctrine as content-neutral.[39] Generally, the argument against content-neutral classifications of this nature stems from concern that they create a legal loophole for lawmakers to target certain types of speech with impunity, which causes confusion for the courts.[40] Also, it is difficult to determine which secondary effects are so severe that they warrant regulation. For example, previous cases have deemed visual clutter, traffic congestion, noise, loss of a profession's integrity, and sexual arousal of readers as problematic secondary effects.[41] Deeming these types of secondary effects as problematic, and therefore subject to regulation, is worrisome; regulation of these "lesser" effects could lead to a slippery slope where regulation may result in greater loss of speech protection. Moreover, the Secondary Effects Doctrine can easily limit commercial and political speech.[42] Regulations aimed at secondary effects have also impeded political and commercial speech,[43] such as the South Carolina city ordinance that prohibited the creation a public mural due to presumed secondary effects that would harm the city's authenticity, property values, and tourism;[44] an Indiana town ordinance that prevented a reporter from using a tape

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[38] *Id.* at 316.

[39] For example, David Hudson blames the Secondary Effects Doctrine, and the *Renton* decision particularly, for "wreak[ing] havoc in First Amendment jurisprudence[,]" while Ofer Raban argues that the Secondary Effects Doctrine "obliterates the content-based doctrine." David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL'Y REV. 19, 19 (2012); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 553 (2000).

[40] *See* Hudson, Jr., *supra* note 39; Raban *supra* note 39; David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55 (1997).

[41] David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55, 77–78 (1997) ("Some of the secondary effects include: increased criminal activity, prostitution, residential privacy, visual clutter, interference with ingress and egress, traffic congestion, noise, security problems, appearances of impropriety, employment discrimination, economic vitality in business districts, property values, preserving the educational appearance of a college dormitory, preventing blockbusting, loss of a profession's integrity, identifying unfit judges, maintaining public order, equal employment opportunities, street crime associated with panhandling, negative effects of gambling, competition in the video programming market, congestion at the polls and confusion for election officials tabulating votes, delay and interference with voters, sexual arousal of readers, signal bleed and harm to children.").

[42] *See id.* at 84–85; *see also* Brandon K. Lemley, *Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine*, 35 J. MARSHALL L. REV. 189 (2002).

[43] Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 69 (1976).

[44] Burke v. City of Charleston, 893 F. Supp. 589, 613–14 (D.S.C. 1995), *vacated*, 139 F.3d 401 (4th Cir. 1998).

recorder while attending a KKK march due to the secondary effect concern that march attendees could injure themselves when holding "personal items" at such events;[45] and a Rhode Island anti-picketing ordinance that silenced anti-abortion protesters in an effort to curtail the secondary effects of traffic interference and risk of privacy violations.[46] Overall, the current consensus among scholars is that that the Secondary Effects Doctrine improperly allows state and local legislatures to stretch current First Amendment protections thin for certain forms of speech and expression, putting the freedom of expression at risk.

B. The Validity of Secondary Effects Research on Sexually Oriented Businesses

The literature that explores the validity of the research presented in secondary effects and SOB cases is divided into two types. The first type of research explores whether the asserted secondary effects from SOBs actually exist. The second type investigates whether an assessment of the research presented by the government establishes that it is scientifically credible.

Governments typically opt to regulate SOBs based on the suggestion that such businesses are associated with increased crime and decreased property value.[47] This notion has been the subject of scholarly scrutiny. For example, in an empirical examination of the relationship between adult erotic dance clubs and the potential secondary effect of increased crime rates, researchers found that, when comparing a community with an erotic dance club against three communities that did not, the community that had the erotic dance club had the least amount of reported crime.[48] Similarly, in an assessment of a Texas city ordinance that contends "human display establishments" produce crime, researchers determined that SOBs were not to blame for the community crime.[49] Rather, alcohol-related establishments and the community demographic characteristics (such as income level, age range, and race/ethnicity) were to blame.[50] Taken together, these findings call into question the

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[45] Potts v. City of Lafayette, 121 F.3d 1106, 1112 (7th Cir. 1997).
[46] Town of Barrington v. Blake, 568 A.2d 1015, 1020 (R.I. 1990).
[47] *Young*, 427 U.S. at 69.
[48] 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 (2004).
[49] 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, 34 (2006).
[50] *Id.* ("In short, the empirical evidence tempers the San Antonio City Council's contention that the presence of human display establishments produces crime. Instead, the results point to weak institutions, namely alcohol outlets and community characteristics associated with social disorganization theory as causes and correlates of crime.").

quality and validity of the research supplied by the government in secondary effects cases.

