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ADULT BUSINESS LITIGATION:
RECENT CASES AND EMERGING STRATEGIES

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I. Introduction

In the last two years, two important cases have been decided by the Supreme Court that impact the way in which cities handle (or should handle) adult business litigation. This paper provides a brief summary of those cases, their treatment in the lower federal courts, and the implications for municipal lawyers defending adult business zoning and licensing ordinances.

II. The Benefits of *Buckhannon*

A. Background

The Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), should come to the municipal practitioner's mind almost every time that a local ordinance – not just an adult business ordinance – is challenged in federal court. This is because the *Buckhannon* case brought about a sea-change in the law regarding attorney's fees, greatly expanding a municipality's ability to amend its laws during litigation without triggering fee liability under the "catalyst theory" with which municipal practitioners are familiar.

In *Buckhannon*, the Supreme Court addressed the question of what relief a party must obtain in order to be considered a "prevailing party" under the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S. § 3601 *et seq*., and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. The plaintiffs had sought declaratory and injunctive relief in federal court against a West Virginia statute requiring that all residents of residential board and care homes be capable of "self-preservation," that is, capable of moving themselves "from situations involving imminent danger, such as fire." 532 U.S. at 600.

While the litigation was pending, the West Virginia legislature amended the statute and the corresponding regulations to eliminate the "self-preservation" requirement, and the state agency defendants moved to dismiss the case as moot. The district court granted the motion and the plaintiffs moved for attorney's fees as the "prevailing party," arguing that they had achieved the desired result because the lawsuit prompted the legislature to change the law. At the time, almost every federal court of appeals recognized this "catalyst theory" as a basis for recovering attorney's fees under various fee-shifting statutes. *See id*. at 602 (citing *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, 577, n. 2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3rd Cir. 1994); *Payne v. Board of Ed.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski Cty. School Dist., # 1*, 17 F.3d 260, 263, n. 2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

The Fourth Circuit, however, had rejected the catalyst theory in *S-1 and S-2 v. State Bd. of Ed. Of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994) (*en banc*), holding that "[a] person may not be a 'prevailing party' … except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought." 532 U.S. at 602. Thus, the district

court rejected the plaintiff's attorney's fee argument, and the Fourth Circuit affirmed in an unpublished, *per curiam* opinion. *Id*.

The Supreme Court granted certiorari and affirmed. The majority began by noting that the "American Rule" includes "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Id*. (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994). The Court concluded that the term "prevailing party" is a legal term of art that, based on the Court's prior cases, is limited to parties that had obtained "enforceable judgments on the merits and court-ordered consent decrees" which alter the legal relationship of the parties and justify an award of attorney's fees. *Id*. at 604.

Thus, the *Buckhannon* Court flatly rejected the "catalyst theory" for awarding attorneys fees. *Id*. at 605.

B. Lower Federal Cases Since *Buckhannon*

Although the *Buckhannon* case itself dealt with the FHAA and the ADA, the *Buckhannon* holding has been extended to cases brought pursuant to 42 U.S.C. § 1983 and other federal statutes which employ similar "prevailing party" language. *See, e.g., New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (affirming denial of attorney's fees in 1983 case and holding that the Supreme Court in *Buckhannon* had "recently consigned the catalyst theory to the scrap heap").

In *Ken-N.K., Inc. v. Vernon Township*, 18 Fed. Appx. 319, 2001 U.S. App. Lexis 19453 (6th Cir. 2001), the Sixth Circuit Court of Appeals applied the rule from *Buckhannon* in an adult business case. In that case, an adult business had opened in a location which was not zoned for adult uses, and the township sued the business in state court to enjoin it from violating the local zoning ordinance. A month later, the township also passed a public nudity ordinance, which, along with the zoning ordinance, was later challenged in a federal suit brought by the adult business. However, "[d]uring the federal proceedings … the township stipulated that it would not enforce the ordinance against the Canfields, and shortly thereafter, repealed the ordinance." *Id*. at 321-322.

