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STRIPPING DOWN A VICTORY FOR ADULT ENTERTAINMENT: SHOWTIME ENTERTAINMENT, LLC V. TOWN OF MENDON

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In a win for adult entertainment, the First Circuit Court of Appeals in *Showtime Entertainment, LLC v. Town of Mendon* struck down a town's zoning ordinance restricting the size and operating hours of a nude dancing establishment. The First Circuit explained that the town did not adequately support its concerns that the business would cause harmful secondary effects and therefore could not limit the business's operation.

This Comment traces the history of adult entertainment zoning jurisprudence, placing special emphasis on the Supreme Court's *Renton* test and *Alameda* burden-shifting approach. It then argues that the First Circuit's ruling is inconsistent with the *Renton* and *Alameda* framework and should be overturned because the court improperly required the town to meet a heightened burden of proof. The town provided adequate support that the adult business would alter the town's rural charm and cause traffic congestion along Route 16 and therefore should have been allowed to "experiment with solutions" to these problems.

I. INTRODUCTION

Your children take the bus home from school one afternoon. Their regular commute takes about fifteen minutes. Although you live in a mostly rural town, it includes a small commercial district that lies on the border of Route 16. The district contains a few warehouses, a drive-in movie theater, and some restaurants. Your children look out the window and take in their surroundings as they do every day on the bus ride home. One child spots something new: a 9,000 square foot establishment on the

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edge of the commercial district. At the top of the building, a sign reads, “Live! Nude Dancers.”¹

In May 2008, the town of Mendon, Massachusetts enacted zoning regulations intended to mitigate the effects of adult entertainment businesses by limiting their location to select parcels bordering Route 16.² The preamble to section 5.01 read:

The purpose of this Adult Entertainment Overlay District section of the Town of Mendon Zoning Bylaws is to address and mitigate the secondary effects of adult entertainment establishments These effects include increased crime, and adverse effects on public health, the business climate, the property values of residential and commercial property and the quality of life.

The provisions of this section have neither the purpose nor intent of imposing a limitation on the content of any communicative matter or materials, including sexually oriented matter or materials. Similarly, it is not the purpose or intent of this Section (Overlay District) to restrict or deny access to adult entertainment establishments or to sexually oriented matter or materials that is protected by the Constitutions of the United States and the Commonwealth of Massachusetts³

The following month, Showtime Entertainment LLC (“Showtime”) applied for a license to build a nude dancing club on one of these parcels.⁴ The proposed establishment would comprise approximately 8,935 square

1. This paragraph is hypothetical and “Live! Nude Dancers” is not the actual name of Showtime’s establishment. Per Mendon’s bylaws, it is unclear whether an adult establishment can erect a sign reading “Live! Nude Dancers.” While section 5.01(f)(iii) mandates that a business cannot erect a sign conveying sexual content, section 5.01(f)(iv) allows an adult establishment to construct a sign identifying the name and purpose of the business. MENDON, MASS., ZONING BY-LAWS art. 5, § 5.01(f)(iii)-(iv) (2016).

2. *Showtime Entm’t, LLC v. Mendon, Mass. (Showtime II)*, 769 F.3d 61, 66 (1st Cir. 2014).

3. *Id.*; see also MENDON, MASS., ZONING BY-LAWS art. 5, § 5.01(b) (2016).

4. *Showtime II*, 769 F.3d at 67.

feet, with space to accommodate 244 patrons and 82 parking spaces.⁵ At a public hearing on September 15, 2008, town residents voiced their disapproval of the proposed project.⁶ They encouraged the Board of Selectmen (“Board”) to enact additional bylaws: (1) imposing height and size restrictions on adult entertainment establishments, (2) limiting the operating hours of these businesses, and (3) banning the sale and consumption of alcohol on the property.⁷

The town rejected Showtime’s proposal, citing public health, safety, noise pollution, and traffic concerns.⁸ A week later, the town held a special public meeting to discuss the negative effects adult entertainment businesses cause on surrounding areas.⁹ In particular, residents identified three primary justifications for enacting additional restrictions: (1) to protect Mendon’s “historically rural atmosphere,” (2) to ensure traffic safety and prevent traffic congestion, and (3) to reduce crime that results from a combination of adult entertainment and alcohol.¹⁰ During the meeting, the residents voted to amend Mendon’s bylaws.¹¹ Under the amended ordinance, no adult entertainment establishment could exceed 2,000 square feet in area and fourteen feet in height, open earlier than 4:30 p.m. on school days, or sell alcohol on its premises.¹²

Showtime amended its application to comply with the new bylaws and included plans to build a single-story, 2,000-square-foot building that would accommodate 74 customers and a parking lot with 103 spaces.¹³ Showtime also agreed not to open before 4:30 p.m. or sell alcohol on its property.¹⁴ It also presented a traffic study, which concluded that “[p]eak-

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Showtime II*, 769 F.3d at 67–68

11. *Id.* At 67.

12. *Id.* at 67–68.

13. *Id.* at 68.

14. *See id.*

hour traffic volume increases as a result of the development [would] have negligible impacts on [traffic near the Overlay District].”¹⁵ On May 3, 2010, the Board approved Showtime’s amended proposal.¹⁶

Nevertheless, Showtime sued the town of Mendon in federal court, claiming that the zoning bylaws restricting its size and hours of operation were unconstitutional restrictions of expressive activity under the First Amendment of the United States Constitution.¹⁷ It also claimed that Article 16 of the Massachusetts state constitution precluded the alcohol ban.¹⁸ However, the district court granted summary judgment in favor of Mendon, concluding that the zoning and alcohol restrictions were constitutional.¹⁹ The Court of Appeals for the First Circuit reversed and remanded the zoning claims back to the district court for entry of summary judgment in favor of Showtime.²⁰ Finding that the alcohol claim involved complex issues of state constitutional law, the First Circuit certified questions concerning the alcohol ban to the Massachusetts Supreme Judicial Court (“SJC”) to resolve.²¹

This Comment will first provide an overview of adult entertainment zoning jurisprudence and the Supreme Court’s treatment of ordinances that restrict an adult business’s ability to operate. It will then argue that, in the case of *Showtime Entertainment, LLC v. Town of Mendon*, the First Circuit misapplied Supreme Court precedent in striking down Mendon’s ordinance by imposing a heightened standard. This Comment does not address the SJC’s ruling on the alcohol ban.²²

15. *Id.*

16. *Showtime II*, 769 F.3d at 68.

17. *Id.* at 69.

18. *Id.*

19. *Id.*

20. *Id.* at 82.

21. *Id.* at 82–83.

22. *See generally* *Showtime Entm’t, LLC v. Town of Mendon*, 32 N.E.3d 1259 (Mass. 2015). For curious readers, the SJC concluded that Mendon had a substantial government interest in regulating crime and an alcohol ban could reasonably serve that purpose, but the ban was not adequately tailored to further this purpose. *Id.* at 1263–67

II. MUNICIPAL ZONING OF ADULT ENTERTAINMENT BUSINESSES: OVERVIEW AND APPLICATION

This section will briefly explore traditional First Amendment jurisprudence and chronologically trace the Supreme Court's treatment of adult entertainment zoning ordinances.

A. The First Amendment and a Multi-Step Approach

The First Amendment provides that Congress shall make no law abridging the freedom of speech.²³ Not all speech is created equal, however, and the Supreme Court has found that certain categories of speech are entitled to lesser constitutional protection than others.²⁴ In *Miller v. California*, the Court declared that while the First Amendment protects works that have “serious literary, artistic, political, or scientific value, . . . the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.”²⁵ As Justice Stevens famously quipped in *Young v. American Mini Theatres, Inc.*, “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”²⁶ Despite society’s “lesser interest in protecting

23. U.S. CONST. amend. I.

24. *See, e.g., Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (“[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire’s immortal comment.”); Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 804–05 (2004) (discussing the Supreme Court’s valuation of political speech, commercial speech, and fighting words and the standard of scrutiny such speech is afforded).

25. *Miller v. California*, 413 U.S. 15, 34–35 (1973) (“[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”). *Miller* established the three-part test for obscenity and reaffirmed the principle that obscene material is not constitutionally protected. *Id.* at 24. Yet commercial entities that market non-obscene, erotic materials (such as adult movie theaters and adult bookstores) enjoy some First Amendment protection.

