CASE NO. 06-12022-JJ

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAYTONA GRAND, INC. d/b/a LOLLIPOP'S GENTLEMEN'S CLUB,
a Florida corporation, and **MILES WEISS**,
Plaintiffs-Appellants/Cross-Appellees
v.
CITY OF DAYTONA BEACH,
a Florida municipal corporation,
Defendant-Appellee/Cross-Appellant.

Appeal From the United States District Court,
For the Middle District of Florida, Orlando Division

Amici Curiae Brief of the Florida League of Cities, Inc., the Florida Municipal Attorneys Association, the International Municipal Lawyers Association, the City of Casselberry, Florida, the City of Flagler Beach, Florida, the City of New Smyrna Beach, Florida, Hillsborough County, Florida, and Manatee County, Florida, Filed With the Consent of All Parties, In Support of Appellee/Cross-Appellant, City of Daytona Beach, Florida, and in Support of Reversal of the District Court's Final Judgment

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DAYTONA GRAND, INC. v. CITY OF DAYTONA BEACH
NO. 06-12022-JJ

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Court Rules 26.1-1 and 26.1-3, Amici Curiae hereby state that the following individuals and/or entities have an interest in the outcome of this case or appeal:

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City of Flagler Beach, Fla.	Amicus Curiae
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Daytona Grand, Inc., d/b/a Lollipop's Gentlemen's Club, a Florida corporation	Appellant/Cross-Appellee

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the Florida League of Cities, Inc., is a Florida not-for-profit corporation. It has no corporate subsidiaries.

Amicus curiae, the Florida Municipal Attorneys Association, is a voluntary membership organization.

Amicus curiae, the International Municipal Lawyers Association, is a non-profit professional organization.

Amici curiae, the City of Casselberry, Florida, the City of Flagler Beach, Florida, and the City of New Smyrna Beach, Florida, are all independent Florida municipal corporations.

Amici curiae, Hillsborough County, Florida, and Manatee County, Florida, are both subdivisions of the State of Florida.

This amici curiae brief is filed with the consent of all parties.

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STATEMENT OF IDENTITIES OF AMICI CURIAE

Amicus curiae, the Florida League of Cities, Inc. ("FLC"), is a Florida not-for-profit corporation. It has no corporate subsidiaries. The FLC is composed of more than 400 municipalities and charters in the State of Florida. The principle purposes of the FLC are the general improvement of municipal government, its efficient administration in the State of Florida, and the promotion of the welfare of the citizens of the respective local governments of the State. The FLC periodically files *amicus curiae* briefs on issues such as those in this case that are of fundamental importance to the FLC's membership.

Amicus curiae, the Florida Municipal Attorneys Association ("FMAA"), is a voluntary membership organization. The FMAA was formally organized in 1981. Its membership consists of over 600 attorneys who specialize in the legal representation of municipalities. These members include full-time and part-time city attorneys and their assistant city attorneys as well as attorneys who engage in private practice and who render specialized legal representation to municipalities. The FMAA's primary objective is to provide a permanent forum for municipal attorneys to identify and address legal problems of common concern among Florida's

municipalities, and to study, summarize, and disseminate legislation, court decisions, and administrative rulings affecting municipal operations.

Amicus curiae, the International Municipal Lawyers Association ("IMLA"), is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members, including local governments, state municipal leagues, and the lawyers who represent them. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. Since its establishment, IMLA has promoted the interests of local governments through its Legal Advocacy Program, appearing as *amicus curiae* before state and federal appellate courts nationwide. IMLA's members are the entities most affected by decisions involving regulations of sexually oriented businesses and their secondary effects.

Amici curiae, the Cities of Casselberry, Florida, Flagler Beach, Florida, and New Smyrna Beach, Florida, along with Hillsborough County, Florida, and Manatee County, Florida, have each been involved in litigation over the regulation of adult entertainment over the last twelve months. The cities and counties have a strong interest in advocating for local governments' ability to regulate sexually oriented businesses.