Assessments of the research quality and validity applied in secondary effects case law found that, with few exceptions, most of the studies used by municipalities "do not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions necessary to calculate an error rate."[51] Moreover, the assessments determined that scientifically credible studies demonstrated that either (1) there was no "negative secondary effect associated with adult businesses," or (2) there was "a reversal of the presumed negative effect."[52] But governments are not the only parties guilty of providing poor science: scholars found that "studies" used by SOBs to refute secondary effects regulations were also flawed.[53] Nonetheless, there is substantial evidence to demonstrate that not only is the research used by local and state governments scientifically flawed, but scientifically credible research has not been used to rebut alleged secondary effects.

In sum, this research suggests that local and state governments' research on SOBs and their alleged negative secondary effects are typically flawed. However, this research focuses only on crime, property value loss, and overall community degradation as the purported secondary effects. There is no published research that assesses the validity of negative secondary effects on public health stemming from SOBs. This study seeks to answer the following research questions:

(1) What health claims do local and state governments make against SOBs?
(2) What is the substantiating evidence for these health claims?
(3) What do these findings suggest about the Secondary Effects Doctrine and the relationship between speech and health?

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[51] Bryant Paul, Daniel Linz, & Bradley Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 367 (2001).
[52] *Id.*
[53] Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO ARTS & ENT. L.J. 565, 586 (2011) ("The problem is that these claims either ignore theoretically relevant characteristics of adult businesses or are methodologically flawed. In particular, such claims ignore the routine activity theory of crime associated with adult businesses or use inappropriate data sources and methods to demonstrate that adult businesses are not associated with secondary effects or both.").

IV. METHODOLOGY

To date, there are over 500 state and federal cases in which a SOB has challenged regulations aimed at secondary effects. Only twenty of these cases involve regulations aimed at protecting health.[54] Prior to this analysis, an initial review of the studies was completed to classify the types of regulations involved in the cases and to ensure the cases met the study's requirements.[55]

The initial review yielded seventeen cases, which presented three types of public health-driven secondary effect regulations: zoning, licensing, and internal regulations.[56] Zoning regulations refer to the locations and distance restrictions placed on SOBs; for example, SOBs are only allowed in certain parts of a community or must be outside a certain distance from other businesses, schools, etc. Licensing regulations refer to the requirements for adult business license acquisition and grounds for a license suspension or revocation. Internal regulations refer to policies restricting or limiting the practices and activities of an adult business. For example, requirements that dancers may not touch patrons, dancers cannot be nude, stages must be a certain height . . . etc. In total, there were nineteen regulations present in the seventeen cases: three licensing, five zoning, and eleven internal. This information is applied in the analysis as a way to categorize and elaborate on the findings. The table below shows

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[54] These twenty cases were identified through Westlaw's search results for First Amendment and secondary effect regulations concerning "health," "public health," "disease," or "infection." There is a chance that there are cases missing from this analysis due to the limitations of the search results. However, the initial identification of twenty cases is sufficient for the analysis.

[55] The initial review determined three cases to be ineligible for analysis because they did not concern public health-driven secondary effect regulations. Instead, these cases simply referenced public health-driven secondary effect regulations, which likely explains why they were included in Westlaw's results.

