

No. \_\_\_\_\_

---

**In the Supreme Court of the United States**

---

TEN'S CABARET, INC., FORMERLY KNOWN AS  
STRINGFELLOWS OF NEW YORK, INC., AND  
PUSSYCAT LOUNGE, INC., D/B/A "PUSSYCAT LOUNGE",  
*Petitioners,*

v.

THE CITY OF NEW YORK, MAYOR MICHAEL BLOOMBERG,  
AS MAYOR OF THE CITY OF NEW YORK, AND  
PATRICIA LANCASTER, AS COMMISSIONER OF THE  
DEPARTMENT OF BUILDINGS OF THE CITY OF  
NEW YORK, *et al.*,  
*Respondents.*

---

*On Petition for Writ of Certiorari to the  
State of New York Court of Appeals*

---

**PETITION FOR WRIT OF CERTIORARI**

---

Martin P. Mehler  
*Counsel of Record*  
Mehler & Buscemi  
305 Broadway  
New York, New York 10007  
(212) 962-4688  
mmehler@mehlerbuscemi.com

*Counsel for Petitioners*

## **QUESTIONS PRESENTED FOR REVIEW**

1. Does the First Amendment allow the facial constitutionality of a 16 year old amendment to an adult zoning law to be determined, either at all or exclusively, by whether, more than a decade after the amendment's adoption, an undetermined and random number of then-operating businesses (operating under injunctions allowing them to present adult entertainment in up to 40% of their square footage, most of which businesses were not parties hereto), are deemed to be engaged in only "sham compliance" with the pre-amendment law which did not restrict such businesses?

2. If so, is there a constitutionally requisite minimum percentage of examined businesses which must be operating as "shams" in order to conclude that such an amendment was constitutional at the time of enactment?

3. In any event, was the ad hoc "sham" test utilized by the Court of Appeals impermissibly random or vague by failing both to 1) articulate what minimum percentage of businesses must be found to be shams and 2) define objective criteria to be used in determining whether a business should be deemed a "sham"?

## **PARTIES TO THE PROCEEDINGS**

### **PETITIONERS**

Ten's Cabaret, Inc., formerly known as Stringfellow's of New York, Inc.; Pussycat Lounge, Inc. d/b/a "Pussycat Lounge."

### **RESPONDENTS**

The City of New York, a municipal corporation.

The Mayor of the City of New York. At the time the action was commenced the Mayor was Hon. Michael Bloomberg. At this time, the Mayor is Hon. Bill DeBlasio.

The Commissioner of the Department of Buildings of the City of New York. At the time the action was commenced the Commissioner was Hon. Patricia Lancaster. At this time, the Commissioner is Hon. Rick D. Chandler.

### **ADDITIONAL RESPONDENTS (PLAINTIFFS BELOW)**

For The People Theatres of N.Y. Inc., d/b/a Fair Theatre, and JGJ Merchandise Corp. d/b/a Vishans Video a/k/a Mixed Emotions, were plaintiffs in an unconsolidated companion action separately tried in the trial Court and separately briefed on all appeals. The cases were consolidated at the appellate proceedings for argument and decision.

**RULE 29.6 STATEMENT**

Ten's Cabaret, Inc. has no parent corporation and no publicly held company owns any of its stock.

Pussycat Lounge, Inc. has no parent corporation and no publicly held company owns any of its stock.

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                 |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| QUESTION PRESENTED FOR REVIEW . . . . .                                                                                                                                                                                                                                                                                                                                                         | i      |
| PARTIES TO THE PROCEEDINGS . . . . .                                                                                                                                                                                                                                                                                                                                                            | ii     |
| RULE 29.6 STATEMENT . . . . .                                                                                                                                                                                                                                                                                                                                                                   | iii    |
| TABLE OF AUTHORITIES . . . . .                                                                                                                                                                                                                                                                                                                                                                  | viii   |
| OPINIONS BELOW . . . . .                                                                                                                                                                                                                                                                                                                                                                        | 1      |
| JURISDICTION . . . . .                                                                                                                                                                                                                                                                                                                                                                          | 3      |
| STATUTORY PROVISIONS . . . . .                                                                                                                                                                                                                                                                                                                                                                  | 3      |
| STATEMENT OF THE CASE . . . . .                                                                                                                                                                                                                                                                                                                                                                 | 3      |
| REASON FOR GRANTING THE WRIT . . . . .                                                                                                                                                                                                                                                                                                                                                          | 21     |
| The New York Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court: whether the novel “sham compliance” test utilized by the court below to uphold New York City’s adult zoning ordinance is a permissible test for adjudicating the constitutionality of an ordinance imposing widespread restrictions on expression . . . . . | 21     |
| CONCLUSION . . . . .                                                                                                                                                                                                                                                                                                                                                                            | 27     |
| APPENDIX                                                                                                                                                                                                                                                                                                                                                                                        |        |
| Appendix A Decision and Order of the Supreme Court of the State of New York, County of New York, in <i>Ten’s Cabaret, Inc., etc., et al. v. City of New York, et al.</i> (September 9, 2003) . . . . .                                                                                                                                                                                          | App. 1 |