The district court held that the claims against the nudity ordinance were not ripe because the township had not enforced that ordinance against the plaintiffs. *Id*. at 322. On appeal, the plaintiffs sought attorneys' fees under the catalyst theory because "[t]he township repealed its public nudity ordinance shortly after the conclusion of proceedings in the district court." *Id*. at 328.

The Sixth Circuit rejected this argument, stating that:

> This circuit has previously held that, even when no judicial relief is ordered in a plaintiff's favor, the plaintiff can still be considered a prevailing party if the "lawsuit produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment[.]" Payne v. Bd. of Educ., Cleveland City Schs., 88 F.3d 392, 397 (6th Cir. 1996) (quotation omitted). In these situations, under past circuit precedent, the plaintiff was required to show that it was their suit which was the "catalyst" that sparked the defendant's change in past practices. Id.

> The Supreme Court, however, has recently struck down the use of the "catalyst theory" as a permissible basis for an award of attorney fees. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001). Rather than consider a plaintiff to have "prevailed" when its suit caused the defendant voluntarily to change its past conduct, the Supreme Court in Buckhannon held that only an enforceable judgment on the merits or a court-ordered consent decree can serve as the basis for prevailing party status and, thus, an award of attorney fees. Because the Canfields obtained neither a judgment on the merits nor a consent decree with respect to their claims against the township defendants, they cannot be considered "prevailing parties" under 42 U.S.C. § 1988. Thus, their request for attorney fees is denied.

Ken-N.K., Inc. v. Vernon Twp., 18 Fed. Appx. 319, 328 (6th Cir. 2001).

In *Ken-N.K.*, the Sixth Circuit faced a situation where the local government had passed a public nudity regulation similar to those upheld by the Supreme Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Thus, although the federal courts never had occasion to consider the constitutionality of the township's ordinance, it is fair to assume that the township would have had at least a fair likelihood of prevailing on the merits of a constitutional challenge to the ordinance.

But what about an ordinance that, under current Supreme Court precedent, is almost certain to fail the constitutional test? Such a situation demonstrates the importance of *Buckhannon* and its ability to protect a municipality from fee liability in situations where the city – caught "with its ordinance(s) down" – does not intend to enforce an outdated ordinance, but rather intends to update the ordinance to bring it into compliance with current constitutional standards.

In *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F.3d 924 (7th Cir. 2003), the Seventh Circuit addressed this question in a First Amendment case. The City of Chicago had passed an ordinance to regulating the location of alcohol and cigarette advertisements. Federation, an association of companies that displays alcohol and cigarette advertisements, filed suit against the City for declaratory and injunctive relief, as well as damages and attorney's fees. *Id*. at 927.

Federation moved for summary judgment on two grounds: (1) that the ordinance was preempted by federal law, and (2) that the ordinance violated the First Amendment. The district court awarded Federation declaratory and injunctive relief, as well as attorney's fees, on its preemption claim, holding that the portions of the ordinance relating to cigarette advertising were preempted and that the portions related to alcohol advertising were not preempted. *Id*. The district court rejected, however, Federation's damages claims, holding that Federation had presented no evidence that it had suffered damages. Finally, because of its ruling on the preemption claim, the district court did not reach Federation's First Amendment claim. *Id*.

The City appealed the grant of summary judgment and the award of attorney's fees, but Federation did not appeal the denial of its damages claim. The Seventh Circuit reversed, holding that only one small exception in the ordinance was preempted by federal law, and that that portion of the ordinance was severable. *Id*. at 927-928.

The case was then remanded to the district court, and Federation moved for summary judgment on the First Amendment grounds contained in its amended complaint. Before the City filed a response, the Supreme Court decided *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which held that a Massachusetts statute, similar to the Chicago ordinance, was preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b), *and* was contrary to the First Amendment. *Id*. at 551, 561. Thereafter,

> Federation filed a supplemental brief arguing that *Lorillard* required the district court to grant its motion for summary judgment. The City did not respond to the merits of Federation's summary judgment motion, but rather on September 13, 2001, filed a cross motion to dismiss based on mootness, citing the City's intention to repeal the ordinance in light of *Lorillard* and noting that since no damages claim remained, repeal would provide Federation full relief and end the controversy. The City did not concede the unconstitutionality of its ordinance, which it contended was materially different from the ordinance at issue in *Lorillard*; rather, it stated that the risks of going forward in light of *Lorillard* had persuaded it to repeal the ordinance. On October 31, 2001, the City Council repealed the ordinance, and a week later the district court granted the City's motion to dismiss, finding that the repeal of the ordinance had rendered the case moot.

