

No. _____

In the Supreme Court of the United States

JGJ MERCHANDISE CORP.,
Petitioner,

v.

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

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QUESTIONS PRESENTED

1. Where a municipality seeks to regulate and restrict the operation of establishments that offer expression protected by the First Amendment under a zoning ordinance, what burden of proof must the municipality bear once the constitutionally protected establishments have furnished evidence that disputes the municipality's rationale for its zoning ordinance?
2. Whether New York City's adult zoning resolution, which authorizes the Building Commissioner to consider "titles" and adopt rules to determine the "substantial purpose" of a bookstore, among other factors, endows officials with unbridled discretion and violates the First Amendment.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner JGJ Merchandise Corp., d/b/a Vishans Video a/k/a Mixed Emotions, was an original Plaintiff to the action. There was another Plaintiff in the lower courts -- For the People Theatres of N.Y., Inc., d/b/a Fair Theatre -- which was not a party in the New York Court of Appeals during the most recent proceeding. Petitioner has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.6.

Respondents in this Court were the Defendants throughout these proceedings: The City of New York; Hon. Michael R. Bloomberg, as Mayor of the City of New York; Amanda M. Burden, as Director of City Planning, Department of City Planning of the City of New York; and Patricia J. Lancaster, as Commissioner of Buildings, Department of Buildings of the City of New York.

The caption of the New York Court of Appeals' decision also includes a separate action -- *Ten's Cabaret, et al. v. City of New York, et al.*, Index No. 121197/02 (Sup. Ct. N.Y. Co.). The cases were tried separately but consolidated by the Court of Appeals for oral argument and decision. The Plaintiffs in that action are Ten's Cabaret, Inc. f/k/a Stringfellow's of New York, Ltd.; Pussycat Lounge, Inc. d/b/a "Pussycat Lounge"; Church Street Café, Inc. d/b/a "Baby Doll"; and 62-20 Queens Blvd., Inc., d/b/a "Nickels." Upon information and belief those Plaintiffs will be filing a Petition for a Writ of Certiorari in this Court from the same decision of the New York Court of Appeals (App. 186). Upon information and belief they have no parent companies, subsidiaries or affiliates to list.

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Petitioner JGJ Merchandise Corp., d/b/a Vishans Video a/k/a Mixed Emotions respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the New York Court of Appeals in the above-captioned proceeding.

OPINIONS AND ORDERS BELOW

The New York Court of Appeals' decision, which upheld the constitutionality of New York City's Adult Zoning Resolution (No. N 010508 ZRY), is reproduced as Appendix H. *See For the People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340 (2017). The Court of Appeals' denial of reargument appears as Appendix I. *For the People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 1115 (2017).

The Court of Appeals reversed a decision from the New York Appellate Division, First Department, which struck down the Adult Zoning Resolution as unconstitutional. Appendix G. *For the People Theatres of N.Y., Inc. v. City of New York*, 131 A.D.3d 279 (1st Dept. 2015). The Appellate Division had affirmed the trial judge's finding that the Adult Zoning Resolution is unconstitutional. Appendix F. *For the People Theatres of N.Y., Inc. v. City of New York*, 38 Misc.3d 663 (Sup. Ct. N.Y. Co. 2012).

The trial judge previously found the law to be unconstitutional and granted summary judgment. Appendix A. *For the People Theatres of N.Y., Inc. v. City of New York*, 1 Misc.3d 394 (Sup. Ct. N.Y. Co. 2003). The Appellate Division reversed. Appendix B. *For the People Theatres of N.Y., Inc. v. City of New York*, 20 A.D.3d 1 (1st Dept. 2005). The New York Court of

Appeals remanded for further proceedings. Appendix C. *For the People Theatres of N.Y., Inc. v. City of New York*, 6 N.Y.3d 63 (2005). The trial court's decision on remand is reproduced as Appendix D. *For the People Theatres of N.Y., Inc. v. City of New York*, 27 Misc.3d 1079 (Sup. Ct. N.Y. Co. 2010). The Appellate Division remanded for further proceedings. Appendix E. *For the People Theatres of N.Y., Inc. v. City of New York*, 84 A.D.3d 48 (1st Dept. 2011).

