APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit (October 12, 2023) . . . . . App. 1

Memorandum of Opinion and Order of the United States District Court for the Northern District of Texas (May 24, 2022) . . . . . App. 21

Order Granting Preliminary Injunction, United States District Court for the Northern District to Texas (May 24, 2022) . . . . . App. 70

Order Denying Motion for Temporary Restraining Order, United States District Court for the Northern District of Texas (January 28, 2022) . . . . . App. 72

Order on Petition for Rehearing and Rehearing en banc, United States Court of Appeals for the Fifth Circuit (November 7, 2023) . . . . . App. 73

United States Const., amend. I . . . . . App. 75

United States Const., amend XIV . . . . . App. 76

Ordinance No. 32125 . . . . . App. 78

Dallas City Code Chapter 41A . . . . . App. 86

United States Court of Appeals
Fifth Circuit
FILED
October 12, 2023
Lyle W. Cayce
Clerk

United States Court of Appeals
for the Fifth Circuit

No. 22-10556

Association of Club Executives of Dallas, Incorporated, *a Texas non-profit Corporation*; Nick's Mainstage Inc Dallas PT's, *doing business as* PT's Men's Club; Fine Dining Club, Incorporated, *a Texas Corporation, doing business as Silver City*; TMCD Corporation, *a Texas Corporation*, *doing business as* The Men's Club of Dallas; 11000 Reeder, L.L.C., *a Texas Limited Liability Company*, *doing business as* Bucks Wild; AVM-AUS, Limited, *a Texas limited partnership*, *doing business as* New Fine Arts Shiloh,

Plaintiffs—Appellees,

versus

City of Dallas, Texas,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-177

Before Wiener, Southwick, and Duncan,
Circuit Judges.
Stuart Kyle Duncan, *Circuit Judge*:

"[W]hile the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring in the judgment). Communities can therefore regulate the so-called "secondary effects" of sexually oriented businesses (or "SOBs"), like crime and blight, without running afoul of the First Amendment. *See generally City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Acting on that authority, the City of Dallas passed Ordinance No. 32125 in 2022. The Ordinance requires licensed SOBs, such as cabarets, escort agencies, and adult video stores, to close between 2:00 a.m. and 6:00 a.m. The Ordinance was backed by ample data—from the City's own police task force, other comparable cities, and academic research—supporting a link between SOBs' late-night operation and increased crime.

Plaintiffs, a group of SOBs and their trade association, challenged the Ordinance under the First Amendment. After a hearing, the district court found that the City lacked reliable evidence to justify the Ordinance and that the Ordinance overly restricted Plaintiffs' speech. It therefore preliminarily enjoined the Ordinance.

The district court erred. Under longstanding Supreme Court precedent, the Ordinance is likely constitutional. The City's evidence reasonably showed a link between SOBs' late-night operations and an increase in "noxious side effects," such as crime. *Alameda Books*, 535 U.S. at 446 (Kennedy, J., concurring in the judgment). The Ordinance also left the SOBs ample opportunity to purvey their speech at other times of the day and night.

We therefore VACATE the preliminary injunction and REMAND for further proceedings.

I.

From late 2020 to early 2021, a rash of shootings in or around Dallas SOBs left multiple people dead.[1] The police responded by forming a task force to patrol near SOBs on busy nights after midnight.[2] Operating for about eight months during 2021, the task force made 123 felony arrests, responded to 134 calls for service, issued over 1,100 citations, and made more than 350 drug and weapon seizures.

The police also compiled and analyzed 2019–21 data on crime occurring within a 500-foot radius of

---

[1] The City defines an SOB as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer." Dall. City Code § 41A-2(31).

[2] Eight officers patrolled on Thursday, Friday, and Saturday nights.

licensed SOBs. They broke this data down based on the number of arrests, crimes reported, and 911 calls. The analysis focused on the nighttime hours, comparing the 10:00 p.m.-to-2:00 a.m. and the 2:00 a.m.-to-6:00 a.m. windows.

During those timeframes, the data showed over 1,600 custodial arrests. And while most property crime occurred from 10:00 p.m. to 2:00 a.m., the opposite was true for violent crime: roughly 67% of all aggravated assaults, rapes, robberies, and murders occurred from 2:00 a.m. to 6:00 a.m. In 2021, that percentage jumped to 76%.

The data told a similar story about 911 calls. The police received over 4,500 calls between 10:00 p.m. and 6:00 a.m., over half of which came between 2:00 a.m. and 6:00 a.m. Over half of the Priority 1 calls—those requiring an immediate emergency response—also came during that window. The same was true with respect to calls to the fire department.

After months of heightened patrols, the department began presenting its findings to the city council—twice to committees and once to the entire council. It also provided summaries of three academic studies linking SOBs to increased crime rates. And it noted that two other Texas cities, Beaumont and Amarillo, had issued reports finding a correlation between SOBs' hours of operation and increased crime. Based on this evidence, the department recommended that the council close SOBs from 2:00 a.m. to 6:00 a.m.

The council unanimously passed the Ordinance in January 2022. The Ordinance stated it was restricting SOBs' hours to "reduce crime and conserve

police and fire-rescue resources" because "the operation of [SOBs] between 2:00 a.m. and 6:00 a.m. is detrimental to the public health, safety, and general welfare." The Ordinance listed the evidence it relied on, including recent "multiple shootings," the increase in violent crime and 911 calls during those hours, the three academic studies, and the Beaumont and Amarillo reports.

Plaintiffs immediately sued to enjoin the Ordinance, arguing it violated the First Amendment. Specifically, they claimed the Ordinance was a content-based restriction on their speech and that the City enacted it "without valid empirical information to support it."

The district court held a hearing and, largely agreeing with the Plaintiffs, granted a preliminary injunction. The court declined to decide whether intermediate or strict scrutiny applied, noting our court's unsettled case law on the continuing validity of the secondary effects doctrine. But it held that the Ordinance likely failed under either standard.

The district court then scrutinized the City's evidence and concluded that it failed to support the "stated rationale for the Ordinance." In particular, the court found that the City's crime data was unreliable and that, regardless, it did not adequately link SOBs to secondary effects such as crime and increased 911 calls. Finally, the court concluded the Ordinance failed to leave SOBs' protected speech sufficiently accessible.

The City now appeals.

II.

"We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022) (citation omitted). To obtain a preliminary injunction, the Plaintiffs must show: (1) they are substantially likely to succeed on the merits; (2) a substantial threat of irreparable harm absent the injunction; (3) the threatened injury outweighs any harm caused by granting the injunction; and (4) the injunction is in the public interest. *Clarke v. CFTC*, 74 F.4th 627, 640–41 (5th Cir. 2023). On appeal, the parties contest only the first factor, whether the Plaintiffs are likely to succeed on the merits of their First Amendment claims.

III.

As a threshold matter, the parties dispute the First Amendment standard governing a municipality's regulation of SOBs.

For over three decades, the Supreme Court has analyzed such regulations under a two-step test adopted in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).[3] The first step asks whether the measure "ban[s]" SOBs or regulates only the "time, place, and manner" of their operation. *Id.* at 46. If the latter, the second step asks whether the regulation is

[3] *See, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433–34 (2002) (plurality) (applying *Renton*); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 295–96 (2000) (plurality) (same); *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 509–10 (5th Cir. 2021) (same); *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 365 (5th Cir. 2002) ("Our court has reviewed SOB licensing and location provisions under the *Renton* test.").

"designed to combat the undesirable secondary effects" of "businesses that purvey sexually explicit materials" rather than to restrict their "free expression." *Id.* at 48–49. A regulation satisfying both steps is "reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations," namely intermediate scrutiny. *Id.* at 50. Accordingly, the regulation will be upheld if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Ibid.*

Plaintiffs argue that *Renton* is no longer good law. And even if it is, they contend that the Ordinance is content-based under recent Supreme Court precedent and thus subject to strict scrutiny. We reject both arguments.

Plaintiffs' first argument depends on our now-overruled decision in *Reagan National Adverting of Austin, Inc. v. City of Austin* (*Reagan I*), 972 F.3d 696 (5th Cir. 2020), *rev'd and remanded sub nom. City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022). There, we applied strict scrutiny to a law distinguishing on-premises from off-premises signs. *Ibid.*[4] To reach that conclusion, we read *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), to require strict scrutiny whenever "a regulation of speech on its face draws distinctions based on the message a speaker conveys," even if the law had a "benign motive" or "content-neutral justification." *Id.* at 702 (quoting *Reed*, 576 U.S. at 163, 165) (internal quotation marks

[4] On-premises signs are those that advertise things located onsite, while off premises signs advertise things elsewhere. *Reagan I*, 972 F.3d at 699–700.

omitted). We further suggested that *Reed* abrogated many of our precedents—including cases applying *Renton* that we listed in a footnote *See id.* at 703 n.3.[5] Plaintiffs' argument here relies heavily on that footnote.

The problem for Plaintiffs—and it is a fatal one—is that the Supreme Court reversed *Reagan I* and rejected that decision's understanding of *Reed* as "too extreme." *City of Austin*, 142 S. Ct. at 1470–71. The Court clarified that its precedents "have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473; *see also id.* at 1474. Based on that principle, the Court held that the sign ordinance at issue was content neutral because it drew only location-based distinctions and had no illicit purpose. *Id.* at 1471. Importantly, the Court emphasized that an overly strict reading of *Reed* would "contravene numerous precedents" upon which "*Reed* did not purport to cast doubt." *Id.* at 1474.

The upshot for our case is obvious. Any shadow cast on the secondary effects doctrine by our *Reagan I* opinion has been dispelled by *City of Austin.* Specifically, Plaintiffs are mistaken that the *Reagan I* footnote somehow survived the decision's reversal. To the contrary, that footnote depended on a view of *Reed* that *City of Austin* repudiated. The footnote, in other

---

[5] These cases included *Illusions–Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003); and *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 292 (5th Cir. 2003).

words, was not spared in the fall of *Reagan I*.[6]

Alternatively, Plaintiffs argue that the Ordinance should now be analyzed as content-based under *City of Austin*'s clarification of *Reed*. We disagree. Both *Reed* and *City of Austin* concerned physical signs and said nothing about SOBs or the secondary effects doctrine. The Court "does not normally overturn . . . earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).[7] So, it would be a mistake to interpret those decisions as silently spelling *Renton*'s demise. To the contrary, *City of Austin* cautioned inferior courts against doing exactly that. *See City of Austin*, 142 S. Ct. at 1474 (warning that overreading *Reed* would "contravene numerous precedents" upon which "*Reed* did not purport to cast doubt").

More to the point, whether to overrule or modify *Renton* is the High Court's business, not ours. "Our job, as an inferior court, is to adhere strictly to Supreme Court precedent, whether or not we think a precedent's best days are behind it." *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023) (en banc) (citing *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023)). *Renton* and its longstanding secondary effects doctrine has "direct application in [this] case," *Rodriguez de*

---

[6] On remand in *Reagan II*, we had no occasion to address *Reagan I*'s footnote 3. *See Reagan Nat'l Advert. of Austin, Inc. v. City of Austin* (*Reagan II*), 64 F.4th 287 (5th Cir. 2023). But nothing in *Reagan II* suggests the footnote remains viable after *City of Austin*.

[7] *Renton* is cited only once across the two decisions—in a concurrence that implies it remains good law. *See Reed*, 576 U.S. at 184 (Kagan, J., concurring in the judgment).

Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989), and so we are bound to apply it to the challenged Ordinance, *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 315 (5th Cir. 2021). To that we now turn.

IV.

Under *Renton*, the Ordinance must be upheld if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50.[8] The district court found the Ordinance likely failed both requirements. We address each in turn.

A.

The district court concluded that the Ordinance failed *Renton*'s first requirement because of flaws in the City's supporting evidence. We disagree. The district court held the City's evidence to a standard of exactitude not required by the Supreme Court's precedents.

The Supreme Court explicated *Renton*'s evidentiary standard in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433 (2002) (plurality opinion); *see also id.* at 444–53 (Kennedy, J.,

---

[8] We have sometimes observed that restrictions on SOBs must also be narrowly tailored. *See Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 292 (5th Cir. 2003*)*, *as clarified*, 352 F.3d 938 (5th Cir. 2003). But later precedents have explained that a restriction that satisfies *Renton*'s formulation is necessarily narrowly tailored. *See H and A Land Corp. v. City of Kennedale*, 480 F.3d 336, 339 (5th Cir. 2007).

concurring in the judgment).[9] An SOB regulation is "designed to serve a substantial government interest" when the municipality can "provid[e] evidence that supports a link" between the regulated business and the targeted secondary effects. *Alameda Books*, 535 U.S. at 434, 437; *see also id.* at 449 (Kennedy, J., concurring in the judgment) (agreeing that the plurality "gives the correct answer" to the question of how much evidence is needed to satisfy *Renton*).[10] A municipality may rely on evidence "reasonably believed to be relevant," *id.* at 438 (quoting *Renton*, 475 U.S. at 51–52), but not on "shoddy data or reasoning" that does not "fairly support" the ordinance's rationale. *Ibid.*; *see also id.* at 451 (Kennedy, J., concurring in the judgment). Plaintiffs may show evidence is "shoddy" either because it "does not support [the ordinance's] rationale," or because

---

[9] While *Alameda Books* generated no majority opinion, we join numerous other circuits in holding that Justice Kennedy's concurrence controls. *See generally Marks v. United States*, 430 U.S. 188, 193 (1977) (the holding of a fragmented court is the position supporting the judgment "on the narrowest grounds"). *See, e.g.*, *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1354 n.7 (11th Cir. 2011); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 718 n.24 (7th Cir. 2003); *Ctr. For Fair Pub. Pol'y v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003). Justice Kennedy's concurrence is the narrowest opinion under *Marks* because it opposed the plurality's "subtle expansion" of *Renton*. *See Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment). Our court's decision in *N.W. Enterprises* implies that Justice Kennedy's concurrence controls. *See N.W. Enters.*, 352 F.3d at 181 & n.18 (citing *Marks* and suggesting Justice Kennedy's rationale was "critical" because his vote was "necessary to the Court's judgment").

[10] *See also N.W. Enters.*, 352 F.3d at 180 n.14 ("Justice Kennedy's concurrence approves the Court's treatment of the evidentiary questions.").

Plaintiffs' own evidence counters the municipality's findings. *Id.* at 438–39. Doing so shifts the burden back to the municipality to provide additional evidence. *Id.* at 439.