|            |                                                                                                                                                                                                                              |          |
|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Appendix B | Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (April 12, 2005) . . . . . | App. 20  |
| Appendix C | Decision of the New York Court of Appeals in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (December 15, 2005) . . . . .                                                            | App. 53  |
| Appendix D | Decision and Judgment of the Supreme Court of the State of New York, County of New York, in <i>Ten's Cabaret, Inc., etc., et al. v. City of New York, et al.</i> (April 22, 2010) . . . .                                    | App. 86  |
| Appendix E | Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (April 7, 2011) . . . . .  | App. 90  |
| Appendix F | Decision, Order and Judgment of the Supreme Court of the State of New York, County of New York, in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (August 30, 2012) . . . . .        | App. 117 |

|            |                                                                                                                                                                                                                             |          |
|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Appendix G | Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (July 21, 2015) . . . . . | App. 141 |
| Appendix H | Decision and Remittitur of the New York Court of Appeals in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (June 6, 2017) (declaring 2001 Amendments constitutional) . . . . .      | App. 185 |
| Appendix I | Order of the New York Court of Appeals in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (June 27, 2017) (denying stay pending petition for certiorari) . . . . .                   | App. 218 |
| Appendix J | Order of the New York Court of Appeals in <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.</i> (September 12, 2017) (denying reargument) . . . . .                                        | App. 220 |
| Appendix K | New York City Council Resolution 897 (1995 definition of “adult establishment” and “adult eating or drinking establishment”) . . . . .                                                                                      | App. 222 |
| Appendix L | New York City Department of Buildings Operation, Policy & Procedure Notice (OPPN) 4/98 . . . . .                                                                                                                            | App. 225 |

|            |                                                                                                                                                  |          |
|------------|--------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Appendix M | New York City Department of Buildings<br>Operation, Policy & Procedure Notice<br>(OPPN) 6/98 . . . . .                                           | App. 228 |
| Appendix N | New York City Council Resolution<br>2096 (2001 definition of “adult<br>establishment” and “adult eating or<br>drinking establishment”) . . . . . | App. 231 |

## TABLE OF AUTHORITIES

### CASES

|                                                                                                                                                                              |               |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>City of Los Angeles v. Alameda Books, Inc.</i> ,<br>535 U.S.425 (2002) . . . . .                                                                                          | 1             |
| <i>City of New York v. Dezer Properties, Inc.</i> ,<br>95 N.Y.2d 771, 732 N.E.2d 943 (2000) . . . . .                                                                        | 6, 21         |
| <i>City of New York v. Les Hommes</i> ,<br>94 N.Y.2d 267, 724 N.E.2d 368 (1999) . . . . .                                                                                    | 5, 21         |
| <i>For The People Theatres of N.Y., Inc., etc., et al. v.</i><br><i>City of New York, et al.</i> ,<br>20 A.D.3d 1, 793 N.Y.S.2d 356<br>(1st Dept. 2005) . . . . .            | 1, 9          |
| <i>For The People Theatres of N.Y., Inc., etc., et al. v.</i><br><i>City of New York, et al.</i> ,<br>6 N.Y.3d 63, 843 N.E.2d 1121 (2005) . . . . .                          | <i>passim</i> |
| <i>For The People Theatres of N.Y., Inc., etc., et al. v.</i><br><i>City of New York, et al.</i> ,<br>84 A.D.3d 48, 923 N.Y.S.2d 11<br>(1st Dept. 2011) . . . . .            | 2, 15, 17, 22 |
| <i>For The People Theatres of N.Y., Inc., etc., et al. v.</i><br><i>City of New York, et al.</i> ,<br>38 Misc.3d 663, 954 N.Y.S.2d 801<br>(Sup. Ct. N.Y. Co. 2012) . . . . . | <i>passim</i> |
| <i>For The People Theatres of N.Y., Inc., etc., et al. v.</i><br><i>City of New York, et al.</i> ,<br>131 A.D.3d 279, 14 N.Y.S.3d 338<br>(1st Dept. 2015) . . . . .          | 2, 19, 20     |

|                                                                                                                                                             |               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.,</i><br>29 N.Y.3d 340, 79 N.E.3d 461, 57 N.Y.S.3d 69<br>(2017) . . . . . | <i>passim</i> |
| <i>For The People Theatres of N.Y., Inc., etc., et al. v. City of New York, et al.,</i><br>29 N.Y.3d 1115, 83 N.E.3d 848 (2017) . . . . .                   | 3, 21         |
| <i>Ten's Cabaret, Inc., etc., et al. v. City of New York, et al.,</i><br>1 Misc.3d 399, 768 N.Y.S.2d 786 (Sup. Ct. N.Y. Co. 2003) . . . . .                 | 1, 8          |

## **CONSTITUTIONS, STATUTES, AND ORDINANCES**

|                                                                                                     |               |
|-----------------------------------------------------------------------------------------------------|---------------|
| U.S. Const. amend. I . . . . .                                                                      | 3, 6, 9, 20   |
| U.S. Const. amend. XIV . . . . .                                                                    | 3             |
| 28 U.S.C. § 1257(a) . . . . .                                                                       | 3             |
| 28 U.S.C. § 2101(f) . . . . .                                                                       | 21            |
| N.Y. Const. Art. I, § 8 . . . . .                                                                   | 6             |
| New York City Department of Buildings Operation,<br>Policy & Procedure Notice (OPPN) 4/98 . . . . . | 4             |
| New York City Department of Buildings Operation,<br>Policy & Procedure Notice (OPPN) 6/98 . . . . . | 4             |
| The Council of the City of New York Resolution<br>No. 897, 1995 Amendments . . . . .                | <i>passim</i> |
| The Council of the City of New York Resolution<br>No. 2096, 2001 Amendments . . . . .               | <i>passim</i> |

**RULE**

|                        |   |
|------------------------|---|
| Sup. Ct. R. 13.3 ..... | 3 |
|------------------------|---|

**PETITION FOR A WRIT OF CERTIORARI**

Petitioners respectfully pray that a Writ of Certiorari issue to review the June 6, 2017 decision of the New York Court of Appeals upholding 2001 amendments (the “2001 Amendments”) to the City of New York’s pre-existing 1995 adult zoning scheme.

