

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-1360

**TITLE** CITY OF RENTON, ET AL., Appellants V. PLAYTIME  
THEATRES, INC., ET AL.

**PLACE** Washington, D. C.

**DATE** November 12, 1985

**PAGES** 1 thru 53



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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF RENTON, ET AL., :

Petitioners :

v. : No. 84-1360

PLAYTIME THEATRES, INC., ET AL., :

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Washington, D.C.

Tuesday, November 12, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:52 o'clock a.m.

APPEARANCES:

E. BARRETT PRETTYMAN, JR., ESQ., Washington, D.C.; on behalf of Petitioners.

JACK R. BURNS, ESQ., Bellevue, Washington, on behalf of Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
E. BARRETT PRETTYMAN, JR., ESQ., on behalf of the Petitioners	3
JACK R. BURNS, ESQ., on behalf of the Respondents	21
E. BARRETT PRETTYMAN, JR., ESQ., on behalf of the Petitioners - rebuttal	47





1                   Renton wanted to deal with this problem before  
2 it became a problem. It wanted to obviate these  
3 secondary effects before they ever got into the city,  
4 because, quite candidly, some other cities, as a result  
5 of Young, had attempted to deal with specific situations  
6 in front of them, and those ordinances had been struck  
7 down.

8                   So, Renton, during the following year, the  
9 City Council, through its committees studied what had  
10 happened in other cities. It looked at the opinions  
11 that had come down in other places; not just in the  
12 State of Washington but in other cities as well.

13                   It held a number of meetings. These were  
14 public meetings. In some of them it listened to  
15 citizens voice their concerns. These citizens were not  
16 only from Renton but from some from nearby cities.

17                   And it finally passed one of three  
18 ordinances. The first ordinance prohibited the location  
19 of adult theatres within 1,000 feet of residences, of  
20 single or multi-family dwellings, churches, or parks.

21                   As to schools, this first ordinance provided  
22 that adult theatres could not be located within a mile  
23 of these schools. That was later reduced in the second  
24 ordinance to 1,000 feet.

25                   After the first ordinance was passed,

1 Appellees, whom I'll call Playtime, brought a suit in  
2 Renton seeking declaratory judgment and an injunction  
3 based on their First Amendment rights and equal  
4 protection. And they shortly thereafter, virtually  
5 within the same week, brought two existing general fare  
6 theatres in downtown Renton, in one of which they said  
7 they intended to show adult fare on a regular basis.

8 The result of our second ordinance, when you  
9 drew circles around the areas that these theatres could  
10 not locate next to, in effect created a permissive or  
11 set-aside zone in the City of Renton which consisted of  
12 some 520 acres. This is, incidentally, a larger area  
13 than the entire commercial area of the City of Renton,  
14 and it is more acres than all of the multi-family  
15 residences in the City of Renton.

16 The district court said that --

17 QUESTION: How many square miles in the --

18 MR. PRETTYMAN: Pardon me?

19 QUESTION: How many square miles in the city?

20 MR. PRETTYMAN: It's 15.3 square miles, Your  
21 Honor.

22 QUESTION: And 520 acres would be somewhat  
23 less than a square mile.

24 MR. PRETTYMAN: Yes, sir. It's enough for  
25 over 400 theatres. That's undisputed by the other side,

1 Your Honor, including parking lots.

2 QUESTION: Does the record show us whether the  
3 City considered the commercial suitability of the 520  
4 acres that were set aside for adult theatre usage?

5 MR. PRETTYMAN: The City's real concern was  
6 with their being too close to the prohibited areas, and  
7 I think it's fair to say that the record does not  
8 reflect a concern as to precise --

9 QUESTION: As to the suitability of the  
10 property that was available for that.

11 MR. PRETTYMAN: Except to this extent, Your  
12 Honor. Mr. Clemmons, our policy development director,  
13 who had been with the City for a number of years and was  
14 thoroughly familiar with the City, was constantly  
15 advising these committees of the City Council, and  
16 consequently I assume that he knew and was advising them  
17 about the nature of the area that was left over.

18 The City -- Renton is a small enough city so  
19 that the City Council is, I think, thoroughly familiar --

20 QUESTION: Is that part of any required  
21 consideration, do you think, to uphold the validity of a  
22 zoning regulation?

23 MR. PRETTYMAN: Let me put it this way,  
24 Justice O'Connor. I think that if the set-aside zone  
25 was entirely, totally unsuitable to the extent of being

1       unavailable -- If I can use an extreme example, if it  
2       was an island with no bridge that you had to swim to to  
3       get to your adult theatre, I think that would be very  
4       quite relevant.

5                But I think where the Ninth Circuit went wrong  
6       was in saying that just because this area is largely  
7       undeveloped or is in the state of development and has  
8       commercial ventures on it now, that --

9                QUESTION: Well, is it relevant that the City  
10       at least consider it as part of the calculus, do you  
11       think --

12               MR. PRETTYMAN: It seems --

13               QUESTION: -- so that deference could be given  
14       to it if has considered.

15               MR. PRETTYMAN: It seems to me that what you  
16       look at is what results. You don't look at whether, you  
17       look at whether the City had a legitimate right to do  
18       what it did; then you turn around and look, well, what  
19       is the result? Do you have a Schad situation where they  
20       had, in effect, excluded them from the City?

21               Or do you have an area for over 400 theatres  
22       that's developing, in the state of development that they  
23       can easily go into?

24               QUESTION: What was the situation here? You  
25       speak goodly, if I may say so, of 400 theatres, and yet



1 a lot of this area was already industrialized, was it  
2 not?

3 MR. PRETTYMAN: Uh, only part --

4 QUESTION: Were there more than three sites  
5 available?

6 MR. PRETTYMAN: Oh, yes. Oh, absolutely, Your  
7 Honor. I think what you may be thinking of is the other  
8 side sent a gentleman out to the zone, and he could find  
9 only three people who said that, in effect, they'd be  
10 willing to sell, but there are far more than three sites  
11 available.

12 Over half of this land is undeveloped. It is  
13 just sitting there.

14 QUESTION: In other words, there were no  
15 theatres in that area.

16 MR. PRETTYMAN: Absolutely not. There were no  
17 theatres there.

18 QUESTION: And how far from that area were the  
19 two theatres that Playtime acquired?

20 MR. PRETTYMAN: Your Honor, if I can show this  
21 to you visually, if I may impose upon you to look at  
22 page 141a of the Appendix to the jurisdictional  
23 statement.

24 QUESTION: What page?

25 MR. PRETTYMAN: 141a. It is called Exhibit

1 U. You will see the set-aside zone in grey, here, in  
2 the heaviest color, and you will see running east-west,  
3 just north of there, a very heavy line which is Route  
4 405.

5 If you follow Route 405 up north where it  
6 crosses the light east-west line at the top, or where  
7 the Renton and Roxy Theatres were located, those were  
8 the two that they bought. Those are only, really,  
9 probably ten minutes from the northern edge of the  
10 permissive zone.