The pertinent inquiry here, then, is whether the City could reasonably believe that its evidence linked SOBs' operation between 2:00 a.m.–6:00 a.m. and the secondary effects targeted by the Ordinance. *See Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir. 2002) (stressing that this is a "reasonable belief standard") (emphasis omitted). The district court answered that question in the negative after closely scrutinizing the City's evidence. "[W]e review a district court's findings as to the existence of a city's evidence for clear error, but we review *de novo* whether that evidence" is "shoddy" or unreliable within the meaning of *Alameda Books*. *H and A Land Corp.*, 480 F.3d at 338.

To begin with, the district court found the City's data flawed in that it "artificially enhance[d]" the association of crime with SOBs. The court cited four main reasons. First, the data included crimes committed at locations that held an SOB license but were not operating as an SOB.[11] Second, the court found the data "inaccurately inflate[d]" the numbers by counting all crime within a 500-foot radius around SOBs, thus bringing in crimes that might have occurred at a nearby restaurant or motel. Third, the court noted that, while the data analyzed crime occurring from 10:00 p.m.– 6:00 a.m., not every SOB

[11] The record reflects that non-operational SOBs accounted for 6% of violent crimes between 2:00 and 6:00 a.m., 2% of violent crime arrests, and 3% of Priority 1 calls for service.

was always open during those hours (for instance, some closed before 6:00 a.m. on weekdays). Finally, the court believed the very existence of the police task force distorted the data—for instance, by generating stops that would not have otherwise occurred or that were unrelated to SOBs, like traffic stops. For these reasons, the court concluded that the crime data did not reasonably link SOBs to secondary effects.

The court also criticized the three academic studies cited in the Ordinance. Its basic objection was that the studies were not sufficiently similar to the Ordinance to be relevant. The court noted that, while all three studies linked SOBs with increased crime rates, they either did not "show increasing crime rates associated with late-night hours" or did not "address[] any particular time of day." Thus, in the court's view, the City could not have reasonably relied upon such studies to curtail nightly hours of operation.

The district court applied *Renton*'s reasonable belief standard too strictly. "[R]equiring proof to this degree of exactitude set the bar too high." *N.W. Enters.*, 352 F.3d at 181. The district court demanded the City link SOBs to secondary effects with a degree of certainty that outstrips what *Renton* envisioned. To the contrary, all *Renton* demands is evidence "reasonably believed to be relevant" to the problem. *Renton*, 475 U.S. at 51; *see also N.W. Enters.*, 352 F.3d at 180 (under the "deference" demanded by *Renton*, "legislators cannot act, and cannot be required to act, only on judicial standards of proof"). Indeed, because "a city must have latitude to experiment" in addressing secondary effects, "very little evidence is required." *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment); *see also Doe I v. Landry*,

909 F.3d 99, 109 (5th Cir. 2018) ("The evidentiary burden to support the governmental interest is light."). The standard does not require a city to forge an ironclad connection between SOBs and secondary effects or to produce studies examining precisely the same conditions at issue. *See Alameda Books*, 535 U.S. at 437 (explaining that the evidence must only "support[] a link" between SOBs and the asserted secondary effects); *see also Ctr. For Fair Pub. Pol'y*, 336 F.3d at 1168 ("The record here is hardly overwhelming, but it does not have to be.").

The City's evidence here meets the *Renton* standard. Consider first the context of the Ordinance's enactment: responding to multiple shootings at Dallas SOBs in the late hours of the night, the City formed a task force to increase police presence around SOBs. The task force operated for the better part of a year and devoted over 1,200 man-hours to patrols. It made over 100 felony arrests, answered over 100 911 calls, and made over 350 weapons and drug seizures. To be sure, as the district court noted, not *every* arrest or seizure was related to an SOB. But the City was still entitled to rely on this type of boots-on-the-ground experience in crafting the Ordinance.

"[C]ourts should not be in the business of second-guessing fact-bound empirical assessments of city planners" because they "know[] the streets" of their cities "better than we do." *Alameda Books*, 535 U.S. at 451–52 (Kennedy, J., concurring in the judgment); *see also, e.g.*, *N.W. Enters.*, 352 F.3d at 180 (emphasizing that, under *Renton* and *Alameda Books*, courts must "respect[] local legislators' superior understanding of local problems"). So long as a city's "inferences appear reasonable, we should not say there

is no basis for its conclusion." *Alameda Books*, 535 U.S. at 452 (Kennedy, J., concurring in the judgment).[12] The City could reasonably infer from the lengthy experiences of its police department—which was presented three times to the city council—that SOBs were responsible in significant part for the noxious secondary effects targeted by the Ordinance. As one officer testified during the preliminary injunction hearing, SOBs are "powder keg[s]" for violent crime in the late hours of the night, because they attract crowds of young men consuming alcohol and drugs.

The City's other evidence reinforces that conclusion. While considering the Ordinance, the city council had before it five other Texas cities' hours-of-operation restrictions on SOBs, including those of Fort Worth, San Antonio, and El Paso. The Ordinance itself noted that Amarillo and Beaumont had issued reports showing "a positive correlation between the hours of operation of [SOBs] and higher crime rates." And all this was in addition to the three studies that, in the district court's words, "suggest that SOBs are associated with an increase in overall crime." Thus, the City was hardly pushing the envelope. Both the Supreme Court and this court have found the reasonable belief standard satisfied on records much more tenuous than this one. *See, e.g.*, *Alameda Books*, 535 U.S. at 451–52 (Kennedy, J., concurring in the judgment) (allowing an ordinance to survive summary

[12] This deference also supports the City's reliance on the 2019–21 crime data even though that data is not perfectly tailored to SOBs. And that deference is particularly warranted here, where the City was viewing the data not in a vacuum but in light of the task force's hands-on experience with the problem of secondary effects.

judgment although supported only by "a single study and common experience"); *H and A Land Corp.*, 480 F.3d at 339–40 (finding the standard satisfied based on two surveys, conducted in other cities, in which real estate appraisers "predicted that the presence of an adult bookstore would negatively affect real estate value in the surrounding area").

The district court also faulted the City for failing to include crime data associated with non-SOBs. Because crime could also occur at "other late-night establishments," the court reasoned, a comparison was necessary to "conclude that the secondary effects are linked to the SOBs, as opposed to some other, unrelated factor." We disagree. The City was entitled to make reasonable inferences from the information it had without needing to rule out other possibilities.

Alameda Books has already settled this point. The Supreme Court faulted the lower court for "implicitly requir[ing] the city to prove that its theory [was] the only one that can plausibly explain the data." 535 U.S. at 437. To the contrary, a city need not "rule[] out every theory for the link between [SOBs and secondary effects] that is inconsistent with its own." *Ibid.* It can instead reasonably interpret the available information without courts "replac[ing] the city's theory . . . with [their] own." *Id.* at 437–38; *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 561 (5th Cir. 2006) (requiring deference to the "legislative process" even if the evidence allows a "different and equally reasonable conclusion" (citation omitted)). So, here, the City could plausibly infer that the best explanation for violent crime and 911 calls near SOBs was the SOBs themselves rather than some other factor.

One final word. At times, the district court appeared concerned with whether the Ordinance would be *successful* in reducing secondary effects. For instance, the court noted that, without data about 911 calls from non-SOBs, it was "impossible to know" whether closing SOBs from 2:00 a.m. to 6:00 a.m. would really conserve City resources. This was the wrong focus, however. Cities' latitude to experiment means, by definition, that they need not show that their "ordinance[s] *will successfully* lower crime," at least "not without actual and convincing evidence from plaintiffs to the contrary." *Alameda Books*, 535 U.S. at 439 (emphasis added); *see also Doe I*, 909 F.3d at 110 ("The State need not demonstrate through empirical data, though, that its regulation will reduce [secondary effects]."); *Baby Dolls Topless Saloons*, 295 F.3d at 481 (rejecting the argument that there must be "specific evidence linking" the ordinance "to reducing secondary effects") (emphasis removed). Once again, the district court demanded evidentiary precision from the City that *Renton* does not require.

In sum, the City is substantially likely to show that the Ordinance was "designed to further a substantial government interest" under *Renton*.[13]

---

[13] Plaintiffs suggest that, at a minimum, the City does not carry its burden with respect to adult bookstores, for which the district court found the "data [was] weakest." But while Plaintiffs can continue to press this argument before the district court, we do not think a preliminary injunction is warranted as to adult bookstores. Although the overall incidence of violent crime at adult bookstores appears low, the data reflects that these locations still generated over 500 911 calls and over 150 arrests between 2:00 a.m. and 6:00 a.m. Courts should not second-guess legislative judgments about the significance of these problems. *See Alameda*

(continued...)

B.

The Ordinance must also "allow[] for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50. It is mostly here that Justice Kennedy's controlling opinion in *Alameda Books* differs from the plurality. *See World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1195 (9th Cir. 2004*)*, *as amended*, (July 12, 2004) (noting that Justice Kennedy's concurrence "dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication"). As he cautioned, restrictions on SOBs must "leave the quantity and accessibility of the speech substantially undiminished." *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment). A city may not reduce secondary effects simply by reducing speech in the same proportion. Rather, "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances . . . may reduce the costs of secondary effects without substantially reducing speech." *Id.* at 450.

The district court found that the Ordinance failed this requirement because closure would cost the SOBs significant revenue while depriving many patrons and dancers of access to protected speech

---

[13](...continued)
Books, 535 U.S. at 451–52 (Kennedy, J., concurring in the judgment); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 639–640 (7th Cir. 2003). Additionally, there is evidence that some of the adult bookstores provide the opportunity to view and use sexual materials on-site, which our precedents recognize as posing a greater threat of secondary effects than SOBs without such opportunities. *See H and A Land Corp.*, 480 F.3d at 339; *Encore Videos*, 330 F.3d at 294–95.

during those hours. We disagree. A regulation need not be costless to be valid. *See Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) (upholding a location-based regulation even though it required SOBs to relocate to places that "d[id] not seem particularly desirable for economic reasons"). And Plaintiffs do not argue that the Ordinance will be so costly as to drive them out of business. *See Ent. Prods., Inc. v. Shelby County*, 721 F.3d 729, 741 (6th Cir. 2013) (rejecting a profitability argument where plaintiffs did "not allege that [the ordinance] . . . makes their businesses unprofitable"). Thus, Plaintiffs still have a "reasonable opportunity to open and operate" their businesses. *See Renton*, 475 U.S. at 54; *see also N.W. Enters.*, 352 F.3d at 181 (interpreting Justice Kennedy's concurrence to mean that "the City may not use its regulation to *eliminate* businesses as a means to reduce their secondary effects" (emphasis added)).

On this record, we cannot say that the Ordinance substantially or disproportionately restricts speech. It leaves SOBs free to open for twenty hours a day, seven days a week, while also, in the City's reasonable view, curtailing the violent crime and 911 calls with which the City was concerned. Other circuits have found similar restrictions valid in the wake of *Alameda Books*. *See, e.g.*, *Ctr. For Fair Pub. Pol'y*, 336 F.3d at 1162–63; *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 791 (6th Cir. 2005). We see no reason to conclude otherwise.[14]

---

[14] To the extent that Plaintiffs argue that an hours-of-operation restriction automatically violates Justice Kennedy's concurrence, *see Annex Books, Inc. v. City of Indianapolis*, 740

(continued...)

***

To sum up, we hold that *Renton* remains good law and thus apply intermediate scrutiny to the Ordinance. We further conclude that, under *Alameda Books*, Plaintiffs have not shown a likelihood of success on the merits of their First Amendment claims. A preliminary injunction was therefore unwarranted.

V.

We VACATE the preliminary injunction and REMAND for further proceedings consistent with this opinion.

---

[14](...continued)
F.3d 1136, 1138 (7th Cir. 2014), such an argument is misplaced. The concurrence recognizes that speech may be decreased if the loss is not "substantial." *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring in the judgment). Moreover, the concurrence must be read in context. Justice Kennedy addressed a "place" regulation that threatened to close businesses entirely, whereas we address a "time" regulation that poses no such threat. Those are starkly different contexts. *See Ctr. For Fair Pub. Pol'y*, 336 F.3d at 1162–63.

(Filed 05/24/22)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ASSOCIATION OF CLUB EXECUTIVES, OF DALLAS INC., et al.	§	Civil Action No. 3:22-cv-00177-M
Plaintiffs,	§	
v.	§	
CITY OF DALLAS, TEXAS,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion for Preliminary Injunction (ECF No. 3) and the Motion for Leave to Amend (ECF No. 34), filed by Plaintiffs the Association of Club Executives of Dallas, Inc.; AVM-AUS, Ltd. d/b/a New Fine Arts Shiloh; Nick's Mainstage, Inc.–Dallas PT's, d/b/a PT's Men's Club; Fine Dining Club, Inc., d/b/a Silver City; 11000 Reeder, LLC, d/b/a Bucks Wild; and TMCD Corporation, d/b/a The Dallas Men's Club (collectively, "Plaintiffs"). Also pending is the Motion to Dismiss for Failure to State a Claim (ECF No. 17), filed by Defendant the City of Dallas (the "City"). For the following reasons, the Motion for Preliminary Injunction is **GRANTED**, the Motion for

Leave to Amend is **GRANTED**, and the Motion to Dismiss is **DENIED AS MOOT**.

I. BACKGROUND

In Chapter 41A of the City of Dallas's Code of Ordinances, the City promulgates numerous regulatory obligations and restrictions on sexually oriented businesses ("SOBs")[1] operating within City limits. On January 26, 2022, following a public hearing, the Dallas City Council unanimously voted to adopt Ordinance No. 32125 to amend Chapter 41A and add, *inter alia*, § 41A-14.3, a provision restricting SOBs from operating between the hours of 2 a.m. and 6 a.m.[2] ECF No. 19-1 at 2–6 (the "Ordinance").

The Ordinance states the Council's finding that the operation of SOBs between 2 a.m. and 6 a.m. is "detrimental to public health, safety, and general welfare," citing various data in support, including crime data purporting to show an increase in violent crime and drug and gun arrests at or near SOBs between 2 a.m. and 6 a.m.; data from the Dallas Fire-Rescue Department showing an increase in the number

---

[1]The Code defines a SOB as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer." Dall. City Code § 41A-2(31).