**OPINIONS BELOW**

The initial opinion in this action was rendered by the Supreme Court of the State of New York, County of New York (York, *J.*), on September 9, 2003, granting summary judgment to plaintiffs and declaring the 2001 Amendments unconstitutional. It is reported at 1 Misc.3d 399, 768 N.Y.S.2d 786 (Sup. Ct. N.Y. Co. 2003), and reprinted in the Appendix to this Petition. (App. 1-19).

The April 12, 2005 opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York, reversing Justice York and declaring the 2001 Amendments constitutional, is reported at 20 A.D.3d 1, 793 N.Y.S.2d 356 (1<sup>st</sup> Dept. 2005), and reprinted in the Appendix to this Petition. (App. 20-52).

The November 17, 2005 opinion of the New York Court of Appeals, reversing the Appellate Division and remanding the action for an evidentiary hearing pursuant to *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.425 (2002), is reported at 6 N.Y.3d 63, 843 N.E.2d 1121 (2005), and reprinted in the Appendix to this Petition. (App. 53-85).

The unreported April 22, 2010 opinion of the Supreme Court of the State of New York, County of

New York (York, J.), following an evidentiary hearing on remand and declaring the 2001 Amendments constitutional, is reprinted in the Appendix to this Petition. (App. 86-89).

The April 7, 2011 opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York, reversing Justice York and remanding the action for findings and redetermination, is reported at 84 A.D.3d 48, 923 N.Y.S.2d 11 (1<sup>st</sup> Dept. 2011), and reprinted in the Appendix to this Petition. (App. 90-116).

The August 30, 2012 opinion of the Supreme Court of the State of New York, County of New York (York, J.), on the second remand, declaring the 2001 Amendments unconstitutional, is reported at 38 Misc.3d 663, 954 N.Y.S.2d 801 (Sup. Ct. N.Y. Co. 2012), and reprinted in the Appendix to this Petition. (App. 117-140).

The July 21, 2015 opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York, affirming Justice York, is reported at 131 A.D.3d 279, 14 N.Y.S.3d 338 (1<sup>st</sup> Dept. 2015), and reprinted in the Appendix to this Petition. (App. 141-184).

The June 6, 2017 opinion of the New York Court of Appeals, reversing the Appellate Division and declaring the 2001 Amendments constitutional, is reported at 29 N.Y.3d 340, 79 N.E.3d 461 (2017), and reprinted in the Appendix to this Petition. (App. 185-217).

## **JURISDICTION**

The jurisdiction of this Court rests on 28 U.S.C. § 1257(a). A different party to the proceeding before the New York Court of Appeals filed a timely petition for reargument of the appeal. The Order of the Court of Appeals denying reargument of the appeal was entered on September 12, 2017 and is reported at 29 N.Y.3d 1115, 83 N.E.3d 848 (2017). (App. 220-221). This Petition is timely under Supreme Court Rule 13.3.

## **STATUTORY PROVISIONS**

United States Constitution, Amend. I, provides in relevant part that: “Congress shall make no law ... abridging the freedom of speech ....”

United States Constitution, Amend. XIV, provides in relevant part that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.”

## **STATEMENT OF THE CASE**

In 1995, the City of New York adopted amendments to its Zoning Resolution designed to reduce concentrations of adult entertainment businesses, to separate them from various sensitive uses and zones, and to mitigate secondary effects in connection with garish exterior signage which was then common in front of such businesses, all for the purpose of reducing perceived adverse secondary effects in neighborhoods surrounding such businesses. (Hereafter “the 1995 Ordinance.”)

The 1995 Ordinance required termination within one year of all businesses it rendered non-conforming, resulting in substantial reductions in the concentration and overall number of adult businesses in New York City and a general consensus that it “cleaned up” Times Square.

Nonetheless, as administratively<sup>1</sup> and later judicially<sup>2</sup> construed (following concessions as to its proper interpretation made in court by attorneys for the City), the 1995 Ordinance exempted businesses which used less than 40% of their floor space for presenting adult live entertainment. (App. 121, 190). Consequently, although several adult live entertainment businesses simply closed by the end of the one year termination period, a number of others converted to what became known as “60-40” businesses and simultaneously modified their exterior signage to remove notably garish signs, the elimination of which had been an important goal of the 1995 Ordinance.<sup>3</sup>

In 2001, notwithstanding the apparent total success of the 1995 Ordinance, the City passed the 2001

---

<sup>1</sup> See New York City Department of Buildings Operations Policy & Procedure Notices 4/98 and 6/98. (App. 225-230).

<sup>2</sup> See, 38 Misc.3d at 674 (App. 121) and 29 N.Y.3d at 344 (App. 190).

<sup>3</sup> Several of these businesses re-configured their premises, at great expense, so as to pass muster under the forty percent standard. Different clubs put the 60% portion of their space to different non-adult uses. E.g., Petitioner Ten’s opened a steakhouse as part of its facility; Petitioner Pussycat Lounge used the majority of its space as a rock concert venue.

