No. 25-

IN THE

Supreme Court of the United States

VISHARA VIDEO, INC., RAINBOW STATION 7 INC., 59 MURRAY ENTERPRISES, INC., AKA 59 MURRAY CORP., DBA NEW YORK DOLLS, AAM HOLDING CORP., DBA PRIVATE EYES, JNS VENTURES LTD, DBA VIXEN, TWENTY WEST PARTNERS, INC., DBA WONDERLAND, 689 EATERY, CORP., DBA SATIN DOLLS, AND 725 EATERY, CORP., SUBSTITUTING FOR MLB ENTERPRISES CORP., DBA PLATINUM,

Petitioners,

v.

CITY OF NEW YORK, HON. ERIC ADAMS, AS MAYOR OF THE CITY OF NEW YORK, JAMES S. ODDO, AS THE COMMISSIONER OF BUILDINGS, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where there have been substantial changes in the circumstances since a municipality enacted an ordinance under its police powers that impacts free expression, and the facts that justified the ordinance have ceased to exist, in evaluating a constitutional challenge brought under the First Amendment, should courts consider whether the ordinance still serves a substantial governmental interest when it is *enforced*, or is an assessment of the need for the ordinance limited solely to consideration of the governmental interest at the time the ordinance is *enacted*?

2. Where the state courts with jurisdiction over the facts have authoritatively and affirmatively held that a type of business that offers adult material in only a portion of its establishment does not give rise to negative secondary effects, and the record as a whole shows that zoning restrictions on those types of businesses constitute a forbidden intrusion on the field of expression, is the challenged municipal zoning ordinance unconstitutional?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Plaintiffs-Appellants:

557 Entertainment Inc., a New York domestic business corporation.

DCD Exclusive Video Inc., a New York domestic business corporation.

Video Lovers, Inc., a New York domestic business corporation.

Jaysara Video, Inc., a New York domestic business corporation.

Vishara Video, Inc., a New York domestic business corporation.

Rainbow Station 7 Inc., a New York domestic business corporation.

59 Murray Enterprises, Inc., a New York domestic business corporation, a/k/a 59 Murray Corp., d/b/a "New York Dolls."

AAM Holding Corp., a New York domestic business corporation, d/b/a "Private Eyes."

JNS Ventures Ltd., a New York domestic business corporation, d/b/a "Vixen."

Twenty West Partners, Inc., a New York domestic business corporation, d/b/a "Wonderland."

689 Eatery Corp., a New York domestic business corporation, d/b/a "Satin Dolls."

725 Eatery Corp., a New York domestic business corporation, d/b/a "Platinum Dolls."

Club at 60th Street, Inc., a Delaware business corporation.

Jacaranda Club, LLC, a New York domestic limited liability company, d/b/a "Sapphire."

Not all Plaintiffs in the Court of Appeals are Petitioners in this Court.

Defendants-Appellees:

City of New York, a New York municipal corporation.

Eric Adams, as Mayor of the City of New York.

James S. Oddo, as Commissioner of Buildings of the City of New York.

Department of Buildings of the City of New York, a municipal department of the City of New York.

CORPORATE DISCLOSURE STATEMENT

No Plaintiff-Petitioner is a nongovernmental corporation the stock of which is publicly held or traded or owned by a publicly held or traded company.

No Plaintiff-Petitioner is the parent or subsidiary of any other corporation.

RELATED PROCEEDINGS

Court of Appeals:

557 Entertainment Inc., et al. v. The City of New York, et al., Second Circuit Cases Nos. 24-621(L), 24-623(C), 24-636(C), and 24-640(C). The order and judgment were issued on July 8, 2025. The mandate issued on October 1, 2025.

District Court:

689 Eatery Corp, etc., et ano. v. The City of New York, et al., SDNY Case No. 02-cv-4431.

59 Murray Enterprises Inc., etc., et al. v. The City of New York, et al., SDNY Case No. 02-cv-4432.

Club at 60th Street, Inc., etc., et ano. v. The City of New York, SDNY Case No. 02-cv-8333.

336 LLC, etc., et al. v. The City of New York, et al., SDNY Case No. 18-cv-3732.

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OPINIONS AND ORDERS BELOW

The District Court decision granting Plaintiffs' motion for a preliminary injunction is published. *725 Eatery Corp., etc., et al. v. City of New York, et al.,* 408 F.Supp.3d 424 (S.D.N.Y. 2019). App.321a.

The District Court's decision denying Plaintiffs' motion in limine is not published. It is available at *689 Eatery Corp. etc., et al. v. City of New York, et al.,* 2023 WL 6977060 (S.D.N.Y., Oct. 23, 2023).

The District Court decision dismissing the action is published. *689 Eatery Corp., etc., et ano. v. City of New York, et al.,* 716 F.Supp.3d 88 (S.D.N.Y. 2024). App.12a.

The Second Circuit's order and judgment, with respect to which certiorari is sought, affirming the District Court decision, is unpublished. It is available at *557 Entertainment Inc. et al. v. City of New York, et al.,* 2025 WL 1873473 (2d Cir. July 8, 2025). App.1a.

The Second Circuit's order denying rehearing, dated August 21, 2025, is unpublished. The Second Circuit's order denying a motion to stay the mandate, and the mandate, both dated October 1, 2025, are unpublished.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254. These consolidated actions were commenced to redress violations of Federal constitutional rights and secure declaratory and equitable relief pursuant to 28 U.S.C. §§ 1343(a)(3) and (a)(4). The District Court had original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a).

The Petition is timely. The Second Circuit's decision sought to be reviewed, dismissing Plaintiffs' civil rights action, was issued on July 8, 2025. App.1a. The Second Circuit's order denying rehearing and rehearing *en banc* was issued on August 21, 2025. App.321a.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech."

STATEMENT OF THE CASE

I. The 1995 Amendments and Establishment of the 60/40 Rule

In 1995, following extensive study and consideration, New York City adopted amendments to its Amended Zoning Resolution ("AZR"), to define "adult establishments," eliminate the loud and garish signage promoting them, and minimize the negative secondary effects attributed to such establishments by prohibiting them in residential districts and breaking up concentrations of such establishments in Times Square and along other commercial corridors (the "1995 Amendments"). The 1995 Amendments imposed 500-foot "buffer zones" between adult establishments, as well as "sensitive receptors" such as schools and churches.

The 1995 Amendments, a quintessential "dispersal plan," were only passed after careful study of whether the types of businesses that then existed caused adverse secondary effects. Those Amendments defined an "adult establishment" as "a commercial establishment where a 'substantial portion' of the establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof." [AZR 12-10]. The 1995 Amendments were consistently upheld as facially constitutional.[1]

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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); *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998), *cert. denied*, 525 U.S. 816 (1998).

In *Hickerson v. City of New York*, more than 100 businesses offering adult material challenged the "substantial portion" standard as unconstitutionally void for vagueness. In response, the City's Department of Buildings ("DOB") confirmed that establishments that limit their adult component to less than 40 percent of their floor space and stock comply with the AZR and are not the types of establishments alleged to cause negative effects. This became known as the "60/40 Rule" and, based on that representation, the vagueness challenge to the 1995 Amendments was withdrawn.

Starting in 1998, when the state and federal courts affirmed the constitutionality of the 1995 Amendments, clubs and bookstores across the City radically reconfigured their premises and reduced their concentration on adult performances and material in compliance with the 60/40 Rule. Those zoning restrictions proved to be very successful in achieving the City's goals. For example, the number of adult establishments was dramatically reduced[2], crime rates steadily fell, property values increased, and exterior signage of businesses featuring adult entertainment or materials was toned down citywide.

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2. The number of adult establishments was reduced from 177 in 1995 to 136 in 2000 (of which 35 were "100%" locations and 101 were "60/40"), and down to 42 in 2022 (of which 10 were "100%" locations and 32 were "60/40"). During this same period, the number of adult establishments in Manhattan was reduced from 107 in 1995 to 69 in 2000 (of which 24 were "100%" locations and 45 were "60/40"). By 2022 there were only 23 adult locations in Manhattan (of which 4 were "100%" adult and 19 were "60/40").

Nevertheless, during enforcement proceedings the City took the position that the 60/40 business model, whereby establishments limited any adult component to less than 40 percent of their business, was a "sham." Even though businesses took pains to comply with the City's own 60/40 Rule, the City urged that they should still be subject to the strict zoning restrictions imposed by the 1995 Amendments. The New York Court of Appeals disagreed and held that businesses that followed the 60/40 Rule fully complied with 1995 Amendments. *See, City of New York v. Les Hommes,* 94 N.Y.2d 267 (1999); *City of New York v. Dezer Properties, Inc.,* 95 N.Y.2d 771 (2000).

