No. 17-1211

In the
Supreme Court of the United States

FLANIGAN'S ENTERPRISES, INC.
OF GEORGIA, et al.,

Petitioners,

v.

CITY OF SANDY SPRINGS, GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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MISCELLANEOUS

REPLY OF THE PETITIONERS

I. This Case Presents a Clean Vehicle for Resolving the Important Constitutional Questions Presented for Review.

Sandy Springs begins its Brief in Opposition, not by addressing the questions presented for review, but by identifying various procedural issues, all but two[1] of which were not raised in the court below. The waters here are not, as Sandy Springs insinuates, muddy.

The trial of this case centered on two issues: (1) Were Sandy Springs' content-based adult entertainment zoning and regulatory ordinances subject to strict or intermediate scrutiny? (2) And if intermediate scrutiny applied, could the regulatory ordinances survive the proportionality test set forth in

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[1] Sandy Springs argued Petitioners were collaterally estopped from challenging the ordinance's ban on adult nightclubs from serving alcohol. The district court found otherwise. App.128–App.131. The Eleventh Circuit declined to address the City's claim in light of its affirmance of the judgment on the merits. App. 30.

Sandy Springs also argued Petitioner Bookstore lacked standing to bring its "Georgia free speech claim." Appellee's Br. at 53–56, Jan. 3, 2017, 11th Cir. No. 14428-EE. The Eleventh Circuit found Petitioner had waived its claim under the Georgia Constitution, and did not address the City's standing argument. App.31–App.33. In a catch-all argument regarding Petitioner's federal claims, the City in a single sentence, asserted that Petitioner Bookstore "lack[ed] standing to argue for strict scrutiny," citing the passage of its argument regarding Petitioner's state constitutional claim. Appellee's Br. at 39. The Eleventh Circuit ruled on the merits of Petitioners' First Amendment claims without discussing standing.

Justice Kennedy's concurrence in *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002)?

The district court, in a 105-page opinion, answered those two questions directly. App.34–App.208. It concluded that *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), did not require it to review the challenged ordinances under strict scrutiny, App. 131–App.150, and held that the ordinances met the requirements of intermediate scrutiny. App.150–App.181. It rejected Petitioners' claim that the regulatory ordinances could not withstand Justice Kennedy's proportionality test. App.181–App.191.[2]

Petitioners appealed to the Eleventh Circuit Court of Appeals, seeking review on both issues. App. 31. Sandy Springs sought affirmance on the merits and additionally argued Petitioners were collaterally estopped from challenging the alcohol ban. It pressed none of the procedural issues it now offers at Opp.9–Opp.19, as reasons for denying the writ.

The Court of Appeals identified the issues before it:

> On appeal, Plaintiffs argue that the district court erred in granting judgment in favor of the City on various claims brought under the First Amendment to

[2] The court also found Petitioners did not have standing to challenge an amortization provision of the ordinances (§ 27(c)) on due process grounds, App. 114–App.125, and rejected Petitioners' challenge to a section of the ordinances on overbreadth grounds. App. 191–App.208. Neither of these issues is raised here.

> the U.S. Constitution. According to Plaintiffs, these claims challenge ordinances that are content based. Plaintiffs acknowledge that if precedent predating *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), applied, the district court may have been correct in subjecting these ordinances to intermediate scrutiny. But they contend that *Reed* changed the applicable law so that the ordinances should have been subjected to strict scrutiny. Mardi Gras and Flashers also argue that, even if the ordinances are not subject to strict scrutiny, they still fail the proportionality test set forth by Justice Kennedy in his concurrence in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)—a test that they claim constitutes binding law in this Circuit.

App.11–App.12.

The court rendered a decision on the merits on those exact issues, which gives rise to the questions presented in this Petition. App.23, App.30. Those issues are squarely before this Court, and none of the contentions made in the opposition brief are an impediment to this Court's review. To the extent the issues the City raises are still available to it, they would be matters for the lower courts to address once this Court rules on the degree of scrutiny that applies and the precedential effect of *Alameda Books. See Byrd v. United States*, No. 16-1371, slip op. at 13, 14 (U.S., May 14, 2018).