Amendments to its 1995 Ordinance, which expressly removed the exemption for businesses presenting adult live entertainment in less than 40% of their premises and despite no new study suggesting there remained any *need* for further reductions in the number of adult businesses, much less elimination of the surviving businesses with no-longer-garish signs which used less than 40% of their premises for presentation of live adult entertainment. (App. 231-234)<sup>4</sup>

Between 1995 and 2001, the City challenged a small number of these “60/40 businesses” as being in “sham compliance” with the 1995 ordinance, but these challenges were rejected by the New York Court of Appeals, concluding, essentially, that the square footage standards were the only relevant standards and were very clear and, so long as a business complied with them, there was no such thing as “sham” compliance. See *City of New York v. Les Hommes*, 94 N.Y.2d 267, 724 N.E.2d 368 (1999) (bookstore), and

---

<sup>4</sup> The 2001 Amendments included distinct provisions eliminating the option of “60-40 compliance” for most bookstores as well, and the challenges by the bookstore owners and live entertainment businesses proceeded concurrently in the same courts on parallel tracks. Both cases came before the New York Court of Appeals twice, and both times were disposed of by that Court in a single appellate case involving both groups of litigants.

However, the current Petition addresses only the portion of the litigation challenging the restrictions imposed by the 2001 Amendments on adult eating and drinking establishments and is brought solely on behalf of those presenting live adult entertainment. Nonetheless, the Court is advised that Petitioners believe that a separate certiorari petition is being filed in this Court by those representing “60-40” bookstores under the name *For the People Theatres v. City of New York*.

*City of New York v. Dezer Properties, Inc.*, 95 N.Y.2d 771, 732 N.E.2d 943 (live entertainment business) (2000).

Following enactment of the 2001 Amendments, several parties, including Petitioners, challenged those amendments in the New York state courts.

Petitioners' State court challenges asserted claims solely under the New York Free Expression Clause (Art. I, § 8, of the New York Constitution) although the bookstore plaintiffs in *For The People Theaters* asserted claims under the First Amendment.

In response to these various challenges, the State court enjoined enforcement of the 2001 Amendments City-wide before it took effect. Through a combination of injunctions and/or stays which remained in effect for approximately 15 years pending numerous appeals, remands, re-trials, etc., the 2001 Amendments did not take effect until they were finally upheld in June of this year by the New York Court of Appeals. However, since that time, the City has voluntarily agreed to withhold enforcement against Petitioners pending the outcome of any timely filed certiorari petitions.

Although Petitioners herein asserted only state constitutional challenges (which nevertheless required determination of the First Amendment issues upon which the state Free Expression protections are premised), the "bookstore plaintiffs" additionally *expressly* challenged the 2001 Amendments under the federal First Amendment and the New York Court of Appeals, in its unitary opinion in both appeals, held that the 2001 Amendments do not violate *any* of the Plaintiffs' First Amendment rights. 29 N.Y.3d at 344

(App. 190.) That ruling is binding against Petitioners in the New York courts and provides the basis for this Court's certiorari jurisdiction herein.

### **The Relevant Constitutional Rulings Below**

All of the numerous lower court rulings turned on the sole question of whether the City, in 2001, had established a sufficient evidentiary basis for concluding that the then-existing 60-40 businesses caused sufficient adverse secondary effects in their surrounding neighborhoods to justify the 2001 provisions eliminating those businesses.

Although there had been several noted changes caused by the 1995 Ordinance, including: (1) fewer adult businesses overall; (2) significantly reduced *concentrations* of adult businesses; and (3) successful elimination of the type of garish and previously common exterior signage the 1995 Ordinance was designed to eliminate, the City conducted no new study prior to enacting its 2001 Amendments to see if there *remained* an *ongoing need* for further restrictions.

Consequently, in enacting its 2001 Amendments, the City relied solely on the evidence of secondary effects it had assembled prior to enacting the original 1995 Ordinance. *That* evidence consisted solely of relying on: (1) a 1994 Department of City Planning (DCP) Adult Entertainment Study (the DCP Report) and a 1995 City Planning Commission Report (the CPC Report), both of which looked at then-existing 100% adult businesses in the City and identified a number of adverse conditions existing near those businesses, but concluded that they could not find that the conditions they observed were necessarily attributable to the

presence or operation of the adult businesses; and (2) cases and studies from other jurisdictions asserting a general correlation between concentrations of adult entertainment businesses and perceived adverse secondary effects.

Significantly, both the City's CPC Report and DCP Report investigated *only* the impacts *outside* the adult businesses and neither pointed to any adverse secondary effects occurring *inside* the businesses.

The plaintiffs submitted evidence offered to demonstrate that the 60-40 businesses (all of which came into existence only after and in response to the 1995 Ordinance) did *not* cause significant adverse secondary effects, including crime studies near 60-40 businesses and a variety of other evidence.