11 There is another theatre just south of that,  
12 between the set-aside zone and the Renton and Roxy  
13 Theatres, and they're the only three sets of theatres in  
14 the City of Renton. The Renton Cinema actually has  
15 three screens, so there are five screens altogether, but  
16 there are only three theatres in the City at the present  
17 time.

18 QUESTION: Mr. Prettyman, on your question  
19 about access, how do you put movie, drive-in movies,  
20 into that argument?

21 MR. PRETTYMAN: I think you --

22 QUESTION: They have as much access as a  
23 drive-in movie.

24 MR. PRETTYMAN: Yes, well, I think clearly if  
25 drive-in movies were going to show adult films that this

1 would be an excellent place for them to be, because this  
2 is extremely accessible.

3 You've got entrances on most sides of this  
4 set-aside zone. You've got highways nearby, and I  
5 think, Justice Marshall, if you want any indication of  
6 how far people will go to see these movies, let me give  
7 you the example of Point Roberts, which is a small  
8 city. It looks like it really ought to be part of  
9 Canada. It's kind of hanging off the edge, there, but  
10 it's actually part of the State of Washington.

11 It has a year-round population of 250 people,  
12 and you know how many patrons they have a week at that  
13 adult theatre which is also owned by Playtime? Fifteen  
14 hundred. And where do they come from? They come  
15 primarily from Vancouver, which is 36 miles away.

16 Now, we're talking about a set-aside zone in  
17 Renton which is just a matter of a few miles from the  
18 outer edges of the City. You're talking about, from the  
19 most northern edge of the City, you're probably talking  
20 twenty minutes, maybe ten, fifteen minutes from  
21 downtown.

22 And here is a zone which is easily accessible,  
23 as the district court held. It's criss-crossed by  
24 streets and highways. It is now well lit, and it is, in  
25 my view -- I was just out there ten years ago. It seems

1 to be sort of the coming area of the city; the next  
2 area, if you will, that's going to be, that's going to  
3 be built up.

4 It seems to us that there are three, basically  
5 three issues here, and that the Ninth Circuit was wrong  
6 on all three. The first issue really relates to whether  
7 we are allowed, we're allowed to look at the experience  
8 of other cities in passing this ordinance, and the Ninth  
9 Circuit said that we could not.

10 QUESTION: In that regard, Mr. Prettyman, the  
11 ordinance of this City was justified on the secondary  
12 effects that these theatres have on particular other  
13 land uses, like residence land or churches or schools.

14 Now, does the record show us whether the City  
15 relied on evidence of that sort gathered in other cities?

16 MR. PRETTYMAN: Well, I think the most obvious  
17 example is the City of Seattle, where Seattle was --  
18 Seattle had 13 adult theatres. Ten of them were  
19 downtown; three were out in residential areas, and they  
20 were the three that they were concerned about.

21 One of them was all by itself in a residential  
22 area, and Seattle passed its zoning ordinance in order  
23 to get all of them into a kind of bad area right  
24 downtown rather than out near residences, and so we were  
25 looking at that example.



1 I might also say in regard to Young --

2 QUESTION: And did Seattle's studies show the  
3 secondary effects of having an adult theatre in a  
4 residential neighborhood?

5 MR. PRETTYMAN: Yes, ma'am, they did. They  
6 showed that, that they caused transience to come in.  
7 They showed an increase of crime, and they showed, in  
8 effect, that property values would go down.

9 One of the things that I think people forget  
10 when they look at Young is everybody concentrates on the  
11 fact that the prescription was 1,000 feet from any two  
12 other adult uses. What they forget is that in the Young  
13 ordinance, it also prohibited adult theatres within 500  
14 feet of residences, and that particular prescription  
15 wasn't even fought in this Court, I assume, because it  
16 was assumed to be, assumed to be constitutional.

17 But that was part of the Young ordinance, and  
18 we had that to look to, and therefore ours is really a  
19 tighter and more permissive ordinance in that respect  
20 than --

21 QUESTION: Detroit and Seattle were doing it  
22 two different ways; Detroit by dispersal and Seattle by  
23 concentration?

24 MR. PRETTYMAN: Yes, that's exactly right.  
25 And different cities have used different methods. This

1 Court said in Young that it made no difference, really.  
2 In fact, you approved both methods, both the dispersal  
3 method and the concentration method. You specifically  
4 said that in Young, and as a matter of fact you even  
5 said that that was true as to theatres in general, that  
6 they could be dispersed; that, in other words, the way  
7 that you deal with the problem is constitutionally  
8 irrelevant.

9 So, our point in regard to whether we could  
10 rely on the experience of other cities is very simple,  
11 and that is, what was there for us to study? They  
12 weren't in there yet. We weren't dealing with one  
13 theater or twenty theatres. What we were saying, in  
14 effective land use planning, which is what zoning is all  
15 about, we were saying when they come in here, whether it  
16 be one or forty, we're going to want them away from our  
17 residences and churches and parks and schools.

18 Let me tell you that Renton is an interesting  
19 town in this respect, because it doesn't have this  
20 commercial area over here and the churches over here and  
21 the residential area over here. It's all mixed up  
22 together, so that right downtown, right in the same  
23 block with these two theatres that Playtime has bought,  
24 are residences, and two little churches as a matter of  
25 fact.

1           The record does not show that, let me make  
2 clear. That is outside the record, but it just happens  
3 to be true, and I am sure Mr. Burns will not dispute  
4 it. But in the same block as these two theatres are  
5 residences and two little churches, and with the high  
6 school just two blocks away.

7           QUESTION: Mr. Prettyman, can I interrupt you  
8 with something that's troubling me --

9           MR. PRETTYMAN: Certainly.

10          QUESTION: -- about the case? Did the court  
11 of appeals, in the words of the jurisdictional statute,  
12 hold the ordinance invalid, in your view? I'm just  
13 wondering if we have an appellate jurisdictional  
14 question.

15          MR. PRETTYMAN: Oh, I don't think that, sir,  
16 that's there's any question that they held it in  
17 violation of the First Amendment. They --

18          QUESTION: They sent it back for allowing to  
19 shore up the record, in effect.

20          MR. PRETTYMAN: Well, that was rather  
21 strange. The reason, if they are sending it back, they  
22 are sending it back because they thought that a  
23 motivating factor, at least there was an inference that  
24 a motivating factor might be that we were trying to  
25 suppress First Amendment rights.

1           Our response to that is twofold. First of  
2 all, Your Honor, why are you looking at intent or motive  
3 in a case where you have a substantial government  
4 interest and only an incidental restriction on First  
5 Amendment rights.

6           You didn't do it in Young, although there was  
7 a suggestion there that there might have been a bad  
8 motive. You refused to do it in O'Brien, even though  
9 that was clearly argued that they had a bad motive, so  
10 you never get to --

11           QUESTION: I understand your argument on the  
12 merits of the motive, but if that issue remains open, is  
13 it clear that they have already directed the district  
14 judge to hold the ordinance invalid?