Federation, 326 F.3d at 928.

Federation filed a motion for rehearing on the grounds that it was a "prevailing party" and entitled to attorney's fees under 42 U.S.C. § 1988. The district court, citing *Buckhannon*, denied the motion, and Federation appealed.

On appeal, the Seventh Circuit affirmed both the district court's mootness determination and the district court's denial of attorney's fees. First, the appellate court held that Federation's failure to appeal the district court's earlier denial of its damages claim rendered that issue, under the doctrine of the law of the case, dead for purposes of the litigation. "Thus, Federation is precluded from resurrecting its damages claim and at this state may only seek injunctive and declaratory relief." *Id*. at 929.

Second, the court held that the City's repeal of the ordinance did not fall under the exception to the mootness doctrine for voluntary cessation of challenged conduct that can be easily resumed after litigation has ended. *See, e.g.*, *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982) (holding that case was not moot where city affirmatively stated that it would reenact the invalidated ordinance if the Supreme Court determined that the case was moot). This exception, the Seventh Circuit noted, will not normally apply to a municipality absent unusual evidence of gamesmanship. "Therefore, we, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar." *Id*. at 930.

The Seventh Circuit held that Federation's challenge to the Chicago ordinance was moot, even though (1) the ordinance was repealed immediately after the *Lorillard* decision, and (2) another sign-restricting ordinance was being proposed by the City. As to the first issue, the court stated that:

> We disagree with Federation's characterization of the City's actions as disingenuous; rather, they just as likely reveal the City's good-faith attempts to initially maintain an effective ordinance that complies with the Constitution, and then its desire to avoid substantial litigation costs by removing a potentially unconstitutional law from the books…. We can hardly fault the City for its attempts to craft an ordinance that passes constitutional muster and complies with judicial decisions.

Id. at 931.

As to the second issue – the City Council's proposal of another sign ordinance – the Seventh Circuit noted that "[t]he proposed ordinance, a content-neutral prohibition, would create a substantially different controversy than the repealed ordinance, which was fundamentally a content-based prohibition…. Moreover, the fact that this is only a proposed ordinance is not insignificant." *Id*. at 932.

Addressing the attorney's fee issue under *Buckhannon*, the district court rejected Federation's argument that its earlier affirmance of a small portion of the original district court decision on preemption made it a "prevailing party" for purposes of attorney's fees. *Id*. at 933 ("The relief sought by Federation was far broader than that which we upheld. It sought not the elimination of merely this exception, but rather the elimination of the entire ordinance…. our holding that the generic advertising exception was preempted actually … further limited Federation's ability to advertise").

The court also rejected the argument that because the district court *would have* been compelled to enter summary judgment in its favor under *Lorillard*, that the City's repeal was not "voluntary" and that Federation should be considered a prevailing party for purposes of attorney's fees. The Seventh Circuit rejected this theory as well, holding that "*Lorillard* may support Federation's position, but it was not a judgment that changed the legal relationship between the parties in *this* case—and that is what *Buckhannon* requires." *Id*.

C. Practical Implications for Municipalities

As the *Federation* case clearly demonstrates, *Buckhannon* provides a powerful strategic tool for cities engaged in a variety of kinds of federal litigation over their local ordinances. Though some plaintiffs' counsel allege, as the plaintiff in *Federation* alleged, that rejection of the catalyst theory encourages games of constitutional "cat and mouse," both the *Buckhannon* Court and the lower federal courts have recognized that the vast majority of municipal governments would not seek to enforce an ordinance that is unconstitutional under prevailing precedents. Rather, municipalities are continuously attempting to craft sound ordinances that advance the interests of the public at large and at the same time comply with decisions that shape the oft-changing landscape of controlling precedent. This is true in the adult business arena as well as in a number of litigation hotspots where several important decisions are handed down in any given year.