[2] Specifically, the Ordinance adopted by the City Council proposed amending §§ 41A-9, -16, -17, and -20 of the Code, and adding § 41A-14.3, the new section restricting SOBs' hours of operation. ECF No. 19-1 at 2.

of calls for service at SOBs between 2 a.m. and 6 a.m.; a 2012 research study by McCord and Tewksbery,[3] analyzing SOBs in Louisville, Kentucky; a 2008 study by McCleary, showing that crime increases when SOBs operate in rural communities; a 2012 study by Weinstein and McCleary, associating SOBs with a higher incidence of crime, regardless of location; and a report from the cities of Beaumont and Amarillo, showing that SOBs promote certain criminal activity, have a deleterious effect on adjacent areas, and increase crime. Ordinance at 1–2.

The Ordinance also references a Dallas Police Department task force (the "Task Force") created in March 2021, at the Council's request, following shootings and other violent crimes that occurred at or near SOBs. Ordinance at 2. On January 5, 2022, the Police Department presented to the Council the Task Force's conclusions, and recommended that SOBs' hours of operation be reduced to decrease criminal activity, improve safety, and reduce demand on City services. *See* ECF No. 19-1, at COD-35 ("SOB Briefing").[4] On January 14, 2022, the Police Department submitted to the Council a "detailed analysis" of data relating to SOBs, including a list of licensed SOBs, graphs displaying data related to violent crime and associated arrests and emergency calls, and graphs displaying data related to all

---

[3] The Ordinance references "a 2021 research study by McCord and *Tewksbery*," but the study attached to the City's Motion to Dismiss is authored by Richard Tewksbury. *See* ECF No. 19-1, at 70.

[4] This presentation was admitted into evidence during the preliminary injunction hearing as Plaintiffs' Exhibit 2.

offenses, arrests, and calls for service. Resp. to Mot. for Preliminary Injunction, Ex. 2 (ECF No. 10 at 46) ("Task Force Report").[5]

On January 26, 2022, to advance its stated goal "to reduce crime and conserve police and fire-rescue resources by requiring [SOBs] to be closed for business between the hours of 2:00a.m. and 6:00 a.m.," the City Council unanimously approved of the Ordinance. Ordinance at 2; Item 36, Dall. City Council Meeting (January 26, 2022), https://dallastx.swagit.com/play/01262022-1031. That same day, Plaintiffs filed a Complaint against the City, and moved for a temporary restraining order and preliminary injunction, asserting that the Ordinance violates Plaintiffs' First Amendment right to freedom of expression. ECF Nos. 1 ("Compl."), 3 ("Mot.").Plaintiffs consist of four adult cabaret businesses and one adult bookstore that qualify as SOBs under the City Code, and a non-for-profit trade association whose members are SOBs and include adult bookstores, arcades, and cabarets located in the City of Dallas. The Complaint alleges that the Ordinance is an unconstitutional content-based restriction of protected expression, does not withstand strict or intermediary scrutiny, and that the data and information relied on by the City in passing the Ordinance is invalid, flawed, and shoddy. Compl. ¶ 48.

On January 28, 2022, the Court denied Plaintiffs' request for a temporary restraining order based on the City's representation that it would not

[5] This report was admitted into evidence during the preliminary injunction hearing as Plaintiffs' Exhibit 3.

enforce the Ordinance before the Motion for Preliminary Injunction was decided. ECF No. 11. On February 18, 2022, the City moved to dismiss under Rule 12(b)(6), attaching the Task Force Report, the Police Department's SOB Briefing to the Council, and the research studies referenced in the Ordinance. ECF Nos. 17, 19. On March 7, March 23, and April 6, 2022, the Court held evidentiary hearings in connection with Plaintiffs' Motion for Preliminary Injunction. On March 31, 2022, Plaintiffs moved for leave to file an amended complaint. ECF No. 34. On April 28, 2022, the Court received supplemental briefing on the recently decided case of *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022).

II. DISCUSSION

The Court will first address the City's Motion to Dismiss and Plaintiffs' Motion for Leave to File an Amended Complaint. ECF Nos. 17, 34. The Court will then address Plaintiffs' Motion for Preliminary Injunction.

A. Motion to Dismiss and Motion for Leave to Amend

The City moves to dismiss under Rule 12(b)(6), arguing that the Complaint does not contain facts plausibly alleging that the City's data was flawed, nor that the Ordinance was not narrowly tailored to achieve a compelling government interest, as required to allege a First Amendment violation. *See* ECF No. 17 at 6–10. In response, Plaintiffs seek leave to amend their pleadings to include additional factual allegations to support their claim that the challenged Ordinance is

unconstitutional, in part incorporating evidence gathered in discovery and proffered during the preliminary injunction hearing. ECF No. 34. The City opposes on the grounds that Plaintiffs' amendments do not satisfy Rule 8 and are futile, and that the City objects to some of the material attached to the proposed Amended Complaint, including the testimony and report of Plaintiffs' expert, Dr. Daniel Linz. ECF No. 37.

Under Federal Rule of Civil Procedure 15, the Court should "freely give leave" to amend"when justice so requires." Fed. R. Civ. P. 15(a)(2). Here, the Court determines that the proposed amendments are not futile, and that justice requires granting Plaintiffs leave to amend the Complaint. The Court has already ruled on most of the City's objections to materials attached to the Amended Complaint during the hearings, and to the extent other objections remain, they are hereby **OVERRULED**. Accordingly, Plaintiffs' Motion for Leave to Amend is **GRANTED**, and the City's Motion to Dismiss is **DENIED AS MOOT.**

B. Motion for Preliminary Injunction

Plaintiffs move for a preliminary injunction enjoining the enforcement of the Ordinance's restriction of hours of operation of SOBs. To be entitled to a preliminary injunction, the movant must demonstrate: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Ladd v. Livingston*, 777 F.3d 286, 288 (5th Cir. 2015).

As a preliminary matter, the Court need not analyze factors (2) and (4), threat of irreparable injury and whether an injunction would be in the public interest, respectively; because Plaintiffs allege a First Amendment violation, these factors are presumed and weigh in favor of an injunction. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013)("Injunctions protecting First Amendment freedoms are always in the public interest."). Accordingly, the Court addresses only whether Plaintiffs have shown a likelihood of success on the merits and the balance of hardships. Based on the evidentiary record before the Court and for the reasons stated below, the Court concludes that Plaintiffs have established a reasonable likelihood of success on the merits, and the balance of hardships weighs in favor of an injunction.

1. Likelihood of Success on the Merits

Plaintiffs contend that the Ordinance's restriction on the hours of operation of SOBs is a content-based law which regulates protected speech, and is unconstitutional under both strict and intermediate scrutiny. The City responds that because the Ordinance regulates SOBs, it is evaluated under the standards established in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S.41, 49 (1986), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality opinion); under *Renton*, the City maintains, the Ordinance is content neutral, because it is aimed at addressing the secondary effects of SOBs, and survives intermediate scrutiny as a reasonable time,

place, and manner restriction. ECF No. 10 at 8.

In analyzing a First Amendment claim, the Court first determines whether the targeted speech is protected, and, if so, what level of scrutiny applies; and second, determines whether the Ordinance survives the appropriate level of scrutiny. *Sorrell v. IMS Health Inc.*, 564 U.S. 552,557 (2011). Nude dancing is expressive conduct protected by the First Amendment. *See City ofErie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (O'Connor, J., plurality) ("[N]ude dancing . . . is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."). Similarly, regulations targeting businesses that purvey sexually explicit materials are subject to scrutiny under the First Amendment. *E.g.*, *Renton*, 475 U.S. at 49–50; *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976). Accordingly, the speech targeted by the Ordinance—nude dancing and materials sold at adult bookstores—is protected.

Here, the Court concludes that it need not determine as a final matter which level of scrutiny applies, because regardless of the standard under which the Ordinance is evaluated, it does not pass muster, and therefore must be enjoined. Accordingly, this factor weighs in favor of an injunction.

a. The governing law is unclear as to whether strict or intermediate scrutiny applies here.

Laws that regulate speech are presumptively unconstitutional because, under the First Amendment, a government has "no power to restrict expression

because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). Laws that target speech based on its"communicative content"—*i.e.*, content-based laws—are subject to strict scrutiny, and may only be justified by a showing that the law is narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). In contrast, time, place, and manner restrictions that are content neutral and "designed to serve a substantial governmental interest and not unreasonably limit alternative avenues of communication" are afforded intermediate scrutiny. *Renton*, 475 U.S. at 41.

Accordingly, whether a law is content based or content neutral determines the scrutiny under which it is evaluated. A law is content based if the regulation, on its face, "draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* at163–64. For example, the Supreme Court in *Reed* considered an ordinance limiting the size, duration, and location of temporary signs to be content based on its face, because the communicative content of the signs had to be read and interpreted—specifically, to determine whether the sign was directional, political, or ideological—to know whether certain restrictions applied. *Id.* at 164 ("The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign."). Here, because the Ordinance regulates SOBs, which are defined in the Dallas City Code by the content of the entertainment or services

purveyed, the Ordinance is content based. *See* Dall. City Code § 41A-2(31) (defining an SOB asa business providing services or items "intended to provide sexual stimulation or sexual gratification to the customer").

Here, the City acknowledges that the Ordinance restricting SOBs is content based, but argues that under *Renton*, regulations addressing SOBs fall into an exception to the normal content-based approach, and are not subject to strict scrutiny. ECF No. 10 at 5 (arguing that,"*despite* their content-based nature," regulations restricting SOBs "are *excepted* from the general neutrality rule" because they address secondary effects, as opposed to the dissemination of speech). In *Renton*, the Supreme Court applied what is often referred to as the "secondary effects doctrine" in the SOB context, which treats certain content-based regulations as content neutral regulations subject to decreased scrutiny, in instances where it appears that the"predominate concerns" of the body enacting the regulation were to address the "secondary effects" of the speech, as opposed to its content. 475 U.S. at 47; *see also Alameda Books*, 535U.S. at 445 (Kennedy, J., concurring) ("The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech."). Secondary effects can include an increased crime rate, diminution of property value, and the adverse impact on the quality of neighborhoods. *Alameda Books*, 535 U.S. at 434 (O'Connor, J., plurality). Here, because the Ordinance states it was approved by the City Council, at least in part to reduce crime, the City contends that the Ordinance is subject to intermediate scrutiny, by application of the secondary effects doctrine.

Plaintiffs contend that the secondary effects

doctrine no longer applies, citing the Supreme Court's decision in *Reed* and the Fifth Circuit's subsequent abrogation of at least some secondary effects doctrine cases. In *Reed*, the Supreme Court held a law that is content based on its face "is subject to strict scrutiny regardless of the government's benign motive, content neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 576 U.S. at 165. Accordingly, a court must consider whether the challenged law is content based or content neutral "*before* turning to the law's justification or purpose." *Id.* at 166. As discussed, *Reed* concerned sign laws, and the majority did not expressly address the secondary effects doctrine, SOBs, or the implication of *Reed* on *Renton* or *Alameda Books*.[6]

In *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696, 702–04 (5th Cir. 2020), *reversed and remanded*, *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022),[7] the Fifth Circuit applied *Reed* to a regulatory sign provision concerning the digitalization of signs. The Code at issue in *Reagan* regulated "on-premises"

---

[6] The only reference this Court found in *Reed* to the regulation of SOBs is in Justice Kagan's concurrence, in which she acknowledges that prior Supreme Court cases "have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws," citing *Renton* in her discussion. *See Reed*, 576 U.S. at 183 (Kagan, J.,concurring).

[7] This opinion uses "*Reagan*" to refer to the Fifth Circuit's decision in *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), and "*City of Austin*," to refer to the Supreme Court's decision overturning the Fifth Circuit in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022).

and "off-premises" signs. An off-premises sign is one "advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." 972 F.3d at 700. The Code permitted on-premises sign owners to install digital signs, but off-premises sign owners could not. *Id.* at 704. Following *Reed*, the Fifth Circuit concluded that because determining whether the sign was "off-premises"under the Code required reading the sign—to determine whether it advertised something located elsewhere or directed someone to a different location—the Code was content based, and subject to strict scrutiny. *Id.* at 707. The Fifth Circuit in *Reagan* applied *Reed*'s reasoning that "a distinction can be facially content based if it defines regulated speech by its function or purpose,"and concluded that because the regulation defined off-premises signs by their purpose of advertising a business elsewhere or directing attention to something at a different location, the regulation was content based. *Id.* at 706.

In reaching its holding, the Fifth Circuit in *Reagan* acknowledged that *Reed* constituted a"sea change" in First Amendment jurisprudence, and that *Reed* abrogated the Fifth Circuit's prior holding that "[c]ontent-neutrality . . . [is] defined by the justification of the law or regulation." *Id.* at 703 (quoting *Asgeirsson v. Abbott*, 696 F.3d 454, 459–60 (5th Cir. 2012), *abrogated by Reagan*, 972 F.3d at 703). In footnote 3 of *Reagan*, the Fifth Circuit specifically identified a number of cases it was abrogating based on *Reed*, including four cases that had upheld ordinances relating to SOBs under the secondary effects doctrine. *Id.* at 703 n.3 (citing *Illusions–Dall. Priv. Club, Inc. v. Steen*, 482 F.3d 299, 303 (5th Cir. 2007) (prohibiting

SOBs from serving alcohol); *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 550 (5th Cir.2006) (restricting proximity from the stage, requiring plexiglass barriers, and regulating tipping); *N.W. Enterprises Inc. v. City of Hous.*, 352 F.3d 162, 172 (5th Cir. 2003) (restricting SOB location, design, and employee licensing); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d288, 290 (5th Cir. 2003) (prohibiting SOBs within 1,000 feet of residential areas). By abrogating these SOB cases in footnote 3 of its opinion in *Reagan*, the Fifth Circuit implicitly applied *Reed*'s holding that a content-based law is subject to strict scrutiny regardless of the government's content-neutral justification, so as to abrogate the secondary effects doctrine in the SOB context. In doing so, however, the Fifth Circuit in *Reagan* did not name the secondary effects doctrine, nor expressly discuss the impact of *Reed* on *Renton* or the Supreme Court's more recent secondary effects case, *Alameda Books.*[8]

---

[8] Apart from the cases cited in footnote 3, the authorities relied on by the Fifth Circuit in *Reagan* either do not address the secondary effects doctrine or the regulation of SOBs, do not reach the issue, or conclude that *Reed* did not impact the secondary effects doctrine. *See e.g.*, *Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 161 (3dCir. 2016) ("We need not reach the issue of whether the secondary effects doctrine survives *Reed* because this is nota secondary effects case."); *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1996 &n.11 (2016) ("Early evidence also suggests that the secondary effects doctrine—another categorical carveout from unitary application of content analysis—also survived *Reed*. The secondary effects doctrine allows 'intermediate rather than strict scrutiny' for zoning ordinances that are facially content based (especially so after *Reed*) but are'designed to decrease secondary effects and not speech.' The doctrine is a contested exception to content analysis that has largely been limited to the context of

(continued...)