Amici curiae are concerned with the erosion of municipalities' and counties' ability to regulate nudity in establishments that serve alcohol, and with the manner in which courts, particularly the District Court for the Middle District of Florida in this case, are interpreting the burden-shifting test enunciated by the United States Supreme Court in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

STATEMENT OF THE ISSUES

Whether the District Court erred, by declaring City of Daytona Beach Ordinance 81-334 and City of Daytona Beach Ordinance 02-496, as amended by City of Daytona Beach Ordinance 03-375, in violation of the First and Fourteenth Amendments to the United States Constitution, because the City of Daytona Beach lacks sufficient evidence that the Ordinances further a substantial government interest in preventing secondary effects associated with adult entertainment. Additionally, in particular, whether the District Court misapplied the law, or created unprecedented and unsupported new law, regarding the evidentiary standard of review to determine whether the aforementioned Ordinances further a substantial government interest.

SUMMARY OF THE ARGUMENT

Contrary to the District Court's opinion, the United States Supreme Court's decision in *City of Los Angeles v. Alameda Books* , 535 U.S. 425 (2003) did not result in an "evolution in the law" regarding the evidentiary burden that local governments must satisfy to further a substantial government interest in regulating adult entertainment establishments. Under the misplaced view that *Alameda Books* did result in an "evolution in the law," the District Court erred by holding the City of Daytona Beach to an evidentiary burden that is both unprecedented and that has been expressly rejected by the United States Supreme Court and other appellate courts.

Nude Dancing and other forms of adult entertainment are within only the outer ambit of First Amendment protection. Contrary to the District Court's view in this case, it is unnecessary to delve into an extensive inquiry of evidence establishing a substantial government interest in order to find that regulations of adult entertainment satisfy intermediate scrutiny under *O'Brien*. In addition, there simply is no constitutional right to consume alcohol while observing nude or semi-nude dancing. Therefore, common sense, coupled with any other evidence, may be employed as a supporting basis upon which a local government may prohibit public nudity at a licensed alcoholic beverage establishment.

This Honorable Court should reverse the District Court's decision and uphold the constitutionality of the City of Daytona Beach's public nudity and alcohol/nudity ordinances.

ARGUMENT AND CITATIONS OF AUTHORITY

The District Court erred in concluding that the City of Daytona Beach ("City") lacks sufficient evidence establishing that the public nudity and alcohol/nudity ordinances further a substantial government interest in protecting communities from the adverse secondary effects associated with adult entertainment. Particularly, the District Court's finding that the City's evidence was "meaningless" because it was not a scientific "comparative analysis" between adult and non-adult businesses is contrary to *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and contrary to the great weight of case law interpreting *Alameda Books* and other First Amendment case law relevant to the minimal evidentiary burden placed on government to demonstrate that a substantial governmental interest exists.

I. Nude dancing and other forms of adult entertainment are within only the outer ambit of First Amendment protection.

The United States Supreme Court has consistently recognized that nude dancing and other kinds of adult entertainment are within only the outer fringes of the protection afforded by the First Amendment to the United States Constitution. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion), the Supreme Court upheld a City of Detroit ordinance which required adult theaters to

be located a certain minimum distance from other types of land uses. In doing so, the Supreme Court specifically addressed the location of erotic materials on the First Amendment spectrum:

> Moreover, even 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 untrammeled political debate** that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But 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.

Id. at 70 (emphasis added).

Since *American Mini Theatres*, the Supreme Court has, on several occasions, re-emphasized that erotic materials, nude dancing, and other forms of adult entertainment are within only the outer ambit of First Amendment protection. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) ("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 untrammeled political debate . . .") (quoting *American Mini Theatres*, 427 U.S. at 70); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion) (Nude dancing in G-strings and pasties "is

expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."); *City of Erie v. Pap's A.M*, 529 U.S. 277, 289 (2000) (plurality opinion) ("As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.").

Consequently, for constitutional analysis purposes, the United States Supreme Court has treated public nudity regulations and other forms of adult entertainment regulations which have an incidental impact on nude dancing and erotic materials as "content neutral" and has applied a less stringent standard of constitutional review (intermediate scrutiny) when reviewing adult entertainment ordinances which regulate expressive conduct. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (Justice Kennedy concurring in judgment) (Although the "content neutral" designation is "something of fiction," intermediate rather than strict scrutiny applies.). The standard of review is actually a four prong test which was set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). An adult entertainment regulation will be sufficiently justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the

incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377. In addition, "the City's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *American Mini Theatres*, 427 U.S. at 71.