15           MR. PRETTYMAN: Oh, I think that's quite  
16 clear, Your Honor, that they have said that it is, that  
17 it violates the First Amendment.

18           QUESTION: And is there -- I see.

19           MR. PRETTYMAN: Yes, absolutely.

20           Passing on, then, let me simply say in regard  
21 to, I believe I have mentioned that the second issue  
22 relates to the set-aside zone itself; the nature and  
23 content of this zone. And let me just read you what the  
24 district court said about that, because I think it goes  
25 directly to this question.



1                   This consists of acreage in all stages of  
2 development from raw land to developed, industrial,  
3 warehouse, office and shopping space. It is  
4 criss-crossed by freeways, highways and roads.

5                   I think that is the nature of this zone, and I  
6 think that that should be perfectly permissible for  
7 First Amendment purposes.

8                   He also --

9                   QUESTION: Mr. Prettyman, do you think that  
10 the Court has to analyze this statute under the O'Brien  
11 factors?

12                  MR. PRETTYMAN: Justice O'Connor, let me say  
13 this as to that. As you know, the plurality in Young  
14 declined to do that, and put the secondary, these adult  
15 theatres in a kind of secondary status, sort of on a  
16 level, if you will, with commercial -- and that Justice  
17 Powell, who wrote the opinion that made the difference  
18 in the result, refused to do that and adopted the  
19 O'Brien test.

20                  Quite candidly, the reason that we have not  
21 taken a position is that it seems to us that it really  
22 doesn't make any difference in the result in our case  
23 which way you go, because the result is the same.

24                  If you asking me, however, what I would like  
25 to see?

1 QUESTION: I am asking.

2 (Laughter.)

3 MR. PRETTYMAN: All right. I thought you  
4 were, Justice O'Connor.

5 I would say, quite candidly, that it seems to  
6 us that the plurality view more neatly fits the  
7 particular problem at hand. O'Brien, after all, was a  
8 criminal case, and the four-part test developed in that  
9 case, it has been used in a variety of circumstances,  
10 and we are happy with it if you want to apply it here.

11 But it seems to us that the plurality really  
12 goes directly to secondary theatres. It talks about the  
13 fact that these are showing films which, in a separate  
14 case in the state court right here in Benton in an  
15 abatement action, have been held to meet the Miller  
16 test; and, therefore, there's a real question in our  
17 minds as to whether, as Justice Stevens said, you're  
18 going to march your sons and daughters off to war to  
19 protect these kinds of films.

20 And it seems to us that these are films that  
21 perhaps because of the secondary effects caused by the  
22 theatres that they're played in, do not deserve the high  
23 degree of protection that other types of speech do.

24 QUESTION: If O'Brien factors were applied,  
25 one of them is a requirement that the governmental

1 interests be unrelated to the suppression of free speech.

2 MR. PRETTYMAN: Correct.

3 QUESTION: And how would you apply that here?

4 MR. PRETTYMAN: I don't think that that means  
5 that you go back and interrogate the City Council  
6 members about what their intent is.

7 As a matter of fact, the Ninth Circuit itself  
8 has held in the Foley case, that you can't do that. If  
9 we had a remand here, we can't, nobody can go back and  
10 subpoena and take the depositions of the City Council  
11 members and determine what they thought, and of course  
12 we don't think you should.

13 So, I don't think it means that. I think what  
14 it means -- you see, we put the emphasis on interest,  
15 the government interest must be unrelated. And the  
16 governmental interest in this case is clearly a proper  
17 one; namely, to make sure that these adverse secondary  
18 effects do not impact upon residences and churches and  
19 so forth. That is the interest, I think, that is  
20 involved, and that is wholly unrelated.

21 We recognize in our findings, there is a  
22 finding which the City Council entered which says  
23 specifically that these theatres have a right to operate.

24 QUESTION: Well, it isn't, it can't be  
25 literally true that it's unrelated, because at least in

1 order to avoid the secondary effects, you are  
2 forbidding, you are forbidding these constitutionally  
3 protected kinds of speech to -- you're making them move.

4 MR. PRETTYMAN: It's unrelated to the  
5 suppression of speech and what the, what the --

6 QUESTION: It's only because they're a speech  
7 of a certain kind that you're making them move.

8 MR. PRETTYMAN: I'm sorry, Your Honor, but  
9 it's not because of that. It's because of the secondary  
10 effects. It's because of what's --

11 QUESTION: Well, the only reason the secondary  
12 effects will occur is because of the nature of the  
13 speech.

14 MR. PRETTYMAN: Well, I'm not --

15 QUESTION: Isn't that right?

16 MR. PRETTYMAN: It is related. The secondary  
17 effects are related in a sense that these kind of films  
18 do apparently draw transience, that they do apparently  
19 create more crime, so in that --

20 QUESTION: All right --

21 MR. PRETTYMAN: -- sense, it is related, but --

22 QUESTION: Yes, of course it is, but that  
23 shouldn't make any difference to your case.

24 MR. PRETTYMAN: It didn't make any difference  
25 in Young.



1 QUESTION: That's right.

2 MR. PRETTYMAN: It certainly didn't.

3 Absolutely.

4 Let me just say that I've indicated that you  
5 shouldn't really reach the issue of intent, and I would  
6 certainly hope that you wouldn't, but if you do I hope  
7 that you will reach it on the basis of the City  
8 Council's findings and not kind of get into some kind of  
9 subjective inquiry into what the City Council might have  
10 had in mind.

11 Let me just say one other thing, and then I  
12 will reserve my time. Small cities like Renton are  
13 dealing with a very serious problem here, and they have  
14 been largely unsuccessful in doing it.

15 These adult theatres are proliferating. They  
16 are moving into areas unlike what they used to, sort of  
17 out on the edges or perhaps right in the middle of  
18 downtown. They're going all over now.

19 And we have made a good faith attempt that was  
20 not directed toward a single theatre, which sometimes  
21 the case. A theatre moves in and we say, we're going to  
22 get that theatre. We didn't do that.

23 We, we, we wanted to deal with the problem in  
24 advance, and we submit to you it was a good faith  
25 attempt, and we have left plenty room, room that's more

1 than commodious enough for these theatres to come into.  
2 It's easily accessible.

3 And I submit to you that if this effort fails,  
4 that it will really prevent small cities and towns  
5 across the country from dealing in an intelligent  
6 fashion ahead of time with this very serious problem.

7 QUESTION: You said there were three  
8 questions, three issues in the case. Have you discussed  
9 them all?

10 MR. PRETTYMAN: I hope I have, Your Honor.  
11 Well, the first one --

12 QUESTION: -- the other two?

13 MR. PRETTYMAN: The first one related to  
14 whether we can rely on the examples of other cities.

15 QUESTION: What are the other two?

16 MR. PRETTYMAN: The second related to the  
17 nature of the set-aside zone itself, and the third  
18 related to the motive of the City Council.