II. The 2001 Amendments and Elimination of the 60/40 Rule

Following the New York Court of Appeals' rejection of the City's "sham compliance" arguments—and notwithstanding the substantial reduction in the number and concentration of adult business, decrease in crime and increase in property values, as well as the elimination of garish signage—the City amended its adult zoning resolution on October 31, 2001 (the "2001 Amendments").

The 2001 Amendments (Text Amendment N 010508 ZRY to the City's Zoning Resolution) completely eliminated the 60/40 Rule for eating and drinking establishments, and significantly modified it for bookstores. For eating and drinking establishments, *any* regularly featured adult entertainment anywhere in the club made the entire business an "adult establishment" subject to the strict locational and other restrictions adopted in the 1995 Amendments. For bookstores, the 2001 Amendments nominally retained the 60/40 Rule (continuing to

measure relative floorspace and stock), but added new considerations, the presence of any of which would render a store that complies with the 60/40 Rule to be a non-compliant "sham." These new considerations regarding the operation of the business include whether certain types of videotapes are offered for rental (not just sale), the variety of adult and non-adult titles, and where the cash register can be in the store.

The 2001 Amendments, *in toto,* were reactive and in response to cases litigated during enforcement proceedings of the 1995 Amendments, rather than related to any adverse secondary effects, governmental interest, or legitimate zoning concerns. Unlike the 1995 Amendments, which were supported by careful study and analysis, including a detailed 1994 study of exclusively adult establishments by the New York Department of City Planning, the 2001 Amendments were not supported by any study.

For example, the City never investigated crime rates or property values in areas with 60/40 establishments. The City did not consider what effect the amendments would have on the public's access to the protected expression then-available in existing adult businesses. The City did not conduct any infrastructure or transportation analyses to assess the viability of the anticipated "alternative available sites" for either businesses or patrons, did not consider any economic burdens to development, and did not consider the cost to create an adult establishment at any site. Additionally, despite having years of real-world experience to draw from, the City did not consider or study whether the toned-down or subdued signage that predominated from and after 1998 (as opposed to the loud or "garish" facades common prior to the 1995

Amendments) had reduced negative secondary effects in the neighborhood around adult establishments.

The 2001 Amendments were challenged in both state and federal courts soon after their adoption. The federal cases for eating and drinking establishments from which these appeals were taken were stayed while state court litigation, challenging the same provisions on State constitutional grounds, proceeded. *See*, *For the People Theatres of N.Y., Inc. v. City of New York,* 38 Misc.3d 663 (Sup. Ct. N.Y. Co. 2012), *aff'd,* 131 A.D.3d 279 (1st Dept. 2015), *rev'd on oth. gnds.,* 29 N.Y.3d 340 (2019).

During the state litigation, after full trials, including site visits, the Supreme Court Justice made specific findings of fact, that the 60/40 businesses featuring both adult and non-adult entertainment and materials do *not* cause negative secondary effects [38 Misc.3d 663], which the Appellate Division affirmed [131 A.D.3d 279], with both courts concluding that the 2001 Amendments were unconstitutional. Under New York law, those Courts have *exclusive jurisdiction over the facts*, which can only be disturbed by the New York Court of Appeals for legal error. CPLR § 5501(b).

The New York Court of Appeals did *not* disturb those findings of fact. Rather, it concluded that the 2001 Amendments were constitutional for New York State purposes because the nature of the businesses being regulated was sufficiently similar to those studied and regulated in 1995 to pass New York constitutional muster. [29 N.Y.3d 340.] The Federal constitutional questions presented here were not raised in that litigation and were not before the New York Court of Appeals.

For the entire period since New York City amended its Zoning Resolution in 2001—*24 years ago*—those provisions were consistently stayed or enjoined through stipulations, court orders and decisions. After the New York Court of Appeals ruled on State constitutional grounds in 2017 the litigation returned to Federal court. District Judge William H. Pauley of the Southern District of New York preliminarily enjoined enforcement of the 2001 Amendments, concluding that "Plaintiffs are more likely than not to succeed on the merits of their First Amendment free speech claims." *725 Eatery Corp. v. City of New York,* 408 F.Supp.3d 424, 459 (S.D.N.Y. 2019). App.229a. Judge Pauley noted that the 2001 Amendments "that are the subject of these now-revived constitutional challenges are a throwback to a bygone era." He underscored that

> [t]he City's landscape has transformed dramatically since Defendants last studied the secondary effects of adult establishments twenty-five years ago. As Proust might say, the "reality that [the City] had known no longer existed," and "houses, roads, [and] avenues are as fugitive, alas, as the years." 408 F.Supp.3d at 470, citing Marcel Proust, Swann's Way, in Remembrance of Things Past (C.K. Scott Moncrieff trans., 1922) (1913). App.319a.

Judge Pauley's observations regarding the changed nature of New York City and stale justification for these unneeded zoning amendments were well-founded in the record. For instance, between 2002 and 2012, nearly 40% of the City was rezoned. Much of that rezoning was in manufacturing areas, which include many of the limited

permissible areas for adult uses, and the intensive rezoning continued after 2012. After the 1995 Amendments went into effect in 1998, the number of adult establishments throughout the City quickly fell. Manhattan—the central business district—saw a drastic drop in the number of adult establishments from 107 in 1993 to just 23 in 2022. Only four actual adult establishments in Manhattan could remain in place if the 2001 Amendments are enforced.

Similarly, the garish exterior signage has been eliminated, as has the concentration of adult uses in Times Square and elsewhere. Additionally, the record establishes that by 2001, the occurrence of seven major categories of felonies (murder, rape, robbery, felonious assault, burglary, grand larceny, and grand larceny auto) in Manhattan had fallen by more than two thirds from the levels at the start of the prior decade. Those rates continued to fall through 2016 (the latest data available in the record), when they were less than 20% of 1990 levels. Incomes and property values showed the same positive trends.

In recent years, the Internet, including Netflix, Amazon, Pornhub, OnlyFans, and other factors have impacted adult businesses. Even the definition of an "adult bookstore" contained in the 2001 Amendments belongs in the last millennium. For example, it refers to "films, motion pictures, video cassettes, slides or other visual matter." However, slides, video cassettes, and VHS tapes are relics of the past. *See* Geoff Boucher, *VHS Era is Winding Down*, Los Angeles Times, Dec. 22, 2008, available at https://www.latimes.com/archives/la-xpm-2008-dec-22-et-vhs-tapes22-story.html ("the once ubiquitous home video format" will "finish this month as a creaky ghost of Christmas past").

Judge Pauley died after granting the preliminary injunction and the case was reassigned. Judge Lewis Liman ultimately upheld the constitutionality of the 2001 Amendments. *689 Eatery Corp, etc., et al. v. City of New York, et al.,* 716 F.Supp.3d 88 (S.D.N.Y. 2024). App.12a. The City stipulated that it would not enforce the 2001 Amendments against the Plaintiffs pending a decision on the merits by the Court of Appeals. The Second Circuit affirmed in a summary order. *557 Entertainment Inc. et al. v. City of New York, et al.,* 2025 WL 1873473 (2d Cir., July 8, 2025). App.1a.

A rehearing petition was denied on August 21, 2025 (App.321a), and a motion to stay issuance of the mandate was likewise denied on October 1, 2025. Justice Sonia Sotomayor denied an application for an injunction pending the filing of this Petition on October 31, 2025 (No. 25A476). As of the date of this Petition, to the best of counsel's knowledge, information and belief, the 2001 Amendments have not as yet been enforced against anyone.

REASONS FOR GRANTING CERTIORARI

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

This case presents the Court with the perfect opportunity to resolve important constitutional questions regarding whether a substantial governmental interest must exist when a municipality seeks to *enforce* restrictions on businesses offering constitutionally protected expression to the public or is it merely enough that a substantial governmental interest may have existed when the ordinance was *enacted*. This

case can definitively resolve questions left open in the wake of this Court's decision in (1) *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, to restrict the operation of businesses offering constitutionally protected explicit entertainment to consenting adults through zoning, and (2) *United States v. Carolene Products Co.,* 304 U.S. 144, 155 (1938), where, in a non-zoning context, this Court recognized that the "constitutionality of a statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts have ceased to exist."

A. A Substantial Governmental Interest Should Exist When a Municipality Seeks to Enforce Restrictions on Free Expression Under its Police Power, Not Just When the Ordinance is Enacted

Nudity in performance *per se* has long been regarded as a "harmless form of diversion or entertainment" and a medium of "communication from one human being to others." *Salem Inn v. Frank,* 522 F.2d 1045, 1048-49 (2d Cir. 1975). Non-obscene nude performance has long been recognized as a protected form of expression. *California v. LaRue,* 409 U.S. (1972); *Doran v. Salem Inn,* 422 U.S. 922 (1975); *Schad v. Mount Ephraim,* 452 U.S. 61 (1981); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991); *City of Erie v. Pap's A.M,* 529 U.S. 277 (2000).