Plaintiffs contend that under the Fifth Circuit's decision in *Reagan*, the Council's stated aim of reducing crime as a secondary effect of SOBs cannot be considered when determining if strict scrutiny applies. In response, the City maintains that the Fifth Circuit's decision in *Reagan* did not disturb the applicability of the standards articulated in *Renton* and *Alameda Books* in the SOB context, and accordingly, argues that this Court must consider whether the City enacted the Ordinance to address secondary effects of SOBs in deciding the scrutiny level. The City points to the case of *Texas Entertainment Association, Inc. v. Hegar*, 10 F.4th 495 (5th Cir. 2021), as establishing the continued viability of the secondary effects doctrine in the SOB context, post-*Reagan*. In *Hegar*, the Fifth Circuit applied the secondary effects doctrine articulated by the Supreme Court in *Renton* and *Alameda Books* to assess whether a rule regulating nude dancing in SOBs was subject to intermediate or strict scrutiny; the Fifth Circuit noted that to determine whether the rule was content based or content neutral, it "must look to its purpose as substantiated by the record." *Id.* at 510. The panel went on to apply strict scrutiny because the record contained no evidence of secondary effects, and accordingly, did not apply the secondary effects doctrine, and the rule was deemed content based. *Id.* at 510–12. Despite being fully briefed, argued, and decided after the Fifth Circuit decided *Reagan*, neither the briefs nor the opinion in *Hegar* cites to *Reagan*.

This Court acknowledges the apparent tension

---

[8](...continued)
sexually explicit speech." (citations omitted))

between the Fifth Circuit's decisions in *Reagan* and *Hegar*. Despite *Reagan*'s seeming abrogation, in footnote 3, of its pre-*Reed* content-neutrality analysis of SOBs under the secondary effects doctrine, *Hegar* references and employs that same purportedly rejected framework, without providing guidance on how to read the two cases harmoniously. Put differently, it is unclear whether, as the City argues, SOBs were implicitly carved out of the Fifth Circuit's acknowledgment of the "sea change" wrought in First Amendment jurisprudence by *Reed*. Nor is it clear how this Court should apply *Reagan* and *Hegar* in light of the Fifth Circuit's rule of orderliness, which provides that when the Fifth Circuit issues a decision that resolves a legal question, absent an intervening change in law or enbanc or Supreme Court decision, a subsequent panel "may not overrule a prior panel opinion andthe earlier precedent controls." *United States v. Walker*, 302 F.3d 322, 325 (5th Cir. 2002); *see also Arnold v. U.S. Dep't of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("[U]nder the rule of orderliness, to the extent that a more recent case contradicts an older case, the newer language has no effect.").

Further complicating matters is the fact that, on April 21, 2022, the Supreme Court issued its opinion in *City of Austin v. Reagan National Advertising of Austin, LLC*, reversing the Fifth Circuit's decision in *Reagan* and thereby perhaps calling into question the Fifth Circuit's abrogation of the secondary effects doctrine in SOB cases therein.[9] 142 S. Ct. at 1470–71. Specifically, in *City of Austin*, the Supreme Court

[9] This Court ordered the parties to submit briefing on the impact on this case of the Supreme Court's decision in *City of Austin*, and they did so. ECF Nos. 38, 39, 40.

disagreed with the Fifth Circuit's conclusion that the regulation targeting off-premises signs was content based simply because the sign's contents must be read to determine whether it qualified as off-premises. *Id.* at 1471–72. Instead, the Supreme Court concluded the Code was a content-neutral, location-based regulation, because"[a] given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not," and "[t]he message on the sign matters only to the extent that it informs the sign's relative location." *Id.* at 1472–73. In so holding, the Supreme Court acknowledged "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral," and reversed the judgment of the Fifth Circuit and remanded for further proceedings.[10] *Id.* at 1473, 1476.

Thus, although it is clear that the Fifth Circuit erred in classifying the off-premises/on-premises regulation at issue as content based, the viability of the remainder of the Fifth Circuit's holdings in *Reagan* is unknown. The Supreme Court's decision in *City of Austin* does not address the Fifth Circuit's abrogation of its pre-*Reed* secondary effects cases, including those SOB cases discussed in footnote 3; given that the Fifth Circuit's reasoning there relied on *Reed*, and is arguably not implicated by the Supreme Court's *City of Austin* opinion, that portion of *Reagan* may have

---

[10] Specifically, the Supreme Court remanded for the lower courts to determine whether the regulation survived intermediate scrutiny, and to consider whether there was evidence that an impermissible purpose or justification under pinned the off-premises regulation, such that the facially content-neutral restriction could be considered content based. *City of Austin*, 142 S. Ct. at 1476.

survived. On the other hand, the Supreme Court in *City of Austin* arguably pushes back against the Fifth Circuit's "broad" characterization of *Reed*, characterizing it as, at least in parts, an "extreme" interpretation. 142 S. Ct. at 1471 ("The Court of Appeals interpreted *Reed* to mean that if '[a] reader must ask: who is the speaker and what is the speaker saying' to apply a regulation, then the regulation is automatically content based. This rule . . . is too extreme an interpretation of this Court's precedent." (citation omitted)). The majority also clarified the scope of *Reed*'s holding, reigning in the scope of its potential impact on earlier precedent. *E.g.*, *id.* at 1474 ("That does not mean that any classification that considers function or purpose is always content based. Such a reading . . . would contravene numerous precedents,. . . . *Reed* did not purport to cast doubt on these cases."); *id.* ("Nor did *Reed* cast doubt on the Nation's history of regulating off-premises signs."); *id.* at 1475 ("Nor do we cast doubt on any of our precedents recognizing examples of topic or subject-matter discrimination as content based."); *see also id.* at 1487 (Thomas, J., dissenting) ("The majority's holding that some rules based on content are not, as it turns out, content based nullifies *Reed*'s clear test."). Admittedly, this commentary arises in the context of whether the off-premises sign regulation was facially content neutral, and not in determining whether an undisputedly content-based restriction can otherwise be subject to intermediate scrutiny under the secondary effects doctrine. However, the salient point is that these cabining assessments of *Reed* by a majority of the Supreme Court at least cast doubt on the Fifth Circuit's expansive application of *Reed* so as to seemingly vitiate the secondary effects doctrine in SOB cases, as Plaintiffs purport is mandated by footnote 3

of *Reagan*.

In the absence of clear guidance that the Fifth Circuit's abrogation of secondary effects cases in footnote 3 remains good law, the silence of *Reed*, *Reagan*, and *City of Austin* regarding the secondary effects doctrine—not to mention SOB cases such as *Renton* and *Alameda Books*—renders Plaintiffs' position that the secondary effects doctrine has been abrogated harder to sustain. In the Supreme Court's most recent secondary effects case, *Alameda Books*, a plurality held that a local zoning ordinance that applied only to adult establishments was content neutral under the secondary effects doctrine because its purpose was to reduce crime, not to suppress speech. 535 U.S. at 436. No intervening Supreme Court case expressly overturned *Alameda Books*, and no Fifth Circuit case distinguished *Alameda Books*. Without clear instruction from the Supreme Court or the Fifth Circuit otherwise, this Court is reluctant to interpret *Reed*, a sign case, as implicitly making sweeping changes to the law governing SOBs, particularly as the Supreme Court has long characterized businesses that offer sexually explicit entertainment as falling within the "outer ambit" of the First Amendment's protection. *See City of Erie*, 529 U.S. at 289; *Young*, 427 U.S. at 70 ("[I]t is manifest that society's interest in protecting this type of [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."); *see also BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1(7th Cir. 2015) ("We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment

protection.").

In sum, the Court is confronted with two outstanding questions regarding the correct scrutiny to apply to the Ordinance at issue here: first, the continued viability of *Reagan*'s abrogation, in footnote 3, of pre-*Reed* Fifth Circuit SOB secondary effects cases in light of *City of Austin*; and second, to the extent footnote 3 of *Reagan* remains good law, how it can be reconciled with the seemingly contrary teachings of *Hegar*. Fortunately, the Court concludes that it need not resolve the question of the continued viability of the secondary effects doctrine in the Fifth Circuit because, as discussed below, the Ordinance does not survive regardless of the scrutiny applied. Accordingly, the Court does not expressly decide whether the Ordinance is subject to strict or intermediate scrutiny.

b. Regardless of the scrutiny applied, the Ordinance is unconstitutional.

In light of its stated purpose and the evidence presented by the parties, the Court concludes the Ordinance's restriction on Plaintiffs' protected expression does not survive strict or intermediate scrutiny, and is thus unconstitutional.

Accordingly, having heard the evidence presented, the Court first considers whether the Ordinance passes strict scrutiny. Laws analyzed under strict scrutiny must be narrowly tailored to serve a compelling state interest. *Reagan*, 972 F.3d at 709. Narrow tailoring requires that an ordinance must be the "least restrictive" means of achieving the

compelling state interest. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The tailoring requirement does not permit the government to take efficiency into consideration. *See id.* at 486.

The City states that it adopted the Ordinance to reduce crime and conserve police and fire rescue resources, by restricting SOBs from operating between the hours of 2 a.m. and 6 a.m. *See* Ordinance at 2. However, even assuming that the stated aim constitutes a compelling government interest, no evidence was presented that the City considered less restrictive means of achieving its stated interest of lowering crime, such as, for example, requiring heightened security, escorts of customers to their vehicles, or better lighting, before it decided to prohibit the operation of SOBs between the hours of 2 a.m. and 6 a.m. Dallas Police Department Major Samuel Sarmiento testified that members of the Police Department met with certain SOBs to make recommendations for how to make their businesses safer, such as adding more lights and cameras for surveillance, but there is no evidence suggesting that the City considered making those recommendations mandatory prior to imposing the Ordinance. *See* Tr. Vol. 1, at 245:20–247:14 (Mar. 7, 2022). Nor did the City consider whether any shorter or alternative time periods could achieve the City's interest, such as whether closing SOBs between 2 a.m. and 4 a.m., or only on weekends, could achieve the desired reduction in crime.[11]

---

[11] As will be discussed, the testimony presented in this case reveals that many of the SOBs affected by the Ordinance are not even open until 6 a.m. during the week, exposing the City's (continued...)

In addition, Major Sarmiento testified that SOBs cannot hire off-duty members of the Dallas Police Department to work security, although officers are permitted to work off-duty security details for other types of businesses. *Id.* at 241:18–25. To the extent the Ordinance was intended to preserve police resources, permitting police officers to work security at SOBs while off-duty would be a less restrictive approach to achieving the City's stated interest of conserving resources. Accordingly, because restricting protected speech is not the least restrictive means available to the City to combat crime and conserve resources, the Court concludes that the Ordinance does not pass strict scrutiny.

The Court also concludes that the Ordinance fails to pass intermediate scrutiny. To survive intermediate scrutiny, a content-neutral law regulating expression must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781,791 (1989). If secondary effects are considered, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 449 (Kennedy, J.,concurring). To satisfy intermediate scrutiny, the City must show that the Ordinance targets the "noxious side effects" of SOBs, rather than the expressive activity, and "may not assert that it will

---

[11](...continued)
failure to consider a less restrictive means. *E.g.*,Tr. Vol. 1, at 182:13–16.

reduce secondary effects by reducing speech in the same proportion." *Id.* at 446–47, 449.

The City may rely on "any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest,"but cannot "get away with shoddy data or reasoning." *Id.* at 438 (O'Connor, plurality) (quoting *Renton*, 475 U.S. at 51–52). The City's evidence must "fairly support" its rationale for the Ordinance. *Id.* Plaintiffs can cast doubt on this rationale, either by demonstrating that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings. *Id.* If Plaintiffs succeed in casting doubt on the City's rationale, the burden shifts back to the City to supplement the record "with evidence renewing support for a theory that justifies its [O]rdinance." *See id.*

As discussed, the Council approved the Ordinance which restricts protected speech at SOBs between the hours of 2:00 a.m. and 6:00 a.m. to advance its stated goal "to reduce crime and conserve police and fire-rescue resources." Ordinance at 2. Accordingly, the City must provide evidence demonstrating a connection between SOBs and its government interest of reducing crime and conserving police resources. In support of its Ordinance, the City submitted evidence including certain crime data; testimony from law enforcement officers, namely Lieutenant Stephen Bishopp, Deputy Chief Rick Watson, Major Devon Palk, and Major Samuel Sarmiento; and three research studies referenced in the Ordinance purportedly connecting SOBs with

increased crime.[12]

The Court begins with the crime data presented. In passing the Ordinance, the City Council relied on the January 5, 2022, SOB Briefing to the City Council, and the January 14, 2022, Task Force Report, both of which contain crime data relating to SOBs from 2019 to 2021.[13] During the preliminary injunction hearing, the City also submitted Exhibit 18 and elicited testimony regarding Exhibit 18-D, which contains raw crime data for 2018 through 2021 regarding calls for service to SOBs or locations within 500 feet of SOBs.[14] There is no indication that Exhibit 18 was available to or relied on by the City Council prior to passing the

---

[12] Richard McCleary, *Rural Hotspots: The Case of Adult Businesses*, 19 Crim. Just. Pol'y Rev. 153 (2008); Erin S. McCord & R. Tewksbury, *Does the Presence of Sexually Oriented Businesses Relate to Increased Levels of Crime? Examination Using Spatial Analyses*, 59 Crime & Delinquency 1108–25 (2012); Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine Social Theory, and Empirical Evidence*, 29 Cardozo Arts & Ent. L. J. 565 (2011).