[56] City of Erie v. Pap's A.M., 529 U.S. 277 (2000); McDoogal's East, Inc. v. Cty. Comm'rs of Caroline Cty., 341 F. App'x. 918 (4th Cir. 2009); Dream Palace v. Cty. of Maricopa, 384 F.3d 990 (9th Cir. 2003); Currence v. City of Cincinnati, 28 F. App'x. 438 (6th Cir. 2002); E. Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995); T.K.'s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir. 1994); Keepers, Inc. v. City of Milford, 944 F. Supp. 2d 129 (D. Conn. 2013); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (D. Conn. 2004); Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery Cty., 256 F. Supp. 2d 385 (D. Md. 2003); Ranch House, Inc. v. Amerson, 146 F.Supp.2d 1180 (N.D. Ala. 2001); DiMa Corp. v. The Town of Hallie, 60 F. Supp. 2d 918 (W.D. Wis. 1998), *aff'd,* 185 F.3d 823 (7th Cir. 1999); U.S. Partners Fin. Corp. v. Kansas City, 707 F. Supp. 1090 (W.D. Mo. 1989); DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (Minn. Ct. App. 1997); Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

the citations for the seventeen cases analyzed and the type of regulation involved in the case.

Table 1: Regulation type present in each case

Case	Internal	Zoning	Licensing
Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (2004)			X
Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, Maryland, 256 F. Supp. 2d 385 (2003)	X	X	
Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (2004)	X		
Currence v. City of Cincinnati, 28 Fed. App'x. 438 (2002)	X		
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	X		
DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (1997)		X	
DiMa Corp. v. The Town of Hallie, Wi., 60 F. Supp. 2d 918 (1998)	X		
Dream Palace v. County of Maricopa, 384 F.3d 990 (2003)	X		
East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (1995)			X
Entertainment Productions, Inc. v. Shelby County, 545 F. Supp. 2d 734 (2008)	X		
Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (1997)	X		
Keepers, Inc. v. City of Milford, Conn., 944 F. Supp. 2d 129 (2013)	X		
McDoogal's East, Inc. v. County Com'rs of Caroline County, 341 Fed. App'x. 918 (2009)		X	
Ocello v. Koster, 354 S.W.3d 187 (2011) (en banc)	X		
Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180 (2001)	X	X	
T.K.'s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir. 1994)			X

U.S. Partners Financial Corp. v. Kansas City, Mo., 707 F. Supp. 1090 (1989)		X	

V. ANALYSIS

A. The Health Claims

The first task of this study was to identify the health claims against SOBs. The analysis identified three types of health claims typically presented by local governments to justify their regulations: (1) preventing the spreading of disease (specifically, STDs), (2) concern for increased danger or harm to health, and (3) the need to protect, promote, and preserve the health of business patrons and the local citizens.

The most commonly cited health claim—the secondary effect—was that adult businesses are associated with the spread of disease.[57] Thirteen cases indicated that diseases, sexual or otherwise, stem from the adult businesses, and cited such diseases as the basis for government regulation.[58] Of these thirteen cases, all but one case[59] explained that the regulation in question was established to address STDs, in particular, HIV/AIDs.[60] Moreover, eight of the thirteen cases asserting this claim specifically stated that regulation would prevent the spreading of STDs that result from the sexual activity that occurs at adult businesses.[61] The remaining four cases also reported that

[57] Thirteen of the seventeen cases analyzed cited spread or risk of disease as the main factor in enacting regulation. The cases were City of Erie v. Pap's A.M., 529 U.S. 277 (2000); McDoogal's East, Inc. v. Cty. Comm'rs of Caroline Cty., 341 F. App'x. 918 (4th Cir. 2009); Dream Palace v. Cty. of Maricopa, 384 F.3d 990 (9th Cir. 2003); Currence v. City of Cincinnati, 28 F. App'x. 438 (6th Cir. 2002); T.K.'s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir. 1994); Keepers, Inc. v. City of Milford, 944 F. Supp. 2d 129 (D. Conn. 2013); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (M.D. Fla. 2004); DiMa Corp. v. The Town of Hallie, 60 F. Supp. 2d 918 (W.D. Wis. 1998), *aff'd,* 185 F.3d 823 (7th Cir. 1999); DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (Minn. Ct. App., 1997); Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

[58] *Id.*

[59] *Keepers, Inc.*, 944 F. Supp. 2d at 129.

[60] *Dream Palace*, 384 F.3d at 1014 ("Specifically, those secondary effects include prostitution, drug abuse, health risks associated with HIV/AIDS, and infiltration and proliferation of organized crime for the purpose of drug and sex related business activities.").