Nevertheless, it has frequently been alleged that businesses featuring adult entertainment, and particularly concentrations of such businesses, are associated with negative secondary effects in surrounding neighborhoods,

such as traffic, crime, and decreases in property values. For that reason, this Court has permitted municipalities, in the exercise of their police powers, to adopt "adult use" zoning schemes, dispersing and regulating the location of such businesses to minimize any alleged adverse impact on their communities. *See, e.g., Young v. American Mini Theatres, Inc.,* 427 U. S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986); *Barnes, supra; Pap's, supra; Alameda Books, supra. See, generally,* Wilson, *Nude Dancing Conveying a Message or Eroticism and Sexuality is Protected by the First Amendment but Can Be Limited under State Police Powers Provided the Government Establishes a Substantial, Content-Neutral Purpose*, 23 St. Mary's Law Journal, No. 2 (1993).

In *Renton* and *Alameda Books* the focus was on whether an ordinance is "designed to serve a substantial government interest." 475 U.S. at 50; 535 U.S. at 440-441. The language "*designed to serve*" clearly relates to the municipality's burden when a law restricting expression is *enacted*. Indeed, in *Renton* "[n]o such uses existed in the city" when its adult zoning ordinance was enacted. 475 U.S. at 43.

The important question presented here does not relate to whether the disputed amendments to New York City's Zoning Resolution were designed to serve a substantial government interest when they were *enacted* back in 2001. Instead, the question posed to this Court relates to whether, after there have been substantial changes in the underlying facts and circumstances, there must still be a substantial government interest years later when the municipality, under its police powers, seeks to *enforce* its ordinance that restricts expression.

The answer to this question should be informed by this Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938), where, in a different context, this Court recognized that the "constitutionality of a statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts have ceased to exist." *See also Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935) (a "statute valid when enacted may become invalid by change in the conditions to which it is applied"). Similarly, in *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931), also under different circumstances, this Court noted that a "police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."

Legislation under the aegis of a municipality's police power is not sacrosanct and must be subject to invalidation if it is no longer needed. Indeed, "[c]ourts can and do regularly abrogate statutes where changed conditions make them unconstitutional. The constitutionality of legislation remains at all times open to judicial inquiry." § 34:5. *Changed Circumstances*, 2 Sutherland Statutory Construction § 34:5 (8th ed.), citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). In *Chastleton*, this Court noted that a "law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." 264 U.S. at 547-548.

In *Dobbins v. City of Los Angeles*, 195 U.S. 223, 238 (1904), this Court recognized that the need to regulate businesses and land use is not static and can change over time. Albeit in the opposite context, the Court noted that

the "right to exercise the police power is a continuing one, and a business lawful to-day may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and may be required to yield to the public good." The converse of that premise is true as well. The need for a municipality to exercise its police powers is constantly changing and restrictions cannot exist in perpetuity merely because at one time they were justified. While not addressed in those cases, this approach should be especially true in the context of zoning ordinances that infringe on free expression.

Indeed, because of the changing nature of land use and significance of the First Amendment implications, in another case the Second Circuit adopted the view that the second prong of a *Renton* analysis—whether the ordinance allows for reasonable alternative avenues of communication—must be considered at the time the ordinance is challenged, rather than just when it is enacted. *TJS of New York, Inc. v. Town of Smithtown*, 598 F.3d 17, 22 (2d Cir. 2010). The court acknowledged that the "First Amendment does not allow courts to ignore post-enactment, extralegal changes and the impact they have on the sufficiency of alternative avenues of communication." 598 F.3d at 23.

Nevertheless, in this case the lower courts abjectly failed to consider the changes in circumstances which, as recognized by Judge Pauley, result in the 2001 Amendments currently being a throwback to a bygone era.[3] Instead, the Second Circuit effectively has taken the

3. Similarly, Justice Louis B. York, of the New York State Supreme Court, who conducted trials in the state court proceedings,

position that the other critical *Renton* prong—whether a substantial government interest exists—must only be considered when an ordinance is enacted and in the future the *need* for a zoning ordinance that restricts adult businesses is immune from judicial review.

Given the grave consequences for free expression, it is imperative that this Court clarify that the First Amendment does not allow courts to ignore post-

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could not "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." *For the People Theatres of N.Y., Inc. v. City of New York,* 38 Misc.3d 663, 675 (Sup. Ct. N.Y. Co. 2012), *aff'd,* 131 A.D.3d 279 (1st Dept. 2015), *rev'd on oth. gnds.*, 29 N.Y.3d 340 (2017), *cert. denied*, 583 U.S. 1118 (2018). He noted, in dicta, that it was "primarily the increased crime rates that spawned the 1994 DCP Study 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 N.Y.2d 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 A.D.2d 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 Theatres of N.Y., Inc. v. City of New York*, 6 N.Y.3d 63, 88 (2005)." 38 Misc.3d at 676. Recognizing the need for a current substantial governmental interest, Justice York asked the relevant question, "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?" 38 Misc. 3d at 676 (internal citation omitted).

enactment changed circumstances that eliminate the substantial government interest that justified the zoning ordinance in the first place. This issue is vitally important to the development of First Amendment jurisprudence. *Renton* was decided nearly 40 years ago. Since then, municipalities across the country have adopted dispersal zoning schemes and other regulations to address actual and/or presumed negative secondary effects attributed to adult businesses. However, with any municipality there may come a time—through changed circumstances and conditions as at bar here—that the zoning restrictions are no longer needed because any substantial government interest that once justified the ordinance no longer exists.

Giving the City every benefit of the doubt, this is exactly what has occurred in New York, where the overwhelming reduction in the number of adult establishments, combined with the industry-wide compliance with the restrictions on exterior signage, and the dispersal of businesses, has eliminated the presumed negative secondary effects attributed to establishments offering some adult entertainment. In these circumstances, at what point may a zoning scheme adopted decades ago, be challenged as no longer required, i.e., that the predicate facts on which the constitutionality of the scheme depends "have ceased to exist"? Only this Court can clarify for courts across the nation how *Carolene Products, Abie State Bank*, and the other cases cited above apply in these circumstances.

As recognized by Justice Anthony Kennedy in *Alameda Books*, a "zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in

the quantity of speech." 535 U.S. at 445 (Kennedy, J., concurring). Here, the decrease in secondary effects has already occurred under the 1995 Amendments and its prudential 60/40 Rule. Thus, enforcement, for the first time, of the unnecessary 2001 Amendments at this point is not consistent with the First Amendment and will result in a significant decrease in the quantity of speech.[4]

B. The *Renton*/*Alameda Books* Question

Another substantial constitutional question presented by this case is whether it is constitutional under *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002) (plurality), and *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), to use a zoning scheme to eradicate a form of adult business—i.e., 60/40 establishments, which offer a protected form of free expression to the public—when that business form has been authoritatively determined, as a matter of fact, not to create negative secondary effects, as occurred at bar in *For the People Theatres of N.Y., Inc. v. City of New York,* 38 Misc.3d 663 (Sup. Ct. N.Y. Co. 2012), *aff'd,* 131 A.D.3d 279 (1st Dept. 2015), *rev'd on oth. gnds.*, 29 N.Y.3d 340 (2017), *cert. denied*, 583 U.S. 1118 (2018).

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4. There are 19 60/40 establishments in Manhattan as of the most recent record evidence (a decrease in adult businesses of approximately 80 percent since 1995). If the 2001 Amendments go into effect, there is only space for three of those displaced businesses to relocate and simultaneously operate in Manhattan. On its face, that small number of legally permissible alternative sites does not ensure that the quantity and the public's accessibility of the protected speech remains "substantially intact," as *Alameda Books* requires.

Specifically, the New York County Supreme Court found after trials (including site visits), and the New York Appellate Division affirmed, that:

> 80. The record contains virtually no information to assist this court in determining the essential characteristics of these 60/40 establishments as compared to the essential characteristics of the 100% adult establishments.
>
> 81. I find Michael Anastos a credible witness with an expertise in market research.
>
> 82. Anastos' survey created in conjunction with Dr. Bryant Paul of Indiana University compared photos typical of the garish signs used to promote 100% adult businesses with signs promoting current 60/40 clubs. He then elicited the following conclusions from neighborhood residents which the court adopts as its factual findings:
>
> > 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.

83. The court finds Dr. Daniel Linz, a professor in the Department of Communications at the University of California at Santa Barbara, to be a credible witness who has specialized in the ways in which adult businesses affect communities.

84. Dr. Linz studied the secondary effects of 60/40 clubs in New York City and made the following findings, which this court adopts:

> 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.