JURISDICTION

The New York Court of Appeals issued its judgment and opinion on June 6, 2017. App.186. A timely petition for reargument was denied on September 13, 2017. App.219. This Petition is being filed within 90 days of the reargument denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law ... abridging the freedom of speech

STATEMENT OF THE CASE

In 1995, the City of New York enacted a zoning resolution to regulate adult establishments. The resolution was only passed after careful study of whether the types of businesses that existed then caused adverse secondary effects. The City indicated that bookstores that limit their adult component to less than 40 percent of their floor space and stock comply with the Resolution and are not the types of establishments alleged to cause negative effects (the “60/40 Rule”). Based, in part, on those representations, the 1995 Resolution was consistently upheld.¹

Starting in 1998, when the state and federal courts affirmed the constitutionality of the 1995 Resolution and the 60/40 Rule, bookstores across all five boroughs of New York City radically reduced their concentration on adult material and complied with the 60/40 Rule. App.80.

The Challenged Resolution

Nevertheless, during the last 100 days of Mayor Rudolph Giuliani’s term in office, an amendment was rushed through the City Council that completely altered the existing adult zoning restrictions: Text Amendment N 010508 ZRY to the City’s Zoning Resolution (the “Adult Zoning Resolution”). See Appendix K. Consideration of the percentage of floor

¹ See *Stringfellow’s of New York, Ltd. v. City of New York*, 171 Misc. 2d 376 (Sup. Ct. N.Y. Co. 1996), *aff’d*, 241 A.D.2d 360 (1st Dept. 1997), *aff’d*, 91 N.Y.2d 382 (1998); *Hickerson v. City of New York*, 997 F. Supp. 418 (S.D.N.Y. 1998), *aff’d*, 146 F.3d 99 (2d Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

space was eliminated completely for theaters and cabarets. The 60/40 Rule was, technically, retained for bookstores. However, that test was eviscerated by eight restrictions which regulate the method of operation of bookstores.

Specifically, the new definition of an “adult bookstore” provides that a bookstore’s *non-adult* stock “shall not be considered” in calculating compliance with the 60/40 Rule if any one of eight alleged “sham” factors exist. App.81, 228-29.

- (1) The store’s layout requires customers to pass through an area with adult material to access any non-adult material;
- (2) the bookstore has booths where adult movies or live performances are available for viewing by customers;
- (3) non-adult material is paid for near where any adult material is located;
- (4) non-adult DVDs are offered for sale only while adult DVDs can be sold or rented;
- (5) the bookstore offers a greater number of different adult titles than the number of different non-adult titles;
- (6) minors are restricted from the whole store or any section with non-adult material;
- (7) the bookstore has a sign advertising adult material that is “disproportionate in size” to signs for non-adult material; *or*

(8) the bookstore has a window display in which the number of adult products is disproportionate to the number of non-adult products. App.81, 229-30.²

In addition, even if a bookstore complies with the 60/40 floor space and stock requirements, and only has a handful of adult DVDs or books, the manager may be subject to a criminal prosecution based upon

[o]ther features relating to configuration and layout or method of operation, as set forth in rules adopted by the Commissioner of Buildings, which the Commissioner has determined render the sale or rental of “adult printed or visual material” a substantial purpose of the business conducted in such store. App.150, 231.

² Virtually all of the factors added onto the definition of adult bookstores result from the City’s efforts to undo judicial decisions, instead of from zoning considerations. *See, e.g. City of New York v. Les Hommes*, 94 N.Y.2d 267 (1999).

The City concededly conducted no studies or research into whether or not bookstores that fully complied with the 60/40 Rule, and have a minimum concentration (less than 40 percent) of adult material, cause any adverse secondary effects warranting stricter regulation. App.71-72. Instead, the City urged that it could rely upon a study conducted back in 1994 of adverse secondary effects caused by adult businesses. App.66.