For example, last year, the Tenth Circuit Court of Appeals in *Z.J. Gifts, D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002), joined the "prompt judicial decision" side of the circuit split over the requirement of "prompt judicial review" in adult business licensing ordinances. The City has petitioned the Supreme Court for certiorari of that decision, and IMLA has authored an amicus brief in support of the City's petition, which has a strong chance of being

granted, given that the Supreme Court has twice granted certiorari to decide the issue. *See City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (dismissing case as moot where petitioner had purportedly closed its adult bookstore after certiorari was granted); *Thomas v. Chicago Park District*, 532 U.S. 316 (2002) (holding that city's park permit ordinance was not a prior restraint and failing to reach the "prompt judicial review" issue). For a complete discussion of this topic, see the author's article in the September/October 2003 issue of *Municipal Lawyer* magazine, or the IMLA Annual Conference Paper (Sept. 2001) on the same topic.

In the meantime, suppose that a city in one of the Tenth Circuit states finds itself facing a preemptive constitutional challenge to its adult business permitting ordinance. If the plaintiff brings a prior restraint claim based on the recent *Z.J. Gifts* decision, the city may very well conclude that its ordinance is procedurally defective. Prior to *Buckhannon*, when the "catalyst theory" was operative in the Tenth Circuit, *see Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994), the city – prior to denying any permit or otherwise violating any constitutional right – would have faced the undesirable choice of either litigating the issue or paying attorney's fees to the plaintiff simply for filing its complaint.

Pursuant to *Buckhannon*, however, the City would have the option of quickly passing a textual amendment to cure the alleged defect in its ordinance – for example, by providing that a business would be provisionally licensed until the court adjudicates the constitutional claim. *See, e.g.*, 11126 Baltimore Blvd. v. Prince George's County, 58 F.3d 988, 1001 n.18 (4th Cir. 1995) ("Moreover, the County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until a judicial determination is rendered affirming a denial of a special permit.").

Absent a damages claim or some other basis for deeming the superceded version of the ordinance justiciable, that version of the ordinance would be moot and the court should evaluate the ordinance in light of how it is currently constituted. *See Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) ("We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered"). Upon passage of the amendment, the City could move to dismiss the original prior restraint claim and then defend its updated ordinance against any remaining challenges. While it would be ideal for cities to immediately update their myriad of ordinances as various cases are decided, the practicalities of municipal governance generally do not permit such luxuries. The rule announced in *Buckhannon*, however, does provide a viable solution for municipalities faced with litigation based on recent precedents that are not yet reflected in local ordinances.

II. Litigating Secondary Effects in the Wake of *Alameda Books*

Contrary to claims made by some adult business attorneys after the Supreme Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), that case has not produced the sea-change in adult business litigation that industry lawyers had hoped. A majority of courts have recognized that *Alameda Books* reaffirmed *Renton's* deferential standard for legislative records supporting adult business zoning and licensing ordinances. *See, e.g., Baby Dolls Topless Saloons v. Dallas*, 295 F.3d 471 (5th Cir. 2002); *Deja Vu-Everett-Federal Way v. City of Federal Way*, 2002 U.S. App. Lexis 17389 (9th Cir. 2002); *Charter Communications, Inc. v. County of Santa Cruz*, 304 F.3d 927, 932 (9th Cir. 2002); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 680 (W.D. Ky. 2002); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *Center for Fair Public Policy v. Maricopa County*, 336

F.3d 1153 (9th Cir. 2003). For a more complete discussion of *Alameda Books*, please see the author's article in the September/October 2002 issue of *Municipal Lawyer* magazine.

Nevertheless, a measurable impact from *Alameda Books* has been noticed in at least two appellate decisions in the last year. The first, *Encore Videos v. City of San Antonio*, 310 F.3d 812 (5th Cir. 2002), suggested that *Alameda Books* fundamentally changed judicial review of adult business ordinances, and that the new "test" to be applied derived from an area of agreement between Justice Kennedy's concurrence and the four justices who joined in *the dissent*.