85. Dr. Freeman undertook a study on the negative effects of 60/40 clubs on residential property values.

86. He made the following findings using the assessed values of the properties, which this court adopts:

> a. proximity to a 60/40 club does not result in a diminution in value;

b. the statistical analysis showed that a close proximity to a 60/40 club tended to increase property values.

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.

89. The City's expert witness, Dr. Richard McCleary, is not found to be credible by this court which accords no weight to his testimony.

90. Dr. McCleary is a statistician who holds no degrees in criminology or urban planning or studies.

91. He conducted no studies, except for a study in which he received a very poor 13.2% return rate from real estate brokers, nor was he aware of any other studies, except for the studies of Drs. Freeman and Linz.

92. He merely offered his ipse dixit opinions that adult clubs draw from a wide geographical area and cause an increase in crime in surrounding areas, patrons tend to carry cash, patrons are reluctant to call police when they are criminally victimized because of the stigma attached to frequenting such establishments. Because of the lack of any real world corroboration for those opinions, the court rejects them.

> 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.
>
> ***
>
> 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. 38 Misc.3d at 672-675 (footnote omitted).

While the merits of the ultimate state constitutional determination by the New York Court of Appeals—which did not have authority to overturn those findings of fact except as a matter of law—can be debated, they are irrelevant for present purposes. What is relevant is that the affirmed findings of fact were not disturbed on appeal. Thus, a fundamental and unique question presented is whether a zoning ordinance that infringes on free expression can survive federal scrutiny under *Renton* and *Alameda Books, supra,* once the state courts with jurisdiction have authoritatively determined that the regulated businesses do not cause negative secondary effects, and the municipality presents no proof to the contrary in federal court.

Upon information and belief, no federal court has ever upheld a municipal zoning scheme against a First Amendment challenge after such "no negative secondary effects" findings by the state courts. And, neither this Court, nor any lower federal court, nor any state court, has held an adult or sexually oriented business zoning scheme constitutional under the First Amendment when there have been such findings. Accordingly, the case at bar is truly unprecedented in modern First Amendment jurisprudence and flies in the face of *Renton, Alameda Books,* and all of the precedent established by this Court, uniformly holding that the curtailment of free expression by zoning is dependent on the government proving that the restriction is justified by the need to reduce or eliminate negative secondary effects attributable to the use––a burden which the City of New York abjectly failed to shoulder, much less meet, in this case.

II. This Case Present a Perfect Platform to Review Constitutional Questions Remaining After *Alameda Books*

Certiorari should be granted to resolve these issues, including, 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 zoning law from the most populous city in the nation.

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 the 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, these perennial questions.

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.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 8, 2025

Nos. 24-621 (Lead), 24-623 (Con),
24-636 (Con), 24-640 (Con)

557 ENTERTAINMENT INC., DCD EXCLUSIVE VIDEO INC., VIDEO LOVERS INC., JAYSARA VIDEO, INC., VISHARA VIDEO, INC., RAINBOW STATION 7 INC., CLUB AT 60TH STREET, INC., A DELAWARE CORPORATION, JACARANDA CLUB, LLC, A NEW YORK LIMITED LIABILITY COMPANY, DBA SAPPHIRE, 59 MURRAY ENTERPRISES, INC., AKA 59 MURRAY CORP., DBA NEW YORK DOLLS, AAM HOLDING CORP., DBA PRIVATE EYES, JNS VENTURES LTD, DBA VIXEN, TWENTY WEST PARTNERS, INC., DBA WONDERLAND, 689 EATERY, CORP., DBA SATIN DOLLS, 725 EATERY, CORP., SUBSTITUTING FOR MLB ENTERPRISES, CORP., DBA PLATINUM DOLLS,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, HON. ERIC ADAMS, AS MAYOR OF THE CITY OF NEW YORK, JAMES S. ODDO, AS THE COMMISSIONER OF BUILDINGS, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,

*Defendants-Appellees.**

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* The Clerk of Court is directed to amend the caption as set forth above.

Appendix A

Filed July 8, 2025

SUMMARY ORDER

PRESENT: Steven J. Menashi,
Myrna Pérez,
Alison J. Nathan,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Liman, J.).

Upon due consideration, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court is **AFFIRMED**.

The plaintiffs-appellants are companies in the adult entertainment business. Eight of the plaintiffs operate or lease space to strip clubs and topless bars, and the other six plaintiffs rent or sell adult books and videos. In 1995, New York City adopted new zoning laws that restrict where adult businesses may operate. The regulations did not reach so-called "60/40" establishments, those businesses at which less than 40 percent of the floorspace or less than 40 percent of a store's stock-in-trade does not feature adult entertainment or media. The plaintiffs operate businesses of this type and were not affected by the City's 1995 regulations. In 2001, the City amended its zoning laws to limit or to remove the 60/40 rule, bringing the plaintiffs within the reach of the restrictions for adult establishments under the zoning laws. Following a bench trial, the district court held that the 2001 amendments did

not violate the Constitution and entered judgment for the defendants. *See 689 Eatery Corp. v. City of New York,* 716 F. Supp. 3d 88 (S.D.N.Y. 2024).

On appeal, the plaintiffs argue that the 2001 amendments violate the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The bookstore plaintiffs also raise a challenge under the Due Process Clause of the Fourteenth Amendment. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

I

The plaintiffs argue that the City's 2001 amendments violate their rights under the First Amendment. We disagree.

While the First Amendment protects adult expression, it also allows a municipality to regulate adult entertainment establishments. *See TJS of N.Y., Inc. v. Town of Smithtown,* 598 F.3d 17, 20-21 (2d Cir. 2010). As part of its zoning power, a city may prohibit adult establishments from operating in certain areas. *See Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50 (1976); *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002). Even in areas where adult-oriented businesses are allowed, a city may prohibit such businesses from operating close to churches, parks, schools, residential areas, or other adult establishments. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 44, 54 (1986).

The Supreme Court has explained that a city may regulate adult establishments in this way to attempt to minimize the harmful "secondary effects" that may accompany adult-oriented businesses, including crime, decreased property values, and urban decay. *Alameda Books,* 535 U.S. at 434 (plurality opinion). To exercise this authority consistent with the First Amendment, a city cannot "use[ ] the power to zone as a pretext for suppressing expression." *Renton,* 475 U.S. at 54 (internal quotation marks omitted). But it can restrict the permissible locations of adult businesses to "preserv[e] the quality of life in the community at large." *Id.* "This, after all, is the essence of zoning." *Id.*

To determine whether a zoning law complies with the First Amendment, we consider three issues. First, we ask whether the zoning ordinance "ban[s] adult [establishments] altogether" or "merely require[s] that they be distanced from certain sensitive locations." *Alameda Books,* 535 U.S. at 434 (plurality opinion). If the latter, the regulations operate like time-place-and-manner regulations of speech. Second, if the zoning ordinance does not ban adult businesses altogether, we ask whether the ordinance is content-based or content-neutral. An ordinance applying solely to adult establishments is not content-based so long as it is "aimed" at "the secondary effects" of those establishments "on the surrounding community." *Renton,* 475 U.S. at 47 (emphasis omitted). Third, if the zoning ordinance is content-neutral, it does not violate the First Amendment if the city can show that the "ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50.

Appendix A

This is not the first time we have considered the constitutionality of the zoning laws that New York City applies to adult businesses. In *Buzzetti v. City of New York,* we examined the City's 1995 zoning amendments that regulated adult establishments, defined as those businesses in which a "substantial portion" of the establishment was (1) used as an "adult book store" or (2) as an "adult eating or drinking establishment" that "regularly feature[d]" explicit entertainment. 140 F.3d 134, 136 (2d Cir. 1998). We held that the 1995 zoning laws did not ban adult businesses altogether and were not "aimed at suppressing" unfavorable viewpoints. *Id.* at 140. Instead, the zoning laws targeted "the negative impact" of adult establishments "on the surrounding community." *Id.* New York City had presented sufficient evidence that adult establishments could cause negative effects such as crime, decreased property values, and urban decay, and we explained that mitigating those effects qualifies as a "substantial governmental interest[ ]." *Id.* Finally, the City had shown that there were 500 "alternative sites" available for the 177 exiting adult establishments that would be affected by the new zoning regulations. *Id.* at 141. As a result, we held that the City's zoning laws did "not violate the First Amendment." *Id.*

Those holdings largely resolve this case. The 2001 amendments modified the definition of an adult establishment, but in doing so the amendments did not alter the preexisting regulatory framework. In the 2001 amendments, the City determined that whether a business qualified as an "adult eating or drinking establishment" would not depend on the amount of floor space devoted to adult entertainment. If an eating or drinking establishment

"regularly features" such entertainment, it qualifies as an "adult eating or drinking establishment" regardless of the square footage the entertainment occupies. N.Y.C. Zoning Resol. § 12-10(1)(b); *see also 689 Eatery Corp.,* 716 F. Supp. 3d at 130. Similarly, the 2001 amendments determined that a bookstore with certain features – such as booths for viewing pornographic videos – qualifies as an adult bookstore under the zoning laws regardless of the percentage of floor space or stock the business devotes to non-adult entertainment. *See* N.Y.C. Zoning Resol. § 12-10(2)(d); *689 Eatery Corp.,* 716 F. Supp. 3d at 131.