[61] In *T.K.'s Video, Inc.*, the court stated that "sexually oriented business are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature." T.K.'s Video, Inc. v. Denton Cty., 830 F. Supp. 335, 340 (E.D. Tex. 1993), *aff'd in part, vacated in part,* T.K.'s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir. 1994). Other cases that cited this include City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000); Dream Palace v. Cty. of Maricopa, 384 F.3d 990, 996 (9th Cir. 2004); Currence v. City of Cincinnati, 28 F. App'x 438, 446 (6th Cir. 2002); DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312, 321 (1997); Ocello v.

the secondary effects regulations targeted the spread of STDs, but these cases did not explain or identify a source for STDs.[62] This is to say that, unlike the eight cases that justified enaction of regulations as a response to the spread of STDs stemming from sexual activity occurring at adult businesses, these four cases did not provide an explanation for how STDs were spreading in the community in question.

The other two types of health claims cited by governments referred to broad and generalized health concerns. For example, in five cases[63] the government did not cite a specific health concern but instead stated that adult businesses generally pose "greater danger to neighborhood health,"[64] threaten "impact on the public health,"[65] or lead to "increased unhealthful conduct."[66] Similarly, in nine cases,[67] the government argued that the objective of the regulation was "to protect and preserve the health, safety, and welfare of both the patrons of adult-oriented establishments and the citizens"[68] of the community

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Koster, 354 S.W.3d 187 (Mo. 2011) (en banc); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056, 1063–64 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

[62] McDoogal's East, Inc. v. Cty. Comm'rs of Caroline Cty., 341 F. App'x. 918 (4th Cir. 2009); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (M.D. Fla. 2004); DiMa Corp. v. The Town of Hallie, 60 F. Supp. 2d 918 (W.D. Wis. 1998), *aff'd,* 185 F.3d 823 (7th Cir. 1999).

[63] City of Erie v. Pap's A.M., 529 U.S. 277, 280 (2000); Dream Palace v. Cty. of Maricopa, 384 F.3d 990, 1014 (9th Cir. 2004); Currence v. City of Cincinnati, 28 F. App'x 438, 446 (6th Cir. 2002); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008), *aff'd,* 588 F.3d 372 (6th Cir. 2009); U.S. Partners Fin. Corp. v. Kansas City, 707 F. Supp. 1090, 1095 (W.D. Mo. 1989).

[64] City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000).

[65] Currence v. City of Cincinnati, 28 F. App'x 438, 446 (6th Cir. 2002).

[66] Keepers, Inc. v. City of Milford, 944 F. Supp. 2d 129 (D. Conn. 2013), *aff'd in part, vacated in part, remanded,* 807 F.3d 24 (2nd Cir. 2015); Dream Palace v. Cty. of Maricopa, 384 F.3d 990 (9th Cir. 2004); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (D. Conn. 2004); Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc). *See* E. Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004), *aff'd in part, and remanded in part,* 581 F.3d 460 (7th Cir. 2009); Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery Cty., 256 F. Supp. 2d 385 (D. Md. 2003); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

[67] Dream Palace v. Cty. of Maricopa, 384 F.3d 990 (9th Cir. 2003); E. Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995); Keepers, Inc. v. City of Milford, 944 F. Supp. 2d 129 (D. Conn. 2013); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (D. Conn. 2004); Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery Cty., 256 F. Supp. 2d 385 (D. Md. 2003); Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180 (N.D. Ala. 2001); Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

[68] *Golden Triangle News*, 700 A.2d at 1063.

that surrounded the SOBs. As a whole, these cases assert claims that are arguably vague and unlimited, especially when compared to the specific health claims about the spread of disease.[69]

To further explicate these findings, the health claims were analyzed in accordance with regulation type. Below is a table of the three types of regulation and the health claims identified within those regulations.