Accordingly, this Court should be mindful that since adult entertainment is only within the outer fringes of First Amendment Protection, local governments have a "freer hand" to adopt regulations under *O'Brien* so long as the regulation is unrelated to the suppression of expression. *See Pap's A.M.*, 529 U.S. at 299. Furthermore, as will be more fully explained below, because nude dancing and other forms of erotic adult entertainment are within the "outer ambit" of First Amendment protection, nude dancing and erotic adult entertainment should not be elevated to a status that is higher than that of political speech, which is afforded the greatest protection under the First Amendment.

II. It is unnecessary to delve into an extensive inquiry of evidence establishing a substantial government interest in order to find that regulations of adult entertainment satisfy intermediate scrutiny under *O'Brien*.

The United States Supreme Court has never required, under the second prong of the *O'Brien* test, that the government produce extensive evidence to establish that a substantial government interest exists in order to regulate adult entertainment

businesses. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the lower court invalidated an ordinance which prohibited adult motion picture theaters from operating within 1,000 feet of residential zones, churches, parks, and schools because the city failed to produce empirical evidence specifically relating to "the particular problems or needs of Renton." *Id.* at 50. The Supreme Court found that the lower court "imposed on the city an unnecessarily rigid burden of proof" and concluded that the city's reliance upon an opinion of the state supreme court in which the related experiences of the city of Seattle with adult theaters was thoroughly discussed was sufficient to demonstrate Renton's substantial government interest in regulating adult theaters. *Id.* at 50-51. The Supreme Court held:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id. at 51-52.

After *Renton*, the Supreme Court upheld a public nudity ordinance in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). The evidentiary record to support the city's substantial government interest in *Pap's* was completely lacking. It contained a legislative finding, but no evidence of the City of Erie's own experiences with public

nudity and adult businesses. Moreover, the record indicated that the city council did not even review studies from other cities before the ordinance was adopted. Nonetheless, the Supreme Court ruled that Erie could rely on its own finding regarding the adverse effects of lewd and immoral activities and "Erie could [also] reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *Id.* at 297.

This minimal evidentiary burden was more recently affirmed by the United States Supreme Court in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). In *Alameda Books*, the plurality, authored by Justice O'Connor, clearly rejected the argument made by the dissent that empirical evidence was required in order to demonstrate that the government had a substantial governmental interest in regulating a particular form of adult entertainment. *Id.* at 438-42. Moreover, Justice Kennedy, in his concurring opinion, also refused to require a municipality to present empirical evidence to support its regulation. Justice Kennedy emphasized that it has been the consistent opinion of the Supreme Court that "a city must have latitude to experiment, at least at the outset, and that very little evidence is required." *Id.* at 451 (citing *Renton*, 475 U.S. at 51-52). In addition, Justice Kennedy concluded "[a]s a general

matter, courts should not be in the business of second-guessing fact bound empirical assessments of city planners," and that city's are "entitled to rely on that knowledge" and reasonable inferences from that knowledge in adopting adult entertainment regulations. *Id.* at 451-52.

While the Supreme Court in *Alameda Books* outlined a burden-shifting *procedural* framework for analyzing whether *Renton's* minimal burden is met, and stated that a legislative body cannot rely on "shoddy data or reasoning,"[1] the Court did not "raise the [evidentiary] bar somewhat" or create an "evolution in the law," as the District Court concluded in this case. *See Daytona Grand, Inc. v. City of Daytona Beach*, 410 F. Supp. 2d 1173, 1178 (M.D. Fla. 2006). In fact, the evidentiary standard enunciated in *Renton* and *Pap's A.M.* remains in place. Therefore, municipalities should be able to reasonably rely on the same kinds of evidence used to demonstrate a substantial government interest in regulating adult entertainment that the Supreme Court has previously found sufficient. *See, e.g., World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-96 (9th Cir. 2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects . . .") (quoting

[1] *Alameda Books*, 535 U.S. at 438.