[13] The record also contains Defendant's Exhibit 5, a December 6, 2021, presentation to the City Council by Chief of Police Eddie Garcia, entitled "Sexually Oriented Businesses, Regulations and Public Hearing," and Defendant's Exhibit 6, a December 13, 2021, presentation to the Public Safety Committee by Chief Garcia entitled "Sexually Oriented Businesses (SOBs), Age Change and Hours of Operation." Testimony was provided during the hearing that Defendant's Exhibits 5 and 6 contain similar crime data information as in the January 5, 2022, SOB Briefing to the City Council. *See* Tr. Vol. 1, at 227:14–228:12.

[14] No testimony or argument was given during the hearing regarding Exhibit 18-A, -B, -C-, or -E, each of which consist of lengthy spreadsheets containing data of unknown significance.

Ordinance.[15]

The materials that were before the City Council indicate that, as of January 14, 2022, there were 35 licensed SOBs in the City, consisting of 9 adult bookstores/arcades/theaters, 10 topless cabarets, 9 fully nude cabarets, and 7 "not operating" establishments.[16] Task Force Report, at COD-040. Lieutenant Stephen Bishopp, who collected and organized the Dallas police data that was presented to the City Council, testified that when assessing whether there was an increase in crime at SOBs, he collected data for three different metrics: arrests, crimes or offenses reported, and calls for service. Tr. Vol. 2, at 105:22–107:7. He focused on two different time frames, 10 p.m. to 2 a.m., and 2 a.m. to 6 a.m., and collected data from locations within a500-foot radius of each of the licensed SOBs. *Id.*

The SOB Briefing provided to the City Council summarized Lieutenant Bishopp's findings. Regarding arrests, Lieutenant Bishopp focused on aggravated assaults, robberies, prostitution, and gun- and drug-related arrests from 2019 to 2021. SOB Briefing, at COD-019. The data collected showed that during that

---

[15] The record also contains Plaintiffs' Exhibit 9, which appears to break out crime data occurring at SOBs by type of crime. However, no testimony or argument was given regarding Exhibit 9, nor did the City Council appear to rely on Exhibit 9 in passing the Ordinance.

[16] During his deposition, Lieutenant Bishopp testified that the businesses listed as "not operating" had a license to operate as an SOB, but were not operating as an SOB. Tr. Vol. 1, at 70:6–12. Lieutenant Bishopp testified that this could mean the business was closed or open, but was not operating as an SOB. *Id.*

three-year period, there were 2,082 total custodial arrests[17] at SOB locations,[18] including 831 arrests between 10 p.m. and 2 a.m., and 772 arrests between 2 a.m. and 6 a.m. *Id.* at COD-025. Gun- and drug-related arrests comprised 58% of all arrests at SOBs between 10 p.m. and 2 a.m., and 63% of all arrests at SOBs between 2 a.m. and 6a.m. *Id.* at COD-019. In 2021, more total arrests occurred at SOBs between 2 a.m. and 6 a.m. than 10 p.m. and 2 a.m.—94 versus 83, respectively—but Lieutenant Bishopp did not look at whether that difference was statistically significant. SOB Briefing, at COD-019; Tr. Vol. 2, at114:16–20 (Mar. 23, 2022).

Regarding reported crime, for 2019 through 2021, less reported crime—both violent and property—occurred at SOBs in the hours of operation from 2 a.m. to 6 a.m., compared to 10 p.m. to 2 a.m. SOB Briefing, at COD-022. However, the data differs when violent crime is segregated from property crime. Nearly 67.16% of reported violent crime[19] in the data

---

[17] A "custodial arrest" is any arrest for which someone is taken into custody, including, for example, violent crime, property crime, and arrests for driving while intoxicated. Tr. Vol. 2, at 130:1–11. It does not necessarily mean that the crime occurred at or near the arrest site.

[18] References to "at SOBs" or "at SOB locations" in this summary of the data includes data associated with locations within a 500-foot radius of each of the licensed SOBs.

[19] Under the Uniform Crime Reports categorization system, "violent crimes" include aggravated assault, rape, robbery, and murder. SOB Briefing, at COD-020; Tr. Vol. 1, at 34:5–10.

collected[20] for SOBs occurred during the 2 a.m. to 6 a.m. period; for 2021, the 2 a.m. to 6 a.m. period had 76 % of all reported violent crime at SOBs. *Id.* at COD-020. Across all three years, violent crime at SOBs decreased by 29% during the 10 p.m. to 2 a.m. period, but increased by80% during the 2 a.m. to 6 a.m. period. *Id.* In contrast, the data reflected that property crime[21] occurred more frequently from 10 p.m. to 2 a.m. (59%), compared to 2 a.m. to 6 a.m. (41%). *Id.* at COD-021.

Regarding calls for service,[22] the data collected

---

[20] The Court notes that because Lieutenant Bishopp only collected crime data covering the 10 p.m. to 6 a.m. time frame, the relative magnitude of the data is exaggerated when expressed as a percentage, as it is in the SOB Briefing to the City Council. For example, the SOB Briefing states that the 2 a.m. to 6 a.m. time period comprises nearly67.17% of "all" reported violent crime at SOBs, when in fact, the 2 a.m. to 6 a.m. period comprises 67.17% of violent crimes reported in the 10 p.m. to 6 a.m. window, not the entire 24-hour day. *See* SOB Briefing, at COD-020; *see also* Tr. Vol. 2, at 117:17–20 (testimony of Lieutenant Bishopp) ("[W]hen I say 'all,' it's all that's within the data set, the SOB crime data sets."). For violent crime offenses, the Task Force Report similarly indicates that from 2019 to 2021,there were a total of 200 violent crime offenses reported, with 65 occurring from 10 p.m. to 2 a.m., and 135 from 2a.m. to 6 a.m. Task Force Report, at COD-041. The 6 a.m. to 10 p.m. time period was not analyzed.

[21] "Property crime" is defined as including burglary, theft, and motor vehicle theft. SOB Briefing, at COD-021.

[22] Calls for service refer to an individual dialing 911 for emergency assistance. They are ranked by priority, with"Priority 1" calls, also referred to as "Code 3" calls, considered the most urgent, requiring an emergency immediate response. Tr. Vol. 2, at 133:1–21. Priority 1 calls would involve shootings, stabbings, aggravated robberies in progress, disturbances, armed encounters, and major accidents on the freeway. *Id.* Priority 2 calls are

(continued...)

showed that between 2019 and 2021,11,999 calls for service were generated at or within 500 feet of SOB locations, which included2,171 calls between 10 p.m. and 2 a.m. (of which 165 were Priority 1), and 2,396 calls between 2a.m. and 6 a.m. (of which 215 were Priority 1).[23] *Id.* at COD-028.

The SOB Briefing also contained charts comparing SOBs and five entertainment districts in Dallas,[24] which were created by researchers at the University of Texas at San Antonio using data supplied by the Dallas Police Department. *See id.* at COD-023,

---

[22](...continued)
disturbances that do not meet the criteria for Priority 1, and include domestic disturbances or suspicious persons, prowler calls, and burglar alarms. *Id.* Priority 3 calls, "General Service," refer to situations in which police service is needed but there is no urgent need or threat of injury. *Id.* For example, a Priority 3 call could consist of someone calling to report a burglary, criminal mischief, or damage to property. *Id.*

[23] The SOB Briefing also includes a slide discussing "Calls for Service – Fire," which Lieutenant Bishopp testified was based on data collected from the Fire Department. SOB Briefing, at COD-031; Tr. Vol. 2, at 139:23–140:8. That data indicates that between 2019 and 2021, 1,317 calls for service for fire services were generated at SOB locations, and of those, there were 270 calls for service between 10 p.m. and 2 a.m., and 405 calls for service between 2 a.m. and 6 a.m. SOB Briefing, at COD-031. However, Lieutenant Bishopp conceded he did not know whether the data reflecting information collected by the Fire Department was based solely on the location of SOBs, or included data reflecting locations within a 500 foot radius of SOBs. Tr. Vol. 2 at 139:23–140:8.

[24] The five entertainment districts considered as a single total were Lower Greenville, Uptown, Deep Ellum, Bishop Arts, and Trinity Groves. Tr. Vol. 3, at 40:23–41:10.

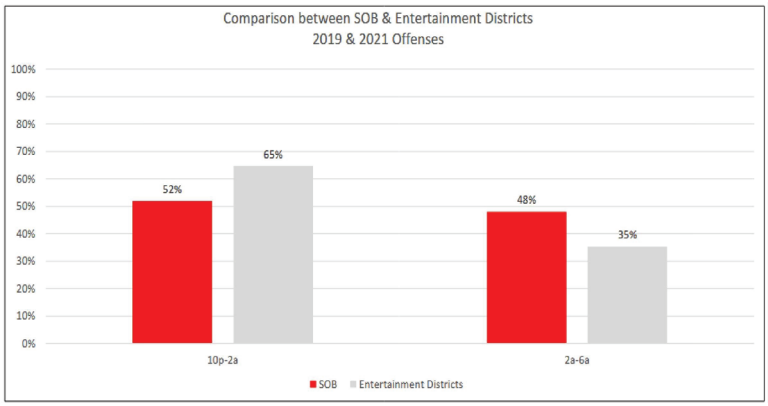
-024, -027, -030; Tr. Vol. 2,at 104:20–25, 120:9–22. These materials were prompted by a request from the City Council to review crime in Deep Ellum in Dallas to see if the crime occurring there in those time periods could be compared to crime occurring at SOBs. Tr. Vol. 2, at 120:13–22; Tr. Vol. 3, at 43:15–47:13 (Apr. 6, 2022). Instead of providing information on Deep Ellum, data was gathered on five entertainment districts in Dallas, and analyzed collectively in a way that would not allow Deep Ellum, which reportedly has a problem with crimes of violence in the early morning hours,[25] to be studied separately. Tr. Vol. 3, at 43:15–47:13. The charts comparing SOBs and entertainment districts differ from Lieutenant Bishopp's analysis, in that the researchers excluded all data from 2020 in their analysis, to avoid incorporating reduced crime rates attributable to the effect of COVID-related shutdowns and quarantining into the results. *See id.* at 123:6–125:5.

These charts compare SOBs and entertainment districts based on four different metrics: all offenses, violent offenses, total arrests, and total calls for service. SOB Briefing, at COD-023, -024, -027, -030. Taking the chart showing all offenses as an example,

---

[25] *See, e.g.*, Kelli Smith, *Man Arrested on Murder Charge in Deep Ellum Gunfire Exchange that Killed 2, Wounded4, in September*, Dallas Morning News (Nov. 19, 2021) (describing a shooting in Deep Ellum occurring at 12:40a.m.), *available at* https://www.dallasnews.com/news/crime/2021/11/19/man-arrested-on-murder-charge-in-deepellum-gunfire-that-killed-2-wounded-4-others-in-september/. In referencing Deep Ellum's reported association with crime, the Court is not making any factual findings regarding the relative rate of crime in Deep Ellum, but instead cites a possible motivation for the City Council's request for crime data for Deep Ellum.

the researchers aggregated all crimes occurring in 2019 and 2021 between 10 p.m. and 6 a.m. for SOBs and entertainment districts, respectively, and then used percentages to show how much of the crime for each group (SOB or entertainment district) occurred between 10 p.m. and 2 a.m., and between 2 a.m. and 6 a.m. *Id.* at COD-023. Thus, as shown in the chart below included for illustrative purposes, of offenses occurring at SOBs between 10 p.m. and 6 a.m. in 2019 and 2021, 52% occurred between 10 p.m. and 2 a.m., and 48% occurred between 2 a.m. and 6 a.m.; for entertainment districts, 65% of offenses occurring between 10 p.m. and 6 a.m. occurred in the earlier 10 p.m. to 2 a.m. window, while 35% occurred from 2 a.m. to 6 a.m.:



Id.

The chart comparing SOBs and the entertainment districts based on 2019 and 2021 violent crime show that, for SOBs, 67% of violent crime occurring between 10 p.m. and 6 a.m. occurred in the 2 a.m. to 6 a.m. window, whereas only 55% of violent crime occurred in that later window for the

entertainment districts. *Id.* at COD-024. For arrests made in 2019 and 2021between 10 p.m. and 6 a.m., the chart indicates that SOBs and entertainment districts had a similar proportion of arrests taking place during the relevant time period: 46% of arrests at SOBs and 47% of arrests at entertainment districts occurred between 2 a.m. and 6 a.m. *Id.* at COD-027. Finally, regarding calls for service, SOBs 52% of calls for service originating between 10 p.m. and 6 a.m. occurring within the 2 a.m. to 6 a.m. window, compared to only 39% for the entertainment districts. *Id.* at COD-030.

The Task Force Report, submitted to the City Council after the SOB Briefing, includes graphs showing the raw crime numbers supporting Lieutenant Bishopp's analysis, along with charts comparing the race of crime victims and arrested persons. The Task Force Report contains the raw data crime statistics for six different crime metrics—violent crime offenses, violent crime arrests, Priority 1 calls, all offenses, all arrests, and all calls—for the three-year period of 2019 through 2021, broken down by the type of SOB, *i.e.*, bookstores/arcades/theaters, topless cabarets, fully nude cabarets, and not operational SOBs, and the time of the incident, either 10 p.m. to 2 a.m., or 2 a.m. to 6 a.m. Task Force Report, at COD-040–046. For example, for violent crime arrests, the Task Force Report shows that, for the three-year period of 2019–2021, at bookstores, there were 5 arrests for violent crimes between 10 p.m. and 2 a.m., and 2arrests between 2 a.m. and 6 a.m.; for fully nude cabarets, 6 and 11 arrests, respectively; for topless cabarets, 6 and 2 arrests, respectively; and for non-operational SOBs, 1 arrest in each of the 10 p.m. to 2 a.m., and 2 a.m. to 6 a.m. time periods. *Id.* at COD-042.

The Task Force Report also contains information for violent offenses, Priority 1 calls, and total offenses, arrests, and calls.

Based on its review of the admitted exhibits, the testimony provided at the hearing, and the arguments made by both sides, the Court concludes that the City's evidence does not fairly support its stated rationale for the Ordinance. Because the City could not reasonably believe that the evidence shows the requisite connection between the protected speech and harmful secondary effects, the Ordinance is not narrowly tailored. *See H & A Land Corp.*, 480 F.3d at 339.