26. *Young*, 427 U.S. at 70.

commercial material, such as borderline pornography,” this speech is still protected by the First Amendment, albeit to a limited extent.²⁷

The Supreme Court takes a multistep approach in evaluating the constitutionality of zoning ordinances that regulate adult entertainment businesses.²⁸ First, it determines whether the ordinance completely bans the business from residing within municipal limits or if it merely restricts the time, place, and manner the business can operate.²⁹

Second, it determines whether the time, place, and manner restriction is content-based or content-neutral.³⁰ For reasons that will become apparent, some scholars suggest that this distinction is often confusing, arbitrary, and impossible to discern.³¹ Others suggest that the Supreme Court has incorrectly framed the analysis.³² However meritorious these critiques, this Comment will not explore the depths of that discussion. Rather, this Comment will focus on the distinction as the Supreme Court has developed and interpreted it.

1. The Content Distinction

The Supreme Court places great emphasis on the content distinction, that is, whether a government restriction on lawful speech is “content-based” or “content-neutral.”³³ As the Court has framed the analysis, a

27. *See id.* (acknowledging that the First Amendment would not tolerate the total suppression of non-obscene, erotic materials); Matthew L. McGinnis, *Sex, But Not the City: Adult-Entertainment Zoning, the First Amendment, and Residential and Rural Municipalities*, 46 B.C. L. REV. 625, 634 (2005).

28. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

29. *Id.*

30. *Id.* at 47.

31. *See, e.g.*, Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128–50 (1981) (arguing that content-neutral regulations should logically be as suspect as content-based regulations because both impair the free flow of expression, and accordingly, the content distinction should be abandoned as theoretically invalid and pragmatically unworkable).

32. *See, e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56–64 (2000) (identifying three problems with how the Court has applied the principle of content neutrality).

33. *See id.* at 53 (“Today, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws.”).

content-based regulation restricts a particular form of speech on the basis of its “message, its ideas, its subject matter, or its content.”³⁴ For example, in *Police Department of Chicago v. Mosley*, a Chicago ordinance banned picketing near school grounds except for picketing involving peaceful labor disputes.³⁵ The Court struck down the ordinance, concluding it impermissibly discriminated against all non-labor picketing *because of its* subject matter without offering a legitimate reason why peaceful labor picketing was allowed.³⁶ Similarly in *United States v. Playboy Entertainment Group*, the Court found that a federal telecommunications regulation requiring cable providers to “scramble” or block sexually explicit channels during late-night hours was content-based, because it singled out promiscuous material.³⁷ The law aimed to prevent “signal bleed” where children might mistakenly have access to the adult content.³⁸ Justice Kennedy, writing for the majority, explained that the regulation “focuse[d] *only* on the content of the speech and the direct impact that speech ha[d] on its listeners.”³⁹

Content-based speech restrictions are “presumptively invalid” and are therefore subject to *strict scrutiny*.⁴⁰ Under strict scrutiny, a content-based speech regulation survives only if it is “narrowly tailored to promote a *compelling* Government interest” and the means used to achieve that interest are “the least restrictive” available.⁴¹ Such content-based speech regulations will rarely be upheld.⁴²

34. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

35. *Id.* at 92–93.

36. *See id.* at 100–01 (“If peaceful labor picketing is permitted, there is no justification for prohibiting all non-labor picketing, both peaceful and non-peaceful. ‘Peaceful’ non-labor picketing, however the term ‘peaceful’ is defined, is obviously no more disruptive than ‘peaceful’ labor picketing. But Chicago’s ordinance permits the latter and prohibits the former.”).

37. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 806–07, 811–12 (2000).

38. *Id.* at 806.

39. *Id.* at 811 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

40. *Id.* at 813–817.

41. *Id.* at 813 (emphasis added) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

42. *Id.* at 818 (“The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and

By contrast, a content-neutral speech regulation serves purposes “unrelated to the content” of expression and therefore receives a lesser degree of scrutiny.⁴³ A content-neutral restriction on the time, place, and or manner of speech is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.⁴⁴ The Supreme Court officially recognized the time, place, and manner test in the context of adult entertainment in *Renton v. Playtime Theaters*.⁴⁵ In analyzing the content distinction of the zoning ordinance, the *Renton* Court reasoned that the “predominate” goal of the legislation was to prevent the “secondary effects” of the speech—i.e., the harmful effects the speech has on the quality of the neighborhood—and not the content of the speech itself.⁴⁶ Although the regulation facially singled out adult establishments for discriminatory treatment, the Court deemed the ordinance content-neutral because the city’s primary purpose was to minimize deleterious effects to the community.⁴⁷ Thus, under *Renton*, an adult entertainment zoning ordinance is said to regulate only the “secondary effects” of such speech and will generally be deemed content-neutral.⁴⁸

expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”).

43. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 662 (1994) (applying intermediate scrutiny to content-neutral speech restrictions because they generally “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue”); *Ward v. Rock Against Racism*, 429 U.S. 781, 791 (1989) (explaining that a content-neutral speech restriction affects speech only incidentally and clarifying the legal standard applicable to time, place, and manner regulations).

44. *Ward*, 429 U.S. at 791.

45. David J. Christiansen, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 VAL. UNIV. L. REV. 695, 712 & n.127 (1988) (noting that, before *Renton*, Justice Powell had suggested adoption of the time, place, and manner standard in his concurring opinion in *Young*).

46. *Renton*, 475 U.S. at 47.

47. *See id.* at 47–48.

48. *Id.* But see McGinnis, *supra* note 27, at 629 n.35 (collecting legal scholarship that maintains that adult entertainment zoning ordinances are not content-neutral, despite the Court’s interpretation in *Renton*); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (naming the content-neutral designation in *Renton* as “a fiction”). For a good analysis on how the Court’s intent-based approach further blurs the content distinction, see Chemerinsky, *supra* note 32, at 59–61.

2. The *Renton* Test

Where an adult establishment is regulated by a content-neutral time, manner, or place restriction, courts apply the *Renton* test, a form of intermediate scrutiny.⁴⁹ Under the *Renton* test, a zoning regulation of adult businesses is constitutional where it: (1) is narrowly tailored to serve a substantial government purpose and (2) leaves open alternative channels of communication.⁵⁰

A municipality may satisfy the first prong under *Renton* by showing that the secondary effects it hopes to prevent are important and the regulation “affect[s] only that category of [businesses] shown to produce the unwanted secondary effects.”⁵¹ The regulation may not be “under-inclusive,” meaning it cannot regulate only some businesses that produce the unwanted secondary effects while leaving others unscathed.⁵² Furthermore, the municipality need not provide studies proving that its regulation will be effective.⁵³ It may rely upon studies by foreign cities and upon any evidence “reasonably believed to be relevant” to addressing its problems.⁵⁴

A municipality may satisfy the second prong under *Renton* by showing that its regulation does not prevent a business owner from otherwise espousing his message.⁵⁵ For example, a city may show that the business owner can operate his establishment elsewhere within city limits.⁵⁶

49. See *Alameda Books*, 535 U.S. at 440 (identifying the *Renton* standard as “intermediate scrutiny”).

50. See *Renton*, 475 U.S. at 47; Christiansen, *supra* note 45, at 712 (describing the *Renton* test applied in adult entertainment cases as a similar but relaxed standard of the traditional time, place, and manner test).

51. *Renton*, 475 U.S. at 52. Though the Court did not explain what makes a government interest “substantial,” it appears to have assumed that cities have important interests in regulating crime and maintaining the quality of their neighborhoods.

52. *Id.*

53. See *id.* at 51–52.

54. *Id.* at 51–52.

55. See *id.* at 54.

56. See *id.*

B. Zoning Adult Entertainment Businesses—The Supreme Court Develops a Standard

This section focuses on the Supreme Court’s holdings in several cases where municipalities enacted legislation limiting the operation of adult businesses.