These modified definitions do not alter our prior conclusions about the City's zoning scheme. Nothing in our earlier analysis required the City to define an adult eating or drinking establishment by reference to the amount of floor space or stock allocated to adult entertainment. We did not imply, for example, that the City's zoning scheme would be unlawful if it reached businesses in which lap dances or strip teases take place in one third of the accessible floor space instead of one half. And our holding in *Buzzetti* did not require the City to allow a bookstore with "peep booths" to operate next to schools and churches simply because the bookstore had non-adult titles in its inventory. *689 Eatery Corp.,* 716 F. Supp. 3d at 133. *Buzzetti* upheld the City's zoning amendments because the amendments aimed at mitigating the harmful effects of adult businesses and because the amendments offered reasonable alternative sites where adult businesses could relocate. None of those conclusions are undermined by the City's modified definitions. *See Buzzetti,* 140 F.3d at 141.

In any event, the City has offered valid explanations for the changes. The City found through its enforcement efforts that the original zoning amendments allowed for "superficial and sham compliance." *689 Eatery Corp.*, 716 F. Supp. 3d at 128. For example, to ensure that its adult stock remained under 40 percent, many adult bookstores would purchase boxes of "old instructional videos, kung-fu or karate films, cartoons and the like, which are inexpensive to purchase in bulk," and then "haphazardly" stock those materials or simply leave the boxes "open[ ] on the floor." *Id.* at 125. And the "artificial separation" between adult and non-adult sections at adult eating and drinking establishments led to "absurd" results. *Id.* (alteration omitted). Even if a topless bar or strip club featured non-adult entertainment or dining options, those features did not alter the nature of the establishment because no customers patronized the establishment without regard to its adult character. *See* Department of City Planning Zoning Amendment Application at 8-9, *689 Eatery Corp. v. City of New York,* No. 02-CV-04431 (S.D.N.Y. May 9, 2022), ECF No. 162-5. The City reasonably concluded that a bookstore with peep booths remains an adult bookstore even if it offers boxes of kung fu movies, and a strip club remains a strip club even if it has a billiards room upstairs. As the New York Court of Appeals has explained:

> A store that stocks nonadult magazines in the front of the store but contains and prominently advertises peep booths is no less sexual in its fundamental focus just because the peep booths are in the back and the copies of Time magazine

> in the front. The same is true of the adult eating and drinking establishments. A topless club is no less an adult establishment if it has small signs and the adjoining comedy club, seating area, or bikini bar is easy to access.

For the People Theatres of N.Y. Inc. v. City of New York, 29 N.Y.3d 340, 361 (2017). The First Amendment does not prohibit that commonsense approach.

When it proposed the 2001 amendments, the City determined that the changes were necessary to address "superficial and formalistic measures" by adult businesses "which do not alter the character of the establishments." CEQR Negative Declaration and Environmental Assessment Statement at 2, *689 Eatery Corp. v. City of New York,* No. 02-CV-04431 (S.D.N.Y. May 9, 2022), ECF No. 162-5. Variations in floor space or stock did not affect the businesses' "predominant, on-going focus on sexually explicit materials or activities." *Id.* The City could "reasonably believe[ ]" that such establishments will present the same problems as other adult venues. *City of Renton,* 475 U.S. at 51. And the City has once again provided evidence that there are over a thousand available lots where the thirty-two affected establishments could legally operate – including 204 lots that could be used simultaneously while maintaining the required buffer between each adult establishment. *See 689 Eatery Corp.,* 716 F. Supp. 3d at 169-70; Consolidated Statement of Stipulated Facts at 78, *336 LLC v. City of New York,* No. 18-CV-3732 (S.D.N.Y. May 25, 2023), ECF No. 168-1. We therefore adhere to our precedent holding that the

zoning laws, even as modified by the 2001 amendments, are "content-neutral time, place, and manner regulation[s], [are] justified by substantial government interests and allow[ ] for reasonable alternative avenues of communication, and, accordingly, do[ ] not violate the First Amendment." *Buzzetti,* 140 F.3d at 141.[1]

II

The plaintiffs argue that the 2001 amendments violate the Equal Protection Clause of the Fourteenth Amendment by treating adult establishments differently from other regulated entities. This claim restates the First Amendment claim and likewise fails.

The Fourteenth Amendment prohibits a state from "deny[ing] to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. Laws that turn on suspect classifications or that impinge on fundamental rights warrant heightened scrutiny, but others receive only rational-basis review. *Romer v. Evans,* 517 U.S. 620, 631 (1996). States must "treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill,* 521 U.S. 793, 799 (1997). Adult establishments are not a suspect class under the Fourteenth Amendment, but the 2001 amendments

1. For the purposes of a facial challenge, the plaintiffs have not met the burden of showing that the 2001 amendments "prohibit[ ] a substantial amount of protected speech . . . relative to the [amendments'] plainly legitimate sweep." *United States v. Williams,* 553 U.S. 285, 292 (2008). "Invalidation for overbreadth is strong medicine that is not to be casually employed." *Id.* at 293 (internal quotation marks omitted).

do affect a fundamental right – the freedom of speech. As explained above, however, the zoning scheme satisfies the heightened scrutiny that the First Amendment requires in this context. To the extent that the plaintiffs assert an equal protection claim that does not depend on a violation of the First Amendment, rational-basis review applies. *See Clementine Co., LLC v. Adams,* 74 F.4th 77, 89 (2d Cir. 2023) (applying rational-basis review to a law burdening free speech "because it does not violate Plaintiffs' First Amendment rights").

The 2001 amendments satisfy rational-basis review. The City has a legitimate interest in curbing the negative secondary effects associated with adult establishments, and the zoning requirements are a rational means of advancing that interest. *See Kane v. De Blasio,* 19 F.4th 152, 166 (2d Cir. 2021) ("Rational basis review requires the City to have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal.").

III

The bookstore plaintiffs argue that the 2001 amendments violate the Due Process Clause of the Fourteenth Amendment. According to the bookstore plaintiffs, the amendments violate the substantive due process right of the bookstores to use their existing lots as adult bookstores. *See DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 130 (2d Cir. 1998). We disagree.

While framed as a substantive due process challenge, the bookstore plaintiffs are again repeating the claim that

the 2001 amendments violate the First Amendment. But "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." *Southerland v. City of New York,* 680 F.3d 127, 142-43 (2d Cir. 2012) (quoting *Kia P. v. McIntyre,* 235 F.3d 749, 757-58 (2d Cir. 2000)); *see also Hu v. City of New York,* 927 F.3d 81, 103 (2d Cir. 2019). Having rejected the First Amendment claim, we likewise reject the plaintiffs' substantive due process argument. *See 20 Dogwood LLC v. Village of Roslyn Harbor,* No. 23-930, 2024 WL 1597642, at *1 (2d Cir. Apr. 12, 2024) ("This more specific constitutional protection, rather than the more general notion of substantive due process, thus provides the framework for evaluating Plaintiffs' claims.").

* * *

We have considered the plaintiffs' remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 9, 2024

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02-cv-4431 (LJL)

689 EATERY CORP., *etc. et ano*,

Plaintiffs,

-v-

CITY OF NEW YORK, *et al.*,

Defendants.

02-cv-4432 (LJL)

59 MURRAY ENTERPRISES, INC. *etc., et ano.*,

Plaintiffs,

-v-

CITY OF NEW YORK, *et al.*,

Defendants.

Appendix B

02-cv-8333 (LJL)

CLUB AT 60TH STREET, *et al.*,

Plaintiffs,

-v-

CITY OF NEW YORK,

Defendant.

18-cv-3732 (LJL)

336 LLC, *etc.*, *et al.*,

Plaintiffs,

-v-

CITY OF NEW YORK,

Defendant.