Table 2: Health claims cited by regulation type

	Risk of Disease	**Endanger or Threaten Health**	**Need to Protect Health**
Zoning			
Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, Maryland, 256 F. Supp. 2d 385 (2003)[a]			X
DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (1997)	X		
McDoogal's East, Inc. v. County Com'rs of Caroline County, 341 Fed. Appx. 918 (2009)	X		
Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180 (2001)[b]			X
U.S. Partners Financial Corp. v. Kansas City, Mo., 707 F. Supp. 1090 (1989)		X	
Licensing			
Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (2004)	X		X
East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (1995)			X
T.K.'s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir.1994)	X		
Internal			
Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, Maryland, 256 F. Supp. 2d 385 (2003)[a]			X
Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (2004)	X		X
Currence v. City of Cincinnati, 28 Fed. Appx. 438 (2002)	X	X	
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	X	X	
DiMa Corp. v. The Town of Hallie, Wi., 60 F. Supp. 2d 918 (1998)	X		

[69] *E.g.*, *Keepers, Inc.*, 944 F. Supp. 2d at 129.

Dream Palace v. County of Maricopa, 384 F.3d 990 (2003)	X	X	X
Entertainment Productions, Inc. v. Shelby County, 545 F. Supp. 2d 734 (2008)	X	X	
Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (1997)	X		X
Keepers, Inc. v. City of Milford, Conn., 944 F. Supp. 2d 129 (2013)	X		X
Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc)	X		X
Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180 (2001)[b]			X

Superscripts [a] and [b] mark the two cases (with their pairs) that included more than one type of regulation.

Several conclusions may be drawn from Table 2. The table reflects all seventeen cases cited at least one type of health claim. Interestingly, the most health claims emerged in cases involving internal regulations, which tended to cite multiple health claims. Table 2 also shows the different types of health claims are distributed across the types of regulations. For example, none of the cases involving licensing regulations claimed that SOBs posed a threat to or endangered health. Conversely, zoning and internal regulations presented all three types of health claims in at least one case.

Collectively, this analysis concludes that each case and regulation type cite at least one type of secondary health effect of SOBs. In many cases, the claims are broad and unexplained, but, unfortunately, specificity is not required of secondary effect regulation. This lack of specificity might explain why local and state governments implementing the same type of regulation cite different types of health claims to support regulation. On the other hand, it is possible that citing different health claims to support the same type of regulation is the result of different evidence substantiating the regulations. Therefore, the following analysis is based on the evidence used by local and state governments to substantiate their health claims against and regulations on SOBs.

B. The Substantiating Evidence

The Secondary Effects Doctrine requires that a secondary effect regulation must serve a substantial government interest. To demonstrate that substantial interest, the burden rests on the local or state government to present evidence that demonstrates the SOB in question not only causes or is associated with the alleged secondary effects, but that the proposed regulation is a

reasonable measure that will reduce those particular effects.[70] Therefore, subsequent to identifying the health claims in these cases, this analysis identified the evidence used by governments to substantiate their health claims.

Upon analysis, however, only six cases contained substantiating evidence claims.[71] In each of the seventeen cases, there was at least one mention of the government in question "examining" or "reviewing" evidence of secondary effects and SOBs, but almost two-thirds of the case law made no mention of substantiating evidence. Further, it is possible that within the case filings evidence is present to substantiate the health claims. However, only six case opinions mention evidence that spoke to substantiate the alleged health claims. As a result, the following discussion concerns only those six cases that contained evidence to substantiate the secondary effect health claims.

The analysis identified three types of evidence used to substantiate the secondary effect health claims: (1) secondary effects studies conducted by other municipalities, (2) secondary effects studies conducted by the municipality in question, and (3) testimony from health officials. The most commonly cited evidence by governments was studies conducted by other municipalities. In five of the six cases, the defending government stated that secondary effects health claims stemmed, either in part or entirely, from research conducted by other cities that identified connections between sexually oriented businesses and adverse health effects.[72] However, none of the opinions reported any statistical findings from the research. This is to say, when the courts cited research findings that pointed to SOBs causing adverse health effects, there were never any inclusions of

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[70] Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 464 (7th Cir. 2009) (citing City of Los Angeles v. Alameda Books, 535 U.S. 425, 438 (2002)). The plurality opinion in *Alameda Books* reasserted the *Renton* standard, under which 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. *Alameda Books*, 535 U.S. at 438 (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986)).