1. *Young v. American Mini Theatres, Inc.* (1976)—In a Case of First Impression, the Supreme Court Upholds a Zoning Ordinance That Dispersed, but Did Not Band, Adult Businesses

The Supreme Court first tackled adult entertainment zoning in the 1976 case *Young v. American Mini Theatres, Inc.* (“*Young*”).⁵⁷ In *Young*, the Court upheld a Detroit ordinance aimed at dispersing adult movie theaters from a single, concentrated area.⁵⁸ Under the ordinance, adult theaters could not operate within 1,000 feet of each other or within 500 feet of a residential area.⁵⁹ The alleged purpose of the ordinance was to preserve the “quality of urban life” by removing concentrated areas of adult business that exacerbated crime and diminished surrounding property values.⁶⁰

The Court determined that the ordinance, which merely aimed to scatter these businesses, was a “place” restriction—not a total ban on adult entertainment.⁶¹ The Court then found that the ordinance was content-neutral because, although it singled out adult businesses on the basis of their content, the primary purpose of the regulation was to mitigate these harmful secondary effects—namely, surges in crime and drops in property values.⁶²

Although this case was decided before *Renton*, the *Young* Court appeared to formulate early sketches of the *Renton* test. Notably, the Detroit ordinance singled out only businesses that displayed nudity.⁶³

57. *Young*, 427 U.S. at 50; see McGinnis, *supra* note 27, at 632.

58. *Young*, 427 U.S. at 52, 72.

59. *Id.* at 52.

60. See *id.* at 55; see also McGinnis, *supra* note 27, at 634.

61. See *Young*, 427 U.S. at 63.

62. See *id.* at 71–72; McGinnis, *supra* note 27, at 634.

63. *Young*, 427 U.S. at 70.

Thus, the ordinance appeared to target businesses on the basis of their content. However, the *Young* Court found that the primary *intent* behind the ordinance was not to prohibit businesses from displaying nudity, but to reduce the harm those businesses have on the quality of urban life.⁶⁴ The *Young* Court accordingly found the ordinance content-neutral.⁶⁵

The Court inferred that Detroit's aims were "significant governmental interests,"⁶⁶ and it alluded to "alternative avenues of communication" when it found that the ordinance, which did not ban but merely dispersed these businesses, left the adult entertainment market "essentially unrestrained."⁶⁷ Ultimately, the *Young* Supreme Court upheld the ordinance.⁶⁸

2. *Schad v. Borough of Mount Ephraim* (1981)—The Supreme Court Invalidates a Zoning Ordinance Imposing an Outright Ban on Live Entertainment

In *Schad v. Borough of Mount Ephraim* ("*Schad*"), the Supreme Court declared unconstitutional an ordinance that mandated a total ban on *all* forms of live entertainment in a residential community, including nude dancing.⁶⁹ In striking down the ordinance, the Court found that *Young* was not controlling because the ordinance there imposed a "place" restriction, not an outright ban.⁷⁰

The Court reasoned that the regulation in *Schad* failed on two fronts.⁷¹ First, the regulation was not narrowly tailored to serve any important

64. *Id.* at 71–72. .

65. *See id.* at 70–73 ("Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.")

66. *See id.* at 63 n.18, 71 ("[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.")

67. *Id.* at 62.

68. *See id.* at 70–73.

69. *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

70. *Id.* at 71–72.

71. *See id.* at 74–76 (finding the regulation was not "narrowly drawn" and did not leave

government interest.⁷² The town, which did not offer any justification on the face of its ordinance, later explained that its ban was necessary to serve its goal of catering to the “immediate needs” of town residents and ensuring that parking, trash, and police protection would not be impacted.⁷³ According to the Court, however, the town fatally failed to explain how a sweeping ban was necessary to address these goals.⁷⁴ Second, the ordinance did not leave open alternative channels of communication for businesses because they could not operate anywhere within town limits.⁷⁵ Therefore, the ordinance did not withstand scrutiny.⁷⁶

3. *Renton v. Playtime Theaters, Inc.* (1986)—The Supreme Court Upholds an Ordinance Requiring Relocation of Adult Businesses

Perhaps no Supreme Court opinion more directly mirrors the facts of *Showtime* than *Renton v. Playtime Theaters, Inc.* (“*Renton*”). In *Renton*, the Supreme Court upheld a city’s zoning ordinance restricting the location of adult entertainment establishments.⁷⁷ Under the regulation, no adult establishment could reside within 1,000 feet of residential property or within one mile of any school.⁷⁸ The purpose of the regulation was to prevent the secondary effects caused by these businesses, such as increased crime.⁷⁹ The ordinance left open approximately 520 acres, or five percent of *Renton*’s total area, on which these businesses could operate.⁸⁰

open “alternative channels of communication”).

72. *Id.* at 73–74.

73. *Id.* at 67, 72–73.

74. *See id.* at 74 (“The Borough has not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression.”).

75. *See Schad*, 452 U.S. at 75–76.

76. *See id.* at 77.

77. *See Renton*, 475 U.S. at 54–55.

78. *Id.* at 44.

79. *See id.* at 48.

80. *See id.* at 53.

The Supreme Court began by applying its multi-step inquiry.⁸¹ First, it found that the ordinance imposed a place restriction, not a total ban, because it allowed adult businesses to relocate within city limits.⁸² Second, it found the restriction content-neutral.⁸³ The Court explained that although the ordinance had content-based elements because it specifically targeted adult businesses on the basis of their suggestive content, the legislative intent of the ordinance was to eliminate the secondary effects they caused.⁸⁴

Next, the Supreme Court enumerated and then applied its two-pronged test—which would later become a staple in adult entertainment zoning jurisprudence.⁸⁵ First, it determined that the city demonstrated a substantial government interest, noting that “a city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect.”⁸⁶ Although the city had not provided its own studies supporting its concerns about the secondary effects of adult businesses, it was allowed to “rely on the experiences of . . . other cities,” and was “allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”⁸⁷ The city could rely on any information “reasonably believed to be relevant to the problem the city addresses.”⁸⁸

The Court also noted that the ordinance was sufficiently “narrowly tailored” because it affected “only that category of theaters shown to produce the unwanted secondary effects.”⁸⁹ Therefore, the ordinance was

81. *See id.* at 46–54 (proceeding by first describing the ordinance as a time, manner, or place regulation, then determining the content-distinction, then analyzing the “substantial government interest” and “reasonable alternative avenues of communication”).

82. *See id.* at 46.

83. *See Renton*, 475 U.S. at 48–49.

84. *See id.* at 47–49.

85. *See id.* at 50–54; *see also* McGinnis, *supra* note 27, at 626–27 (describing the *Renton* test); *Alameda Books*, 535 U.S. 425; *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).

86. *Renton*, 475 U.S. at 50.

87. *Id.* at 51–52.

88. *Id.* at 51.

89. *Id.* at 52.

not “under-inclusive.”⁹⁰ The Court elaborated that the city could withstand future under-inclusiveness challenges by later amending its bylaws if and when other businesses produced similar secondary effects.⁹¹

Second, the Court found that the ordinance left open alternative channels of communication for adult businesses.⁹² It noted that, although adult businesses could only relocate to five percent of the city’s total land, the mere fact that the ordinance left “some areas” open to these businesses was legally sufficient to pass muster.⁹³

4. *City of Erie v. Pap’s A.M.* (2000)—A Municipality May Rely on Evidence of Secondary Effects from the Cities in *Renton* and *Young*

In *City of Erie, v. Pap’s A.M.* (“*Pap’s A.M.*”), a Supreme Court plurality upheld a city’s statute that criminalized all forms of public nudity.⁹⁴ The ordinance’s preamble read that its purpose was to limit the adverse impacts of live nudity on “public health, safety and welfare.”⁹⁵ It required that erotic dancers wear at least “pasties” and a “G-string.”⁹⁶ Although the city offered its own evidence supporting its assessment of these secondary effects, the Court found that it could properly rely on the evidence set forth in *Renton* and *Young* that even a single adult establishment in a neighborhood causes harmful secondary effects.⁹⁷

Justice O’Connor, writing for the plurality, flatly rejected Justice Souter’s argument that a city must develop an “evidentiary record” supporting its ordinance.⁹⁸ O’Connor also rejected the dissenting view’s “questioning the wisdom” of the city’s approach.⁹⁹ Echoing *Renton*,

90. *Id.*

91. *See id.* at 52–53.

92. *See Renton*, 475 U.S. at 53–54.

93. *See id.* at 54.

94. *See Pap’s A.M.*, 529 U.S. at 283.

95. *Id.* at 290.

96. *Id.* at 284.

97. *Id.* at 297.

98. *See id.* at 299–300.

99. *See id.* at 299–301.