February 9, 2024, Decided;
February 9, 2024, Filed

Appendix B

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

This case, comprised of four consolidated actions, involves a decades-long challenge to the constitutionality of amendments to the New York City Zoning Resolution that define and regulate adult entertainment establishments. Plaintiffs are nineteen corporations or limited liability corporations which own, operate, or lease space to establishments that provide adult entertainment, including eight gentlemen's clubs ("Club Plaintiffs")[1] and eleven adult bookstores ("Bookstore Plaintiffs") that sell or rent adults books and videos and contain private booths for patrons to view adult films.[2] Defendants are

1. The eight Club Plaintiffs—which collectively brought the first three of the four suits pending before this Court—include, in the first case, CM-ECF 02-cv-4431 Dkt. No. 77 ¶¶ 4-5: (1) 725 Eatery, Corp., doing business as "Platinum Dolls"; (2) 689 Eatery, Corp., doing business as "Satin Dolls"; in the second case, CM-ECF 02-cv-4432 Dkt. No. 26 ¶¶ 7-10, (3) 59 Murray Enterprises, Inc., doing business as "New York Dolls," located in Manhattan; (4) AAM Holding Corp., doing business as "Private Eyes," located in Manhattan; (5) West 20th Enterprises Corp., doing business as "VIP Club New York," located in Manhattan; (6) JNS Ventures Ltd., doing business as "Vixen," located in Queens; and, in the third case, CM-ECF 02-cv-8333 Dkt. No. 42 ¶¶ 7-8, (7) Club at 60th Street, Inc., which leases out a portion of its Manhattan premises to (8) Jacaranda Club, LLC, doing business as "Sapphire."

2. The eleven Bookstore Plaintiffs, which collectively brought the final of the four suits consolidated here, include: (1) 336 LLC, doing business as "Erotica," located in Brooklyn; (2) Chelsea 7 Corp., located in Manhattan; (3) Gotham Video Sales & Distribution

the City of New York (the "City"), the former Mayor of New York, and the current and preceding Commissioners of the City's Department of Buildings ("DOB"), the city agency charged with issuing permits to build new and alter existing buildings (collectively, "Defendants").

This case represents the continuation of a dispute between the purveyors of adult entertainment and the City, which began in the early 1990s when the City first enacted zoning laws aimed specifically at adult entertainment establishments. The City—like many other municipalities around the country—sought to ameliorate elevated crime rates, lowered property values, and decreased quality of life, by restricting where adult entertainment establishments could operate.

In 1995, the City adopted regulations that restricted adult entertainment establishments to certain areas of New York City, and prohibited them from being located near each other or "sensitive receptors" such as schools and houses of worship. Protracted litigation ensued. Although both state and federal courts ultimately found the City's efforts constitutional, the litigation stemming from the 1995 law also resulted in a determination by New York's highest court that adult establishments that

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Inc., located in Manhattan; (4) Rainbow Station 7 Inc., located in Manhattan; (5) Video Lovers Inc., located in Brooklyn; (6) Vishara Video, Inc., located in Manhattan; (7) Vishans Video, Inc., located in Manhattan; (8) 725 Video Outlet Inc., located in Manhattan; (9) Jaysara Video, Inc., located in Manhattan; (10) DCD Exclusive Video, Inc., located in Queens; and (11) 557 Entertainment Inc., located in Manhattan. CM-ECF 18-3732 Dkt. No. 78 ¶¶ 11-27.

limited their adult components to less than forty percent of their floor area and stock-in-trade were not subject to the law. Many adult establishments thus modified their internal configurations and limited their stock-in-trade to avoid becoming falling subject to the law. But, in 2001, in response to what the City viewed as attempts to circumvent the spirit of the adult-use regulations through "sham" compliance, the City amended its zoning law again. Plaintiffs challenge the constitutionality of the 2001 amendments to the zoning law under the First Amendment's Free Expression Clause and the Fourteenth Amendment's Equal Protection Clause. The Bookstore Plaintiffs also allege a violation of the Fourteenth Amendment Due Process Clause. Plaintiffs seek permanent injunctive relief enjoining enforcement of the zoning law.

On September 30, 2019, the Honorable William H. Pauley III, to whom the case was then assigned, entered a preliminary injunction against the enforcement of the 2001 Amendments. *725 Eatery Corp. v. City of New York*, 408 F. Supp. 3d 424 (S.D.N.Y. 2019). By agreement of the parties, this Court has conducted a trial on the papers with respect to Plaintiffs' demand for declaratory relief and a permanent injunction. The Court heard closing arguments on the evidence over two days on November 28 and 29, 2023.

This Opinion and Order constitutes the Court's findings of fact and conclusions of law for purposes of Federal Rule of Civil Procedure 52(a)(1). To the extent any statement labeled as a finding of fact is a conclusion of law, it shall be deemed a conclusion of law, and vice versa.

Appendix B

FINDINGS OF FACT

This case concerns changes to New York City's Zoning Resolution made in 2001 that restrict where "adult establishments" may locate around the City. *See, e.g.*, CM-ECF 02-cv-4431, Dkt. No. 77.[3] But a description of the events leading up to the 2001 changes, including the City's enactment of its inaugural zoning restrictions on adult establishments in 1995, is necessary for a proper understanding of the issues presented for decision.

I. The History of Zoning and Adult Entertainment in New York City

New York City, long considered a cultural capital of the United States, was also for many years a haven to a thriving business in adult entertainment. The presence of adult entertainment establishments in New York City is noted as early as the 1920s. Dkt. No. 83 at 216-26 ("Freeman Aff.") ¶ 11. At that time, theaters in Times Square in Manhattan, struggling to stay afloat without liquor sales during the Prohibition Era, began showing "B" movies to largely male audiences or converting into burlesque houses. *Id.* Other adult entertainment establishments, including adult bookstores and arcades, soon also began congregating in Times Square. *Id.*

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3. Plaintiffs filed identical motions seeking permanent injunctive relief in all four suits, with the exception of Bookstore Plaintiffs' additional due process challenge. Defendants uniformly opposed with identical filings across the actions. Accordingly, for ease of reference, the Court cites to the submissions and docket numbers corresponding to the first case filed, Case No. 02-cv-4431, unless otherwise noted.

But Times Square—which experienced rapid gentrification over the course of the 1990s and 2000s—was far from the tourist mecca known today. *Id.* ¶ 19; Dkt. No. 83 at 161-211 ("Kelley Decl.") ¶ 17. Around the same time that theaters began showing sexually explicit content to drive sales in the 1920s, Times Square began developing a reputation as the "red light district" of the City. Freeman Aff. ¶¶ 11-12.

During the Prohibition Era, land-use regulations, then in their infancy, were not contemplated to address the effects of adult entertainment establishments on their surrounding neighborhoods. In fact, the government agency tasked with regulating land use and recommending zoning changes, the City Planning Commission ("CPC") and the Department of City Planning ("DCP"), did not yet exist. Dkt. No. 162-2, Ex. 24 ("CPC Planning History"), at 182-83.[4] And although New York City did have a zoning code, groundbreaking at the time of its enactment in 1916 as the nation's first local zoning law, it did not seek

4. The City Charter established the CPC in 1936. CPC Planning History at 183. The establishment of the CPC "provided the structure for comprehensive planning in New York City, replacing a haphazard planning and zoning system that functioned principally through the interaction of interest groups and political forces." CPC Planning History at 183. The CPC is "generally charged with planning for the orderly growth, development and improvement of the City of New York." Dkt. No. 102 ("Laremont Decl.") ¶ 1. The CPC's specific responsibilities "include evaluating and giving preliminary approval to amendments" to the City's Zoning Resolution. *Id.* DCP, for its part, "provides staff assistance" to the CPC, *id.*, and is headed by the CPC chairperson and staffed with engineers, architects, experts, and other officers and employees, CPC Planning History at 184.

to regulate the growing number of adult businesses. CPC Planning History at 184-85. The 1916 Ordinance establishing the zoning code instead addressed itself to more fundamental topics like the height and form limits on buildings. CPC Planning History at 184-85.

Over the course of the following two decades, adult uses continued to proliferate citywide, and in particular, in Times Square. By the middle of the twentieth century, the reputation of Times Square as home to the City's (and perhaps the nation's) x-rated business was cemented. Freeman Aff. ¶¶ 11-12.

But still, even as the number of adult entertainment businesses increased in the mid-twentieth century, New York City did not adopt zoning restrictions specifically targeting these businesses. In 1961, as technological advances and modern planning ideals rendered the 1916 zoning law an anachronism, the City replaced the 1916 zoning code with the still-operative Zoning Resolution ("Z.R."). CPC Planning History at 184-85. The Zoning Resolution aimed to promote and protect "public health, safety and general welfare," Laremont Decl. ¶ 2 (quoting the Zoning Resolution Preamble), by regulating, *inter alia*, the height and bulk of buildings and other structures, the area of open spaces, the density of the residential population, and the location of trades, industries, and buildings designed for specific uses within the City. CPC Planning History at 185; Dkt. No. 212-1 ("Amron Decl.") ¶ 2 (citing Z.R. § 11-01). To further these goals, the Zoning Resolution divides the City into three basic types of zoning districts: (1) residential, the most common

zoning districts, accounting for about seventy-five percent of the City's zoned land area, Dkt. No. 216-1 ("CSF") ¶ 2; (2) commercial, typically in areas "with a high degree of transit accessibility as well as an established pattern of commercial development, where a high degree of future commercial development is anticipated"; and (3) manufacturing, Amron Decl. ¶¶ 2, 10. Within these three broad categories are numerous subgroups to which more specific regulations apply. *Id.* ¶ 2.