19 QUESTION: Okay, thank you.

20 MR. PRETTYMAN: Thank you.

21 CHIEF JUSTICE BURGER: Mr. Burns?

22 MR. BURNS: Mr. Chief Justice, may it please  
23 the Court:

24 This Court's decisions allow regulation of an  
25 adult business whose operational characteristics produce

1 some identifiable secondary effect. In other words, is  
2 there, is the form of speech intrusive in, to some  
3 extent? Is it too loud; is it too ugly?

4 We're talking, essentially, about a secondary  
5 effect that we can see, touch, hear or feel. In other  
6 words, is the mode incompatible with the zone that we're  
7 dealing with?

8 Renton's ordinance, on the other hand, is  
9 related solely to perceptions about the effects of the  
10 content of the speech. It's not related to land use  
11 concerns. It's aimed at the speech and not at the style  
12 of the speech.

13 QUESTION: Well, Mr. Burns, is it not more  
14 accurately the kind of people it attracts?

15 MR. BURNS: Your Honor, there is no evidence  
16 in this record that this kind of speech attracts any  
17 other kind of people than the people that are in this  
18 courtroom. There's nothing in this record that  
19 establishes that it attracts an adverse kind of people  
20 or anybody other than the general public that is making  
21 itself or desires to make adult material available to --

22 QUESTION: What you're saying is that we  
23 cannot take traditional notice of the contrary?

24 MR. BURNS: Well, Your Honor, I think that we  
25 have to look to what this Court said in *Young*, in that

1 certain things are not, are not, we just can't assume  
2 that they exist as a matter of experience.

3 The only thing that this Court found as a  
4 matter of experience that they could rely on in Young  
5 was that congregating various types of uses together  
6 produced a detrimental secondary effect, and that effect  
7 was a deterioration of property values.

8 But I think you have to look at what happened  
9 in Young. There, you had an ordinance that had been in  
10 place for years. It regulated many kinds of uses, and  
11 what Young did, or Detroit did, was they added adult  
12 theatres to those regulated uses, and said these uses,  
13 all of them as a whole, when they congregate together,  
14 they produce this adverse secondary effect of a deletion  
15 in property values.

16 That is not the case here. What this  
17 ordinance does and what Renton has done is said that a  
18 single adult theatre in a commercial zone, not in regard  
19 to other businesses that may be regulated or may not be  
20 regulated, because it doesn't regulate any other kind of  
21 business, that that single adult business will cause  
22 these deleterious effects.

23 QUESTION: Well, Mr. Burns --

24 MR. BURNS: Yes, sir?

25 QUESTION: -- Mr. Prettyman said that the City

1 of Renton was entitled to rely on the City of Seattle's  
2 experience, and he said that a Seattle study had shown  
3 that adult theatres in residential areas produced, you  
4 know, transience, crime, that sort of thing.

5 Do you say there was no such Seattle  
6 experience, or that the City of Renton might not rely on  
7 that Seattle experience if that was Seattle's experience?

8 MR. BURNS: Your Honor, I take exception to  
9 his description of what the experience of Seattle was.

10 QUESTION: Well, first of all, do you contend  
11 that the City of Renton was not entitled to rely in  
12 drafting its ordinance on whatever experience the City  
13 of Seattle might have had?

14 MR. BURNS: Your Honor, if the City of Renton  
15 is going to rely on Seattle's experience, it should  
16 target the same evils at which Seattle targetted its  
17 ordinance, and it should rely on the same means.

18 It should not be able to say --

19 QUESTION: Why is that so? I mean, if a  
20 Seattle study shows particular facts flowing from the  
21 location of an adult theatre, why can't the City of  
22 Renton say, we don't like these facts to exist in  
23 certain zones in our city. We're going to go at it  
24 differently than Seattle, however.

25 MR. BURNS: Your Honor, I think it's risky to



1 rely on the experience of other cities for a number of  
2 reasons.

3 QUESTION: Well, it's sufficiently risky so  
4 that the Constitution forbids Renton from doing it?

5 MR. BURNS: Absolutely, because what we do  
6 then, if you allow a city such as Renton to pick the  
7 City of Seattle or pick the City of Tacoma and say, they  
8 passed an ordinance, we are going to mimic it, we are  
9 going to rely on it, you have effectively immunized and  
10 sanitized that ordinance from judicial scrutiny, even  
11 though the reasons may be painfully fabricated; even  
12 though the reasons that they assert may not apply in  
13 their city.

14 Because I would submit to this Court that --

15 QUESTION: Mr. Burns, if your opponent is  
16 right -- I haven't read this, the Washington case, but  
17 he said that in the Seattle experience there was one  
18 theatre out in a residential neighborhood, and that that  
19 was a bone of contention, and that would be a comparable  
20 example, wouldn't it?

21 MR. BURNS: No, it wouldn't, Your Honor. As I  
22 recall, there were three theatres out in residential  
23 neighborhoods that were affected by --

24 QUESTION: But they were separated from one  
25 another.

1 MR. BURNS: Pardon me?

2 QUESTION: He indicated they were separated  
3 from one another, so you might have a residential  
4 neighborhood with one theatre in it, and they said you  
5 have to move that theatre.

6 MR. BURNS: That's true, but what they did in  
7 Seattle was different than what Renton did here.

8 Seattle moved all the adult theatres --

9 QUESTION: But just to the point of whether  
10 there is anything on which they could base concern about  
11 a single theatre, at least that would be some evidence,  
12 wouldn't it?

13 MR. BURNS: But, Your Honor, it may be some  
14 evidence, but I think we have to look to the issue that  
15 we have to solve these problems that deal with First  
16 Amendment concerns by the least intrusive means. You  
17 do not take a sledge hammer when a scalpel will do.

18 The experience of Seattle is different --

19 QUESTION: So, for that argument you basically  
20 ask us to re-examine Young, don't you?

21 MR. BURNS: No, I'm not asking you to  
22 re-examine Young, because I think that this case is --

23 QUESTION: But you did --

24 MR. BURNS: different than Young. Well, I did  
25 to the extent that it's a time, place or manner

1 restriction, but on the basic facts I'm not asking you  
2 to re-examine Young. I think that this case can be  
3 decided within the confines of Young.

4 But I don't think this is a Young case.

5 QUESTION: What are the confines of Young on  
6 the standard you resort to?

7 MR. BURNS: Your Honor, the Young case, as I  
8 read it, is, as I read Justice Stevens' opinion, is that  
9 if there is a demonstrable adverse secondary effect that  
10 we can see and we can touch and we can feel, the City  
11 can be concerned about that and regulate it by the least  
12 intrusive means.

13 In Young, the Court made its decision based  
14 upon the fact that there were a myriad of locations  
15 available, that there were locations available in all  
16 kinds of zones, all commercial zones.