O'Connor reasoned that the city was allowed to "experiment with solutions to admittedly serious problems," even where other remedies would clearly prove more effective.¹⁰⁰ The city's chosen approach need only "further the [government's] interest" in reducing secondary effects.¹⁰¹

5. *City of Los Angeles v. Alameda Books, Inc.* (2002)—The Supreme Court Solidifies Its Burden-Shifting Approach Within the *Renton* Framework

In *City of L.A. Los Angeles v. Alameda Books, Inc.* ("Alameda Books"), the Supreme Court—again by plurality—upheld a Los Angeles zoning ordinance that prohibited more than one adult establishment from operating in a single building or structure.¹⁰² By enacting the ordinance, the city hoped to reduce the effects of crime inherent in areas of concentrated adult businesses.¹⁰³ Like the regulations in *Young* and *Renton*, the regulation in *Alameda Books* aimed to disperse adult businesses but not ban them outright.¹⁰⁴ In support of its ordinance, the city cited a 1977 police study concluding that concentrated areas of adult businesses are associated with more crime.¹⁰⁵

The *Alameda Books* plurality focused its discussion on the first prong of the two-part *Renton* test and, in particular, the degree of proof necessary to show that the city's ordinance served its "substantial government interest" in reducing crime.¹⁰⁶ The Court reasoned that the city was not required to *prove* that its ordinance would meet its substantial government interest so long as the evidence it relied on "'fairly support[s]' . . . the city's rationale for its ordinance."¹⁰⁷ It similarly explained that a judiciary may not substitute its own theory or draw its own conclusions from a city's study where there is more than one plausible way to interpret the data.¹⁰⁸

100. *Pap's A.M.*, 529 U.S. at 299–301.

101. *See id.*

102. *Alameda Books*, 535 U.S. at 430.

103. *Id.* at 429–30.

104. *See id.* at 430–31; *see also Renton*, 475 U.S. at 46; *Young*, 427 U.S. at 63.

105. *Alameda Books*, 535 U.S. at 430.

106. *Id.* at 435, 438–39.

107. *Id.* at 438–39.

108. *See id.* at 437–38, 440–42.

The plurality noted that a city is in a better position than a court to gather and interpret data on local problems.¹⁰⁹

However, the plurality here appeared to go further than *Renton* by discussing the possibility of burden-shifting.¹¹⁰ The Court reasoned that although a city cannot rely on “shoddy data or reasoning,” it may meet its initial burden by an appeal to common sense and common judgment that its regulation will mitigate the undesirable secondary effects.¹¹¹ However, a business can dispute this common sense evidence by either showing that the city’s evidence does not support its rationale or introducing its own evidence contradicting the city’s findings.¹¹² The business must provide “actual and convincing” evidence to do so.¹¹³ If the business successfully does so, the “burden shifts back to the [city] to supplement the record with evidence renewing support for a theory that justifies its ordinance.”¹¹⁴

The plurality found, however, that the city could rely on the 1977 police study and reasonably infer from the evidence that prohibiting an adult business from operating in the same structure as another would reduce crime.¹¹⁵ Thus, the city met its burden even where alternative theories suggested that its ordinance would not affect crime rates mentioned in the study.¹¹⁶ Because the adult business failed to cast doubt on the city’s interpretation of the study or provide its own contrary evidence, the ordinance was constitutional.¹¹⁷

III. SHOWTIME ENTERTAINMENT, LLC V. TOWN OF MENDON: THE DISTRICT COURT’S FINDINGS AND THE FIRST CIRCUIT’S REVERSAL

In the instant case, the District Court of Massachusetts and the Court of Appeals for the First Circuit applied the Supreme Court’s principles but

109. *Id.* at 440.

110. *See id.* at 439.

111. *See Alameda Books*, 535 U.S. at 438–39.

112. *Id.*

113. *Id.* at 439.

114. *Id.*

115. *See id.* at 436–37.

116. *See id.* at 437, 439.

117. *Alameda Books*, 535 U.S. at 438–43.

reached opposing conclusions.¹¹⁸ Both courts applied intermediate scrutiny¹¹⁹ but they disagreed about whether Mendon's bylaws targeted Showtime's secondary effects and whether the regulations were under-inclusive, meaning they did not target other businesses that produced the same secondary effects.¹²⁰ The courts separately considered Mendon's two primary concerns: (1) protecting Mendon's rural aesthetics and (2) preventing traffic congestion.¹²¹ Under *Renton* and *Alameda Books*, the district court found that Mendon met its burden.¹²² The First Circuit held the opposite.¹²³ Interestingly, the appellate court made only brief mention of *Renton* and did not account for the *Alameda Books* burden-shifting approach in its analysis.¹²⁴ Rather, the "narrow application" of Mendon's zoning bylaws were "tellingly underinclusive," such that Mendon failed to prove its bylaws actually furthered a substantial interest in regulating the secondary effects of adult-entertainment businesses.¹²⁵

A. Protecting Mendon's Rural Aesthetics

One of Mendon's primary concerns when it enacted its adult entertainment zoning bylaws was maintaining its historically rural atmosphere.¹²⁶ This primary concern embodies two related but distinct concerns: maintaining its small-town charm and its surrounding property values.¹²⁷ According to Showtime, however, Mendon's ordinance did not

118. See generally *Showtime Entm't, LLC v. Town of Mendon (Showtime II)*, 769 F.3d 61 (1st Cir. 2014); *Showtime Entm't LLC v. Ammendolia (Showtime I)*, 885 F. Supp. 2d 507 (D. Mass. 2012).

119. *Showtime II*, 769 F.3d at 72 ("Therefore, recognizing that the zoning bylaws' express terms set forth content-neutral purposes, we proceed in the application of intermediate scrutiny while withholding judgment as to the bylaws' true content neutrality."); *Showtime I*, 885 F. Supp. 2d at 522, 529 ("[T]he regulations will be reviewed under the intermediate level of scrutiny outlined in *Renton*").

120. See *Showtime II*, 769 F.3d at 72–78; *Showtime I*, 885 F. Supp. 2d 522–27.

121. See *Showtime II*, 769 F.3d at 72–78; *Showtime I*, 885 F. Supp. 2d 522–27.

122. *Showtime I*, 885 F. Supp. 2d at 522–27.

123. *Showtime II*, 769 F.3d at 72–78.

124. See *id.* at 72.

125. See *id.* at 78.

126. See *Showtime I*, 885 F. Supp. 2d at 519.

127. See *id.* at 521.

address these concerns because less promiscuous neighboring parcels were not subject to the same restrictions as Showtime's adult entertainment business.¹²⁸ Neighboring developments, for instance, were larger than the 2,000 square foot restriction imposed on Showtime, yet did "not appear particularly rural in character."¹²⁹ Thus, Showtime argued, the restrictions were not genuinely designed to promote the visual character of the town, but instead to suppress expression.¹³⁰

The district court disagreed with Showtime's arguments.¹³¹ Mendon adequately justified its concern about aesthetic character because it believed the addition of an adult business could further detract from the town's aesthetics.¹³² The town cited studies that supported a positive correlation between adult entertainment businesses and blight, and a negative correlation between adult entertainment businesses and surrounding property values.¹³³ Applying the burden-shifting approach developed in *Alameda Books*, the district court found that Mendon had met its initial burden because it could have reasonably concluded that imposing a size requirement would mitigate these undesirable effects.¹³⁴ Showtime had not provided "actual and convincing" proof to discredit the negative impact adult businesses have on neighborhoods, nor did it convince the court that a nearly 9,000 square foot adult establishment would not detract from the town's charm.¹³⁵

The First Circuit rejected the district court's findings.¹³⁶ Specifically, it held that the size and height restrictions were so underinclusive that the bylaws could not truly serve a substantial interest in maintaining the rural character of the town.¹³⁷ It was uncontested that the Adult Entertainment

128. *Id.* at 523.

129. *Id.*

130. *Id.*

131. *See id.* at 523–24.

132. *Showtime I*, 885 F. Supp. 2d at 523–24.

133. *Id.*

134. *Id.*

135. *See id.*

136. *See Showtime II*, 769 F.3d at 74.

137. *Id.* at 73–75.