Upon the city's petition for rehearing, however, the panel withdrew the opinion and replaced it with another that omitted the original opinion's lengthy discussion of *Alameda Books.* The second opinion, reported at 330 F.3d 288 (5th Cir. 2003), simply stated in a footnote that *Alameda Books* was "not to the contrary" of the panel's conclusion that the City had failed to present secondary effects evidence specifically applicable to adult bookstores that lack peep show booths. *But see ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994) (holding that secondary effects evidence addressing adult bookstores is sufficient and that city need not present evidence specific to a particular sub-category of adult bookstores); *Z.J. Gifts, D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998) (same).

The second decision of import is *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003). In that case, the district court granted summary judgment to the county against claims that its public nudity ordinance was unconstitutional. On appeal, the Eleventh Circuit concluded that the Supreme Court's intervening decision in *Alameda Books* warranted a remand. Although the county had met its initial secondary effects burden under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the court held that the plaintiffs had made a sufficient challenge to the county's legislative record to shift the burden back to the county to provide additional support for its secondary effects rationale.

The Eleventh Circuit noted, however, that that "the fact that the Adult Lounges have managed, in their 'as applied' challenge, to cast doubt on the County's basis for enacting Ordinance 99-18 does not mean the ordinance could not ultimately survive intermediate scrutiny." *Id*. at *61. While the county is required to provide evidence which "renew[s] support for a theory that justifies its ordinance," *id*. at *62 (quoting *Alameda Books*, 535 U.S. at 439 (plurality opinion)), the appellate court reiterated that "the District Court should be careful not to substitute its own judgment for that of the County. The County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies." *Id*. at *62.

In so holding, the appellate court recognized that even in First Amendment cases, the judiciary's role in evaluating the government's support for its regulation is limited. As the Supreme Court explained in another First Amendment, intermediate scrutiny case:

> The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress. *Turner*, 512 U.S. at 665-666. In making that determination, we are not to 're-weigh the evidence de novo, or to replace Congress' factual predictions with our own.' Id. at 666.

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 211 (1997) ("*Turner II*") (quoting *Turner I*, 512 U.S. 622 (1994)).

Nevertheless, the *Peek-A-Boo Lounge* decision raises serious questions about the Eleventh Circuit's application of *Alameda Books* to a situation far different from the unique "multiple-use prohibition" employed in Los Angeles' zoning ordinance. Instead of the novel regulation at issue in *Alameda Books*, the Manatee County ordinance was a prohibition of public nudity like those already upheld by the Supreme Court in both *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Thus, the question arises, does the ability of adult business plaintiffs to "cast direct doubt" on the rationale and findings in a municipality's legislative record extend to rationales and findings that the Supreme Court has already as worthy of reasonable reliance? *See, e.g.*, 529 U.S. at 296-297 ("Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young*, and *LaRue*, it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects.") (citations omitted).

Since the Supreme Court has clearly held that a municipality can reasonably rely on the Court's previous cases when drafting its ordinance, *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, the *Peek-A-Boo* court appears to have applied language from *Alameda Books* in a context for which it was not intended. Indeed, in doing so, the *Peek-A-Boo* court appears to have imposed the "empirical proof" requirement that was flatly rejected in *Alameda Books*. *See Peek-A-Boo*, 337 F.3d 1251, *60 ("Significantly, the County has not attempted to counter the Adult Lounges' evidence with local studies of its own. We are not dealing, therefore, with a case involving a battle of competing experts."); *but see Alameda Books*, 535 U.S. at 439 ("In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech.").

The expansion of *Alameda Books* outside the context of novel regulations – which lack support in the relevant cases – seems to be contrary to *Alameda Books*, which reaffirmed the deferential *Renton* standard for evaluating legislative records. Under that standard, the city's legislative judgment is accepted as long as the city "relies on evidence reasonably believed to be relevant to the problem" the city is addressing.