This Court's Decision in *Los Angeles v. Alameda Books* Provides the "Analytical Framework" for the New York Court of Appeals' Decision

In 2005, this case made its first trip to the New York Court of Appeals. At that time, in a sharply divided (4-3) decision, the state's highest court held that this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), "supplies the analytical framework for this appeal" regarding "what a municipality must demonstrate in order to sustain a zoning ordinance regulating adult businesses in the face of a First Amendment challenge." App.56.

In *Alameda Books*, this Court set out a burden-shifting framework for evaluating the constitutionality of a zoning ordinance that regulates adult businesses. The municipality must produce evidence that "fairly supports" its rationale for the ordinance. The plaintiffs must then "cast direct doubt on this rationale." The burden then "shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." App.60, quoting 535 U.S. at 438-39.

The Court of Appeals concluded that New York City met its “very low” evidentiary hurdle under Stage I to justify a secondary-effects rationale for the Adult Zoning Resolution. App.63. The burden then shifted to the Bookstores to demonstrate, under Stage II, that the “City’s evidence does not support its rationale”, or to furnish evidence that “disputes the City’s factual findings.” App.65.

The Court found that the Plaintiffs met their burden under Stage II by disputing the “factual findings undergirding” the Adult Zoning Resolution. App.63. Specifically, the Bookstores presented affidavits and reports from “Dr. Elliott D. Sclar, an economist by training who is professor of urban planning and public affairs at Columbia University.” App.63-64. After a comprehensive study, Professor Sclar concluded that the “presence of a 60/40 bookstore or theater within a specific area could *not* be linked to any weakening or decrease of property values within that area.” App.64 (emphasis in original). Similarly, after an in-depth study, Dr. Charles Winick, of the graduate faculty at John Jay College of Criminal Justice, found “no 60/40 bookstores or theaters appeared on the NYPD’s list of hot spots for crime; no relationship between prostitution arrests and these bookstores and theaters; and no correlation between any concentration of these bookstores and theaters in a precinct and the violent felony rate.” App.64-65.

The Court of Appeals concluded that under Stage III of *Alameda Books*’ test, the “burden shifted back to the City ‘to supplement the record with evidence renewing support for a theory that justifies its ordinance.’” App.65.

The Court remanded the matter for a trial on the factual question of “whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 [New York City Department of City Planning] Study 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.” App.66.

The Court of Appeals did not set forth specific guidelines or a roadmap for the trial court on remand. The Court did, however, state:

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.

If not, plaintiffs will prevail on their claim that the 2001 Amendments are insufficiently narrow and therefore violate their free speech rights. In that event, plaintiffs will be entitled to judgment and a declaration that the 2001 Amendments are unconstitutional. App.67.

Three Judges from the Court of Appeals, including then Chief Judge Judith Kaye, dissented because the City was enacting a new law restricting free expression, rather than closing an alleged “loophole” and, as such, the City could not “rely entirely on the evidence it presented in support of the earlier law.” App.68.³ At that time, because of the remand, the Court of Appeals’ decision was not a final order appealable to this Court.

The Remand Proceedings

On August 30, 2012, after an evidentiary trial and another remand from the State’s Appellate Division (App.74, 91), the New York Supreme Court found “significant and distinct differences” between the exclusively adult establishments that existed in 1994 and 60/40 entities, such that the “current establishments no longer resemble their 1994 predecessors.” App.139.

Justice Louis B. York, who personally inspected establishments during the trial, concluded that “these entities no longer operate in an atmosphere placing more dominance of sexual matters over non-sexual ones.” App.139. Since the City failed to meet its burden, Justice York granted judgment to the

³ The dissenters found that the Plaintiffs “produced substantial evidence that the 60/40 businesses are functionally different from the pre-1995 businesses.” App.72. Moreover, “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.” *Id.* Therefore, the dissenters would have struck down this change to the existing law. *Id.*

Bookstores and declared the Adult Zoning Resolution to be unconstitutional.⁴ App.141.