Stringfellow's of N.Y., Ltd. v. City of New York, 694 N.E.2d 407, 417 (N.Y. 1998)); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005) ("While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform. . . . [N]o precedent requires the City to obtain research targeting the exact activity that it wishes to regulate: the City is only required to rely on evidence 'reasonably believed to be relevant' to the problem being addressed.") (quoting *Alameda Books*, 535 U.S. at 438); *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153, 1163 (9th Cir. 2003) (rejecting the argument that *Alameda Books* presents a "new and different approach to the constitutional analysis of secondary effects law"); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 640 (7th Cir. 2003) (*Daubert*[2] quality evidence is not required to support an adult entertainment ordinance and would impose an unreasonable burden on the legislative process).

In fact, in other non-adult entertainment cases involving the First Amendment, including political speech cases, the United States Supreme Court and other courts have not demanded that the government present extensive evidence in order to

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[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

demonstrate that a substantial government interest exists. For instance, in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court upheld a criminal conviction under a federal law that prohibited a person from knowingly mutilating or destroying a draft card, because the government had a substantial government interest in preventing harm to the smooth and efficient functioning of the Selective Service System. When the United States Congress adopted the law, Congress did not rely on any studies or evidence that demonstrated the destruction of draft cards would impair the Selective Service System. Rather, the Court noted that the law was passed with very little Congressional debate and that the Committees On Armed Services of the Senate and House simply had "concerns" with the destruction of draft cards and that such concerns "stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System." *Id.* at 385-86.

The Supreme Court's most recent nude dancing decision specifically identifies the lack of a "study" in *O'Brien*, and holds that such empirical evidence is not necessary to justify regulations of nude conduct. *Pap's A.M.*, 529 U.S. at 298-300. The court in *Pap's A.M.* also relied on *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), in which the Supreme Court found that a Missouri campaign financing

law survived First Amendment scrutiny because the state had a substantial government interest in preventing corruption and the appearance of it that flows from the munificent campaign contributions. In demonstrating the substantial government interest, the state relied upon a legislative affidavit, newspaper accounts of kickback and conspiracy scandals involving public officials, and a state-wide election outcome which "attested to the perception" of corruption relied upon by the state to justify the financing law. *Id.* at 393-94. Moreover, the Court found that academic studies that challenged the state's conclusions regarding the perceived adverse effects of large campaign contributions did not cast doubt on the evidence establishing the substantial government interest justifying the law. *Id.* at 394.

Similarly, in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995), the Supreme Court upheld a Florida Bar rule which prohibited lawyers from sending direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The Court stated that the "anecdotal record mustered by the Bar" was "noteworthy for its breadth and detail." *Id.* at 627. The record included a 106-page Bar study which contained extensive statistical and anecdotal data, complaints, and newspaper articles which suggested that the Florida public views such advertising as an intrusion on privacy that reflects poorly upon the legal profession.

Id. at 627. The Court found that this anecdotal evidence supported the Bar's substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers. *Id.*

In another First Amendment case, the Telephone Consumer Protection Act banning unsolicited advertising via facsimile transmissions was upheld because the Government demonstrated a substantial government interest in preventing advertising cost shifting and interference with fax machines that such unwanted facsimiles placed on the recipients. Specifically, the court noted that the Government was aware of the junk fax problem through media reports and state regulatory efforts, that numerous consumers had complained for various reasons about receiving these "nuisance" faxes, and that such advertisements could shift advertising costs to the recipient. The court also rejected the argument that the Government must produce empirical studies to show the significance of the harm it seeks to remedy; the court concluded that the Government can demonstrate a substantial government interest with anecdotes, history, consensus, and simple common sense. *Missouri v. American Blast Fax, Inc.*, 323 F.3d 649, 654 (8th Cir. 2003) (citing *Went For It, Inc.* 515 U.S. at 628; *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