Indeed, the Ninth Circuit in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. July 28, 2003), rejected an attempt to expand *Alameda Books* to strike down an hours of operation regulation for adult businesses. Noting that weight of authority in support of such regulations, the court stated:

> [Justice Kennedy] wrote separately to guard against 'a subtle expansion' of Renton, and not, as Fair Public Policy would have it, to signal a fundamental shift in the Renton framework. Given his emphatic reaffirmance of Renton, we are not persuaded that Justice Kennedy meant to precipitate a sea change in this particular corner of First Amendment law. This is especially so given that the circuit courts have thus far been unanimous in upholding similar or even more severe hours of operation restrictions under Renton. See *DiMa Corp.*, 185 F.3d at 829; *Lady J. Lingerie, Inc.*, 176 F.3d at 1358; *Richland Bookmart Inc.*, 137 F.3d at 435; *Nat'l Amusements Inc.*, 43 F.3d at 731; *Mitchell*, 10 F.3d at 123; *Star Satellite, Inc.*, 779 F.2d at 1074. We read nothing in Justice Kennedy's separate opinion signaling disapproval with these results.

Ctr. for Fair Pub. Policy v. Maricopa County, 2003 U.S. App. Lexis 14918, 19-20 (9th Cir. 2003).

The Ninth Circuit then proceeded to reiterate the most important aspect of *Alameda Books*: the Supreme Court's straightforward rejection of an empirical proof requirement for local legislatures seeking to regulate secondary effects. *Id.* at 37-38 ("To the extent Fair Public Policy argues that the state needs to come forward with empirical data in support of its rationale, that argument was specifically rejected in *Alameda Books*. 535 U.S. at 439) (plurality opinion) ('Such a requirement would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech.') (internal quotation omitted); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring) ('legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects')).

Thus, the Ninth Circuit – whose original *Alameda Books* decision, 222 F.3d 719 (9th Cir. 2000), was reversed by the Supreme Court for being too burdensome – recognized that the "reasonably believed to be relevant standard" announced in *Renton* continues to apply. *Ctr. for Fair Pub. Policy*, 2003 U.S. App. Lexis 14918, 38; *accord Baby Dolls Topless Saloons v. Dallas, supra*; *Kentucky Restaurant Concepts, supra*; *Ben's Bar, supra*.

Of course, the application of that "reasonableness" standard, as always, is subject to the vagaries inherent in judicial review. For that reason, cities should be careful to compile a thorough legislative record to support their ordinances and should be ready to identify the findings and rationales for its ordinance that are consistent with Supreme Court precedents. Moreover, municipalities should remember that its ordinance is not required to ameliorate every secondary effects concern that adult businesses may engender, but that under intermediate analysis, the ordinance is constitutional provided that it serves a substantial government interest. *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F. Supp. 2d 1143, 1156-59 (E.D. Wash. 2002). Should the municipality be forced in the midst of litigation to renew support for its theory of secondary effects, it should be ready to hire its own expert to attest to the relationship between adult businesses and secondary effects. Under the Supreme Court's analysis of First Amendment challenges in both the adult business cases and in other cases where less deference is required, *see Turner I* and *Turner II*, *supra*, conflicts between the parties concerning legislative evidence should be resolved in favor of the legislature's judgment. *See, e.g., Turner II*, 520 U.S. at 211; *see also City of Erie*, 529 U.S. at 297-298.

III. Conclusion

The Supreme Court's recent decisions in *Buckhannon* and *Alameda Books* offer tools that can be successfully employed by municipalities engaged in constitutional litigation. In the broader context, *Buckhannon* expands the options available to cities faced with federal law challenges to local regulations. In the adult business arena, the recent cases demonstrate that *Alameda Books* reaffirmed *Renton's* deferential standard, but that in certain cases municipalities should be ready to provide additional secondary effects evidence for their ordinances. Such evidence is not required to be empirical in order to support the legislative judgment, but is sufficient provided that it is reasonably believed to be relevant to the problems sought to be prevented by the municipality's regulations.