Overlay District is a heavily commercialized zone “far from rural in nature,” and neighboring parcels that did not appear “rural” were not subject to the same size and height restrictions as Showtime’s equally not “rural” establishment.¹³⁸ Further, the appellate court found that “a large adult-entertainment business has no secondary effect distinct from a large building of another sort, at least without reference to what goes on ‘in the building.’”¹³⁹ Thus, because Showtime had agreed to comply with other regulations on building design and advertisements, Mendon failed to clarify how Showtime’s building would harm the community’s rural aesthetics any greater than a neighboring mainstream establishment would.¹⁴⁰ The First Circuit also rejected the notion that adult establishments negatively affect neighboring property values.¹⁴¹ Mendon’s studies, the First Circuit concluded, presented only “limited” effects on home prices located near adult businesses and had no impact on homes more than several blocks away.¹⁴²

B. Preventing Traffic Congestion

Mendon next argued that the ordinance’s size and hour restriction aimed to minimize significant traffic congestion caused by an influx of foreign customers.¹⁴³ In support, it provided studies supporting a correlation between adult businesses and increased traffic congestion, and offered evidence that adult businesses often draw customers from foreign communities.¹⁴⁴ The hour restriction, which prohibited Showtime from operating its business during school hours, was intended to ensure that the town’s school bus service would not suffer excessive traffic delays.¹⁴⁵ The size restriction, on the other hand, would reduce to two-thirds the number

138. *Id.* at 73–74.

139. *Id.* at 74.

140. *Id.* at 74–75.

141. *Id.* at 75 (accusing the town of attempting “to subtly change the contours of its stated interest”).

142. *Showtime II*, 769 F.3d at 75.

143. *See Showtime I*, 885 F. Supp. 2d at 521–22, 524.

144. *Id.* at 524.

145. *See id.* at 519, 524.

of patrons Showtime's establishment could accommodate.¹⁴⁶ While Showtime originally designed its business to fit 244 customers, its ordinance-friendly design could fit only 73.¹⁴⁷

Showtime countered with its own evidence to appease Mendon's purported traffic concerns.¹⁴⁸ For example, Showtime presented a study concluding that any traffic congestion caused by its establishment would be "negligible."¹⁴⁹ Thus, Showtime argued that Mendon's purported interest in curbing the secondary effects of traffic was mere pretext.¹⁵⁰

The district court again applied *Alameda Books* and concluded that Mendon, which had no obligation to conduct independent studies, had met its initial burden because it was "entirely reasonable to expect" that a larger building that accommodated more staff and customers would have a larger impact on traffic than a smaller establishment.¹⁵¹ Additionally, Mendon could reasonably conclude that excess traffic caused by the business would delay the school bus system, and the town had an interest in restricting opening hours to 4:30 p.m. to prevent such a conflict.¹⁵² On the other hand, Showtime's rebuttal study was flawed because it did not account for cumulative traffic effects caused by neighboring parcels.¹⁵³ Thus, Showtime did not offer "actual and convincing" evidence to shift the burden back to Mendon.¹⁵⁴

Without applying the *Alameda Books* burden-shifting approach, the First Circuit concluded, "Mendon . . . [did] not set forth evidence that the bylaws actually further its substantial interest in curbing traffic congestion

146. *See id.* at 524.

147. *Id.*

148. *Id.* at 523.

149. *Showtime I*, 885 F. Supp. 2d at 523.

150. *See id.* at 521 (contending that "the true purpose of the hours restriction is not to ameliorate traffic, but to prevent exposure of the regulated activity to children who ride the school bus").

151. *See id.* at 522–24.

152. *See id.* at 524.

153. *Id.* at 523.

154. *See id.* at 523 ("Plaintiff's objections do not convincingly discredit the town's asserted foundation for its zoning restrictions.").

in a manner sufficient to survive intermediate scrutiny.”¹⁵⁵ First, the court noted that Mendon failed to demonstrate how adult businesses cause any more traffic than large, commercial businesses along the same route.¹⁵⁶ Next, the First Circuit “conducted an independent review” of Mendon’s proffered studies and found them to be “largely anecdotal” and unresponsive of any realistic traffic concerns.¹⁵⁷ Finally, even if the adult business would attract traffic from out-of-town patrons, the court hypothesized that a roadside restaurant offering an “early-bird dinner special” would presumably cause the same effect, yet would not be subject to Mendon’s size or operating restrictions.¹⁵⁸ According to the First Circuit, then, because Mendon did not impose regulations on other businesses that caused the same alleged secondary effects as Showtime’s business, “the bylaws [were] equally underinclusive as related to traffic concerns as they were to Mendon’s rural aesthetic.”¹⁵⁹

IV. ARGUMENT: THE FIRST CIRCUIT MISAPPLIED THE *RENTON* TEST AND IMPROPERLY FOUND MENDON’S ORDINANCE INVALID

The First Circuit did not neatly apply the multi-step inquiry outlined in *Renton*.¹⁶⁰ First, it did not decide whether the regulation was a time, manner, and place restriction or an outright ban.¹⁶¹ Since the ordinance merely restricted the size of Showtime’s building and its hours of operation, the ordinance indeed is properly considered a time, place, or manner restriction.¹⁶² Second, the First Circuit declined judgment on whether the ordinance was content-based or content-neutral.¹⁶³ It explained

155. *Showtime II*, 769 F.3d at 76.

156. *Id.*

157. *Id.* at 76–77.

158. *Id.* at 77–78.

159. *See id.* at 76.

160. *See Showtime Entm’t, LLC v. Town of Mendon (Showtime II)*, 769 F.3d 61, 72–78 (1st Cir. 2014).

161. *See id.* at 72–73 (explaining the content distinction but failing to characterize the ordinance as a content-neutral time, place, or manner restriction).

162. *See Showtime Entm’t LLC v. Ammendolia (Showtime I)*, 885 F. Supp. 2d 507, 525 (D. Mass. 2012) (characterizing the ordinance as a content-neutral time, place, and manner restriction).

163. *See Showtime II*, 769 F.3d at 72.

“the distinction is ultimately immaterial” because the ordinance could not withstand even intermediate scrutiny typically reserved for content-neutral bylaws.¹⁶⁴

The crux of the First Circuit’s objection to the ordinance stems from the remaining step of the inquiry, the two-part *Renton* test.¹⁶⁵ Again, under the *Renton* test, a zoning regulation of adult businesses is constitutional where it: (1) is narrowly tailored to serve a substantial government purpose and (2) leaves open alternative channels of communication.¹⁶⁶ In particular, the First Circuit found that Mendon’s bylaws were not narrowly tailored to serve a substantial government interest because Mendon failed to prove that the adult establishment would alter the town’s rural aesthetics or cause traffic congestion any more than other types of businesses not subject to the regulation.¹⁶⁷ Therefore, the bylaws were “tellingly underinclusive” and could not survive intermediate scrutiny.¹⁶⁸ The court did not address whether the regulation left open alternative avenues of communication.

As explained below, the First Circuit erred when it found that Mendon’s zoning ordinance violated the First Amendment because it imposed a heightened *Renton* standard.

A. Mendon’s Ordinance Is Narrowly Tailored to Serve Its Legitimate Goals of Maintaining Its Rural Aesthetics and Preventing Traffic Congestion

The Supreme Court in *Renton* upheld a city ordinance that sought to “preserve the quality of urban life.”¹⁶⁹ Surely, the Supreme Court could see similar value in preserving a town’s quality of rural life. Here, the First Circuit explained that while Mendon’s interests in maintaining its aesthetic charm and preventing traffic congestion were “theoretically” substantial,

164. *Id.*

165. The court did not specifically mention it was using the *Renton* test, but it outlined the *Renton* framework. *See id.* at 71 (“This intermediate level of scrutiny allows regulations justified by neutral purposes, rather than by the content of speech, to survive so long as they support a significant government interest, do not burden substantially more speech than necessary, and leave available alternative channels of communication.”).

166. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

167. *See Showtime II*, 769 F.3d at 75, 78.

168. *See id.*

169. *Id.*

Mendon failed to prove that restricting the size and hours of Showtime’s establishment would serve these interests.¹⁷⁰ However, Mendon’s bylaws (1) further the town’s legitimate interest in maintaining its rural aesthetics and preventing traffic congestion and (2) are narrowly tailored to serve these goals.