The Court will first address crime data, starting with the quality of the data. The Court notes that to carry its burden under the secondary effects doctrine, the City was not required to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relied upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51–52; *see also Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex.*, 295 F.3d 471, 481 (5th Cir. 2002) ("We must determine whether, under this reasonable belief standard, the City's evidence demonstrates a link between its interest in combating secondary effects and the Ordinance."). Nor is there a requirement that the City conduct a rigorous statistical inquiry or use control groups, so as to quantitatively justify the Ordinance with any particular degree of reliability. However, while the Court does not fault the City for not conducting a statistical study, the data it relies on is flawed such that it is not probative as to the secondary effects the City sought to address, so that the City could not have reasonably relied on it to

justify the Ordinance.

The Court finds at least four issues relating to the crime data relied on by the City to justify the Ordinance. First, the inclusion of data relating to closed or non-operational SOBs renders the City's reliance on it unreasonable. Lieutenant Bishopp testified that the City's data includes crime statistics for locations which hold a license to operate as an SOB, but are not currently operating—or never operated—as an SOB. Tr. Vol. 1, at 33:20–34:5. Some of these locations are empty buildings or vacant parking lots, while others are operating in a non-SOB capacity, such as a poker house. Tr. Vol. 2, at 22:2–24:16. Thus, the City's data purports to identify adverse secondary effects associated with SOBs, but includes multiple locations where it concedes there are no SOBs operating. As Plaintiffs' expert, Dr. Daniel Linz, testified, including non-operating businesses introduces "tremendous error" into the City's crime statistics. Tr. Vol.1, at 106:6. The Court agrees; by commingling non-operational SOBs with operational cabarets and bookstores, it is impossible to tell whether any increased crime rate observed is a result of SOBs, or some other factor, such as, for example, the general potential for parking lots to attract criminal activity. *E.g.*, Tr. Vol. 2, at 40:22–41:3 (testimony of Major Palk acknowledging no"material difference between crime in the parking lots of establishments in entertainment districts as compared to parking lots of [SOBs]"). Indeed, the City's data indicates that, from 2019 through 2021, non-operational SOBs accounted for more violent crime offenses occurring from 2 a.m. to 6 a.m. than SOBs operating as bookstores. Task Force Report, at COD-041.

The inclusion of crime unrelated to SOBs is likewise problematic in the second observed issue with the City's crime data, namely that by including data from crimes occurring at locations within a 500-foot radius of SOBs, the data does not necessarily reflect crime resulting from activity at the SOBs. Lieutenant Bishopp testified that, depending on the particular SOB, his data could include unrelated crime that happened to occur within 500 feet of the SOB's location. Tr. Vol. 2, at 107:22–108:6; *see also* Tr. Vol. 1, at 56:8–17 (acknowledging that arrests would include arrests based on traffic stops, outstanding warrants, and misdemeanor offenses that happened to take place within 500 feet of an SOB). For example, depending on the SOB's location vis-à-vis the parking lot, road, and neighboring businesses, the data could reflect crimes resulting from traffic stops, robberies or crimes at other businesses or locations, or unrelated calls for service. Testimony was presented that, at least for SOBs on Northwest Highway, there are businesses within 500 feet of the SOB locations that are open during the relevant time periods and may have crime associated with them. Tr. Vol. 1, at 176:22–177:9 (discussing a storage facility next to an SOB that has "homeless people breaking in"), 189:15–22 (owner of Plaintiff The Men's Club testifying that there are two 24/7 hotels, a gas station, and two late-night eateries nearby The Men's Club), 205:3–13. One SOB is apparently surrounded by four motels that fall within 500 feet of the SOB's location. *Id.* at 205:3–13. No attempt was made to segregate crime that may have actually resulted from another business or arrest that happened to occur within 500feet of an SOB. *Id.* at 35:11–36:8; Tr. Vol. 3, 25:10–22. Accordingly, by attributing everything occurring within a 500-foot radius of an SOB to the the SOB, the City's data

inaccurately inflates the actual effect of protected sexual expression on rates of crime, arrests, and calls for service.

Third, because not all of the SOBs included in the City's data are open twenty-four hours a day, seven days a week, the time periods studied—10 p.m. to 2 a.m., and 2 a.m. to 6 a.m.—do not necessarily reflect crime that is attributable to the SOBs. Specifically, although SOBs operating as bookstores are typically open 24 hours per day, *see* Tr. Vol. 1, at 201:16–17,testimony at the hearing indicated that, for Sunday through Thursday, several of the topless and fully nude cabaret SOBs included in the City's data close at 2 a.m. or 4 a.m., and are open later only on weekends.[26] *E.g.*, Tr. Vol. 1, at 156:12–16 (Bucks Wilds closes at 4 a.m. except on Saturdays (5 a.m.) and Sundays (6 a.m.)); *id.* at 162:11–18, 182:13–16 (Bucks Cabaret and The Men's Club close at 2 a.m., except on Fridays and Saturdays (4 a.m.)); Tr. Vol. 2, 46:7–12(testimony of Major Palk, agreeing that he knew of several TABC-licensed SOBs that close around 2 a.m.). However, because the City's data does not account for whether the SOB in question was open when the crime, arrest, or call for service occurred, crime unrelated to the expression of protected speech is improperly attributed to SOBs. *See* Tr. Vol. 3, at

---

[26] Testimony was presented establishing that several of the SOB Plaintiffs are licensed by the Texas Alcoholic Beverage Commission ("TABC") to serve alcohol, whereas others operate as "BYOB" establishments, in which patrons bring their own alcohol to consume on the SOB's premises. Fully nude cabarets cannot receive a TABC license to serve alcohol. Tr. Vol. 2, at 41:19–42:2. The testimony presented was that all SOBs, regardless of whether they serve alcohol or are BYOB, prohibit the serving or consumption of alcohol after 2 a.m. *Id.* at 42:24–43:13.

14:13–20(testimony of Lieutenant Bishopp, agreeing that the statistics he provided do not reflect whether the SOBs in question were open at the time the criminal activity occurred). For example, if an arrest for a violent crime occurred at 5 a.m. at a location 495 feet away from a closed SOB, that arrest would be attributed to the SOB in the City's crime data. Accordingly, the City's crime data overstates the amount of criminal activity and need for police resources attributable to SOBs during the 2 a.m. to 6 a.m. window and, by extension, protected speech.

Fourth, the Court notes that the crime data attributed to SOBs in the City's analysis was inflated due to the presence of resources generated by the creation of the Task Force created by the Dallas Police Department in March 2021. *See* SOB Briefing, at COD-015. The Task Force consisted of eight officers and one sergeant posted at or near SOBs, starting at midnight on Thursday, Friday, and Saturday evenings. According to the testimony of Major Sarmiento, Task Force officers were instructed to have a high visibility police presence and saturate the area, and use "probable cause to do traffic stops and what not." Tr. Vol. 1, at 223:20–224:2. Accordingly, the presence of the Task Force enlarged the amount of reported crime and arrests beyond that which would have otherwise been attributable to SOBs. *Id.* at 224:4–6 ("[T]he people that are there committing some violations or what not are going to be caught because I have police presence there."); Tr. Vol. 2, 129:22–24 (Lieutenant Bishopp testifying that arrest data includes"proactive enforcement; officers seeing things occur because they're out there"). Indeed, Deputy Chief Watson agreed during his deposition that, for any given area at any of time day, if eight additional officers were on

patrol, additional police stops would necessarily take place by virtue of the additional enforcement that comes with increased police presence. Tr. Vol. 1, 85:13–18.Deputy Chief Watson also testified that the "vast majority" of citations and arrests associated with the Task Force's work were the result of traffic stops, such as going through a red light, turning right without stopping, expired license plates, checking for outstanding warrants, etc. *Id.* at 83:17–85:23, 88:13–23. He also agreed that many of the individuals associated with the traffic stops had nothing to do with the SOBs. *Id.* Accordingly, the implementation of the Task Force resources not only increased the amount of reported crime and arrests associated with the SOBs during the relevant time periods, but also increased reports of crime, such as traffic stops, that were wholly unrelated to SOBs or any protected expression.

In sum, the Court concludes that the data relied on by the City Council does not fairly support the City's stated rationale for the Ordinance of reducing crime, because the data artificially enhances crime data associated with SOBs, and in doing so, unfairly attributes adverse secondary effects to SOBs. The City's data does not reasonably link the regulated activity—protected expression at SOBs—to the adverse secondary effects, namely increased reports of crime, arrests, and calls for service. *See Alameda Books*, 535 U.S. at 437 (O'Connor, J., plurality) ("[T]he city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects . . . ."); *G.M. Enters. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) ("The plurality [in *Alameda Books*] did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so

long as the research it relied upon *reasonably linked* the regulated activity to adverse secondary effects." (emphasis added)). At minimum, Plaintiffs have successfully cast doubt on the City's evidence, and by extension, the City's rationale for the Ordinance. *See Alameda Books*, 535 U.S. at 438.

Notwithstanding the problems with the City's data described herein, the Court further finds that the City's evidence does not reasonably show that the Ordinance has the purpose and effect of suppressing the claimed secondary effects of increased crime and use of limited police and fire resources. *See id.* at 449 (Kennedy, J., concurring). In other words, even if the Court assumes that the City's data accurately reflects the criminal offenses, arrests, and calls for service resulting from SOBs—which, as discussed, it does not—the Court finds that the City's evidence, taken collectively, does not demonstrate a link between its interest in combating secondary effects and the Ordinance. *See Baby Dolls*, 295 F.3d at 481.

As an initial matter, the evidence does not clearly establish that that there are more adverse secondary effects at SOBs from 2 a.m. to 6 a.m., the time period covered by the Ordinance, so as to justify a complete restriction on protected speech. In the three-year period of 2019 to 2021, when considering both violent and property crime occurring at SOBs, there was less crime reported during the relevant time period of 2 a.m. to 6 a.m., compared to 10 p.m. to 2 a.m. SOB Briefing, at COD-022. And while the data does show more reports of violent crime from 2 a.m. to 6 a.m., compared to 10 p.m. to 2 a.m., in the same 2019 to 2021 period, there were only 21 total arrests for violent crimes at SOBs from 2 a.m. to 6 a.m., compared

to 18 arrests during the 10 p.m. to 2 a.m. window. Task Force Report, at COD-042. An additional three arrests for violent crime over three years—*i.e.*, one additional arrest per year, distributed across approximately 28 active SOBs—does not demonstrate a reasonable link between violent crime and SOBs so as to justify a complete restriction of protected speech at all SOBs from 2 a.m. to 6 a.m. *See Alameda Books*, 535 U.S. at 449–50 ("The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech."). Moreover, Lieutenant Bishopp testified that he had not considered whether the difference in 2021 in total arrests between 2 a.m. and 6 a.m. compared to 10 p.m. and 2 a.m. was statistically significant, further undermining the data's probative value.

The data is weakest when considering the SOBs operating as bookstores. The Ordinance is a blanket restriction on all SOBs, so arcades and bookstores are treated the same as topless and fully nude cabarets. However, the data shows that from 2019 to 2021, bookstores experienced less arrests and less violent crime arrests from 2 a.m. to 6 a.m., compared to 10 p.m. to 2 a.m. Task Force Report, at COD-042, -045. Bookstores likewise had almost the same number of total reported offenses across the two time periods (51 vs. 52, for 10 p.m. to 2 a.m., and 2 a.m. to 6a.m., respectively), and comparable number of total calls for service (513 vs. 530). *Id.* at COD-044, -046. Major Palk described a shooting that occurred in the parking lot of a bookstore, but testified that it occurred at 10 a.m., and thus is irrelevant to justifying a prohibition on bookstores operating in the middle of the night. Tr. Vol. 2, at 64:9–25, 65:20–22.

No reasonable effort was made to explain how the City's justification of reducing crime and conserving resources applies to the bookstores, for which there is no support in the data.[27] Accordingly, because the Ordinance encompasses bookstores, despite not being shown to be associated with any adverse secondary effects, the Ordinance is not narrowly tailored to the City's stated governmental interest. *Renton*, 475 U.S. at 52 ("[T]he *Renton* ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . . ."); *see also Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460,463 (7th Cir. 2009) ("If there is more misconduct at a bar than at an adult emporium, how would that justify greater legal restrictions on the bookstore—much of whose stock in trade is constitutionally protected in a way that beer

---

[27] During closing arguments, the City attempted to justify the Ordinance's application to bookstores on the grounds that the calls for service emanating from bookstores places a significant burden on the police and fire departments during a time period when there are fewer police officers working. Tr. Vol. 3, at 142:21–143:17. However, the Court notes that the City's data reveals that there were only an additional 17 calls for service at bookstores during the 2 a.m. to 6 a.m. time period, compared to the 10 p.m. to 2 a.m. time period. Task Force Report, at COD-046 (depicting 513calls for service from 10 p.m. to 2 a.m., and 530 calls for service from 2 a.m. to 6 a.m.). When considered across all 9 bookstores considered in the City's data, and the fact that the data was collected over the three-year period of 2019 to 2021, this results in, at most, one additional call per bookstore per year, which the Court concludes is not a sufficient adverse secondary effect to justify the complete restriction on speech mandated by the Ordinance. In addition, as will be discussed, the Court concludes that the City cannot reasonably justify the Ordinance based on calls for service without comparing SOBs to non-SOB locations.

and liquor are not.").

The Ordinance is not narrowly tailored, and thus fails intermediate scrutiny, for an additional significant reason. The City provides data comparing reported crimes, arrests, and calls for service occurring at SOBs during different time periods, but provides no evidence from which the Court can conclude that the secondary effects are linked to the SOBs, as opposed to some other, unrelated factor. Because protected speech occurs at SOBs regardless of the time of day, the City's evidence is, at best, probative only as to which particular four-hour window has more or less crime, arrests, or calls at locations within 500 feet of SOBs, but is silent as to whether protected speech at SOBs—the unchanging constant in the City's data—caused the observed variations. The failure to include information about non-SOBs renders the City's reliance on this evidence unreasonable. *See H & A Land Corp.*, 480 F.3d at 339 ("[The municipality] Kennedale cannot reasonably believe its evidence is relevant unless it sufficiently segregates data attributable to off-site establishments from the data attributable to on-site establishments."); *Baby Dolls*, 295 F.3d at 481 (upholding ordinance based on criminal data studies showing that sex crime arrests were three to five times more frequent in the study area compared to a control area).