When first enacted, the 1961 Zoning Resolution, like its predecessor, did not contain any restrictions that applied specifically to adult entertainment establishments. *See* Dkt. No. 101-1 ("Karnovsky Decl.") ¶ 7. Nevertheless, and despite their growth in the early- and mid-twentieth century, the absolute number of adult entertainment establishments city-wide remained relatively low due to restrictions on the sale and distribution of pornography.[5]

5. Legal bans or restrictions on pornography were, before the 1960s, quite common and justified by reason of the content's "obscenity." And the ban extended well beyond what today would be considered pornography. For example, in 1933, federal agents blocked importation of James Joyce's *Ulysses*—considered by some the greatest modern American novel—for its passages describing sex acts. 19 U.S.C. § 1305. The ban stood until courts intervened. *See, e.g., United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff'd sub nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, Treas. Dec. 47412 (2d Cir. 1934) (A.N. Hand, J.); *see also Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960) (finding that D.H. Lawrence's *Lady Chatterley's Lover* was not obscene). Other heralded classics, including John Steinbeck's *The Grapes of Wrath* and Joseph Heller's *Catch-22*, were also banned or prohibited. *See, e.g., Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976).

Dkt. No. 162-4, Ex. 41 ("DCP Study"), at 331. But as those restrictions were lifted in the second half of the 1960s, the number of adult establishments in New York City grew to 151 by 1976—an increase of over 1,500% from the nine establishments that the City identified in 1965. *See id.*

The government response to the dramatic increase of adult entertainment establishments in New York City was varied. In 1976, the United States Supreme Court upheld Detroit's "anti-skid row" zoning ordinance, which restricted how close adult entertainment establishments could be to each other and to residential areas. *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). In the wake of that decision, the DCP, a division of the CPC, began preparing zoning recommendations modeled after the Detroit ordinance. DCP Study at 344. That same year, for the first time, CPC proposed a similar change to the New York City Zoning Resolution. *See id.*; Dkt. No. 162-7, Ex. 52 ("Karnovsky Aff.") ¶ 16. Based on its findings that adult uses had negative impacts on their surrounding areas, Karnovsky Decl. ¶ 15, the DCP sought to distinguish adult entertainment establishments from other businesses, to restrict the locations in which adult establishments could operate to a few commercial districts, and to prohibit such establishments from operating in close proximity with one another or with churches and schools, DCP Study at 341-46. But the plan "drew sharp denunciations" from a variety of groups, and ultimately failed,[6] *id.*, leaving regulators to

6. Views in opposition to the amendment were primarily voiced by individuals and groups from the four boroughs other than Manhattan, who accused the CPC of fostering red light districts outside of Manhattan. DCP Study at 345-46.

find alternative solutions. The City permanently banned "physical culture establishments"—a zoning term for massage parlors—in 1978. *Id.* at 344-46. Between 1978 and 1983, the City closed 106 illegal establishments, and eventually pursued civil actions against sex-oriented businesses under nuisance abatements laws, successfully closing prostitution hotels and virtually eliminating the practice of sexually explicit hand-billing on City streets. *Id.* at 348-49; *see* Karnovsky Aff. ¶ 17. New York State, for its part, declared portions of the City "blighted" to justify using eminent domain to acquire properties for redevelopment. Freeman Aff. ¶ 14.

Between 1976 and 1984, the City saw a thirteen percent decline in the number of adult entertainment establishments. DCP Study at 304. But whether even that modest decline was driven specifically by the government's regulatory efforts is unclear. As DCP noted, other factors—namely, technological advances and the start of major construction projects in Midtown Manhattan that increased investor confidence in the neighborhood's prospects as a commercial hub—may have driven the decline. *Id.* at 331.

Whatever the reason for the decline, it was short-lived. Between 1984 and 1993, the number of adult entertainment establishments in New York City increased by 35%, *id.* at 335, with the boroughs of Manhattan and Queens seeing the greatest increases, *id.* at 331. By Fall 1993, there were 177 such establishments in New York City, with over 100 located in Manhattan alone. Dkt. No. 162-5, Ex. 41-1, at 395-99. The type of adult entertainment establishments

emerging also changed—as technological advances drove down prices of adult entertainment created for private consumption and reduced patronage at adult theaters, the number of adult bookstores which sold and rented adult films increased precipitously and the number of adult theaters was reduced by half. *See* DCP Study at 305. The number of nude or topless bars also increased, growth ascribed to careful recasting by such bars as upscale entertainment centers that catered to young businessmen with disposable incomes. *Id.* at 330. By 1993, the landscape of New York City adult entertainment establishments was comprised of 49% adult bookstores (including video stores) and peepshows, 38% nude and topless bars, and 13% adult theaters. *Id.* at 333. The majority of these establishments were located in four community districts in Manhattan, specifically around Times Square and Chelsea. *Id.* at 332, 335.

Troubled by the rise in adult entertainment establishments and the accessibility of adult material, various groups—including elected officials—undertook studies to understand the impacts of adult entertainment establishments on the community. *See, e.g.*, Laremont Decl. ¶ 7. The Borough President of Manhattan established the Task Force on the Regulation of Sex-Related Businesses, which conducted a public fact-finding hearing in November 1993 regarding the impacts of adult entertainment establishments. DCP Study at 351-52. That same year, the Chelsea Action Coalition and Community Board undertook to study the economic impact of adult video stores in the neighborhood. And, in 1994, the Times Square Business Improvement District found a negative

relationship between adult entertainment establishments and property values, as well as a positive relationship between adult uses and crime complaints. *Id.* at 307. Then, in November 1994, the City commissioned DCP to conduct a study on the effects of adult entertainment.[7] Karnovsky Decl. ¶ 7; CSF ¶ 4. The DCP Study, as described in greater detail *infra*, reviewed the findings of these studies and others that further described how and where adult businesses operated in New York City, reviewed trends in growth and development of adult uses, surveyed adult entertainment studies conducted by other municipalities, and conducted an independent survey of the impact of New York City's adult entertainment establishments on their surroundings. *See* Laremont Decl. ¶ 8. The DCP Study ultimately led to amendments to the City's Zoning Resolution which would, for the first time, distinguish between adult entertainment and other commercial establishments.

II. The Enactment of the 1995 Regulations

New York City enacted its first iteration of zoning restrictions specifically targeting adult establishments—specifically "adult eating or drinking establishments," "adult book stores," a category which includes adult video stores, and "adult theaters,"—in 1995 by adopting changes to the Zoning Resolution (the "1995 Regulations"). CSF ¶ 1.

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7. In addition, in 1993 and 1994, two neighborhood-specific surveys of Chelsea and Times Square concluded that the proliferation of adult entertainment businesses had created negative economic consequences. *See* DCP Study at 307; Karnovsky Decl. ¶¶ 18-19.

Appendix B

A. The 1995 Regulations

The 1995 Regulations subjected all businesses that fell within its definition of "adult establishments" to locational, size, signage, and amortization limits. Dkt. No. 162-1, Ex. 1 ("1995 Z.R."), at 22-26; CSF ¶ 3; *see also* Amron Decl. ¶ 3. Adult establishments were prohibited in residential districts, as well as those commercial and manufacturing districts that permitted new residential uses.[8] 1995 Z.R. at 25, 27-28. Within the remaining commercial and manufacturing districts in which adult establishments were allowed, adult establishments were required to be located at least 500 feet from certain "sensitive receptors" (*i.e.*, an existing house of worship, school, or daycare), any other adult establishment, and certain districts in which adult uses were not permitted.[9] *Id.* § 32-01; CSF ¶ 3. The 1995 Regulations further barred more than one adult establishment from being located on a single lot. 1995 Z.R. § 32-01(d). The size of each adult establishment could not exceed 10,000 square feet in floor area and cellar space. *Id.* § 32-01(e). Finally, the 1995 Regulations imposed

8. The 1995 Regulations further provided that if a zoning district was reclassified into a different district category in which adult entertainment establishments were categorically barred from operating—for example, if a manufacturing district was reclassified as a residential zoning district—adult entertainment establishments in that district would be required to relocate or shut down. Amron Decl. ¶ 8.