That is not to say that any of Sandy Springs' procedural arguments have merit.

First, Petitioners have not conceded their challenge to the City's content-based adult zoning ordinance. Opp.11. Wholly apart from their primary contention that the City's adult zoning ordinance must be tested under strict scrutiny based on *Reed*, Petitioners had also challenged the ordinance on the independent ground that its restrictions did not leave open sufficient land in the city for adult uses, as *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986), requires. During the course of the litigation, Sandy Springs amended its ordinances, and by the time of trial, a sufficient number of sites became available. App.65. Petitioners, therefore, conceded their challenge on *that* ground. App.125.

Petitioners did not, however, in any way waive or concede their central claim that the City's content-based adult zoning ordinance must satisfy strict, rather than intermediate, scrutiny. Petitioners have consistently argued that the zoning ordinance's content-based restrictions are unconstitutional under strict scrutiny. App.8–App.9; Appellants' Br. at 18–19, 34, Oct. 11, 2016, 11th Cir No. 16-14428. And if they prevail on that claim, all three Petitioners will be able to continue to operate in their current locations.

Second, the adoption of the 2017 Development Code did not moot Petitioners' challenge to Sandy

Springs' zoning ordinance. Opp.13.[3] The ordinance's content-based definitions of adult entertainment establishments, on which Petitioners' challenge is premised, remain wholly untouched. *See* App. 224–App.226; App. 295–App.297; 2017 Development Code, § 7.5.1.A (incorporating current definition of adult establishment). Because of the content of the expression they offer, the zoning ordinance continues to restrict where Petitioners can operate. 2017 Development Code, § 7.5.1.C. Although the new development code renamed the City's zoning districts and amended the language of the distance restrictions to reflect the new names, it did not abolish the content-based restrictions that are the subject of Petitioners' constitutional challenge.

Third, Sandy Springs makes two arguments challenging Petitioner Nightclubs' standing. Opp.15–Opp.17. It begins by claiming that even in the absence of its regulations prohibiting adult entertainment venues from serving alcohol, Petitioner Nightclubs would not be able to serve alcohol because they are ineligible for liquor licenses under the general provisions of the Alcohol Code. That's not true.

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[3] Sandy Springs reports that the 2017 Development Code was completed the day after the court of appeals issued its decision. Opp.9. It became effective September 15, 2017. § 1.1.3, 2017 Dev. Code. Petitioners filed their Petition for Rehearing on Sept. 1, 2017. Petition, Sept. 1, 2017, 11th Cir. No. 16-14428. The Petition was denied on November 27, 2017. App.209–App.210. At no point during the pendency of the Petition for Rehearing did Sandy Springs notify the court of the adoption of its new development code as permitted by 11th Cir.R. 40-5 (providing that a party, by letter to the clerk, may advise the court of pertinent and significant authorities while a petition is pending).

Under Sandy Springs' Alcohol Code, restaurants and supper clubs that have at least 50 percent of their total sales comprised of the sale of food and nonalcoholic beverages consumed on the premises, are eligible to be licensed to serve alcohol. §§ 6-103, 6-105. At trial, the president of one of Petitioner Nightclubs testified that the club has a full menu and serves "everything from hot wings to steak," R. 374, Tr., Vol.1 (Phifer) at 66, so Petitioners could, in fact, meet the eligibility requirements.

Sandy Springs also claims that Petitioners waived their challenge to § 6-135 (d) of the alcohol code, prohibiting licensees from presenting adult entertainment. App.303.[4] But that's not true either.

On summary judgment, Petitioners argued that § 6-135 was subject to strict scrutiny. R. 266, Opp. to Motion for Summary Judgment at 47-57. Sandy Springs countered that § 6-135 was subject only to intermediate scrutiny, but never suggested that Petitioners' argument for strict scrutiny had been waived. R. 280, Reply at 35-39. The issue was preserved for appeal, where Petitioners argued for strict scrutiny again. Appellants' Br. at 30–31, 45–65, Oct. 11, 2016, 11th Cir. No. 14428-EE. And again,

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[4] That section reads:

> No licensee shall suffer or permit any person to engage in live conduct exposing to public view the person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks, or any portion of the female breast below the top of the areola on the licensed premises.