17 The Renton ordinance specifically removes  
18 adult theatres from all commercial zones of the City of  
19 Renton. They simply are not allowed in the commercial  
20 zones.

21 If, I think in that respect a look at the map  
22 is useful. If you would look at the last page of the  
23 jurisdictional statement, which is page 142a, Appendix  
24 V, you can see where these theatres have been relegated  
25 to. It's essentially an industrial wasteland. There

1 are undeveloped areas. There's a tank farm. It's  
2 criss-crossed with railroad spurs. It is essentially --

3 QUESTION: Is that such an unlikely location  
4 for, say, a drive-in theatre?

5 MR. BURNS: It would, because a drive-in  
6 theatre probably would not be permitted in that zoning.  
7 Essentially, the drive-in theatre business in this  
8 country in commercial areas --

9 QUESTION: But I thought we took it as  
10 stipulated that an adult theatre was permissible. Are  
11 you saying that an adult self-contained theatre would be  
12 admissible but perhaps a drive-in theatre not?

13 MR. BURNS: It's in the record below that  
14 there would be a zoning change required in order to  
15 locate an adult theatre in this area.

16 These are permissible locations, but that  
17 doesn't mean that the zoning is appropriate.

18 QUESTION: But you say it's an industrial  
19 wasteland. Do you insist that there be a theatre  
20 building in existence for you to come in and rent?

21 MR. BURNS: No, Your Honor, but I think access  
22 has three components.

23 Those components are, first, permissible  
24 locations; secondly, that those locations, that there be  
25 available locations to go to; and thirdly, that there be

1 suitable locations for a commercial business such as a  
2 theatre.

3 QUESTION: Well, what do you mean by an  
4 available location?

5 MR. BURNS: Your Honor, if the City is going  
6 to regulate and restrict where a theatre can locate, and  
7 in fact nobody will sell or rent property to a theatre,  
8 the restriction and burden on speech has become  
9 substantial, not incidental, because there is no place  
10 that they can go.

11 QUESTION: Well, would that entitle a theatre  
12 to locate out of a commercial zone and in a residential  
13 zone because no one in a commercial zone would sell them  
14 theatre space?

15 MR. BURNS: No, Your Honor.

16 QUESTION: Well, why wouldn't it under your  
17 reasoning?

18 MR. BURNS: It wouldn't because if, if a  
19 general audience theatre were permitted to locate in a  
20 residential zone, then it's my position that an adult  
21 theatre should be allowed to locate there as well unless  
22 you can demonstrate that there's some adverse secondary  
23 effect that arises out of the operation of the adult  
24 theatre that does not arise out of the operation of the  
25 general release theatre.



1 QUESTION: Well, how about the transience and  
2 crime from the Seattle study?

3 MR. BURNS: Your Honor, the City of Renton  
4 didn't look at any data from Seattle. The record is  
5 clear that all the planning director and the City  
6 Council looked at with respect to the City of Seattle  
7 was the decision of our state supreme court.

8 QUESTION: Well, did the City of -- did the  
9 decision of your state supreme court summarize findings  
10 that had been made in Seattle?

11 MR. BURNS: Yes, it did.

12 QUESTION: Well, why on Earth shouldn't they  
13 be able to look at the supreme court opinion as a  
14 secondary source? Are you going to require the best  
15 evidence rule?

16 MR. BURNS: Your Honor, when we're looking at  
17 speech, I think that we need to have empirical evidence  
18 that's of a compelling nature. We can't rely upon  
19 hearsay, opinion --

20 QUESTION: Now, that's a nice sounding phrase,  
21 but how would you define empirical evidence that's of a  
22 compelling nature, as opposed to just garden variety  
23 evidence?

24 MR. BURNS: Your Honor, in a commercial zone,  
25 what is the problem that transients cost -- cause? Let

1 me ask that as a rhetorical question.

2 That, the major problem that I see with the  
3 findings in the Renton ordinance is that they're  
4 assertions. They're conclusions. They're simply  
5 assertions of harm that may not, in fact, exist.

6 And if transients cause a problem, what kind  
7 of problem is it that they cause? There's no indication  
8 in this record of any sort what kind of problems a  
9 transient would cause.

10 Now, if a transient causes problems, let's  
11 deal with those problems in some specific way. If it --

12 QUESTION: Provide them with bus tickets?

13 MR. BURNS: Pardon me?

14 QUESTION: Provide them with bus tickets?

15 (Laughter.)

16 MR. BURNS: That may be one answer to the  
17 problem, but I think that this Court's decision required  
18 that when we're dealing with First Amendment concerns,  
19 we have to deal with the problem in the least intrusive  
20 way.

21 If you had, as I think Justice Blackmun said  
22 in Schad, if there's a problem with traffic, deal with  
23 the traffic problem. If there's a problem with signage,  
24 deal with the signage problem, but do not simply  
25 relegate these theatres out to this uncommercial area in

1 the guise of meeting a land use concern.

2 What essentially they're getting at here is a  
3 censorship concern.

4 QUESTION: You said something that I'm not  
5 sure I understand. It's about what the members of the  
6 City Council were thinking; what influenced their  
7 opinions.

8 Is it not reasonable to assume that the  
9 members of any city council in a particular state know  
10 what's going on in other cities? What the experience of  
11 other cities is, whether it's with traffic or flooding  
12 or with these so-called adult theatres?

13 MR. BURNS: Your Honor, there's nowhere in  
14 this record that I can find what their concerns were  
15 about these theatres.

16 QUESTION: Well, why do they have to -- do  
17 they have to put their concerns in the record? Do they  
18 have to say what they're thinking?

19 MR. BURNS: I think so, Your Honor.

20 QUESTION: What they have against them?

21 MR. BURNS: I think what -- they have to make  
22 findings of fact that justify the restriction on  
23 speech. I don't think there's any way around that,  
24 because if their intent is to, is to censor speech and  
25 to oppress it in any respect, that's an improper attempt

1 which cannot be sanctioned in any sense.

2 What Renton is suggesting to this Court is a  
3 rule that would allow it to state a governmental  
4 interest and say that we have made available permissible  
5 locations, and then insulate that decision forever from  
6 judicial scrutiny, and that rule, I don't believe, can  
7 be accepted by this Court.

8 The essential difference between this case and  
9 Young is that there is an intolerable burden on speech  
10 that exists as a result of this ordinance, and that's  
11 problem of access.

12 If government makes no rule about access and  
13 does not limit access to speech, then there's no  
14 intrusion that can be blamed on the government and no  
15 violation of the First Amendment.

16 On the other hand, if government does make the  
17 rule and government does limit access, then I think  
18 government has the duty to establish that not only are  
19 there permissible locations, but that somebody can  
20 actually go there, because otherwise they've precluded  
21 them through a de facto zoning scheme from going  
22 anywhere, and they've created what they've perhaps set  
23 out to do, was censor the material and remove it  
24 entirely from the City.

