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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF LOS ANGELES, :

Petitioner :

v. : No. 00-799

ALAMEDA BOOKS, INC., ET AL. :

- - - - -X

Washington, D.C.

Tuesday, December 4, 2001

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Klekner.

ORAL ARGUMENT OF MICHAEL L. KLEKNER

ON BEHALF OF THE PETITIONER

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

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

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

QUESTION: Do we know if, at the time the

1 ordinance was enacted -- 1977?

2 MR. KLEKNER: '78, sir.

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

6 MR. KLEKNER: I presume --

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

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

11 QUESTION: All right.

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

14 QUESTION: All right.

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

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

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

21 MR. KLEKNER: Our clients are innocent.

22 (Laughter.)

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

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

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

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

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

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

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

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

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

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

1 clustering effect in the city's various communities.

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

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

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

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

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

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

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

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

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

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

17 MR. KLEKNER: Correct.

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

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

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

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

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

4 QUESTION: Pardon?

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

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

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

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

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

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

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

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

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

10 MR. KLEKNER: Correct.

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

19 MR. KLEKNER: Well --

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

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

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

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

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

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

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

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

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

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

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

1 in 1991.

2 QUESTION: Adult bookstores only --

3 MR. KLEKNER: Correct.

4 QUESTION: -- without arcades in them --

5 MR. KLEKNER: Correct.

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

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

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

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

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

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

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

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

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

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

18 MR. KLEKNER: For free?

19 QUESTION: For free.

20 MR. KLEKNER: Yes.

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

23 MR. KLEKNER: We are talking about --

24 QUESTION: But they want to charge for it.

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

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

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

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

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

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

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

6 QUESTION: Yes.

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

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

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

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

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

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

5 QUESTION: Isn't that your problem?

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

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

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

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

19 MR. KLEKNER: -- less or more.

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

1 that, as at least intuitive.

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

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

8 QUESTION: Yes.

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

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

1 people that they would have as separate entities.

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

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

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

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

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

1 covers are dull, but I --

2 (Laughter.)

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

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

8 QUESTION: Mr. Klekner --

9 MR. KLEKNER: That's the difference.

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

17 MR. KLEKNER: Correct.

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

23 MR. KLEKNER: Correct, North Carolina.

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

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

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

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

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

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

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

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

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

25 QUESTION: Before the adoption of this

1 amendment?

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

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

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

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

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

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

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

13 MR. KLEKNER: But --

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

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

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

5 QUESTION: Let me ask you --

6 QUESTION: Why doesn't --

7 QUESTION: Go ahead.

8 QUESTION: No, please.

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

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

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

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

1 QUESTION: That's an adjective.

2 MR. KLEKNER: Excuse me, yes.

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

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

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

1 MR. KLEKNER: In part, yes.

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

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

6 QUESTION: Very well, Mr. Klekner.

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

8 ORAL ARGUMENT OF JOHN H. WESTON

9 ON BEHALF OF THE RESPONDENTS

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

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

25 QUESTION: Do you know of any other cities that

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

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

6 QUESTION: I mean, you know --

7 MR. WESTON: You'll --

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

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

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

22 MR. WESTON: Please.

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

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

3 MR. WESTON: Right.

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

6 MR. WESTON: That's correct.

7 QUESTION: Mr. Wiener, right?

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

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

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

24 QUESTION: Was he considered really another
25 business?

1 MR. WESTON: That's correct.

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

4 MR. WESTON: That's correct.

5 QUESTION: Right.

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

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

12 MR. WESTON: No --

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

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

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

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

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

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

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

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

11 MR. WESTON: Absolutely, Your Honor.

12 QUESTION: -- in California?

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

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

1 MR. WESTON: Yes, Your Honor.

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

4 MR. WESTON: If I may read --

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

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

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

13 MR. WESTON: But that's --

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

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

1 constitute an adult use.

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

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

9 QUESTION: Okay.

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

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

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

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

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

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

7 QUESTION: As an adult business.

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

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

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

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

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

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

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

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

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

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

17 QUESTION: But can I --

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

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

1 as I understand it, which may --

2 MR. WESTON: Yes, Justice Breyer.

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

13 MR. WESTON: Certainly.

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

21 MR. WESTON: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. WESTON: Thank you, Justice Scalia.

13 QUESTION: On --

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

15 (Laughter.)

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

17 (Laughter.)

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

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

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

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

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

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

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

11 (Laughter.)

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

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

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

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

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

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

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

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

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

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

24 MR. WESTON: Absolutely, and --

25 QUESTION: Although some people might consider

1 that expression.

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

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

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

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

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

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

6 QUESTION: Respondent's --

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

9 QUESTION: The red brief, in page 2?

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

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

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

4 MR. WESTON: Yes, Your Honor.

5 QUESTION: Messages don't.

6 MR. WESTON: Right, and I --

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

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

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

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

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

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

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

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

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

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

24 QUESTION: Go ahead. You --

25 QUESTION: That may be true if you interpreted

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

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

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

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

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

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

16 MR. WESTON: I --

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

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

1 cabaret.

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

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

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

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

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

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

6 QUESTION: Thank you, Mr. Weston.

7 Mr. Klekner, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF MICHAEL L. KLEKNER

9 ON BEHALF OF THE PETITIONER

10 MR. KLEKNER: Thank you.

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

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

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

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

1 cannot expect an ordinance to solve everything in --

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

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

10 QUESTION: But you can't --

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

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

1 inferences from the same evidence.

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

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

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