On July 21, 2015, the Appellate Division affirmed that the Adult Zoning Resolution, as to bookstores and cabarets, is an “unconstitutional violation” of the First Amendment. The trial court and Appellate Division permanently enjoined the City from enforcing the amendments. App.164-65.

For the entire 16-year period since New York City amended its Zoning Resolution, *back in 2001*, those provisions were consistently stayed or enjoined through court orders and decisions. On June 27, 2017, a single Judge of the New York Court of Appeals denied the Bookstores’ application for a stay pursuant to 28 U.S.C. § 2101(f) pending an application to this Court for a Writ of Certiorari. App. 221. *See* Supreme Court Rule 23.3. On July 7, 2017, Justice Ginsburg denied a stay. Most enforcement is currently stayed by stipulation among the parties.

⁴ Justice York previously found that the City failed to meet its burden to establish that *theaters*, which reduce their adult component to less than 40 percent of the business, have a predominant, ongoing focus on adult materials. App.89. The City did not appeal Justice York’s judgment relating to theaters. App.153.

REASONS FOR GRANTING CERTIORARI

This case presents an important constitutional question left wide open in the wake of this Court's plurality decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), regarding the burden of proof a municipality must bear, under the First Amendment, once establishments that offer constitutionally protected expression dispute the rationale for the adult zoning ordinance.

More than 15 years ago this Court granted Certiorari to examine the constitutionality of Los Angeles' adult zoning scheme at the summary judgment stage. Only four Justices (Rehnquist, C.J., O'Connor, Scalia, and Thomas, JJ.) joined the plurality decision in *Alameda Books*. That fractured decision crafted a three-part burden-shifting test to be applied when municipalities seek to address the alleged secondary effects of protected speech. Justices Ginsburg, Souter, and Stevens dissented from the plurality's decision, which was never able to obtain majority support.

Under Stage I, the "municipality's evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438. Then, under Stage II, the burden shifts to the bookstore owners to cast doubt on the rationale either by "demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." 535 U.S. at 438-39. If the bookstores "succeed in casting doubt on a municipality's rationale in either manner," under Stage III, the burden shifts back to the municipality to "supplement the record with evidence renewing

support for a theory that justifies its ordinance.” 535 U.S. at 439.

The plurality did not spell out the specific burden of proof that a municipality must meet under Stage III once the businesses have called into question -- by actual proof and evidence -- the rationale for the zoning ordinance. Thus, although *Alameda Books* established a skeleton for considering constitutional challenges it never put any meat on those gaunt bones to explain how the burden-shifting test is properly applied.

Guidance is now needed from this Court to flesh out the proper standards. The confusing plurality decision in *Alameda Books* has left federal and state courts conflicted and in disarray. Municipalities across the nation do not know the true burdens of proof that they must meet to regulate adult businesses. Legal commentators cry out for guidance. And, this Court continues to be plagued by petitions for Certiorari which raise important questions resulting from uncertainties caused by *Alameda Books*.

Certiorari should be granted to resolve, once and for all, the recurring questions remaining after *Alameda Books*. The issues are squarely and clearly presented in this case, which involves the constitutionality of a highly publicized zoning law from the most populous city in the nation.

Moreover, because of ambiguities resulting from *Alameda Books*, New York’s highest court conflated the City’s burdens under Stage I and III to impermissibly lower municipalities’ burdens of proof. Lacking guidance from this Court, the New York Court of Appeals construed *Alameda Books* to impose the same

“modest evidentiary burden” on a municipality during a Stage I analysis (before the bookstores have called into question the municipality’s rationale) *and* during Stage III (after the bookstores have presented evidence undermining and discrediting the municipality’s rationale). App.210.