Initially, the lower court granted summary judgment declaring the 2001 Amendments unconstitutional as a matter of law. 1 Misc.3d 399, 768 N.Y.S.2d 786 (Sup. Ct. N.Y. Co. 2003) (App. 1-19). On the pivotal question of whether the City had established a nexus between the "60/40" establishments existing in 2001 and the adverse secondary effects attributed to the 1994-95 "100%" establishments studied in the DCP Report, the trial Court held, in pertinent part, as follows:

This court holds that defendants may not rely on the 1993 [sic, 1994] DCP Report as the basis for the 2001 amendments. *The ... DCP Report did not study 60/40s, and it cannot be used as evidence to demonstrate that these establishments cause secondary effects. A [new] study would reveal whether the 60/40 rule*

*remedied the adverse secondary problems described in the ... DCP Report or whether a broader law is necessary.* Furthermore, plaintiff has presented data of its own demonstrating that 60/40s do not cause the secondary effect of increased crime. (*Ten's Cabaret*, exhibit D, Feb. 2001 police report.) Thus, defendants have not met their burden under the First Amendment. For the same reason, defendants have not shown that the 2001 amendments are “justified by concerns unrelated to speech.” (*Stringfellow's*, 91 NY2d at 397.) Accordingly, the 2001 amendments fail to meet the New York State constitutional requirements of article I, § 8. While New York courts have “long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization,” if an ordinance, as here, aims to curb adult uses then it implicates speech or conduct protected under both the First Amendment and by article I, § 8 of the New York State Constitution and must be held to stricter scrutiny. (*Stringfellow's*, 91 NY2d at 395-396.).

The intermediate appellate court reversed and granted judgment in favor of the City, declaring the 2001 Amendments constitutional as a matter of law, 20 A.D.3d 1, 793 N.Y.S.2d 356 (1<sup>st</sup> Dept. 2005) (App. 20-52), holding that plaintiffs had the burden of affirmatively proving that the “essential nature” of the 60/40’s had changed, making reliance on the 1994 DCP Report inappropriate, and had failed to carry their burden.

Upon initial review by the New York Court of Appeals (the 2005 Decision) (6 N.Y.3d 63, 843 N.E.2d 1121 (2005) (App. 53-85), three judges agreed with the trial court and voted to reverse the intermediate court and reinstate the trial court's judgment of unconstitutionality. 6 N.Y.3d at 84, 843 N.E.2d at 1134. However, the four-judge Court of Appeals majority, agreeing that a reversal was in order, nonetheless remanded for further proceedings as it felt the evidence had not been adequately developed to answer the relevant constitutional question.

Nonetheless, rather than remanding for a determination of whether sufficient secondary effects continued to exist in 2001 to justify the elimination of all the 60-40 businesses, the majority instead remanded for a bizarre and unprecedented constitutional inquiry whereby the validity of the 2001 Amendments was to be based on whether an undefined number of presently existing 60-40 businesses were operating in some type of undefined "sham" compliance with the pre-2001 zoning scheme, concluding that if it is found that they are now so operating, then the 2001 Amendments should be found valid:

[A] triable question of fact has been presented as to whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Report and in studies and court decisions around the country, to create negative secondary effects—as plaintiffs contend — or whether

these businesses' technical compliance with the 60/40 formula is merely a sham — as the City contends.

6 N.Y.3d at 83-84, 843 N.E.2d at 1133.

Additionally, the majority specifically stated that the remand would *not* require the City to prove the existence of any ongoing adverse secondary effects caused by the presence or operation of the 60-40 businesses. Its sole concern should be with whether the interior operation of an undefined number of the currently existing 60-40 businesses was essentially the same as that of their 100% predecessors, concluding that if their interior focus is found to still be on adult entertainment, they should be deemed a “sham” regardless of any changes in their exterior appearance or their overall number or concentration, all of which may impact secondary effects. Importantly, it did not even articulate a standard of how widespread the asserted current “sham” compliance must be in order to find the 2001 Amendments valid:

Because plaintiffs have ... “furnish[ed] evidence that disputes the [City’s] factual findings,” the burden shifted back to the City “to supplement the record with evidence renewing support for a theory that justifies its ordinance” (*Alameda Books*, 535 U.S. at 439). The City was not required, however, to relitigate the secondary effects of adult uses, or to produce empirical studies connecting 60/40 businesses to adverse secondary effects.

... [W]e anticipate that the City will produce evidence relating to the purportedly sham

character of self-identified 60/40 book and video stores, theaters and eating and drinking establishments or other commercial establishments located in the city. ***This does not mean that the City has to*** perform a formal study or a statistical analysis, or ***to establish that it has looked at a representative sample of 60/40 businesses in the city.*** If the trier of fact determines, after review of this evidence, that the City has fairly supported its position on sham compliance — i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed — the City will have satisfied its burden to justify strengthening the 1995 Ordinance by enacting the 2001 Amendments, and will be entitled to judgment in its favor.

6 N.Y.3d at 83-84, 843 N.E.2d at 1132-1133 (emphasis added).

In short, the remand seemed to turn on whether an undefined percentage of then-currently operating 60-40 businesses were still predominantly focused on adult entertainment, regardless of any changes designed to reduce or eliminate any adverse effects on their surrounding neighborhoods.

In an opinion by then Chief Judge Kaye, the three Court of Appeals dissenters urged that:

The City was obliged to present *some* evidence demonstrating a nexus between the 60/40

businesses and the deleterious social effects supporting its 2001 regulation. The City cannot rely on the studies justifying the 1995 ordinance because the businesses within the reach of the 2001 law are different in character than those the City sought to regulate 10 years ago. While it produced voluminous evidence that the businesses targeted by the 1995 law were the source of deleterious negative secondary effects, the City has offered nothing of the kind here.

In contrast, in support of their motions for summary judgment, plaintiffs produced substantial evidence that the 60/40 businesses are functionally different from the pre-1995 businesses and that the 60/40 businesses do not produce negative secondary effects. The plaintiffs provided expert proof that property values increased in 60/40 neighborhoods on a par with those in the rest of the city after the 1995 resolution went into effect and that crime rates dropped in 60/40 precincts at the same or greater rate as in non-60/40 precincts after the 1995 resolution was enforced. Additionally, the plaintiffs offered evidence that many of the community representatives in areas with a heavy presence of 60/40 businesses who had supported the 1995 resolution now opposed the 2001 amendment.