1. Sufficient Evidentiary Support

The First Circuit struck down the ordinance, in part, because it found that Mendon did not offer sufficient evidence that the regulations would adequately address its purported government interests.¹⁷¹ As explained below, Mendon reasonably relied on ample evidence to meet its burden under *Renton* and *Alameda Books*.¹⁷²

a. Aesthetics—Mendon’s Reasonable Conclusion that Adult Businesses Detract from Small Town Charm and Decreased Property Values, Even if Minimal, is Sufficient

As outlined above, the First Circuit reasoned that Showtime’s non-rural building would look identical to surrounding, non-rural buildings; the adult business’s lack of rural character cannot affect Mendon’s aesthetic charm any more than those equally-sized, non-rural structures; while studies show neighborhoods experience negative effects caused by adult entertainment businesses, the effects are limited in radius; these “patently underinclusive” shortcomings suggest the dispute is about “what goes on in the building” and is unrelated to the interest of maintaining the town’s charm.¹⁷³

The First Circuit’s reasoning fails for two reasons. While the court correctly points out that the adult building’s exterior would mimic the non-rural appearance and non-rural character of neighboring establishments, (1) Mendon could reasonably conclude that a gigantic adult business would further detract from the quality of its small-town charm, and (2) Mendon is entitled to impose restrictions that promote this interest, even though the restrictions do not eradicate the problem entirely. As the district court correctly observed, “the fact that some large structures now exist on [Route

170. See *Showtime II*, 769 F.3d at 78.

171. See *id.*

172. See *id.*

173. See *id.* at 74–75.

16] does not detract from the town’s concern that *additional* structures—particularly ones dedicated to adult entertainment—would *further* detract from the rural character of the town as a whole.”¹⁷⁴ Thus, while Mendon may be able to take more effective steps to solidify its small-town feel, it could reasonably conclude that downsizing a 9,000 square foot nude-entertainment to 2,000 square feet could somewhat achieve its purpose. From the “numerous studies, reports, and articles” the town submitted, Mendon could reasonably believe that a gigantic adult business would detract from the quality of its small-town appeal.¹⁷⁵ Residents of other towns, for example, have complained that adult businesses alter their small-town feel and affect interactions with visiting business leaders.¹⁷⁶ In this respect, Mendon could reasonably conclude that a 9,000 square foot adult business would detract from the quality of its small-town appeal more than a 2,000, appreciably smaller, square foot building. And, consistent with Justice O’Connor’s reasoning in *Pap’s A.M.*, Mendon is entitled to take minor steps to minimize harmful secondary effects, even where other remedies may prove more effective.¹⁷⁷ Therefore, Mendon met its initial burden under *Alameda Books* because it relied on common judgment that its ordinance would target the unwanted secondary effect.¹⁷⁸ Showtime, by contrast, has not provided “actual and convincing” evidence to rebut Mendon’s rationale.¹⁷⁹

174. *Showtime I*, 885 F. Supp. 2d at 523 (emphasis added).

175. *Id.* at 521 n.12; see Amy Reinink, *Adult Businesses vs. Small Area Cities*, GAINSEVILLE SUN, <http://www.gainesville.com/article/20060227/LOCAL/202270353> [http://perma.cc/G5EE-RW7T]; *Officials: Strip Clubs Tarnish City’s Image*, AUGUSTA CHRONICLE, http://chronicle.augusta.com/stories/2000/04/30/met_289671.shtml#.VtNtopMrKRu [http://perma.cc/B383-72ZQ]; see also *Renton*, 475 U.S. at 50 (explaining a city’s interest in preserving its quality of urban life “must be accorded high respect”).

176. See Reinink, *supra* note 177 (reporting several rural communities in which the residents complain about nude establishments ruining small-town values); *Officials: Strip Clubs Tarnish City’s Image*, *supra* note 177 (reporting that foreign business leaders who visit the city of Augusta, Georgia notice the presence of adult businesses across the street from the chamber of commerce building, which is not the type of image city officials want to portray).

177. See *City of Erie v. Pap’s A.M.*, 529 U.S. 282, 300–01 (2000) (explaining that even where a regulation may not greatly reduce the feared secondary effects, the regulation need only “further the interest in combating such effects”).

178. See *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 438–39 (2002) (explaining that a city can rely on common sense).

179. See *Alameda Books*, 535 U.S. at 439 (describing the “actual and convincing” evidentiary standard).

Mendon's second rural aesthetic justification, maintaining property values, fared no better before the appellate court. The First Circuit rejected Mendon's studies that purported to show that adult businesses cause a decline in surrounding property values and found no evidence that adult entertainment establishments have any true effect on the rural value of homes in surrounding areas.¹⁸⁰ Importantly, however, the First Circuit's reasoning fails because it imposes too high a burden on Mendon, as explained below.

The Supreme Court has not specified the degree to which an adult business must detrimentally affect a town before the town can mitigate the business's effect.¹⁸¹ Thus, even if the First Circuit is correct that surrounding homes are only minimally affected, no case law supports its conclusion that Mendon's actions are unjustified. Mendon could reasonably have a substantial government interest in mitigating even small impacts on its surrounding residential value.¹⁸²

Additionally, the Supreme Court has long recognized a correlation between declining property values and adult establishments.¹⁸³ Thus, even if Mendon's independent studies do not support this conclusion under *Pap's A.M.*, Mendon can permissibly rely on studies from other towns or from parties of former Supreme Court cases.¹⁸⁴ Indeed, under *Renton*, Mendon was not required to provide its own studies, and the fact that it did further reinforces its justification.¹⁸⁵ Based on its own studies and the Supreme Court's prior holdings, Mendon could reasonably conclude that a smaller and subtler adult establishment would mitigate the effects of decreasing property values.¹⁸⁶ As the *Renton* Court noted, municipalities

180. *Id.*

181. *See Renton*, 475 U.S. at 51–52 (holding that a town must be allowed to determine detrimental secondary effects and experiment with solutions).

182. *See id.* at 51–52; *see also Pap's A.M.*, 529 U.S. at 300–01 (reasoning that even where a regulation may not greatly reduce the feared secondary effects, the regulation need only “further the interest in combating such effects”).

183. *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 55 (1976); *Renton*, 475 U.S. at 48 (upholding ordinance aimed in part at maintaining surrounding property values).

184. *Pap's A.M.*, 529 U.S. at 297 (holding that a party could rely on the city of *Renton's* findings).

185. *Renton*, 475 U.S. at 51–52 (finding that a city is not required to provide its own studies but may rely on the experiences of other cities).

186. *See id.* (holding that a town must be allowed to determine detrimental secondary effects and experiment with solutions); *see also Pap's A.M.*, 529 U.S. at 300–01 (explaining that

like Mendon must be given an opportunity to experiment with solutions to important problems.¹⁸⁷

In the 1999 case *D.H.L. Associates v. O’Gorman*, the First Circuit properly adhered to the *Renton* standard and found that a town did not need to provide its own studies, but could rely on the experiences of other cities in enacting its ordinance restricting nude dancing at a restaurant.¹⁸⁸ The town needed only to provide some reasonable basis for believing that the ordinance would alleviate the targeted secondary effects.¹⁸⁹ The Supreme Court’s *Alameda Books* decision allowed businesses the opportunity to cast doubt on evidence relied upon by municipalities.¹⁹⁰ When a business does so, then, the *Renton* approach allowing towns to rely on outside studies may not go far enough.¹⁹¹ Nevertheless, where the town has provided sufficient evidence to support its position and the business has not disputed the town’s findings by “actual and convincing evidence,” the town has met its burden.¹⁹² Moreover, as mentioned earlier, a court cannot substitute its own judgment for the town where the town’s interpretation of its evidence is reasonable.¹⁹³

Here, Mendon did far more than was required under *Renton* and provided sufficient evidence to meet its burden under *Alameda Books*.¹⁹⁴ Mendon actually provided numerous studies supporting its position.¹⁹⁵ The town cited a study where an appraiser identified “exterior building appearance” as a factor that affects property values.¹⁹⁶ It cited another

even where a regulation may not greatly reduce the feared secondary effects, the regulation need only “further the interest in combating such effects”).

187. See *Renton*, 475 U.S. at 51–52 (holding that a town must be allowed to experiment with solutions to secondary effects).

188. *D.H.L. Assocs. v. O’Gorman*, 199 F.3d 50, 57 (1st Cir. 1999).

189. See *id.*

190. *Alameda Books*, 535 U.S. at 438.

191. See generally *Renton*, 475 U.S. 41 (making no mention of burden-shifting or businesses providing contrasting studies).

192. *Alameda Books*, 535 U.S. at 439.

193. *Id.* at 437–38.