[71] Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 463 (7th Cir. 2009); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008), *aff'd,* Entm't Prods., Inc. v. Shelby Cty., 588 F.3d 372, 383 (6th Cir. 2009); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183, 191 (D. Conn. 2004); DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312, 320 (Minn. Ct. App. 1997); Ocello v. Koster, 354 S.W.3d 187, 203 (Mo. 2011) (en banc); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

[72] DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (Minn. Ct. App. 1997); Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460 (7th Cir. 2009); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008), *aff'd,* Entm't Prods., Inc. v. Shelby Cty., 588 F.3d 372 (6th Cir. 2009); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (D. Conn. 2004); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

numeric or statistical data—only broad and generalized statements. This phenomenon further demonstrates the lack of government substantiation for its public health-based regulations of SOBs.

The lack of reported statistical data is also prevalent in cases where the government utilized other types of substantiating evidence, such as studies conducted by the municipality in question and testimony from health officials. Only one case, *Entertainment Productions, Inc. v. Shelby County*,[73] presented a scenario where the government relied on research conducted by the city itself:

> Upon review of the record, the Shelby County ordinance adopting the Act cites numerous studies on the effects of adult entertainment in Memphis and Shelby County . . . The ordinance further relies upon the Tennessee legislative findings that the Act sought to "address some recognized deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the spread of sexually transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues.[74]

Similarly, *Ocello v. Koster*[75] was the only case where the government cited testimony from its own local health officials to further substantiate its health claims: "[t]he government also relied on testimony from health department officials in Missouri describing the health problems associated with sexually oriented businesses. Among other issues, the officials discussed that people infected with [STDs], including HIV, frequent [SOBs], and often engage in anonymous and unprotected sex."[76] Still, just like the cases that cited studies conducted by other municipalities, neither of these opinions report any statistical findings to substantiate the health claims against the SOBs.

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[73] 545 F. Supp. 2d 734 (W.D. Tenn. 2008).
[74] *Id.* at 742.
[75] Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc).
[76] *Id.* at 206.

To continue the analysis, the evidence was next analyzed in accordance with regulation type. Below is a table of the three types of regulations and the evidence identified within those regulations.

Table 3: Evidence cited by regulation type

	Studies by other cities	**Studies by the city in question**	**Testimony from health officials**
Zoning			
DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (1997)	X		
Licensing			
Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (2004)	X		
Internal			
Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (2004)	X		
Entertainment Productions, Inc. v. Shelby County, 545 F. Supp. 2d 734 (2008)	X	X	
Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (1997)	X		
Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc)			X

Table 3 reflects the finding that six cases cited at least one type of substantiating evidence. Interestingly, for each type of regulation, the defending governments relied on other municipalities' studies. Granted, this analysis reviewed only one zoning regulation and one licensing regulation. Nonetheless, these findings show the proliferation of other municipalities' research in local and state government secondary effects regulation. Additionally, the table shows that one case, *Entertainment Productions, Inc. v. Shelby County*, utilized two types of evidence: studies by other municipalities and studies conducted by the municipality in question.[77] Finally, Table 3 shows different types of evidence reside entirely in the internal regulations; all three types of evidence (studies by other municipalities, the municipality in question, and testimony by health officials) are prevalent only in the internal regulations, while only studies for other municipalities emerge in zoning and licensing regulations.

[77] *See* Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734, 742 (W.D. Tenn. 2008), *aff'd,* Entm't Prods., Inc. v. Shelby Cty., 588 F.3d 372 (6th Cir. 2009).

Coupled with the health claim findings, the data reveals a pattern of vagueness in these cases measuring the validity of public health-driven secondary effects regulations. Regarding the health claim findings, the defending governments typically do not supply specifics on the health claims they make against SOBs.[78] Moreover, when the courts discuss the substantiating evidence provided by the governments, either no health-specific evidence is reported, or the evidence reported is vague and lacks statistical support. Together, these findings suggest that there are serious problems with the Secondary Effects Doctrine based on the threshold for evidence required. Further, the identification of the health claims and substantiating evidence within these seventeen cases affords a larger discussion on these public health-driven secondary effect regulations and their impact on the balance between protecting health and protecting speech.