63 N.Y. at 87; emphasis in original.

On remand, after discovery, a lengthy trial was held. Fourteen witnesses testified. The City conceded that it had the burden of proof. Its case-in-chief witnesses were two New York City Building

Department inspectors, three New York City Police Department officers, and five “60/40” club operators (including the principals of the petitioners). The Building Inspectors and Police Officers testified to their observations made upon inspection of a number of “60/40” clubs. None of these witnesses claimed any knowledge of or attempted to compare the “60/40” clubs with the “100%” clubs studied in 1994. However, one of the Inspectors, who is the City’s signage expert, supported the Petitioners’ claim by admitting that the City’s signage regulations adopted as part of the 1995 Amendments had resulted in “toned down” signage for adult establishments throughout the City, and the trial court ultimately expressly found this to be the case. 38 Misc.3d at 672-673.

Petitioner’s representatives, called as adverse parties, and the other club operators, testified as to the extent and expense of converting their businesses to a “60/40” business model in order to comply with the “substantial portion” test under the 1995 Amendments, the nature of their current operations, and their current advertising, especially on the Internet. None of these witnesses was asked to compare their “60/40” operation to their prior “100%” operations.

Petitioners also called three expert witnesses, subsequently found credible by the trial court, who testified that their studies indicated that the “60/40” clubs are *not* criminogenic, do *not* have any adverse affect on real estate values, and were much *more acceptable* to neighborhood residents than the clubs which existed in 1995 featuring garish exterior signage. In rebuttal, the City called an “all-purpose” rebuttal

expert, whom the court expressly found not to be credible.

The trial court, without making findings, then summarily held the 2001 Amendments constitutional in respect of adult eating and drinking establishments based solely on its interpretation of the opinion of the New York Court of Appeals. (App. 86-89).<sup>5</sup>

Upon intermediate appellate review, the judgment of constitutionality was reversed, 84 A.D.3d 48, 923 N.Y.S.2d 11 (1<sup>st</sup> Dept. 2011) (App. 90-116). The action was remanded to the trial court for findings of fact and re-determination, with critical guidance from the intermediate appellate court that the City had to establish a 1994 “baseline” in order to rely on the 1994 DCP Report to justify the 2001 Amendments:

In assessing the validity of the 2001 Amendments, Supreme Court needed to compare “self-identified” 60/40 businesses with the adult businesses discussed in the DCP Report, other studies and case law so as to determine whether the 60/40 businesses retained a predominant focus on sexually explicit materials. In so doing, Supreme Court needed to determine the particular

---

<sup>5</sup> It a later opinion following another remand, the trial court conceded that it had mistakenly reached this conclusion because:

“too much emphasis was placed on the easy burden this court understood the Court of Appeals had placed on the City. Moreover, the rational basis and substantial evidence tests were not appropriate means to determine the constitutional validity of the legislation in question.” 38 Misc.3d 663, 673, 954 N.Y.S.2d 801, 808.

characteristics associated with the promotion of sexually explicit materials. The negative characteristics identified by the Supreme Court would serve as baseline against which the “so transformed” issue could be adjudicated. Using that baseline, Supreme Court would then need to determine whether the 60/40 businesses had a similar predominant focus on sexually explicit materials.

In establishing the criteria by which the current uses can be compared to the uses studied in 1994, the DCP Report is a helpful starting point. Though that study focused on the consequences of significant concentrations of adult businesses emphasizing sexually explicit materials and not the particular attributes that caused secondary effects, it did highlight some of the attributes that define an adult business. Specifically, it noted that establishments might qualify as being of an adult nature if they 1) exclude minors by reason of age or 2) sold materials emphasizing “specified sexual activities” or “specified anatomical areas.” In addition to those salient characteristics, the study placed special emphasis on the presence of adult signs that were larger than those of nearby non-adult businesses.

Based on the DCP Report, it is possible to discern the relevant characteristics of adult uses that can be linked to a focus on sexually explicit materials. For example, the presence of large signs advertising adult content may indicate a predominant focus on promoting sexually

explicit materials. The same is true of a significant emphasis on the promotion of materials exhibiting “specified sexual activities” or “specified anatomical areas,” as evidenced by a large quantity of peep booths featuring adult films. Other indicators of a predominant focus on sexually explicit materials might be the exclusion of minors from the premises on the basis of age or difficulties in accessing non-adult materials. In using the DCP Report to assess the constitutionality of the 2001 Amendments, Supreme Court should consider the extent to which 60/40 businesses have such attributes in determining whether they have a predominant focus on sexually explicit materials [or activities].

84 A.D.3d at 61-62; footnotes omitted.

On remand, the City declined to introduce any additional evidence. The trial court then made well in excess of 100 findings of fact and concluded [38 Misc.3d 663, 954 N.Y.S.2d 801 (2012) (App. 117-140)] that the 2001 Amendments were facially unconstitutional:

This court finds significant and distinct differences between the 1994 adult entities and 60/40 entities, so that the current establishments no longer resemble their 1994 predecessors. Given their current arrangements and secondary characteristics, these entities no longer operate in an atmosphere placing more dominance of sexual matters over nonsexual ones. Accordingly, there is no need for the 2001 amendments. On their face, therefore, they are

a violation of free speech provisions of the US and State Constitutions.