Specifically, the Court of Appeals concluded that a municipality need only present evidence that “fairly supports” the rationale for its ordinance during both Stage I and Stage III. App.210. Thus, the Court grafted the light burden that a municipality must meet for its *initial* burden under Stage I onto Stage III as well. However, this effectively merges the Stages into each other and allows precious speech to hang in the balance. Certainly, given the First Amendment implications, a municipality must do more than merely present evidence that “fairly supports” its rationale once that rationale has been discredited.

**This Case Involves Constitutional Issues
that are Important and Likely to Recur
Across the Nation**

The issues presented by this case regarding the burdens of proof to sustain adult zoning regulations are of considerable interest -- in both federal and state courts -- across the nation. Since *Alameda Books* was decided 15 years ago, municipalities everywhere have and continue to enact zoning resolutions regulating adult establishments. Indeed, “Americans increasingly seek adult entertainment, yet their locally-elected

representatives increasingly are imposing limitations on their ability to obtain it.”⁵

Many commentators recognize the important and recurring nature of these issues. For instance, the Harvard Journal of Law & Public Policy recently reported that “although *Alameda*, the most recent Supreme Court case involving secondary effects, was decided in 2002, the philosophical and jurisdictional problem at the root of these cases remains, perhaps now more than ever, exceedingly relevant.”⁶

⁵ Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. Legis. & Pub. Pol’y 287, 290 (2004).

⁶ Santiago Legarre & Gregory J. Mitchell, *Secondary Effects and Public Morality*, 40 Harv. J.L. & Pub. Pol’y 321, 322 (2017). See also Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 Rutgers L. Rev. 1175, 1212 (2002) (noting that *Alameda Books* “represents a missed opportunity for the court to come to a decision on the intricacies of the secondary effects analysis, which would be useful once the Court begins applying the analysis consistently outside the area of adult entertainment regulations”); Roger Enriquez, Jeffrey M. Cancino & Sean P. Verano, *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol’y & Law 1, 39 (2006) (“The post-*Alameda* jurisprudence makes it clear that courts are struggling with the issue of ‘quantum and quality’ of evidence necessary to establish an association or link between sexually oriented businesses and negative secondary effects”).

Because of the confusion that has arisen through the disjointed decision in *Alameda Books*, and its equally divided progeny, Certiorari is warranted to resolve the questions presented by this case. This Court should give definitive guidance as to municipalities' burdens when dealing with adult expression. This issue is not going away. Instead, it will continue to fester across the country. It will also continue to spawn other Petitions for Certiorari.⁷

⁷ See, e.g., *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, No. 07-768, 2007 WL 4340920 (U.S. 2007), *cert. denied*, 552 U.S. 1183 (2008) (petition for certiorari noting that after *Alameda Books* the “lack of a clear evidentiary standard for evaluating the validity of the secondary effects doctrine in individual communities has led to discord among the Circuits and an endless series of cases which can best be described as dysfunctional”); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, No. 10-1300, 2011 WL 1540437 (U.S. 2011), *cert. denied*, 563 U.S. 1033 (2011) (noting that “[e]ven though there is agreement on who articulated the ‘holding’ of *Alameda Books*, there is no agreement as to what type of evidence is relevant, or what that ‘burden’ actually is, after it ‘shifts’”); *P.M. Realty & Investments, Inc. v. City of Tampa, Fla.*, No. 06-1161, 2007 WL 579740 (U.S. 2007), *cert. denied*, 550 U.S. 918 (2007) (urging the Court to “provide much needed clarification of the ‘burden shifting’ analysis articulated in the *Alameda Books* decision”); *Missouri Ass’n of Club Executives v. Koster*, No. 11-994, 2012 WL 457672 (U.S. 2012), *cert. denied*, 568 U.S. 813 (2012) (pointing out the “conflict among the lower courts regarding the evidentiary burdens required by *Alameda Books*”). This list is illustrative and by no means exhaustive.

This Case Presents a Perfect Platform to Review the Constitutional Questions

This case presents an ideal platform for review. The New York Court of Appeals, which is the State's court of last resort, decided the Bookstores' claims on federal constitutional grounds, not on an adequate or independent state ground. Indeed, the State's highest court determined that *Alameda Books* "supplies the analytical framework for this appeal" and held that "the amendments do not violate plaintiffs' First Amendment rights." App.56, 187.