194. See *Showtime I*, 885 F. Supp. 2d at 524.

195. See *id.*

196. *Id.*

study that found that “the more visible a sexually-oriented business is, the more impact it has.”¹⁹⁷

Furthermore, the First Circuit’s approach in requiring Mendon to prove that its size and operating restriction is the only plausible solution to maintaining its small town charm was nearly identical to the approach the Supreme Court rejected in *Alameda Books*.¹⁹⁸ The First Circuit improperly came to its own conclusion based on the evidence before it, even where the town’s interpretation of the data was reasonable.¹⁹⁹ Accordingly, the Supreme Court had stated a town must be granted reasonable latitude to enact its own ordinances.²⁰⁰ Here, because Mendon “reasonably believed [Showtime’s establishment was] relevant” to the town’s declining property values, it should have been allowed to experiment with reasonable solutions.²⁰¹

As the district court in the instant case noted, the Supreme Court “does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve the community.”²⁰² Rather, “the court must give due credit to legislative statements of policy where . . . they inform an inquiry into legislative purpose by identifying specific secondary effects that the town may target without offending the constitution.”²⁰³ For the reasons explained above, the First Circuit erred in imposing too high a burden on Mendon.

b. A Court May Not Substitute its Judgment for Mendon’s Reasonable Conclusion that Adult Businesses Significantly Increase Traffic Congestion

Although Mendon provided numerous studies explaining the effects Showtime’s adult establishment would have on traffic, the First Circuit conducted an “independent review” of the studies and determined that they

197. *Id.*

198. *See id.* at 75; *see also Alameda Books*, 535 U.S. at 437–38.

199. *See Showtime II*, 769 F.3d at 75; *see also Showtime I*, 885 F. Supp. 2d at 524.

200. *See Renton v. Playtime Theatres*, 475 U.S. 41, at 51–52 (1986) (holding that a town must be allowed to experiment with solutions to secondary effects).

201. *Id.*

202. *Id.*

203. *Id.* at 521.

were inadequate.²⁰⁴ According to the Court, the studies were “largely anecdotal, rel[ied] nearly exclusively on personal perceptions rather than verifiable data, and include[d] significant hedging language, such as indicating that increased traffic is merely a hypothesis.”²⁰⁵ The court also referenced a competing study offered by Showtime concluding that its establishment would cause only negligible traffic effects.²⁰⁶

In a similar approach toward Mendon’s asserted interest in maintaining rural aesthetics argument, the First Circuit erred by requiring Mendon to *prove* that its ordinance would mitigate traffic.²⁰⁷ The court improperly required that Mendon offer verifiable data, even though Mendon could not empirically collect figures until after Showtime had already built its establishment.²⁰⁸ Moreover, under *Alameda Books*, a town’s initial burden requires no more than common sense to adjudge the business’s likely secondary effects.²⁰⁹ It is reasonable to conclude, as the District Court observed, that a 9,000 square foot building accommodating 244 customers and operating during school bus operating hours could cause significant traffic delays.²¹⁰

Furthermore, because restricting Showtime to downsize its building and not operate during school hours was a plausible remedy to the area’s traffic problem, the court should not have substituted its judgment for Mendon’s.²¹¹ Mendon should have been granted latitude to experiment with reasonable solutions to its problem.²¹²

204. *See id.* at 76–77 (listing each study Mendon relied on).

205. *Id.* at 77.

206. *Id.* at 76.

207. *See id.* at 76–77.

208. There is no evidence of other strip clubs in the area and thus no way *Mendon* could empirically test these hypotheses. *See Renton*, 475 U.S. at 50 (“The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to ‘the particular problems or needs of Renton,’ the city’s justifications for the ordinance were ‘conclusory and speculative.’ We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle.”).

209. *See Alameda Books*, 535 U.S. at 438–39.

210. *See Showtime I*, 885 F. Supp. 2d at 524.

211. *See Alameda Books*, 535 U.S. at 437–38.

212. *See Renton*, 475 U.S. at 51–52 (holding that a town must be allowed to experiment with solutions to secondary effects).

Granted, the First Circuit noted that Showtime offered its own study rebutting Mendon's findings.²¹³ Under *Alameda Books*, the burden of proof may shift back to the town that enacts the ordinance when a business successfully casts doubt on the town's evidence by providing its own study.²¹⁴ However, the traffic study Showtime offered did not offer verifiable data (its conclusions were hypothetical, given that the establishment had not been built yet) and did not account for the cumulative effect of traffic from neighboring parcels (as the district court notably pointed out).²¹⁵ Thus, Mendon, which was not required even to provide its own studies, more than met its burden and Showtime failed to cast doubt on these studies with "actual and convincing" evidence.

A rural case study conducted on an adult entertainment establishment in Montrose, Illinois, supports Mendon's insight.²¹⁶ Soon after the "Lion's Den" opened in Montrose, an adult business marketing "X-rated videos, books, and novelties" for purchase "24/7", residents complained of significant traffic increases.²¹⁷ In fact, the gravel access road that led toward the establishment broke down because it could not handle the weight of big trucks that started making their way into the area.²¹⁸ Before the adult business had opened, foreign travelers had no reason to exit the I-70 into Montrose.²¹⁹ In short, Mendon's traffic concerns were justified and sufficiently supported.

2. Sufficient Narrow Tailoring

The First Circuit explained that "[m]ere reference to a neutral intent does not suffice to satisfy Mendon's burden to prove that its bylaws in fact further a substantial government interest."²²⁰ It then found that despite Mendon's purported government interests, the ordinance did not ban more

213. See *Showtime II*, 769 F.3d at 68.

214. *Alameda Books*, 535 U.S. at 439.

215. See *Showtime I*, 885 F. Supp. 2d at 516, 523.

216. See Alan C. Weinstein & Richard D. McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO ARTS & ENT. L.J. 565, 593 (2012).

217. See *id.*

218. See *id.*

219. See *id.*

220. *Showtime II*, 769 F.3d at 72.

wholesome businesses that caused the same detrimental secondary effects as Showtime's adult establishment.²²¹ Thus, according to the court, because the ordinance left unscathed all other businesses that also produced these secondary effects, the ordinance was underinclusive.²²²

a. Regulating Only Businesses That Affect the Town's Charm

The First Circuit found Mendon's ordinance underinclusive, first, because it curtailed Showtime's speech without affecting similarly non-rural neighboring buildings.²²³ However, while the bylaws may appear to single out Showtime's business, Mendon did not act unconstitutionally.²²⁴ As noted earlier, a regulation must "affect only that category of [establishments] shown to produce the unwanted secondary effects."²²⁵ In accordance with this rule, Mendon's ordinance is no broader than necessary to achieve its rural aesthetic and traffic goals. Thus, the First Circuit should have found the ordinance valid.

The First Circuit did not provide sufficient justification that Mendon's bylaws are unconstitutionally under-inclusive, because underinclusiveness "does not invalidate an otherwise-permissible zoning ordinance . . . [that] is well-supported by a substantial government interest."²²⁶ The court did not consider that the promiscuous nature of Showtime's business alone can detract from town aesthetics, irrespective of its outer appearance.²²⁷ For example, town-goers and visitors may stumble upon sexually explicit litter in nearby areas.²²⁸ The district court also cited studies demonstrating a

221. *Id.* at 74.

222. *Id.*

223. *See id.*

224. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) ("[T]he First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation" upon a State's prohibition of proscribable speech.)).

225. *Renton*, 475 U.S. at 52.

226. *See Showtime II*, 769 F.3d at 73–74; *Showtime I*, 885 F. Supp. 2d at 526.

227. *See Showtime I*, 885 F. Supp. 2d at 524 (citing Mendon's studies on positive correlation between blight and adult business); *Young*, 427 U.S. 50 (accepting that adult businesses cause secondary effects); Weinstein & McCleary, *supra* note 218, at 594 (presenting evidence that the Lion's Den "sexually explicit litter" decreased use of the nearby in park).