In this case, the District Court's opinion reveals that the City had an array of pre-enactment and post-enactment evidence to support its public nudity and alcohol/nudity ordinances. Such evidence included: local police dispatch records for calls for service made in the vicinity of adult businesses; police reports of prostitution and other criminal activities; first-hand accounts of crimes occurring in and around adult entertainment businesses; trial testimony from a prior adult entertainment case successfully litigated by the City, *Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544 (M.D. Fla. 1987), in which experts testified that adult entertainment establishments were the cause of "urban blight" and were a "source of drug and prostitution activity"; local news articles describing nudity during college events and its effects on the community; narrative reports by detectives and special unit officers describing incidents in which dancers at adult entertainment establishments simulated sex acts, made sexual contact with customers and with each other, and in one case, propositioned an officer for sex; an article published in the New Statesman which described how the author's experiences in an adult entertainment establishment encouraged him to have sex with a prostitute; and several peer reviewed laboratory studies of Dr. William George, Ph. D., regarding the adverse effects of drinking

alcohol while reviewing erotic material.[3] *See Daytona Grand, Inc.*, 410 F. Supp. 2d at 1180,1182,1185.

Furthermore, Ordinance 81-334 (alcohol/nudity), which is one of the ordinances at issue herein, was previously upheld by the Florida Supreme Court. *City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985) ("The record in this case is replete with the legislative findings of the city commission and supporting reports and documents provided by the police, indicating that nude dancing in Daytona Beach contributes to criminal activities."). Interestingly, the Florida Supreme Court's prior review and decision upholding this ordinance was not discussed or analyzed by the District Court in its opinion. This is in stark contrast to the United States Supreme Court's reliance, in *City of Renton* , 475 U.S. at 50-51, upon detailed findings summarized in an opinion issued by the Washington Supreme Court which, unlike this case, did not even involve the same city's experiences. *See id.* ("We hold that Renton was entitled to rely . . . on the 'detailed findings' [involving the city of

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[3] In addition to the peer review studies of Dr. George, the City had trial testimony transcripts wherein Dr. George indicated that his research is applicable to the "real world" of an adult entertainment establishment.

Seattle] summarized in the Washington Supreme Court's *Northend Cinema* opinion . . . .").

As the aforementioned cases demonstrate, many justices and judges have studied and evaluated the evidentiary burden to be imposed upon the government in order to demonstrate that a substantial government interest exists for the regulation of speech protected by the First Amendment. The evidence presented by the City in this case is sufficient, under all of the aforementioned cases, to support the City of Daytona Beach's substantial government interest in regulating the adverse effects of adult entertainment establishments. By rejecting this evidence and elevating the City's evidentiary burden, the District Court has disregarded decades of binding and persuasive authority, and has afforded erotic speech more protection than that afforded to pure political speech. Moreover, the District Court improperly substituted its wisdom for the legislative judgement of the City Commission of Daytona Beach. *See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1273 (11th Cir. 2003) (In weighing the evidence, "the District Court should be careful not to substitute its own judgement for that of the County. The County's legislative judgement should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies."); *Del*

Percio, 476 So. 2d at 204 ("While some may question the wisdom of regulating crime such as this, which said detractors might term victimless, the decision lies with the legislative body, not the courts."). Therefore, the District Court's decision should be reversed and the Ordinances should be declared constitutional.

III. There simply is no constitutional right to consume alcohol while observing nude or semi-nude dancing. Therefore, common sense, coupled with any other evidence, may be employed as a supporting basis upon which a local government may prohibit such nudity at a licensed alcoholic beverage establishment.

The United Supreme Court has recognized that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public places begets undesirable behavior." *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). To combat this undesirable behavior, this Court has held that a municipality has a substantial government interest in "controlling the combustible mixture of alcohol and nudity." *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *see also Artistic Entertainment, Inc. v. City of Warner Robbins,* 223 F.3d 1306, 1309 (11th Cir. 2000) (quoting *Sammy's of Mobile*, 140 F.3d at 997, for the proposition that "the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as [the officials'] own wisdom and common sense" were sufficient to uphold the alcohol/nudity ordinance."). Other federal

circuit courts have agreed that a municipality has a substantial government interest in prohibiting nudity in licensed beverage establishments. *See, e.g., G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2004); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121 (7th Cir. 2001); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001). *G.M. Enterprises* and *Ben's Bar* are particularly instructive because both of these cases upheld alcohol/nudity ordinances post- *Alameda Books*.