Lieutenant Bishopp testified that he did not consider crime statistics associated with non-SOB businesses open during the deep hours of the night, such as non-SOB dance halls or night clubs, 24/7 convenience stores and drugstores, all-night eateries, gas stations, or motels and hotels. Tr. Vol. 2, at 165:16–166:7. However, the crime and police resource

concerns associated with SOBs must also be associated with other late-night establishments, including night clubs. For example, Major Sarmiento testified that the parking lots of SOBs create a public safety and policing concern, due to a large number of intoxicated individuals congregating with easy access to firearms that are kept in vehicles, and that almost all of the shootings which prompted the formation of the Task Force occurred in parking lots of nightclubs or SOBs.[28] Tr. Vol. 2, at 32:21–33:22, 39:20–40:7. However, he also testified that there is no difference, with regard to the capacity for violent crime, between parking lots of SOBs and other types of late-night establishments in entertainment districts. *Id.* at 40:14–41:3. Similarly, Major Sarmiento testified that a major concern with crime at SOBs is the inability to access crime scenes due to traffic, which results in large crime scenes and the need for additional officers for crowd control, but also acknowledged that police officers experience similar difficulty with ingress and egress whenever confronted with traffic and full parking lots. Tr. Vol. 1, at 225:25–226:15; Tr. Vol. 2, at 78:14–79:4. Major Sarmiento also testified that while strip clubs are attractive to individuals involved in narcotics trafficking and organized crimes as locations at which to conduct business, in his experience as a narcotics detective, he had also observed many drug transactions or gang activity occurring at late-night eateries. *Id.* at 36:18–37:15.

---

[28] Major Sarmiento testified about several murders that prompted the creation of the Task Force focused on SOBs, but acknowledged that at least two of them occurred at nightclubs that are not SOBs. Tr. Vol. 1, at 220:13–223:3(describing murders at the Kalua Club and Pryme Bar, neither of which are SOBs).

Accordingly, the evidence indicates that some of the secondary effects the City sought to address with the Ordinance—namely, drug- and gang-related crimes, and crimes occurring in parking lots requiring substantial police resources—are not limited to SOBs. Without additional data, it is impossible to tell whether these secondary effects are the result of the SOBs, or some other, unrelated variable, such that the City is merely using the Ordinance to "reduce secondary effects by reducing speech in the same proportion," *i.e.*, by closing SOBs. *Alameda Books*, 535U.S. at 1742 (Kennedy, J., concurring).

The City's charts purportedly comparing SOBs to the entertainment districts do not warrant a different outcome. As discussed, that data compared various metrics based on time period by percentage, but did not provide the raw numbers underlying the statistics. For example, the charts showed that of calls for service occurring between 10 p.m. and 6 a.m., for SOBs, 48% occurred in the 10 p.m. to 2 a.m. window and 52% in the 2 a.m. to 6 a.m. window; for entertainment districts, 61% occurred in 10 p.m. to 2 a.m. window, and 39% in the 2 a.m. to 6a.m. window. SOB Briefing, at COD-030. However, without the raw figures underlying these percentages—*i.e.*, the actual number of calls for service that occurred at each location during each of the respective time periods—the data cannot be meaningfully compared. Indeed, it is impossible to know whether the SOBs received an astronomically high number of calls as compared to the entertainment districts, or vice versa, because all that is being compared is the relative proportion of calls at SOBs, and entertainment districts, based on when they occurred. For example, SOBs could have generated only 100 calls for service

during 2019 and 2021, and the entertainment districts 10,000 calls during the same time period, but that relative difference in the total number of calls is not reflected in the data.[29]

The absence of meaningful non-SOB comparison data becomes more stark when considering the City's other stated justification for the Ordinance, to conserve police resources by reducing calls for service. Major Sarmiento testified that the Ordinance is necessary to help with staffing, in that he would prefer to use officers to respond to 911 calls as opposed to staffing large crime scenes such as murders. Tr. Vol. 1, at 235:6–236:20. Lieutenant Bishopp testified that there are fewer officers working the overnight shift than during the day, resulting in greater strain on individual officers and resources to address incoming calls. Tr. Vol. 2, at 127:16–23. However, even assuming that a high number of police calls constitutes an adverse secondary effect capable of justifying a restriction on protected speech,[30] the lack of evidence

---

[29] The Court further notes that the City Council requested information from the Police Department specifically comparing Deep Ellum, an entertainment district, with SOBs. Tr. Vol. 3, at 43:15–47:13. Instead, the Police Department provided to the Council collective data on five different entertainment districts, and did not analyze any entertainment district singularly. *Id.* Lieutenant Bishopp agreed that Deep Ellum could have been compared with SOBs to determine which of the two had more crime, but that analysis was not performed. *Id.* at 46:15–22. He further testified that he would not have chosen the entertainment districts relied on as a comparison group, because"methodologically, it didn't make a lot of sense." *Id.* at 47:20–22.

[30] During closing arguments, the City's counsel conceded

(continued...)

regarding non-SOBs dooms this stated rationale because it is impossible to tell whether reducing calls for service at SOBs would actually conserve resources in a way so as to meaningfully target the alleged side effect of the speech, as opposed to the speech itself. *See Alameda Books*, 535 U.S. at 446–47 (Kennedy, J., concurring). For example, consider again the City's evidence comparing calls for service at SOBs and the entertainment districts. Each call for service reflects a drain on police resources. However, because the actual numbers of calls for service related to SOBs as compared to the entertainment districts are not provided, the relative significance of decreasing calls for service at SOBs—in the context of the entertainment districts and the city writ large—is unknown. Hypothetically, for purposes of example, imagine that closing SOBs under the Ordinance from 2 a.m. to 6 a.m. results in 100 less calls for service annually. Taken in isolation, without context, it is impossible to know whether that reduction in calls for service actually conserves resources, or whether the Ordinance instead targets speech without achieving its

---

[30](...continued)
that calls for service, unrelated to an increase in crime, could not justify closure of a business protected by the First Amendment. Tr. Vol. 3, at 145:11–16. The Court agrees; because no evidence was presented that the expression of protected speech can cause, in and of itself, an increase in the number of calls for police or fire service, any issues with the City's resource allocation is not a result of the protected speech occurring at SOBs. To the extent the City argues that SOBs increase crime rate, which then in turn overburdens the City's resources because there are insufficient officers on duty to handle the calls for service, this appears to be a resulting consequence of the secondary effect of increased crime, which would be, at best, a tertiary—not secondary—effect of the speech.

stated purpose of conserving resources. If the City had provided data showing that the City typically receives 1,000 calls for service annually during that time period, evidence showing that reducing calls by 10%, *i.e.*, by 100 calls, could plausibly justify and support a restriction of speech; if it receives 10,000 calls for service, that 1% reduction might not. No such evidence is in the record, nor was it apparently provided to the City Council.

Because the City provided no non-SOB comparison data indicating that the problems of which the City complains are particularly associated with SOBs, the Ordinance amounts to a targeted and unjustified restriction on protected speech. The Court is further concerned by what appears to be the Ordinance's bare restriction on speech in light of the City's failure to consider whether forcing SOBs to close at 2 a.m. could potentially result in more alcohol-related crime—and, by extension, more calls for service and need for police resources—resulting from customers being forced to leave immediately upon cessation of alcohol service at the SOBs without time to sober up, despite those concerns being readily apparent. Specifically, Major Sarmiento agreed that patrons tend to escalate drinking as 2 a.m. approaches, and expressed concerned that, if SOBs are forced to close at 2 a.m., more inebriated people will be getting on the road. Tr. Vol. 2 at 85:6–86:18. He also acknowledged that, to the extent crime occurs in the parking lots of SOBs, it is generally people who have just left the business, and thus those parking-lot escalations could occur at any time of night. *Id.* However, despite recognizing that there are criminogenic concerns associated with closing SOBs at 2 a.m., as mandated by the Ordinance, these concerns

were not considered by the City when adopting the Ordinance and, in particular, at the time periods under which SOBs cannot operate. *Id.*

In sum, the Court finds that the City's stated rationale for the Ordinance is not fairly supported by the evidence, and accordingly, the Ordinance is not narrowly tailored to serve a substantial governmental interest. In addition, the Court finds that the Ordinance's prohibition on SOBs operating between the hours of 2 a.m. and 6 a.m. does not leave the quantity and accessibility of speech intact. *See Alameda Books*, 535 U.S. at 451. Clearly, the Ordinance is overbroad as to bookstores; it limits speech during hours where the evidence shows no secondary effects are occurring, and thus disproportionately restricts speech. *See Rock Against Racism*, 491 U.S. at 799 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."). Evidence was also presented indicating that, for certain dancers and patrons, restricting speech from 2 a.m. to 6 a.m. substantially decreases the accessibility of the protected speech in question. Specifically, Plaintiffs presented testimony that a substantial number of patrons visit SOBs after 2 a.m.; that clubs, including Plaintiffs, earn a significant portion of their revenue after that time; and that many of the dancers employed by Plaintiffs work other jobs or have child care obligations, which means they can only perform overnight, including after 2 a.m. *E.g.*, Tr. Vol. 1, at 188:13–21; Tr. Vol. 2, at 77:7–24. Accordingly, restricting SOBs from operating from 2 a.m. to 6 a.m. does not leave a substantial quantity of speech intact or accessible, in that closing the SOBs during this

period would deprive numerous people access to protected speech.

Finally, the Court finds that the research studies cited by the City do not reasonably justify the Ordinance. McCleary's article, *Rural Hotspots: The Case of Adult Businesses*, 19 Crim. Just. Pol'y Rev. 153 (2008), examines rural areas, not urban cities like Dallas, and shows that crime rates tend to increase around SOBs, but does not show increasing crime rates associated with the late-night hours. Similarly, the other two articles provided suggest that SOBs are associated with an increase in overall crime, without addressing any particular time of day. *See* Erin S. McCord & R. Tewksbury, *Does the Presence of Sexually Oriented Businesses Relate to Increased Levels of Crime? Examination Using Spatial Analyses*, 59 Crime & Delinquency1108–25 (2012); Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine Social Theory, and Empirical Evidence*, 29 Cardozo Arts & Ent. L.J. 565 (2011). The City could not reasonably rely on these studies to justify the Ordinance with respect to curtailing particular hours of operation.

In sum, the Court concludes that Plaintiffs have successfully cast doubt on the evidence relied on by the City in justifying the Ordinance. Absent any evidence to reasonably link the complained-of secondary effects and the protected speech, the Ordinance amounts to an unjustified restriction on protected expression, and does not survive intermediate scrutiny.

Because the Court concludes that the Ordinance does not pass strict or intermediate scrutiny, Plaintiffs

have shown a likelihood of success on the merits, weighing in favor of an injunction.

2. Balance of Hardships

The Court next considers the remaining factor of the preliminary injunction inquiry: the balance of hardships, *i.e.*, whether the harm of not granting an injunction outweighs the harm of granting it. The Court concludes that this factor weighs in favor of an injunction.

Should the preliminary injunction be denied, the injury to Plaintiffs for a violation of their First Amendment rights is presumptively great. As stated, the violation of Plaintiffs' First Amendment rights constitutes an irreparable injury. *See, e.g.*, *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F.Supp.3d 511, 529 (S.D. Tex. 2020) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."). The Court finds that the burden on Plaintiffs' First Amendment right to free speech and expression outweighs the City's burden in dealing with increased crime and a drain on resources, if any, associated with SOBs. Moreover, if the injunction is entered, the City willbe deprived solely of the opportunity to enforce a law that violates the First Amendment, whichthe Fifth Circuit has acknowledged is "no harm at all." *See McDonald v. Longley*, 4 F.4th 229,255 (5th Cir. 2021).

III. CONCLUSION

The Court concludes that Plaintiffs have established they are entitled to a preliminary

injunction. For the above reasons, Plaintiffs' Motion for Preliminary Injunction is GRANTED. Plaintiffs' Motion for Leave to Amend is GRANTED. The Motion to Dismiss is DENIED AS MOOT.

SO ORDERED.

May 24, 2022.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

(Filed 05/24/22)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ASSOCIATION OF CLUB EXECUTIVES, OF DALLAS INC., et al.	§	Civil Action No. 3:22-cv-00177-M
Plaintiffs,	§	
v.	§	
CITY OF DALLAS, TEXAS,	§	
Defendant.	§	

PRELIMINARY INJUNCTION

Before the Court is the Motion for Preliminary Injunction (ECF No. 3), filed by Plaintiffs the Association of Club Executives of Dallas, Inc.; AVM-AUS, Ltd. d/b/a New Fine Arts Shiloh; Nick's Mainstage, Inc.–Dallas PT's, d/b/a PT's Men's Club; Fine Dining Club, Inc., d/b/a Silver City; 11000 Reeder, LLC, d/b/a Bucks Wild; and TMCD Corporation, d/b/a The Dallas Men's Club (collectively, "Plaintiffs"). For the reasons stated in the Court's May 24, 2022, Memorandum Opinion and Order, the Motion is GRANTED.

It is **ORDERED** that the City of Dallas, Texas,

its officers, agents, servants, attorneys, and those acting in concert and participation with them, are hereby immediately enjoined and prohibited from enforcing § 41A-14.3 of the Dallas City Code of Ordinances, which restricts sexually oriented businesses, as defined in § 41A-2(31), from operating between the hours of 2 a.m. and 6 a.m.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 65(c), Plaintiffs shall post a bond in the amount of $1.00. This preliminary injunction shall be effective immediately upon posting by Plaintiffs of a security bond in the amount of $1.00, and shall remain in full force and effect unless otherwise ordered.

SO ORDERED.

May 24, 2022.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

(Filed 01/28/22)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ASSOCIATION OF CLUB EXECUTIVES, OF DALLAS INC., et al.	§	Civil Action No. 3:22-cv-00177-M
Plaintiffs,	§	
v.	§	
CITY OF DALLAS, TEXAS,	§	
Defendant.	§	

Before the Court is the Plaintiffs' Motion for Temporary Restraining Order (ECF No. 3). The Motion is **DENIED**, based on the Court's understanding that the ordinance at issue will not be enforced before the hearing on the Plaintiffs' Motion for Preliminary Injunction, which will take place on or before February 10, 2022.

SO ORDERED.