25 In this respect, I believe that the zone that

1 I described and as depicted on that map is a substantial  
2 burden on speech. The alternative locations are  
3 unsatisfactory. As this Court has said before, an  
4 individual is not to have his right of free speech  
5 circumscribed on the argument that he can exercise it  
6 somewhere else.

7 These locations make it more difficult both  
8 for sellers to reach an audience and for the public to  
9 make the material available to us -- to itself. Its  
10 design, this ordinance is designed to prevent some  
11 people from getting the information by making it more  
12 difficult to get it.

13 What Renton has said, in essence, out of  
14 sight, out of mind. We can't identify what's wrong with  
15 these locations. We can't identify what the harm is to  
16 churches or schools, but we know it exists somewhere --

17 QUESTION: Could I, could I ask, suppose that  
18 in this record there was evidence of the likely effect  
19 of adult theatres being too close to residential  
20 districts. And suppose the evidence was such that even  
21 you would agree that there's a pretty good showing that  
22 that would have these harmful consequences.

23 But then the rest of the facts here are the  
24 same. Would you say that Renton then could not exclude  
25 these adult theatres from these locations?



1 MR. BURNS: Well, Your Honor, to answer your  
2 direct question about residential areas, I think they  
3 could make such a showing. They could exclude under  
4 Young.

5 QUESTION: And even though the only place  
6 these, even though the only place these theatres could  
7 then go is to this area that you say is wholly  
8 unsatisfactory?

9 MR. BURNS: Well, that creates a more  
10 substantial --

11 QUESTION: Well, that's my question.

12 MR. BURNS: Okay. Well, if, if they can show  
13 a substantial harm, I believe that they can regulate,  
14 Your Honor.

15 QUESTION: And even though this area that the  
16 adult theatres would have to move to is as  
17 unsatisfactory as you say it is?

18 MR. BURNS: Yes, Your Honor.

19 Now, the reason that I say that is that, is  
20 that there are locations out there, permissible  
21 locations. If none are available, however, we have to  
22 balance these interests that --

23 QUESTION: Well, that's what I'm asking. The  
24 other facts in this case are the same except that  
25 there's adequate proof of, of harm, of potential harm to

1 the residential areas.

2 MR. BURNS: If there is adequate proof of  
3 potential harm, they can zone out. That's a  
4 demonstrable secondary effect. On the other hand, Your  
5 Honor --

6 QUESTION: Even though, even though other  
7 sites may not be available?

8 MR. BURNS: Well, I think, in my personal  
9 view, a city has the right to deal with these problems  
10 as they can any other kinds of land use problems.  
11 However, in dealing with those problems, they have to be  
12 sensitive to the concerns that exist.

13 But the problem here with Renton is that they  
14 have zoned these theatres out of the commercial areas as  
15 well as the residential areas. And when you zone them  
16 out of the commercial areas as well, the problems that  
17 may exist and the concerns that you're trying to protect  
18 in a residential area do not exist to the same degree in  
19 a commercial area.

20 Now, Renton's ordinance is different from the  
21 ordinance in Young and the ordinance in Seattle, in that  
22 Renton's ordinance excludes these operations or these  
23 businesses from a location within 1,000 feet of any  
24 residential unit.

25 QUESTION: Well, now, is none of the property

1 in the 520 acres zoned for commercial use? Is that what  
2 you're saying?

3 MR. BURNS: Generally, Your Honor, it's zoned  
4 for industrial use.

5 QUESTION: Is any of the property in the 520  
6 acres zoned for commercial use?

7 MR. BURNS: Not to my knowledge, Your Honor.

8 QUESTION: Well, can a commercial property be  
9 located in an industrial area?

10 MR. BURNS: Well, to that extent that it can,  
11 there are less --

12 QUESTION: I mean, it's not forbidden. It's  
13 not forbidden even --

14 MR. BURNS: No.

15 QUESTION: --though, so the answer is  
16 commercial establishments may be located in an  
17 industrial area.

18 MR. BURNS: They can; but, Your Honor, there's  
19 evidence in this record that a commercial establishment  
20 such as a theatre requires a certain kind of location  
21 that nobody disputed. It's a recreational kind of  
22 activity. It needs streets --

23 QUESTION: But it would not be against the  
24 zoning law for this theatre to be in the industrial area.

25 MR. BURNS: No,, it would not be against the

1 zoning law.

2 QUESTION: Does the record disclose that there  
3 is at least one shopping center in the 520 acres?

4 MR. BURNS: Yes, Your Honor, that's a fully  
5 developed shopping -- well, yes, it is. But it's, it is  
6 in a location which is outside of that main area.

7 If I could point it out to you on a map which  
8 Mr. Prettyman showed to you. It's the map on page 141.

9 QUESTION: 141a?

10 MR. BURNS: 141a, Your Honor. It is the  
11 location which is up here in the corner that looks  
12 somewhat like an upside down L. That is the location of  
13 the commercial shopping center.

14 QUESTION: Up in the extreme right corner?

15 MR. BURNS: Yes, Your Honor, if you can see  
16 where I'm pointing. It's sort of an upside down L  
17 that's in grey.

18 Now, that particular location, Your Honor, is  
19 a fully developed shopping center --

20 QUESTION: Oh, I see. He has that upside down.

21 MR. BURNS: However, that location is not  
22 available in a practical sense, in that the location is  
23 very small in size. In the opinion of our experts, it  
24 would not have enough land to accommodate an adult  
25 theatre.

1           So, while that particular location is both  
2 suitable and permissible, it's not available in the  
3 sense that it's not large enough, and it's not available  
4 in the sense that it's probably not for sale.

5           QUESTION: But there would be other  
6 undeveloped land nearby --

7           MR. BURNS: No.

8           QUESTION: -- that presumably could be  
9 available?

10          MR. BURNS: Well, Your Honor, that little  
11 L-shaped area is the only area there that is available.  
12 The other area is that little rectangular area to, as  
13 you're looking at the map, directly beneath it over  
14 here, which is an industrial warehouse kind of area  
15 which is served by railroads.

16          And then the main core of the 520 acres is  
17 down in this undeveloped land, which I showed you in the  
18 aerial photograph.

19          QUESTION: What do you mean unavailable?

20          MR. BURNS: I mean unavailable in the sense  
21 that somebody will not sell it or rent it to you, Your  
22 Honor. That's what I mean by unavailable.

23          We had, the record below establishes that  
24 there was a real estate expert who went around to every  
25 property owner within this land area and queried whether



1 their property was for sale or whether they would rent  
2 it for use as an adult theatre.

3 The almost unanimous answer of those people  
4 was no.

5 QUESTION: But, again, if there had been  
6 adequate proof or some grounds for believing, a decent  
7 grounds for believing there would be danger to  
8 residential areas, this unavailability would make no  
9 difference?