Sandy Springs did not argue waiver.

Fourth, Sandy Springs challenges Petitioner Bookstore's standing–also on two grounds. Opp.17–Opp.19. It argues that since the bookstore is subject to restriction as an adult use–not only because of the content of the expressive materials it sells and offers for viewing on the premises (which are constitutionally protected)–but also because it sells sexual devices, the bookstore would not "benefit 'in a tangible way' from a favorable decision," on First Amendment grounds since it is subject to the ordinances by virtue of its sale of sexual devices. Opp.18 (citation omitted). But Sandy Springs is wrong again.

If Sandy Springs' content-based regulations are determined to be unconstitutional, then the court must decide whether the regulations should be struck down in their entirety, or whether their unconstitutional portions can be severed. If they are struck down in their entirety, that, of course, will be a favorable decision for the Bookstore. And if the provisions pertaining to the sale of expressive materials alone are stricken, that will also be a favorable decision for Petitioner Bookstore, since it will be free to carry on its business without the sale of sexual devices to avoid having to shut down.

Sandy Springs also argues that Petitioner Bookstore has no standing because the Eleventh Circuit held that it had waived its challenge to the ordinance under strict scrutiny. Opp.18–Opp.19. The Eleventh Circuit did no such thing. Rather, it held that Petitioner Bookstore had waived its claim under the *Georgia Constitution*. App.31–App.33. The Eleventh

Circuit did *not* hold that Petitioner Bookstore had waived its challenge to the ordinances under the First Amendment. App.7–App.10, App.12–App.13.

Last, Sandy Springs argues that its ordinances simply regulate "live conduct" at adult nightclubs, not expression. Opp.22–Opp.24. The language of the regulations makes clear, however, their restrictions apply to expressive performances presented before an audience. They regulate "adult *entertainment*," presented by "adult *entertainers"* on a "*stage*." § 26-22, App.224–App.225; § 26-24, App.234–App.235 ("No adult entertainment shall occur within four feet of any patron or in any location other than on a fixed stage."). The regulations recognize: "[A]dult entertainment businesses are actually protected under the free speech clause of the First Amendment of the Constitution of the United States for their role in communicating 'erotic speech.'" § 26-1 (12), App.220.

II. *Reed* Left the Fate of the Secondary Effects Doctrine in Limbo.

Sandy Springs tells us, in addition to the Eleventh Circuit, "[o]ther courts...have continued to apply this Court's secondary effects precedent," citing *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) and *Free Speech Coalition*, *Inc. v. Atty. Gen. United States*, 825 F.3d 149, 161 n.8 (3rd Cir. 2016). Opp.28.

But those two cases beg the question presented here. *See,* Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 BOSTON UNIV. L. REV. 1533, 1566 (2017) ("The rhetoric of *Reed* is sufficiently strong that it may portend the soon-to-come overruling of past

decisions of this Court," referencing *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)).

In a footnote, the court in *BBL* acknowledged *Reed* had "clarified the concept of 'content-based' laws," but summarily noted: "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment." 809 F.3d at 326 n.1.

As for *Free Speech Coalition*, the Third Circuit found *Reed* required it to review a content-based statute regulating sexually explicit expression under strict scrutiny and rejected the Government's argument that the secondary effects doctrine justified application of intermediate scrutiny instead. *Free Speech Coalition,* 825 F.3d at 160–62. In a footnote, the court explained it had not reached the issue of whether the secondary effects doctrine survived *Reed*, since it found the secondary effects doctrine did not apply, but offered, "it is doubtful that *Reed* has overturned" the doctrine. *Id.* at 161 n.8. Judge Rendell in dissent emphasized: "[W]e are left wondering whether *Reed*" eliminated the secondary effects doctrine. *Id.* at 174 (Rendell, J., dissenting). While acknowledging, "it would appear so," she found that since *Reed* had not addressed the issue, the court was not free to conclude the doctrine had been "overruled by implication." *Id.*

The court below expressed similar reservations. It acknowledged there is "no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine," App. 20, but found it was "not at liberty to disregard binding case law," App. at

22, *citing Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996), even when that case law "rests on reasons rejected in some other line of decisions." App. at 21, *quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484 (1989).