There can be "no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959). It is "enough if the state court 'reached and decided it.'" Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 197 (10th ed. 2013), quoting *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

The State Supreme Court and Appellate Division also held that the "2001 amendments to the Zoning Law are an unconstitutional violation of the First Amendment." App.141, 164, 200. The Court of Appeals' determination is a final decision that is fully reviewable by this Court. The decision relates to radical restrictions on bookstores in the largest and most culturally diverse city in the nation. The issues are ripe and ready for review, and municipalities across the nation are looking to this Court for guidance.⁸

⁸ The scope and breadth of this case are further evidenced by the fact that this high-profile case has received extensive national press and news coverage. *See, e.g. Verena Dobnik*, "NYC's long war on storefront porn reaches new tipping point", Associated Press (Aug. 6, 2017).

The need for prompt guidance counsels against further delay. This case is an excellent vehicle for such a reexamination. The inherent importance of the questions presented by this Petition combined with the substantial impact the answers will have on the exercise of free speech warrant review of this case.

New York's Court of Last Resort Decided a Significant Question of Federal Law, Arising Under the First Amendment, on an Issue Which has Caused Conflicts in the Law

Review should also be granted because the New York Court of Appeals' decision stands in conflict with the law in other areas. For instance, in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004), the Eleventh Circuit concluded that under a Stage III *Alameda Books* analysis, once the plaintiffs have cast doubt on the municipality's rationale for its ordinance, the reviewing court must "decide by a *preponderance of the evidence*" whether "there remains credible evidence" upon which the municipality can reasonably rely to support its theory. 337 F.3d at 1273 (emphasis supplied). In stark contrast, New York's court of last resort only requires a municipality to "fairly support" its rationale. App.210. The heavier burden imposed by the Eleventh Circuit better comports with the necessities of the First Amendment than New York's unexacting approach.

Other state courts around the country have also called out for clearer guidance from this Court regarding the proper standards to be applied to governmental regulation of adult uses. *See, e.g., XLP Corp. v. County of Lake*, 359 Ill.App.3d 239, 244 (App.

Ct. Ill. 2005) (lamenting that “guidance from the Supreme Court on this issue has been somewhat less than clear” and noting the “somewhat nebulous state of the case law” because the decisions from the Supreme Court have been fractured and contain no clear consensus), *cert. denied*, 547 U.S. 1128 (2006).

The First Amendment Lawyers Association and Free Speech Coalition have cautioned that “despite this Court’s best attempts, the state of the law is in chaos.” There are “scores of other decisions misconstruing *Alameda Books*, and this is a problem of huge constitutional significance.” Furthermore, “the decisions construing the ‘shifting burden’ of *Alameda Books* are truly ‘all over the road.’” *See Pooh Bah Enterprises, Inc. v. The City of Chicago*, No. 06-1614, 2007 WL 1985586 (U.S. 2007), *cert. denied*, 552 U.S. 941 (2007) (brief of Amici Curiae First Amendment Lawyers Association and Free Speech Coalition in support of Petition for Certiorari).

The call to reconsider *Alameda Books* from members of state and federal courts, as well as scholars, continues unabated. *See, e.g.*, Daniel R. Aaronson, *The First Amendment in Chaos: How the Law of Secondary Effects is Applied and Misapplied by the Circuit Courts*, 63 U. Miami L. Rev. 741 (April 2009) (noting that the “conflict among the circuits is not limited to just the weight of evidence that is necessary to ‘cast direct doubt’ on legislative findings, but also the form of evidence that is even relevant to meeting these standards”). *See also Regulation of Adult Entertainment Businesses -- Zoning*, 12 Bus. & Com. Litig. Fed. Cts. § 128:53 (4th ed. 2017) (stating that since *Alameda Books*, “lower federal courts have

wrestled with several difficult questions regarding the constitutionality of zoning ordinances governing adult entertainment businesses” including “[u]nder what circumstances is the government’s evidence of secondary effects sufficient to support its zoning regulations?”).