In *G.M. Enterprises*, 350 F.3d 631, the Town relied upon sixteen foreign studies, a number of judicial opinions, and police reports to justify two ordinances which had the combined effect of prohibiting nude dancing at sexually oriented businesses and licensed beverage establishments. *Id.* at 633-34. The plaintiff, G.M., alleged that the Town did not rely on adequate evidence to support the ordinances. In support of its position, the plaintiff questioned the Town's conclusions by arguing that the Town Board did not actually review and rely on the studies.

G.M. also presented a study by Bryant Paul, Daniel Linz, and Bradley Shafer that found the majority of the studies the Board collected were "fundamentally unsound," and methodologically flawed. Additionally, Daniel Linz submitted an affidavit of the study. G.M. also presented information that the Board's findings were

contrary to actual experience. Further, G.M. submitted several other affidavits stating that property values near the club have increased over time, and that a majority of the police calls to the police regarding the club were generated when no nude dancing was offered. *Id.* at 635-36.

The Court held that although G.M.'s evidence shows that the Town might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, G.M.'s evidence was not sufficient to "vitiate the result reached in the Board's legislative process." *Id.* at 639. Interpreting *Alameda Books*, the Court stated:

> *Alameda Books* 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 a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed.

Id. at 640. The Court then denounced the plaintiff's view that the Town had to rely on studies that "are of sufficient methodological rigor to be admissible under *Daubert*," and explained that requiring a *Daubert* level of evidence would be an "unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would-

undeniably-reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement." *Id.* at 640.

In *Ben's Bar,* the Court held that a municipality may restrict the sale or consumption of alcohol on the premises of businesses that serve as venues for adult entertainment without violating the First Amendment. *Ben's Bar,* 316 F.3d at 708. The court found that the regulation of alcohol sales and consumption in "inappropriate locations" was within the Village's general police powers. *Id.* at 722. Additionally, the court determined that the ordinance "does not completely prohibit Ben's Bar's dancers from conveying an erotic message, it merely prohibits alcohol from being sold or consumed on the premises of adult entertainment establishments." *Id.* at 723.

The court's holding in this regard was consistent with this Court's holdings of *Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Georgia*, 217 F.3d 1360, 1365 (11th Cir. 2000) (holding that "[t]he ordinance does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise") and *Sammy's of Mobile*, 140 F.3d at 998 (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments

did not ban nude dancing, but merely restricted "the place or manner of nude dancing without regulating any particular message it might convey").

The court in *Ben's Bar* also held that the ordinance was "aimed at the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing" and that "[r]egulations that prohibit nude dancing where alcohol is served or consumed are independent of expressive or communicative elements of conduct, and therefore are treated as if they were content-neutral." *Ben's Bar*, 316 F.3d at 724. Furthermore, the court concluded that the record relied upon by the Village, which included "numerous judicial decisions, studies from 11 different cities, and 'findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin[,] and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (June 6, 1989, State of Minnesota),'" supported the Village's proffered rationale for the ordinance. *Id.* at 725-26.

Lastly, the court opined:

> [W]e note that Section 5(b)'s liquor prohibition is no greater than is essential to further the Village's substantial interest in combating the secondary effects resulting from the combination of nude and semi-nude dancing and alcohol consumption because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment

establishments is the *only* way the Village can advance that interest. As the Supreme Court recognized in [*California v.*] *LaRue,* [409 U.S. 109 (1972)],

> Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self- regulation on the part of the bartender could have been relied upon by the Department to secure compliance with ... [the] regulation[s]. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one . . ..

409 U.S. at 116, 93 S. Ct. 390. *See also Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia,* 217 F.3d 1360, 1364-65 (11th Cir.2000) (holding that ordinance prohibiting alcohol on the premises of adult entertainment establishments satisfied *O'Brien*'s requirement that restriction on First Amendment rights be no greater than necessary to the furtherance of the government's interest because "[t]here is no less restrictive alternative"). Indeed, unlike the zoning ordinance at issue in *Alameda Books,* there is no need to speculate as to whether Section 5(b) will achieve its stated purpose. Prohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing.