C. The Imbalance between Speech & Health

Based on the cases studied, it is evident that courts do not require defending governments to present specific, scientifically supported evidence to support their claims against SOBs. This is apparent in the nine cases that consisted of broad and unspecified claims about the need to "protect and promote"[79] the health of business patrons and local citizens. Likewise, the five cases that contained all-encompassing claims alleging SOBs pose "greater danger to neighborhood health"[80] and threaten "impact[s] on the public health."[81] Moreover, none of the opinions provide instruction to the defending governments on how to specify their claims or present evidence to support their claims. Instead, in each case the courts held that the government in question was well within its legislative power to create and enforce ordinances that address secondary health effects, regardless of breadth or ambiguity of the government's characterization of those effects.

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[78] *See* City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000). *See also supra* Part V.A.

[79] Dream Palace v. Cty. of Maricopa, 384 F.3d 990 (9th Cir. 2003); E. Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995); Keepers, Inc. v. City of Milford, 944 F. Supp. 2d 129 (D. Conn. 2013); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (D. Conn. 2004); Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery Cty., 256 F. Supp. 2d 385 (D. Md. 2003); Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180 (N.D. Ala. 2001); Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc); Golden Triangle News, Inc. v. Corbett, 700 A.2d 1056 (Pa. Commw. Ct. 1997), *aff'd sub nom.* Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).

[80] City of Erie v. Pap's A.M., 529 U.S. 277, 280 (2000); Dream Palace v. Cty. of Maricopa, 384 F.3d 990, 1014 (9th Cir. 2004); Currence v. City of Cincinnati, 28 F. App'x 438, 446 (6th Cir. 2002); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008), *aff'd,* 588 F.3d 372 (6th Cir, 2009); U.S. Partners Fin. Corp. v. Kansas City, Mo., 707 F. Supp. 1090, 1095 (W.D. Mo. 1989).

[81] *City of Erie*, 529 U.S. at 291.

This freedom to assert broad and vague health claims in an attempt to regulate certain forms of expression poses a great risk to speech, sexual or otherwise. While it is within the power of local and state governments to enact measures that protect public health, the existing case law demonstrates that there is only limited restraint on lawmakers to regulate this area, allowing them to paint with broad strokes about health effects that stem from certain types of speech and expression, and even disfavor certain forms of expression without providing reliable support. In short, for scholars who criticize the secondary effects doctrine, this analysis shows their worst fears are true. This precedent opens the door to a slippery slope, which could present a scenario where local and state governments can lawfully regulate any speech so long as the regulations concern protecting health or curbing "increased unhealthful conduct."[82] At the very least, this precedent exposes SOBs to unsubstantiated overregulation. These threats undermine First Amendment freedoms and demonstrate a need for change in the current application of the Secondary Effects Doctrine.

One solution is for courts to require a higher standard of support when adjudicating public health-driven secondary effect regulations. Courts should not accept vague and/or overly broad claims alleging harm to public health when reviewing local or state regulation of SOBs or other businesses. Rather, courts should require local and state governments to explicate specific, scientifically sound evidence to justify regulations aimed at curbing public health-driven secondary effects. By adopting a more rigorous standard to support such public health-driven claims, local and state governments must clear a higher hurdle to limit the speech and expression of SOBs and similar businesses. In adopting a more stringent standard, courts will require stronger justifications, and stronger contentions, from the governments that the regulations presented truly target harmful effects, solidifying that such regulations are indeed content-neutral. Adopting this standard will protect speech of SOBs and other sexual or adult speech as well as improve the current analysis of secondary effects overall. Additionally, this places accountability on our local and state governments to only enact regulation where there are true, identified health claims—not simply target speech the state may find mature or suggestive.