In *Alameda Books* the challenge to Los Angeles’ adult zoning ordinance was at a “very early stage in the process.” 535 U.S. at 437. Certainly, given the sharp split when this Court initially decided *Alameda Books* back in 2002, and the conflicting decisions that have resulted in its wake, the Supreme Court should grant review to resolve, at long last, this perennial question of considerable importance.

The Case also Presents an Important Constitutional Question of Whether New York City’s Adult Zoning Resolution, Which Authorizes the Building Commissioner to Consider “Titles” and Adopt Rules to Determine the “Substantial Purpose” of a Bookstore, Among Other Factors, Violates the First Amendment

The Adult Zoning Resolution’s definition of an “adult bookstore” provides that *non-adult* stock “shall not be considered” in calculating compliance with the 60/40 Rule if any one of eight alleged “sham” factors exist. Included in that list are whether the bookstore offers a greater number of different adult *titles* than the number of different non-adult *titles*. App.230. Thus, the Adult Zoning Resolution adds an amalgam of factors that supplant purely objective criteria -- relative floor space and stock -- with impermissible content-based standards.

Under the aegis of the Court of Appeals' decision the City of New York and other municipalities may now *dictate the content of bookstores* -- including strict limitations and restrictions on the *variety of titles* -- through zoning laws. Criminal charges may be issued to the operator of a constitutionally protected bookstore based simply on the *titles* she offers for sale -- regardless of the percentage of adult stock in the store. Therefore, a storeowner who devotes the entire front of her store to selling hundreds of copies of the same top-ten non-adult DVDs -- such as *Hidden Figures* and *Manchester by the Sea* -- will not be able to have a small section in the back containing a mere 15 different adult DVDs. Instead, she will have to censor that selection of erotic films to reduce the variety of adult titles to a number less than ten. This chills the store owner's expression and limits the *selection* of constitutionally protected material that can be accessed by the public. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969).

In addition, even if a bookstore complies with the 60/40 floor space and stock requirements, and only has a handful of adult DVDs or books, the store owner may be subject to criminal charges or nuisance abatement proceedings based upon "[o]ther features relating to configuration and layout or method of operation, as set forth in rules adopted by the Commissioner of Buildings, which the Commissioner has determined render the sale or rental of 'adult printed or visual material' a substantial purpose of the business conducted in such store." App.231.

A representative of the Buildings Department is now endowed with broad authority to determine the “substantial purpose” of bookstores and to make judgments in a sensitive area governed by the First Amendment. Such a provision subjects expression to restrictions and prior restraints without narrow, objective, and definite standards. There are no limitations on the Commissioner’s unbridled discretion. Review by this Court is warranted to determine whether it is constitutional to bestow such broad authority on a representative of the Buildings Department to make judgments in an area governed by the First Amendment.

One of the most cherished policies of this nation is that the First Amendment will not tolerate statutes that endow government officials with unbridled discretion to regulate or restrict expression. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). Indeed, because of the supremacy of the First Amendment, this Court is vigilant against censorship that masquerades as zoning or other government regulation of controversial expression. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 84 (1981) (Stevens, J., concurring) (“municipalities may regulate expressive activity -- even protected activity -- pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official”).

This case presents a perfect opportunity to review this important issue. As developed above, the New York Court of Appeals decided the constitutionality of the Adult Zoning Resolution under the First Amendment. App.187. Seven Judges -- including three Judges of the New York Court of Appeals -- found the Adult Zoning Resolution to be unconstitutional. App.73, 164-65.⁹

CONCLUSION

For all these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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⁹ The ordinance at issue in Los Angeles was “not limited to expressive activities” and included massage parlors. *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring). Here, the ordinance directly relates to the operation of bookstores -- including particular details that restrict expressive activities.