10 MR. BURNS: Not out in that area it wouldn't,  
11 but there is no proof that there's any danger --

12 QUESTION: I know that's your claim.

13 MR. BURNS: -- to the commercial areas, Your  
14 Honor.

15 It is our position that this ordinance asserts  
16 no compelling governmental interest in the sense that  
17 the concerns of this ordinance are with the effects of  
18 the content of the speech, not the operational  
19 characteristics of the business, which we believe is the  
20 key determinative factor.

21 There's no difference in this record in the  
22 operational characteristics between an adult theatre and  
23 a general audience theatre. There's no indication that  
24 this theatre draws transience or does anything else of  
25 an outward nature.

1 QUESTION: When you say this theatre, are you  
2 referring to an unbuilt theatre in Renton?

3 MR. BURNS: Yes, Your Honor. I'm referring to  
4 my client's theatre in one sense and to the unbuilt  
5 theatre, because this ordinance affects the first use  
6 that comes into town. It's not an ordinance that says  
7 that these kinds of uses cannot congregate together or  
8 must be separated.

9 QUESTION: It would be hard to get any  
10 empirical evidence that an unbuilt theatre did much of  
11 anything in Renton, I suppose.

12 MR. BURNS: But, Your Honor, there are  
13 locations in small cities within the State of Washington  
14 where there is one adult theatre.

15 QUESTION: You say that --

16 MR. BURNS: And they could go get that kind of  
17 evidence if they wanted to.

18 QUESTION: But they can't go to Seattle.

19 MR. BURNS: Well, what they did in Seattle is  
20 different, Your Honor, and I think that's the  
21 distinction and the difficulty in relying on the  
22 experiences of other cities.

23 If you're going to rely on what Seattle did,  
24 be concerned about the same problems and do the same  
25 thing. If you're going to rely on what Detroit did --

1 QUESTION: But it, but if Seattle made a study  
2 in anticipation of taking some action in its city,  
3 regardless of what action Seattle took as a result, why  
4 can't the City of Renton rely on the studies paid for  
5 and produced by the City of Seattle?

6 MR. BURNS: Your Honor, I don't object to  
7 that, but Renton never looked at that study in this  
8 case. They never even looked at it.

9 QUESTION: Well, but the State of Washington's  
10 courts looked at it, and I would think that might even  
11 be the best evidence.

12 MR. BURNS: Your Honor, I don't believe that  
13 reading a court decision supplies the empirical basis  
14 needed to make a zoning decision.

15 QUESTION: It doesn't, even though the court's  
16 decision is based on, on satisfactory empirical data?

17 MR. BURNS: Your Honor, it doesn't give you  
18 the empirical data, the underlying studies upon which to  
19 make the decision.

20 I don't believe that simply by reading court  
21 decisions, any municipality can say we have that  
22 problem; these studies support our answer to it. I just  
23 don't find that persuasive. In --

24 QUESTION: Do you contend that the court  
25 somehow has to make sure that every city council member

1 has set aside so much time and really studied a  
2 particular thing in a particular manner to survive  
3 constitutional testing of their actions?

4 MR. BURNS: Your Honor, if they're going to  
5 infringe upon First Amendment interests, then the answer  
6 is yes. I think that they have to be extremely careful  
7 to what they're doing in order to place any burden on  
8 speech. In that respect, I would --

9 QUESTION: You don't think any post hoc  
10 production of evidence would suffice?

11 MR. BURNS: Certainly not in this case, which  
12 all the evidence was post hoc.

13 But what I would suggest as a minimum is that  
14 if they're going to rely on the experience of other  
15 cities, that they say that a city compelled to assert  
16 precisely what it is they're relying on and why they're  
17 relying on it, and put that in their findings of fact  
18 and their conclusion of --

19 QUESTION: Mr. Burns, supposing they had a  
20 growing, a rapidly growing city, and didn't have any  
21 motion picture theatres at all, and they had to plan a  
22 city plan with zoning in it, and they decide to put  
23 motion picture theatres in a commercial zone.

24 Do they have to go out and make an independent  
25 study, or can they rely on the experience of other

1 cities for that kind of decision? Clearly, it would  
2 burden the First Amendment interest.

3 MR. BURNS: But, Your Honor, as long as they  
4 haven't based their decision on content, at that point I  
5 think what they've done is okay.

6 If they say general audience theatres can be  
7 in one zone and adult theatres have to be in another  
8 zone, then they're making a distinction based on --

9 QUESTION: So, it's critical to your case, as  
10 I understand it, it's critical to your case that this is  
11 a content regulation?

12 MR. BURNS: Absolutely, Your Honor, absolutely.

13 QUESTION: So, you do really ask us to  
14 re-examine Young?

15 MR. BURNS: No --

16 QUESTION: You say so in so many words in your  
17 brief, and I'm just surprised you don't stick to your  
18 guns.

19 MR. BURNS: Well, I don't think I'm asking you  
20 to re-examine Young, because I think that that this case  
21 can be analyzed under Justice Powell's decision, his use  
22 of the O'Brien test, but I don't even believe the  
23 O'Brien test is appropriate in this case, because I  
24 believe that the burden on speech is substantial here.  
25 It's not minimal or incidental, and therefore strict



1 scrutiny is the test that ought to be applied.

2 And so, I can live with Young. Young says to  
3 me, Justice Stevens, that we can base decisions on  
4 content with respect to motion picture theatres so long  
5 as there is an identifiable secondary effect from the  
6 operational characteristics, not that we perceive that  
7 the speech is going to have people react or not react in  
8 one manner or another.

9 Let me conclude --

10 QUESTION: Before you move to another -- The  
11 district court found, and this is on page 28a of the  
12 Appendix, Appendix to the jurisdictional statement, 28a,  
13 the last sentence in the full paragraph on that page,  
14 that ample accessible real estate is available for the  
15 location of adult theatres in Renton.

16 The court of appeals declined to accept that.  
17 It also declined to apply the clearly erroneous rule to  
18 it, relying on this Court's decision in Bose, B-o-s-e.

19 Do you rely on Bose?

20 MR. BURNS: Yes, I do, Your Honor.

21 QUESTION: You're aware that Bose involved  
22 Sullivan against New York Times and proof of malice.

23 MR. BURNS: Yes, sir.

24 QUESTION: Do you have to prove malice in this  
25 case?

1 MR. BURNS: No, I don't think you to have  
2 prove malice. I think --

3 QUESTION: Well, why is Bose relevant, then?

4 MR. BURNS: Well, I think Bose stands for the  
5 proposition that where there are fact law determinations  
6 and the law is critical to how one analyzes the facts,  
7 that the court has the responsibility to examine those  
8 de novo.

9 Much as in the area of obscenity, where this  
10 Court reviews de novo, or has the right to review de  
11 novo, the obscenity of any material before it. A  
12 district court or a jury may find it obscene, and that's  
13 a finding of fact, but this Court has to make that  
14 ultimate First Amendment decision which is based upon  
15 the fact law problem.

16 QUESTION: In every First Amendment case?

17 MR. BURNS: Yes, Your Honor.

18 QUESTION: Even where the district court has  
19 held that the effect on First Amendment rights, if any,  
20 was quite incidental?