228. *See* Weinstein & McCleary, *supra* note 218, at 594.

positive correlation between adult entertainment and blight.²²⁹ Furthermore, although the Supreme Court has repeatedly recognized that adult businesses, specifically, can detrimentally impact the overall quality of neighborhoods,²³⁰ the First Circuit readily and unjustifiably did enunciated justification to depart from this approach. Instead, it reasoned that a court should “rightly pay attention to underinclusiveness where it reveals significant doubts that the government indeed has a substantial interest that is furthered by its proffered purpose.”²³¹ Its justification appears to question whether Mendon’s government interests are mere pretexts, since the restrictions do not affect all large commercial structures.²³² However, the appellate court failed to did explain how neighboring movie theaters or hardware stores have the same detrimental effect on a town’s aesthetic charm or property values as a 9,000 square foot adult establishment. Indeed, as the Supreme Court explained in *Renton*, Mendon can later rewrite its bylaws to include any businesses that it may later discover cause the same detrimental secondary effects.²³³ Because there is no reason to believe that other types of large businesses detract from Mendon’s charm or residential property values, its bylaws are narrowly tailored against adult businesses to further its stated goals.

b. Regulating Only Businesses Likely to Have Detrimental Effects on Traffic

The First Circuit also found Mendon’s ordinance underinclusive because it did not differentiate between traffic effects caused by Showtime’s adult business and other types of businesses along Route 16.²³⁴ Further, the court determined that Mendon did not adequately explain why commercial businesses/attractions (a diner’s “early-bird dinner special”)

229. See *Showtime I*, 885 F. Supp. 2d at 524 (citing Mendon’s studies on positive correlation between blight and adult business).

230. See, e.g., *Alameda Books*, 535 U.S. 425 (accepting city’s judgment that adult businesses cause detrimental effects); *Renton*, 475 U.S. 41 (recognizing correlation between adult businesses and secondary effects); *Young*, 427 U.S. 50 (accepting that adult businesses cause secondary effects).

231. *Showtime II*, 769 F.3d at 73.

232. See *id.*

233. See *Renton*, 475 U.S. at 52–53 (explaining that a city can later re-write bylaws if new businesses cause detrimental secondary effects).

234. See *Showtime II*, 769 F.3d at 76–78.

along Route 16.²³⁵ Yet the adult business in *Renton* made a similar “underinclusive” argument,²³⁶ and there the Supreme Court expressly concluded, “[t]hat Renton chose first to address the potential problems created by one particular kind of . . . business in no way suggests that the city has ‘singled out’ [Playtime Theatres] for discriminatory treatment.”²³⁷

Studies show that adult establishments serve as a special draw for out-of-towners that may not have similar businesses in their hometowns.²³⁸ It is unclear that a general movie theater, for example, attracts a similar number of visitors. Moreover, although the First Circuit noted that out-of-towners may similarly flock to an early-bird dinner special, Mendon has demonstrated no reason to fear the secondary effects caused by these restaurants.²³⁹ As the Supreme Court explained in *Renton*, Mendon can later rewrite its bylaws to impose size or time restrictions on a gigantic restaurant offering an early bird dinner special if it fears the restaurant will cause problematic traffic congestion.²⁴⁰ However, until other businesses pose similar problems, Mendon “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”²⁴¹ Accordingly, Mendon’s bylaws are properly narrowly tailored to target unwanted secondary effects.

B. Reasonable Alternative Avenues of Communication

Under the second element of the *Renton* test, an ordinance may survive intermediate scrutiny only where it provides the affected business

235. *Id.*

236. See *Renton*, 475 U.S. at 52 (“[Playtime Theatres] contend that the Renton ordinance is “underinclusive,” in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail.”).

237. *Id.* at 52–53.

238. See, e.g., *Showtime I*, 885 F. Supp. 2d at 524 (referencing Mendon’s study showing that adult businesses draw out-of-town patrons); see also Weinstein & McCleary, *supra* note 218, at 593 (describing how residents were not used to traffic before the adult store opened, as travelers had few other reasons to exit the I-70).

239. See *Showtime II*, 769 F.3d at 78.

240. See *id.*; see also *Renton*, 475 U.S. at 52–53 (explaining that a city can later re-write bylaws if new businesses cause detrimental secondary effects).

241. *Renton*, 475 U.S. at 52 (citing *Am. Mini Theatres*, 427 U.S. at 71).

with “reasonable alternative avenues of communication.”²⁴² Here, the First Circuit did not apparently reach this element of the *Renton* test, perhaps because it found that Mendon’s bylaws did not meet a substantial government interest.²⁴³ In any event, Mendon’s ordinance clearly meets this element. In both *Renton* and *D.H.L. Associates*, the courts respectively affirmed decisions where the ordinances would have forced businesses to relocate.²⁴⁴ In each of those cases, the issue of “alternative reasonable communications” hinged on whether the areas that the businesses could relocate to were reasonable.²⁴⁵ In *Renton*, the ordinance provided the adult movie theater reasonable alternative avenues of communication where the theater could have opened on any of 520 acres of land.²⁴⁶ According to the Court, the 520 acres of land consisted of “ample, accessible real estate.”²⁴⁷

Similarly, the First Circuit in *D.H.L. Associates* found that the restaurant had reasonable alternative avenues of communication where it could have relocated to the area specifically zoned to allow adult entertainment, even where there were only ten acres on which the restaurant could operate.²⁴⁸ There, the First Circuit noted that courts must look to multiple factors to determine whether a business can reasonably relocate, including “the percentage of land theoretically available to adult businesses, the number of sites potentially available in relation to the population of the city, the number of sites compared with the existing number of adult businesses, [and] the number of businesses desiring to offer adult entertainment.”²⁴⁹ Here, by contrast, Mendon’s bylaws do not even mandate that Showtime relocate its establishment.²⁵⁰ The ordinance

242. *Id.* at 50.

243. *See Showtime II*, 769 F.3d at 78 (referencing “alternative channels of communication” but not applying the facts to the test).

244. *See generally Renton*, 475 U.S. 41; *D.H.L. Assocs.*, 199 F.3d 50.

245. *See Renton*, 475 U.S. at 53; *D.H.L. Assocs.*, 199 F.3d at 59–60.

246. *Renton*, 475 U.S. at 53.

247. *Id.*

248. *D.H.L. Assocs.*, 199 F.3d at 59–60.

249. *Id.*

250. *See Showtime I*, 885 F. Supp. 2d at 516; *see also Renton*, 475 U.S. at 48 (“As JUSTICE POWELL observed in *American Mini Theatres*, ‘[if] [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.’”).

allows Showtime to operate its establishment exactly where it is, but requires that it merely decrease the size of the building and open after 4:30 p.m.²⁵¹ Thus, the only aspect of Showtime's speech that the ordinance curtails, then, is based on the size and hours restriction.²⁵² However, because the business can still accommodate at least 73 patrons, can open starting at 4:30 p.m., and can remain open throughout the night, Showtime has more alternative means of communication than the businesses in *Renton* and *D.H.L. Associates*.²⁵³ Accordingly, Mendon's bylaws meet the second element of the *Renton* test.

V. CONCLUSION

Robert Mangiaratti, Mendon's legal counsel, stated, "[t]here's no evidence that the town of Mendon cares whether people dance nude or whether they don't."²⁵⁴ Mangiaratti continued, I don't think this is a pretext [to ban adult entertainment], I think this is a small town concerned about the impacts to the community."²⁵⁵ If Mendon's primary purpose was to eliminate Showtime from opening altogether, it could have made its bylaws far more restrictive or, like the ordinances in *Renton* and *D.H.L. Associates*,²⁵⁶ forced Showtime to relocate.

Mendon has a legal right to prohibit businesses from causing harmful effects to the town.²⁵⁷ Its reasons for somewhat limiting Showtime's ability to operate—maintaining its small-town charm and preventing traffic congestion—are concerns common to many municipalities.²⁵⁸ Because

251. *Showtime I*, 885 F. Supp. 2d at 516.

252. *See id.*

253. *See id.* *See generally* *Renton*, 475 U.S. 41; *D.H.L. Assocs.*, 199 F.3d 50.

254. Mike Gleason, *Mendon, Strip Club Face Off on Alcohol Ban*, MILFORD DAILY NEWS (Mar. 6, 2015, 12:26 PM), <http://www.milforddailynews.com/article/20150306/NEWS/150307615> [https://perma.cc/6D72-TMFP].

255. *Id.*

256. *See generally* *Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50 (1st Cir. 1999).

257. *See City of Los Angeles v. Alameda Books*, 535 U.S. 425, 433 (2002) (holding that a municipality can seek to eliminate harmful secondary effects).

258. *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 73 (1st Cir. 2014); *see e.g., Alameda Books*, 535 U.S. 425 (accepting city's judgment that adult businesses cause detrimental effects); *Renton*, 475 U.S. 41 (recognizing correlation between adult businesses and

these secondary effects Mendon sought to regulate are substantial government interests and because Mendon's bylaws pass the *Renton* test, the ordinance passes constitutional muster and the First Circuit's ruling should be overturned.

secondary effects); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976) (accepting that adult businesses cause secondary effects).