In a coda to his opinion that the trial judge labeled “dicta,” he continued, in pertinent part:

*... [T]his court cannot understand how an 18-year-old study of the negative effects of the 100% entities can be applied to the current 60/40 entities without determining the actual negative secondary effect of these institutions today. It was primarily the increased crime rates that spawned the 1994 DCP Report and led to the legislative changes in 1995 that this record shows was successful. New York State has a storied reputation for protecting freedom of speech. Its courts have consistently held that the content of speech cannot be regulated (*People v Mobil Oil Corp.*, 48 NY2d 192 [1979]). What can be regulated are the negative secondary effects of the legislation in issue by virtue of the exercise of the police powers (*Stringfellow’s of N.Y. v City of New York*, 241 AD2d 360 [1st Dept 1997]). Here, no investigation was conducted by the defendants. Instead, there was a fictionalized reliance on the 1994 study. Without an actual study, the 2001 legislation should have been struck down, as urged by the three-judge Court of Appeals’ minority opinion in *For the People* (at 6 NY3d 88).*

\* \* \*

Isn’t, without a finding of negative secondary effects generated by the current 60/40 entities, what the City is really regulating—the content of expression — clearly a violation of the

plaintiffs' rights to freedom of speech (*People v Mobil Oil Corp.*, 48 NY2d 192 [1979])?

38 Misc.3d at 675-76 (emphasis added).

On appeal, a divided panel of the intermediate appellate court rejected the City's bid for judgment in its favor and affirmed the judgment of unconstitutionality, 131 A.D.3d 279, 14 N.Y.S.3d 338 (1st Dept. 2015), with the three judge majority holding that while the City had established "that the 60/40 clubs regularly feature topless dancing and lap dancing in a substantial portion of their overall space" and heavily promote this aspect of the business, the City's evidence was insufficient to justify reliance on the 1994 DCP Report to make the constitutionally critical connection between the challenged ordinance and adverse secondary effects, explaining that:

there was little to no evidence presented as to the other factors, such as the nature of the outward signage (first factor) and the difficulty in accessing the nonadult material, or, in this case, the nonadult section of the club (fourth factor). There was also no evidence presented as to the nature of the pre-1994 or 100% clubs.

\* \* \*

As with the book stores and video stores, satisfaction of one of the factors is not sufficient to meet the City's burden. The City assumes that because the 60/40 clubs regularly feature topless dancing, this automatically means that they retain a predominant sexual focus. However, there is nothing in the prior related decisions that mandates that conclusion. Thus,

this Court finds that the City has not met its burden with respect to the adult eating and drinking establishments.

131 A.D.3d at 293 (emphasis added).

The two dissenting intermediate appellate judges disagreed, returning to the (seemingly) discredited theme of “sham compliance” and concluding that “the trial [C]ourt ... allowed its improper reconsideration of “negative secondary effects” to permeate its decision, and that the City has sustained its burden as to sham compliance by demonstrating that by and large the essential character of the 60/40 businesses has not changed. 131 A.D.3d at 295.

On further appeal, the New York Court of Appeals noted that “the Appellate Division’s approach lost sight of the fact that the [only] issue was whether there was sham compliance.” 29 N.Y.3d at 361; 79 N.E.3d 476.

The court concluded that “sham compliance” (by an undetermined percentage of businesses at the time of trial) had been successfully demonstrated and that it was therefor “evident as a matter of law that the City met its burden of showing that the adult establishments continued to have a predominant focus on sexually explicit materials and activities.”

The Court of Appeals accordingly reversed, finding the 2001 Amendments facially valid not only under the New York Constitution, but also under the First Amendment to the United States Constitution: “It follows, under our 2005 decision in this case, that the amendments do not violate plaintiffs’ *First Amendment* rights.” 29 N.Y.3d at 344, 79 N.E.3d at 463 (App. 186).

### **Basis For Finality of Decision**

Concurrent motions in both *For The People Theatres* and *Ten's/Pussycat Lounge* for stays pending petitions for writs of certiorari were then denied without opinion by Associate Judge Fahey pursuant to 28 U.S.C. § 2101(f) (App. 218-219) and, more recently, the New York Court of Appeals denied a motion in *For The People Theatres* for reargument, reported at 29 N.Y.3d 1115, 83 N.E.3d 848 (2017) (App. 220-221), bringing finality to the State court litigation and clearing the way for Supreme Court review.

### **REASONS FOR GRANTING THE WRIT**

**The New York Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court: whether the ad hoc “sham compliance” test exclusively utilized by the court below to uphold New York City’s adult zoning ordinance is a permissible test for adjudicating the constitutionality of an ordinance imposing widespread restrictions on expression.**

Relying on its earlier 2005 Opinion, the New York Court of Appeals’ 2017 Decision upheld the constitutionality of the City’s 2001 Amendments based solely on whether an undefined number of so-called 60-40 businesses in existence more than a decade later were operating in what it referred to as “sham compliance” with the law as it existed prior to the 2001 Amendments (even though its own earlier opinions in *Les Hommes and Dezer, supra*, expressly held that any businesses meeting the square footage requirements

were, as a matter of law, *not* to be deemed in sham compliance).