21 MR. BURNS: That, again, the incidental effect  
22 is another fact law determination that I think is, is  
23 critical.

24 QUESTION: -- mixed question of fact and law?

25 MR. BURNS: Yes, Your Honor.

1 I would say, in conclusion, that the notion  
2 that pervades Renton's ordinance is that there's a need  
3 to protect certain places, schools, churches, and so on  
4 from adult theatres. But that need, that express need,  
5 the whole purpose of this ordinance is nullified by the  
6 under-inclusiveness of the ordinance.

7 This ordinance deals only with adult  
8 theatres. There is no evidence in this record or  
9 anything that I can find that establishes that an adult  
10 theatre has a different operational characteristic or  
11 effect upon these places than other adult businesses  
12 which are not regulated and not subject to the burden of  
13 this ordinance.

14 For those reasons, Your Honor, I would submit  
15 that the judgment of the Ninth Circuit should be  
16 affirmed.

17 Thank you.

18 CHIEF JUSTICE BURGER: Do you have anything  
19 further, Mr. Prettyman?

20 MR. PRETTYMAN: Three brief points, Your Honor.

21 First, my co-counsel tells me I said that I  
22 was out there ten years, and I meant ten days ago. I  
23 apologize to the Court.

24 The first point is this. Mr. Burns said that  
25 there's nothing in the record to indicate that adult

1 theatres attract people other than those that are here  
2 in the courtroom. I assure you that that is not the  
3 case; that this record shows, through Mr. Clemmons'  
4 testimony, who attended virtually all of these meetings,  
5 that what these committees and the City Council  
6 considered were the experiences of other cities as  
7 reflected in some documents, but primarily in the  
8 decisions which, as Justice Rehnquist has pointed out,  
9 fully set forth precisely what had gone on in those  
10 communities.

11 Justice Stevens, in the Seattle case, Northend  
12 Cinema, if you -- they noted that the Apple Theatre, for  
13 example, in the First Hill community by itself, and then  
14 two other theatres in another residential community, had  
15 the adverse effects.

16 Mr. Clemmons had been, incidentally, for seven  
17 years in Milpedes, California, where they had had an  
18 adult problem, and he was familiar with that and could  
19 tell the City Council about it.

20 The record also indicates that we looked at  
21 Tacoma. Tacoma had a case which the Ninth Circuit,  
22 where they approved a zoning ordinance in an unreported  
23 decision. We've cited that in our reply brief --

24 QUESTION: Why did they, why did they approve  
25 that? Did they recite the adverse effects?

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MR. PRETTYMAN: Yes, they did.

QUESTION: Likely or probable or actual, or what?

MR. PRETTYMAN: No, they cited actual in that case, and it was primarily based upon things such as property values going down and that kind of thing, which of course we relied on here.

If you want to see a good example of a study which goes to a single theatre, look at the Phoenix study, which is cited in our brief, which compared a single adult theatre in an area with another area that did not have one and found, for example, that the crime rate was three times as high.

QUESTION: Mr. Prettyman, may I interrupt you? You're now focusing on the justification for the ordinance, and turn your attention to what remains available for the adult theatres, that phase of the case, and that as Justice Powell pointed out, the district court found that there was ample accessible real estate there, and the court of appeals then says the standard of review is de novo.

What, in your view, is the correct standard of review of that finding of fact?

MR. PRETTYMAN: That was going to be my third point, and I'll go to it immediately, Justice Stevens.



1           It seems, the reason that we haven't paid much  
2 attention to that in our briefs is that we're happy to  
3 have you use strict scrutiny if you want to, because we  
4 think we passed the test.

5           But it seems to use that the Bose test is  
6 really a strange one to use in this context for the  
7 reasons that Justice Powell pointed out, and it is very  
8 interesting that the Ninth Circuit itself, different  
9 panels admittedly, in the Tacoma case and the City of  
10 Carona case, which is cited by Mr. Burns in one of his  
11 later briefs, both use the clearly erroneous test in  
12 this situation.

13           And it seems to us that in a situation where  
14 you have such an incidental restriction on First  
15 Amendment rights as opposed to one where you have a  
16 total exclusion or some factor such as the malice  
17 situation --

18           QUESTION: Yes, but in Young, of course, it  
19 was specifically assumed that the total market for the  
20 particular speech was not diminished.

21           MR. PRETTYMAN: I think you can assume that  
22 here. The most that we have in this --

23           QUESTION: You can't under this finding, but  
24 the question is whether that finding is important enough  
25 to merit more careful review and some finding --

1 MR. PRETTYMAN: Well, Your Honor, I think that  
2 where you have an area that will accommodate over 400  
3 theatres and it's readily accessible and criss-crossed  
4 by roads, the most that you've got is an inconvenience.  
5 Somebody who may want to be downtown and see one is  
6 going to have to drive for a little bit.

7 QUESTION: Mr. Prettyman, I take it that your  
8 opposition indicated that there was sufficient proof of  
9 probable injury to residential neighborhoods, that  
10 availability wouldn't make any difference.

11 MR. PRETTYMAN: If there was sufficient proof,  
12 availability wouldn't make any difference?

13 QUESTION: No, no, no. If there was  
14 sufficient proof of harm to residential neighborhoods --

15 MR. PRETTYMAN: I don't go that far. I don't  
16 say that if you had harm to residential neighborhoods  
17 you could zone them; you could do a Schad. I don't say  
18 that.

19 And I think the reason, Justice White, is that  
20 there would then have to be some accommodation. You  
21 might have to, you might have to restrict your area from  
22 1,000 feet to 500. You might have to accommodate in  
23 some fashion to make sure that there was some outlet for  
24 this expression.

25 QUESTION: But you think that whatever,

1 whatever threshold availability there was was passed,  
2 here?

3 MR. PRETTYMAN: It's clearly that in this  
4 case, yes.

5 The only other point I would make is that he  
6 said that we zoned him out of the commercial area. We  
7 didn't zone them away from the commercial area, we zoned  
8 them away from residences and churches and stuff, and it  
9 just so happened that in our city they're all mixed in  
10 with the commercial zone, so they're not right downtown.

11 But let me pose this question to you. Do they  
12 have a right, do they have a constitutional right to be  
13 where they want to be, where most customers are walking  
14 by the door, where they don't have to put up signs  
15 because there's so many people walking by that they'll  
16 get a ready audience?

17 Or can we put them away from where they're  
18 doing the harm but where people can still go, you still  
19 have plenty of film, plenty of theatres, plenty of  
20 access, and everybody can see what they want to?

21 And with that, I hope very much that you'll  
22 reverse.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
24 The case is submitted.

25 (Whereupon, at 11:50 a.m., the case in the

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above-entitled matter was submitted.)

CERTIFICATION.

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
#84-1360 - CITY OF RENTON, ET AL., Appellants V. PLAYTIME THEATRES, INC.,  
ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



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