Given the foregoing, we conclude that Section 5(b) does not violate the First Amendment. The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting

> either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary* [*v. City of Warner Robbins, Georgia*], 311 F.3d [1334, 1338 (11th Cir. 2002)] (holding that there is no generalized right to associate with other adults in alcohol- purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor.

Id. at 727-28.

The rationale reiterated in *Ben's Bar* applies with equal force in this case. There simply is no constitutional right to consume alcohol while observing nude or semi-nude dancing. As explained in Section II of this Amicus Brief, the City had sufficient evidence to demonstrate that it had a substantial government interest in prohibiting public nudity in alcoholic beverage establishments, and the District Court improperly substituted its judgment for the city commission's judgment. Nude or semi-nude erotic dancing and drinking alcohol are still permitted in communities that choose to prohibit such nudity at alcoholic beverage establishments. The two,

however, are not permitted in the same place. Thus, such regulations leave the quantity of speech (erotic dancing) substantially undiminished, *see Alameda Books*, 535 U.S. at 451 (Justice Kennedy concurring) (the rationale of the ordinance must not be to "substantially diminish" speech), while significantly reducing secondary effects. *See Ben's Bar,* 316 F.3d at 727, 728 ("Prohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing."). Therefore, like the aforementioned cases upholding ordinances which prohibit public nudity in adult entertainment establishments that serve alcohol, this Court should also uphold the City of Daytona Beach's Ordinance 81-334.

CONCLUSION

Based upon the foregoing, Amici Curiae, the Florida League of Cities, the Florida Municipal Attorneys Association, the International Municipal Lawyers Association, the cities of Casselberry, Florida, Flagler Beach, Florida, and New Smyrna Beach, Florida, along with Hillsborough County, Florida, and Manatee County, Florida, respectfully request that this Honorable Court reverse the Final Judgment rendered by the District Court.

Respectfully submitted on this 7th day of August, 2006.

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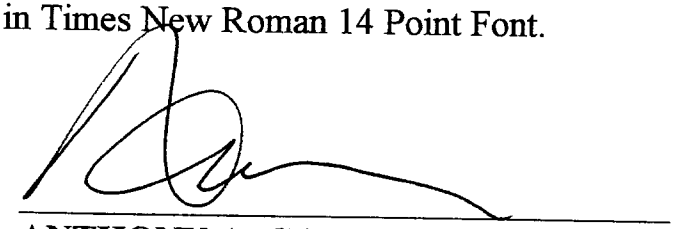
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) because this brief contains 5,718 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 12 in Times New Roman 14 Point Font.



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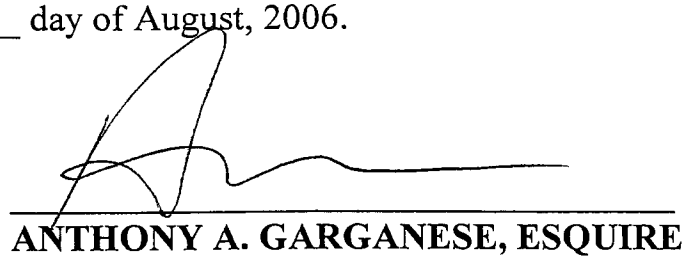
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by Federal Express to: **Marie Hartman, Deputy City Attorney, City of Daytona Beach, Counsel for Appellee/Cross-Appellant**, 301 South Ridgewood Avenue, Suite 220, Daytona Beach, Florida 32115; **Scott D. Bergthold, Esquire, Counsel for**

Appellee/Cross-Appellant, 8052 Standifer Gap Road, Suite C, Chatanooga, Tennessee, 37421; **Gary S. Edinger, Esquire, Counsel for Appellant/Cross-Appellee**, 305 N.E. 1st Street, Gainesville, Florida 32601; and **Daniel R. Aaronson, Esquire, Counsel for Appellant/Cross-Appellee**, 1 Financial Plaza # 1615, Ft. Lauderdale, Florida 33394, and with the original and six copies being filed with the **Clerk of the Court, Eleventh Circuit Court of Appeals**, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, on this 7th day of August, 2006.



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