In regard to substantiating these claims and regulations, precedent requires that local and state governments merely provide evidence that shows the regulations are reasonable and will reduce the identified secondary effects.[83] However, our

[82] Hudson, Jr., *supra* note 41 at 77–78.
[83] *See* Young v. Am. Mini Theatres, Inc. 427 U.S. 50, 55 (1976).

analysis found that even so, only six cases reported evidence to support the regulations. The lack of reported evidence, statistical or otherwise, means that in practice it is not necessary for governments to provide specific evidence to substantiate their claims against SOBs or to substantiate that the regulations in question curb their health claims. This makes existing matters worse considering that the threshold for evidence required by the Secondary Effects Doctrine is already low. Existing precedent holds that governments are not allowed to rely on "shoddy data or reasoning,"[84] but, ironically, the Court has explained it is not the courts' job to assess the validity of the substantiating evidence.[85]

Hence, there is a great contradiction in this matter: courts require evidence for the claim, but evidence is not used to determine the regulation's validity. Coupled together, the low threshold of evidence and the contradiction between evidence requirement and evidence assessment turns the Secondary Effects Doctrine into a mere checklist of requirements, not a fair balancing test. This rubberstamping has created a body of cases that favor the protection of health over the protection of speech, and that have very little scientific or other support. When dealing with controversial speech, such as SOBs, it presents a dangerous loophole that lawmakers have capitalized on to censor or limit speech they find troublesome or unfavorable.

D. A Solution

Therefore, remedies to close this content-based loophole in the Secondary Effects Doctrine are needed to ensure a fair test and to establish a balance between speech and health. This balance can be achieved through specified and supported health claims and by raising the standard for the quality and type of evidence required to substantiate such claims in court. The natural path to achieve this goal would be through legislative or judicial action. However it is approached, the threshold should require local and state governments to supply evidence for each of its claims and evidence that shows the regulation will further the cited interests. Specifically, when such regulations are challenged in court, defending governments should be required to supply jurisdiction-specific and data-driven evidence. To ensure the threshold of evidence is met, courts must resolve the conflict with evidence presence and evidence assessment.

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[84] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 426 (2002).
[85] *Alameda Books*, 535 U.S. at 445; City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51–52 (1986); G.M. Enters. v. Town of St. Joseph, 350 F.3d 631, 639–40 (7th Cir. 2003).

Although the role of the court is to be a rational voice interpreting the law that is not contingent on science or data, in cases involving speech regulation for the purposes of protecting public health, it is crucial for the courts to consider the validity of the evidence presented. Recent case law involving content regulations on speech, such as mandated graphic warning labels on tobacco products, show that courts may assess the quality and conclusions of the evidence supplied by defending governments.[86] This practice of evidence assessment should be carried over to secondary effect regulations. Collectively, through a requirement that local and state governments provide specific health claims, raising the threshold of evidence to support public health-driven secondary effects regulation, and resolving the contradiction between evidence presence and evidence assessment will provide a fair test for assessing public health-drive secondary effect regulations.

VI. CONCLUSION

At their core, public health-driven regulations implicate a challenging conflict between speech and health. On the one hand, efforts are made by local and state governments to protect the public's health from the negative effects that stem from SOBs. On the other hand, constitutionally protected freedoms of speech and expression for controversial business, like SOBs, are threatened. It has been recognized in the First Amendment jurisprudence that sexual speech—and thus SOBs—are accorded less protection.[87] However, lesser protection does not equate to a total loss of protection. Lawmakers should not be able to target SOBs or other such businesses under the guise of content-neutral regulations where their claims are unsubstantiated.

Our case analysis shows that local and state governments are free to manipulate the Secondary Effects Doctrine through regulations drafted with broad strokes about the health claims they make against SOBs, and without having to support those claims with evidence. This freedom has been afforded to them through the Secondary Effects Doctrine, but at the cost of certain speech protections. The low threshold for evidence and the courts' inactivity in assessing the supplied evidence's validity

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[86] *See* R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1219 (D.C. Cir. 2012).

[87] Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70–71 (1976). The plurality opinion in *Young* asserted the low-value status of non-obscene sex speech, like the speech found in SOBs, when it stated: "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment." *Id.*

leaves SOBs and the freedom of speech ripe for unsubstantiated overregulation. But these risks can be remedied by requiring specific health claims, raising the threshold of evidence, and resolving the contradiction between evidence presence and evidence assessment. If such steps are taken, this particular loophole in the Secondary Effects Doctrine may be remedied and a balance will be struck between protecting health and protecting speech. Otherwise, the Secondary Effects Doctrine creates a slippery slope for First Amendment protections to slip away—not just for SOBs, but for everyone.