In both its 2005 and 2017 opinions herein, the Court of Appeals defined “sham compliance” as merely whether a live entertainment business continued to have a “predominant focus on sexually explicit ... activities” (6 N.Y.3d at 84 and 29 N.Y.3d at 344). Its opinions did not specify the objective criteria by which this determination of “predominant focus” should be measured (e.g., percentage of adult vs. non-adult revenue, percentage of adult vs. non-adult advertising, percentage of adult vs. non-adult square footage), nor, even more importantly, did it ever state how *many* of the then-existing 60-40 businesses in New York City needed to have been found in “sham compliance” in order for the 2001 Amendments to be upheld.

Although the Court of Appeals’ 2005 remand instructions were ambiguous (as evidenced by the numerous conflicting lower court opinions on remand trying to interpret them), its 2017 opinion made clear that it had also implicitly presumed that any *other* evidence would be irrelevant.

Both the vagueness and constitutional irrelevance of this “sham compliance” test are best revealed by comparing the Court of Appeals’ holding with the trial court’s numerous findings of fact, all of which seem to be more pertinent to the constitutional issue than the insufficiently defined and artificial “sham” test established by the Court of Appeals. Following an extensive evidentiary trial, the trial court made each of the following findings of fact:

84. a. 60/40 clubs are not associated with negative secondary crime effects;

b. 60/40 clubs were not “hot spots” for crime in their neighborhoods;

c. crimes did not increase with the opening of a 60/40 club;

d. crimes did not decrease after the closing of a 60/40 club.

\* \* \*

87. Since the enactment of the 1995 amendments, adult establishments have dramatically declined in numbers.

88. Adult clubs have become far more widely dispersed since the enactment of the 1995 amendments.

\* \* \*

93. The court finds that the current signage for 60/40 entities is less garish, more subdued and, frequently, the 60/40 nonadult portion is equally or more prominent than the adult portion.

38 Misc.3d at 672-673.

Also, after finding plaintiffs’ expert Michael Anastas to be “a credible witness with an expertise in market research” (*id.*), the trial judge made the following additional Findings of Fact with respect to conclusions Anastas had reached based on Anastas’ extensive surveys of residents comparing 60-40 businesses with their 100% predecessors:

82. a. the overall quality of life in the 60/40 clubs' areas was better;
- b. the 60/40 neighborhoods were safer;
- c. the 60/40 neighborhoods were a more preferable place to live;
- d. the 60/40 neighborhoods were a preferred shopping area.

*(Id.)*

The trial court nonetheless attempted to apply the test given it on remand and reached the following conclusions of law:

Although 18 years have passed since ... [the DCP's 1994] study and significant changes have occurred since ... [that] Study, both the Court of Appeals in its remand and the Appellate Division remand after that, have directed this court not to consider any negative secondary effects of these changes. The ultimate question they have laid out, is whether the nature of these entities have so changed that they no longer resemble their 100% forebears. To do this, we must consider whether their nonadult features or characteristics predominate over their adult features.

One of the characteristics pointed out by the DCP Study was the concentration of adult businesses in particular neighborhoods. Now, due to the provisions of the 1995 ordinance, these entities are not able to exist in residential and many manufacturing and commercial

neighborhoods, but where they are allowed to exist only one such entity is permitted in each zoning district, and must be at least 500 feet from each other and any school or house of worship. Thus, there are no more such concentrations. In contrast to the 1994 study, entities where the entire business contained 100% adult entities, all of the current entities studied, contain separate adult and nonadult sections with more product or space devoted to nonadult features. The nonadult portion is almost always located in the front of the entity with the adult section in the back, so that a patron can visit the front and never go to the back of the store, a distinct difference from the 1994 areas. In many of the entities, patrons in the nonadult section are unable to see what is going on in the adult section, a contrast to the 100% entities in the 1994 study. In most businesses, there are legitimate activities going on in the nonadult sections, which can be a restaurant, or a sports bar, or entertainment in the form of theater or celebrity entertainment, another feature distinct from its forbears. The exterior and interior signage has changed. There are almost no garish neon lighted signs, no hardcore sexual images or language on them and the nonadult signage is as prominent as the adult signage, certainly a significant change from the 1994 situation.

38 Misc.3d at 674-675.

Given the findings above, it would seem clear that the Court of Appeals' "sham compliance" test bore no

resemblance to any standards of constitutional analysis previously identified by this Court. Additionally, it was incredibly vague, particularly in that it did not even identify what number or percentage of businesses must be found in “sham compliance” in order for the 2001 Amendments to be upheld. For all these reasons, it was utterly inappropriate for it to be used as the sole basis for evaluation of the relevant constitutional issues.

Nonetheless, Petitioners recognize that the City would be unfairly prejudiced, having had these cases remanded and tried under the Court of Appeals’ inappropriate “sham compliance” standard, if it were not given the opportunity to put on its evidence under an *appropriate* set of remand guidelines. Consequently, Petitioners do not seek from this Court a final determination of unconstitutionality but, instead, request that the Court of Appeals’ decision be vacated and remanded for further proceedings pursuant to an appropriate constitutional standard for final resolution of these cases.

## CONCLUSION

For all these reasons, Petitioners respectfully urge that their Petition for a Writ of Certiorari, to review the Judgment declaring the 2001 Amendments to the Zoning Resolution of the City of New York constitutional, be granted.

Dated: New York, New York  
December 8, 2017

Respectfully submitted,

Martin P. Mehler  
*Counsel of Record*  
Mehler & Buscemi  
305 Broadway  
New York, New York 10007  
(212) 962-4688  
mmehler@mehlerbuscemi.com

*Counsel for Petitioners*