January 28, 2022.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

(Filed: 11/07/2023)

United States Court of Appeals
for the Fifth Circuit

No. 22-10556

Association of Club Executives of Dallas, Incorporated, *a Texas non-profit Corporation*; Nick's Mainstage Inc Dallas PT's, *doing business as* PT's Men's Club; Fine Dining Club, Incorporated, *a Texas Corporation, doing business as Silver City*; TMCD Corporation, *a Texas Corporation*, *doing business as* The Men's Club of Dallas; 11000 Reeder, L.L.C., *a Texas Limited Liability Company*, *doing business as* Bucks Wild; AVM-AUS, Limited, *a Texas limited partnership*, *doing business as* New Fine Arts Shiloh,

Plaintiffs—Appellees,

versus

City of Dallas, Texas,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-177

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before Wiener, Southwick, and Duncan,
Circuit Judges.
PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing in banc (FED. R. APP. P. 35 AND 5TH CIR. R. 35), the petition for rehearing en back is DENIED.

U. S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const., Amend. XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any

State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ORDINANCE NO. 32125

An ordinance amending Chapter 41A, "Sexually Oriented Businesses," of the Dallas City Code by amending Sections 41A-9, 41A-16, 41A-17, and 41A-20. l and adding a new Section 41A-14.3; prohibiting a sexually oriented business from employing or contracting with a person who is under the age of 21; providing that sexually oriented businesses may not operate between 2:00 a.m. and 6:00 a.m. each day; providing that a sexually oriented business license shall be suspended for a period not to exceed 30 days for a violation of the hours of operation; providing a penalty not to exceed $4,000 and confinement in jail not to exceed one year; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the 87th Texas Legislature met in regular session between January 12, 2021 and May 31, 2021; and

WHEREAS, S.B. 315 was filed on January 11, 2021; and

WHEREAS, S.B. 315 prohibits a sexually oriented business from employing or contracting with a person who is under the age of 21; and

WHEREAS, S.B. 315 was approved by both chambers of the Texas Legislature; and

WHEREAS, S.B. 315 was signed by Governor Greg Abbott on May 24, 2021 and took effect immediately; and

WHEREAS, the Dallas Police Department created the northwest club taskforce in March 2021 due to multiple shootings and other violent crimes occurring at or near sexually oriented businesses; and

WHEREAS, crime data shows a significant increase in violent crime and drug and gun arrests at or near sexually oriented businesses between the hours of 2:00 a.m. and 6:00 a.m.; and

WHEREAS, Dallas Fire-Rescue Department data shows a significant increase in the number of calls for service at sexually oriented businesses between the hours of 2:00 a.m. and 6:00 a.m.; and

WHEREAS, a 2012 research study by McCord and Tewksbery analysing sexually oriented businesses in Louisville, Kentucky showed that there were higher rates of all types of criminal offenses in the immediate vicinity of sexually oriented businesses and that the effects of sexually oriented businesses significantly impact the local community; and

WHEREAS, a 2008 study by McCleary showed that when a sexually oriented business opens on an interstate highway offramp in a rural community, total crime rises by 60 percent; and

WHEREAS , a 2012 study by Weinstein and McCleary showed that sexually oriented businesses are associated with a higher incidence of crime regardless of the business's location; and

WHEREAS, the cities of Beaumont, Texas and Amarillo, Texas produced a report showing that sexually oriented businesses: (1) promote prostitution,

drug use, and other criminal activity; (2) have a deleterious effect on existing businesses and the surrounding residential areas adjacent to them, and (3) increase crime, and that there is a positive correlation between the hours of operation of a sexually oriented business and higher crime rates; and

WHEREAS, based upon this data the Dallas City Council finds that the operation of sexually oriented businesses between the hours of 2:00 a.m. and 6:00 a.m. is detrimental to the public health, safety, and general welfare; and

WHEREAS , the city council wishes to reduce crime and conserve police and fire-rescue resources by requiring sexually oriented businesses to be closed for business between the hours of 2:00 a.m. and 6:00 a.m.; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Section 41A-9, "Suspension," of Chapter 41A, "Sexually Oriented Businesses, " of the Dallas City Code is amended to read as follows:

"SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if the chief of police determines that a licensee, an operator, or an employee has:

(1) violated or is not in compliance with Section 41A-4(h), 41A-7, 41A-7.1, 41A-13, 41A-14.1, 41A-14.2, 41A-14.3, 41A-15, 41A-16, 41A-17, 41A-18,

41A-18.1, 41A- 19, or 41A-20 of this chapter;

(2) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter; or

(3) knowingly permitted gambling by any person on the sexually oriented
business premises.

SECTION 2. That Chapter 41A, "Sexually Oriented Businesses," of the Dallas City Code is amended by adding a new Section 41A-14.3, "Hours of Operation," to read as follows:

"SEC. 41A-14.3. HOURS OF OPERATION.

(a) A sexually oriented business must be closed for business each day between the hours of 2:00 a.m. and 6:00 a.m.

(b) This section shall be reviewed by the appropriate city council committee on or before January 26, 2024, and by the January of every even numbered year thereafter."

SECTION 3. That Subsection (a) of Section 41A-16, "Additional Regulations for Nude Model Studios," of Chapter 41A, "Sexually Oriented Businesses," of the Dallas City Code is amended to read as follows:

"(a) A person commits an offense if he knowingly allows a person under 21 years of age to appear in a state of nudity in or on the premises of a nude model studio. [~~Reserved.~~]"

SECTION 4. That Subsection (a) of Section 41A-17, "Additional Regulations for Adult Motion Picture Theaters," of Chapter 41A, "Sexually Oriented Businesses," of the Dallas City Code is amended to read as follows:

"(a) A person commits an offense if he knowingly allows a person under 21 years of age [~~minor~~] to appear in a state of nudity in or on the premises of an adult motion picture theater."

SECTION 5. That Section 41A-20.1, "Prohibitions Against Minors In Sexually Oriented Businesses," of Chapter 41 A, "Sexually Oriented Businesses," of the Dallas City Code is amended to read as follows:

"SEC. 41A-20.1. PROHIBITIONS AGAINST MINORS IN SEXUALLY ORIENTED BUSINESSES.

(a) A licensee or operator commits an offense if he knowingly:

(1) allows a minor to enter the interior premises of a sexually oriented business;

(2) employs, contracts with, or otherwise engages or allows a person under 21 year of age [~~minor~~] to perform adult cabaret entertainment; or

(3) employs a person under 21 years of age [~~minor~~] in a sexually oriented business.

(b) Knowledge on the part of the licensee or operator is presumed under Paragraph (2) or (3) of

Subsection (a) if identification records were not kept in accordance with the requirements of Section 41A-7 . l, and properly kept records would have informed the licensee or operator of the person [~~minor's~~] age.

(c) An employee commits an offense if the employee knowingly:

(1) allows a minor to enter the interior premises of a sexually oriented business;

(2) employs, contracts with, or otherwise engages or allows a person under 21 years of age [~~minor~~] to perform adult cabaret entertainment; or

(3) employs a person under 21 years of age [~~minor~~] in a sexually oriented business.

(d) A minor commits an offense if the minor knowing enters the interior premises of a sexually oriented business."

SECTION 6. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed $4,000 and confinement in jail not to exceed one year.

SECTION 7. That Chapter 41A of the Dallas City Code shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 8. That any act done or right vested or accrued, or any proceeding , suit, or prosecution had or commenced in any action before the amendment or repeal of any ordinance, or part thereof, shall not be affected or impaired by amendment or repeal of any

ordinance, or part thereof, and shall be treated as still remaining in full force and effect for all intents and purposes as if the amended or repealed ordinance, or part thereof, had remained in force.

SECTION 9 . That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of Chapter 1 of the Dallas City Code, as amended.

SECTION 10. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM :

CHRISTOPHER J. CASO, City Attorney

By /s/ Casey Buyers
Assistant City Attorney

Passed JAN 2 6 2022

PROOF OF PUBLICATION - LEGAL ADVERTISING

The legal advertisement required for the noted ordinance was published in the Dallas Morning News, the official newspaper of the city, as required by law, and the Dallas City Charter, Chapter XVIII, Section 7.

DATE ADOPTED BY CITY COUNCIL Jan 26 2022

ORDINANCE NUMBER 32125

DATE PUBLISHED JAN 29 2022

ATTESTED BY:

Dallas City Code Chapter 41A

. . .

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ACHROMATIC means colorless or lacking in saturation or hue. The term includes, but is not limited to, grays, tans, and light earth tones. The term does not include white, black, or any bold coloration that attracts attention.

(2) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(3) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment that as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, DVD's, video cassettes or video reproductions, slides, or other visual representations, that depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities."

(4) ADULT CABARET means a commercial establishment that regularly features the offering to

customers of adult cabaret entertainment.

(5) ADULT CABARET ENTERTAINER means an employee of a sexually oriented business who engages in or performs adult cabaret entertainment.

(6) ADULT CABARET ENTERTAINMENT means live entertainment that:

(A) is intended to provide sexual stimulation or sexual gratification; and

(B) is distinguished by or characterized by an emphasis on matter depicting, simulating, describing, or relating to "specified anatomical areas" or "specified sexual activities."

(7) ADULT MOTEL means a hotel, motel, or similar commercial establishment that:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way that advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(8) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(9) APPLICANT means:

(A) a person in whose name a license to operate a sexually oriented business will be issued;

(B) each individual who signs an application for a sexually oriented business license as required by Section 41A-4(d);

(C) each individual who is an officer of a sexually oriented business for which a license application is made under Section 41A-4, regardless of whether the individual's name or signature appears on the application;

(D) each individual who has a 20 percent or greater ownership interest in a sexually oriented business for which a license application is made under Section 41A-4, regardless of whether the individual's name or signature appears on the application; and

(E) each individual who exercises substantial de facto control over a sexually oriented business for which a license application is made under Section 41A-4, regardless of whether the individual's name or signature appears on the application.

(10) CHIEF OF POLICE means the chief of police of the city of Dallas or the chief's designated agent.

(11) CHILD-CARE FACILITY has the meaning given that term in Section 51A-4.204 of the Dallas Development Code, as amended.

(12) CHURCH has the meaning given that term in Section 51A-4.204 of the Dallas Development Code, as amended.

(13) CONVICTION means a conviction in a federal court or a court of any state or foreign nation or political subdivision of a state or foreign nation that has not been reversed, vacated, or pardoned. "Conviction" includes disposition of charges against a person by probation or deferred adjudication.

(14) DESIGNATED OPERATOR means the

person or persons identified in the license application, or in any supplement or amendment to the license application, as being a designated operator of the sexually oriented business.

(15) EMPLOYEE means any individual who:

(A) is listed as a part-time, full-time, temporary, or permanent employee on the payroll of an applicant, licensee, or sexually oriented business; or

(B) performs or provides entertainment on the sexually oriented business premises for any form of compensation or consideration.

(16) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(17) ESCORT AGENCY means a person or business association that furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(18) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(19) HISTORIC DISTRICT means an historic overlay zoning district as defined in the Dallas Development Code, as amended.

(20) HOSPITAL has the meaning given that term

in Section 51A-4.204 of the Dallas Development Code, as amended.

(21) LICENSEE means:

(A) a person in whose name a license to operate a sexually oriented business has been issued;

(B) each individual listed as an applicant on the application for a license;

(C) each individual who is an officer of a sexually oriented business for which a license has been issued under this chapter, regardless of whether the individual's name or signature appears on the license application;

(D) each individual who has a 20 percent or greater ownership interest in a sexually oriented business for which a license has been issued under this chapter, regardless of whether the individual's name or signature appears on the license application; and

(E) each individual who exercises substantial de facto control over a sexually oriented business for which a license has been issued under this chapter, regardless of whether the individual's name or signature appears on the license application.

(22) MINOR means a person under the age of 18 years.

(23) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(24) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(B) a state of dress that fails to completely and opaquely cover a human buttock, anus, male genitals,

female genitals, or any part of the female breast or breasts that is situated below a point immediately above the top of the areola.

(25) OPERATES OR CAUSES TO BE OPERATED means to cause to function or to put or keep in operation. A person may be found to be operating or causing to be operated a sexually oriented business whether or not that person is an owner, part owner, or licensee of the business.

(26) OPERATOR means any person who has managerial control of the on-site, day-to-day operations of a sexually oriented business, regardless of whether that person is a designated operator of the sexually oriented business.

(27) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(28) PUBLIC PARK has the meaning given that term in Section 51A-4.208 of the Dallas Development Code, as amended.

(29) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family, or mobile home zoning district as defined in the Dallas Development Code, as amended.

(30) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code, as amended.

(31) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to

the customer.

(32) SIGN means any display, design, pictorial, or other representation that is:

(A) constructed, placed, attached, painted, erected, fastened, or manufactured in any manner whatsoever so that it is visible from the outside of a sexually oriented business; and

(B) used to seek the attraction of the public to any goods, services, or merchandise available at the sexually oriented business.

The term "sign" also includes any representation painted on or otherwise affixed to any exterior portion of a sexually oriented business establishment or to any part of the tract upon which the establishment is situated.

(33) SPECIFIED ANATOMICAL AREAS means:

(A) any of the following, or any combination of the following, when less than completely and opaquely covered:

(i) any human genitals, pubic region, or pubic hair;

(ii) any buttock; or

(iii) any portion of the female breast or breasts that is situated below a point immediately above the top of the areola; or

(B) human male genitals in a discernibly erect state, even if completely and opaquely covered.

(34) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in Paragraphs (A) through (C) of this subsection.

(35) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means an increase in the floor area occupied by the business by more than 25 percent, as the floor area existed on:

(A) June 18, 1986, for any premises that were used as a sexually oriented business on or before that date, regardless of any subsequent changes in applicants, licensees, owners, or operators of the premises or the sexually oriented business;

(B) August 22, 2001, for any premises that were used as a sexually oriented business on or before August 22, 2001, but not on or before June 18, 1986, regardless of any subsequent changes in applicants, licensees, owners, or operators of the premises or the sexually oriented business; or

(C) for any premises not used as a sexually oriented business on or before August 22, 2001, the date an initial application for a license to use the premises as a sexually oriented business is received by the chief of police designating the floor area of the structure or proposed structure in which the sexually oriented business will be conducted, regardless of any subsequent changes in applicants, licensees, owners, or operators of the premises or the sexually oriented business.

(36) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities that constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other

similar legal device that transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

(37) VIP ROOM means any separate area, room, booth, cubicle, or other portion of the interior of an adult cabaret (excluding a restroom and excluding an area of which the entire interior is clearly and completely visible from the exterior of the area) to which one or more customers are allowed access or occupancy and other customers are excluded. (Ord. Nos. 19196; 19377; 20291; 20552; 21838; 23137; 24440; 24699; 25296; 27139)