III. The Ordinances Fail to Satisfy the Proportionality Test in Justice Kennedy's Concurrence in *Alameda Books,* Which As the Narrowest Ground on which the Majority of the Members of this Court Concurred in Judgment, Is the Holding of that Case Under *Marks v. United States,* 430 U.S. 188 (1977).

Sandy Springs contends "petitioners do not seek a ruling from this Court that Justice Kennedy's *Alameda Books* concurrence is the holding of that case." Opp. 32. But that's exactly what they seek. See Questions Presented, Pet. at i.

At trial, Petitioners presented evidence demonstrating that enforcement of the ban on alcohol at venues presenting nude dancing would sound their death knell and therefore, that regulation could not satisfy the proportionality test set forth in Justice Kennedy's concurrence, providing that a regulation of expression "must leave the quantity and accessibility of speech substantially intact." *Alameda Books,* 535 U.S. at 449–50 (Kennedy, J., concurring). He explained:

> If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the

latter.

Id. at 450–51.

In line with Justice Kennedy's reasoning, Petitioners argued that the City's ordinances requiring the separation of alcohol consumption and constitutionally protected nude dancing at adult nightclubs will have one of two results: either the clubs will stop serving alcohol and continue to present nude dancing, or they will close their doors, putting an end to nude dancing in Sandy Springs. The City's premise "cannot be the latter."

While the district court rejected Petitioners argument, on appeal, the Eleventh Circuit refused to rule on the merits of the argument. The court found that "[b]ecause Justice Kennedy's proportionality test cannot be harmonized with the plurality's opinion, it is not binding Supreme Court precedent." App.27.

Petitioners seek review of that ruling, which is at odds with the conclusion of every other court that has addressed the issue.

IV. This Case Merits Review on the *Marks* Issue.

Sandy Springs makes no attempt to defend the Eleventh Circuit's application of *Marks* to conclude that Justice Kennedy's concurrence is not the holding of *Alameda Books*. Instead, it suggests that because the opinion below is unpublished, there is no need to take the case in. Opp.31–Opp.32. But the court's "Do Not Publish," designation should make no difference–particularly here. *See Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J.,

dissenting). *See also Plumley v. Austin*, 135 S.Ct. 828 (2015) (mem.) (Thomas, J., dissenting).

The court below expressed concerns about the issues it was asked to decide–noting that *Reed* had called into question the reasoning undergirding its secondary effects doctrine precedents, App.20, and candidly wondering what it should do about its "prior precedents that *Reed* did not explicitly deal with or overrule." Oral Arg., Apr. 26, 2017 at 1:02.[5]

And for that reason, it declined to adopt Justice Kennedy's proportionality test. After concluding his concurrence was not binding, App.27–App.30, it considered whether it should, nonetheless, adopt it. It declined to do so, explaining:

> That *Reed* has called into question the fundamental underpinnings of the secondary-effects doctrine, even suggesting the doctrine may be abrogated, counsels against extending the doctrine based on the opinion of one Supreme Court Justice in one of his concurrences, which was based on a fact pattern not present in this case.

App.29.

Sandy Springs argues, however, there is no

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[5] Available at: http://www.ca11.uscourts.gov/oral-argument-recordings?title=16-14428&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=(last visited May 16, 2018)

reason to accept this case for review since this Court is set to address the *Marks* rule in *United States v. Hughes*, 849 F.3d 1008 (11th Cir. 2017) *cert. granted*, No. 17-155, Dec. 8, 2017. Opp.36. But the grant of certiorari in *Hughes* demonstrates the importance of the question presented in this case. And, at the very least, the Court should hold this case pending a decision in *Hughes*, grant the Petition on that issue, vacate the judgment below, and remand for reconsideration in light of *Hughes*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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