9. The 1995 Regulations contemplated a narrow exception for adult entertainment establishments operating in manufacturing districts, which could be located within 500 feet of a boundary of some specified manufacturing districts. 1995 Z.R. § 42-01(b).

limitations on the size and type of advertising permitted to be used, including by adult establishments. CSF ¶ 3. The 1995 Regulations restricted the size, placement, and illumination of accessory business signs that adult establishments could use to advertise. 1995 Z.R. §§ 32-69, 42-55.

Adult uses that did not conform with the location and size restrictions were subject to the "amortization" or "mandatory termination" provisions.[10] To give owners time to recoup their investment in the adult portion of the establishment, most non-conforming adult uses were given one year to either relocate, close, or conform their businesses to the zoning requirements.[11] *Id.* § 52-77. Adult establishments could apply to the Board of Standards and Appeals for additional time to amortize their establishments, so long as they did so at least 120 days before the required termination date. *Id.* § 52-734.

The 1995 Regulations defined an "adult establishment" as "a commercial establishment where a 'substantial portion' of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or

10. Adult entertainment establishments that failed to comply only with the signage restrictions, however, were not subject to the mandatory termination provisions.

11. The 1995 Regulations contemplated a limited exception for adult establishments existing as of October 25, 1995. *See* 1995 Z.R. § 32-01(f). Those establishments, if not located in prohibited zoning districts, and if otherwise conforming except that they were located within 500 feet of another adult use, located on the same zoning lot of another adult use, or exceeded 10,000 square feet of usable floor area, were not subject to the mandatory termination provisions. *Id.*

other adult commercial establishment, or any combination thereof." CSF ¶ 5; 1995 Z.R. § 12-10. The 1995 Regulations go on to define each type of specific establishment.

The 1995 Regulations defined an "adult eating or drinking establishment" as:

> an eating or drinking establishment which regularly features any one or more of the following: (1) live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or, (2) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or (3) employees who, as part of their employment, regularly expose to patrons "specified anatomical areas[,]" and which is not customarily open to the general public during such features because it excludes minors by reason of age.

1995 Z.R. § 12-10(b); CSF ¶ 7. The 1995 Regulations further defined the meaning of "specified sexual activities" and "specified anatomical areas," which appeared in the definitions of both "adult eating and drinking establishments" and "adult book stores."[12] 1995 Z.R. § 12-10.

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12. The 1995 Regulations defined "specified sexual activities" as "(i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse

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The 1995 Regulations defined an "adult book store" as:

> a book store which has as a "substantial portion" of its stock-in-trade any one or more of the following: (1) books, magazines, periodicals or other printed matter which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or (2) photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

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or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast." 1995 Z.R. § 12-10(d). The Regulations defined "specified anatomical areas" as "(i) less than completely or opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed." *Id.* These definitions were common among zoning restrictions that municipalities imposed on adult establishments. *See, e.g., Am. Mini Theatres*, 427 U.S. at 53 n.4; *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1367 (11th Cir. 2021); *Ent. Prods., Inc. v. Shelby County*, 588 F.3d 372 (6th Cir. 2009), *cert. denied*, 562 U.S. 835, 131 S. Ct. 141, 178 L. Ed. 2d 36 (2010); *Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir.), *cert. denied*, 537 U.S. 1088, 123 S. Ct. 699, 154 L. Ed. 2d 632 (2002); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 994 (7th Cir. 2002); *Moore v. Brown*, 215 F.3d 1320 (4th Cir. 2000); *T&A's, Inc. v. Town Bd. of Town of Ramapo*, 109 F. Supp. 2d 161 (S.D.N.Y. 2000) (Parker, J.).

1995 Z.R. § 12-10(a); CSF ¶ 6. And, although not relevant to this litigation, the 1995 Regulations defined an adult theater as:

> a theater which regularly features one or more of the following: (1) films, motion pictures, video cassettes, slides or similar photographic reproductions characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas"; or, (2) live performances characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; and which is not customarily open to the general public during such features because it excludes minors by reason of age.

1995 Z.R. § 12-10(c). Finally, the 1995 Regulations provided a catchall term for "[a]n other adult commercial establishment," defined as:

> a facility—other than an adult book store, adult eating and drinking establishment, adult theater, commercial studio, or business or trade school—which features employees who as part of their employment, regularly expose to patrons "specified anatomical areas" and which is not customarily open to the general public during such features because it excludes minors by reason of age.

Id. § 12-10(d).

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Having set forth the definitions of the types of establishments that were subject to the restrictions, the 1995 Regulations went on to define the phrase "substantial portion"—which ultimately became central to this litigation—as it was used in some of the definitions:

> For the purpose of determining whether a 'substantial portion' of an establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or combination thereof, the following factors shall be considered: (1) the amount of floor area and cellar space accessible to customers and allocated to such uses; and (2) the amount of floor area and cellar space accessible to customers and allocated to such uses as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. § 12-10. The 1995 Regulations provide further guidance as to the meaning of "substantial portion" with respect to adult bookstores:

> For the purpose of determining whether a bookstore has a "substantial portion" of [sexually explicit] stock in materials . . . , the following factors shall be considered:
>
> > (1) the amount of such stock accessible to customers as compared to the total stock accessible to customers in the

> establishment; and (2) the amount of floor area and cellar space accessible to customers containing such stock; and (3) the amount of floor area and cellar space accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. Under the 1995 Regulations, businesses falling within these definitions were limited to approximately 11% of the City's overall land area. Dkt. No. 162-7, Ex. 53 ("Sec. Karnovsky Aff.") ¶ 85. And, as noted above, "adult entertainment establishments" were subjected to limitations on size and external signage.

B. The Adoption of the 1995 Regulations

The 1995 Regulations were the product of work and studies conducted by the CPC and the DCP. Under the New York City Charter, zoning amendments are proposed by the DCP or other planning groups, preliminarily approved by the CPC, and adopted by the New York City Council. Amron Decl. ¶ 1; CPC Planning History at 184. All zoning proposal plans are subject to an environmental analysis and are referred by the DCP to all affected community boards,[13] all affected borough boards, and all affected borough presidents, for hearing, review, and a written

13. There are presently 59 community districts in New York City, each of which is represented by a community board. CPC Planning History at 186.

recommendation. N.Y. City Charter ch. 8 § 197-a(c). In addition, before approving a plan, the CPC must hold a public hearing. *Id.* § 197-a(d). If the plan is approved by the CPC, it is subject to review and action by the City Council. *Id.* Before approving a plan, the City Council must also hold a public hearing. *Id.* § 197-d(c). An affirmative vote of a majority of council members is required to approve, approve with modifications, or disapprove, a plan. *Id.* That process was followed with respect to the 1995 Regulations, and, later, the amendments that the City enacted in 2001. *See* CSF ¶¶ 192-93.

But before the provisions that would become the 1995 Regulations were drafted, the DCP conducted an "Adult Entertainment Study" in 1994 to "evaluate the nature and extent of adverse impacts associated with adult entertainment uses." DCP Study at 312. The DCP Study ultimately found a relationship between adult entertainment establishments and negative secondary effects based on its assessment of, *inter alia*, studies conducted by other municipalities evaluating the impact of adult entertainment establishments, the results of neighborhood-specific studies undertaken by two New York City neighborhoods, and DCP's own survey results.

The DCP Study begins with the acknowledgments that "[t]here is a vast array of businesses that may be considered 'adult,'" and that "'adult use' is technically defined differently from municipality to municipality, but generally refers to a commercial establishment that purveys materials or services of a sexual nature." *Id.* at 312-13. For its purposes, the DCP Study defined an

adult entertainment establishment as a business with "a commercial use that defines itself as such through exterior signs or other advertisements." *Id.* at 312. The definition did not distinguish between adult theaters, adult bookstores, or adult drinking and eating establishments.

As to historical trends, the DCP Study reported that, as of 1994, adult entertainment establishments were both more prevalent and more readily accessible than they had been ten years earlier. *Id.* at 309. It further reported that, consistent with responses from a similar national survey of real estate appraisers, "[m]ost real estate brokers report that adult entertainment establishments are perceived to negatively affect nearby property values and decrease market values. Eighty percent of the brokers responding to the DCP survey indicated that an adult use would have a negative impact on nearby property values." *Id.* at 379.

The DCP Study also summarized the results of studies from several other localities. It reported that these studies "found that adult entertainment uses have negative secondary impacts such as increased crime rates, depreciation of property values, deterioration of property values, deterioration of community character and the quality of urban life." *Id.* at 309-10. DCP included in its Study a summary of studies and reports conducted by nine other local and state governments between 1977 and 1989—namely, Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota. *Id.* at 314-20. Although the studies varied in their analytic

rigor as well as the conclusiveness of their results,[14] they generally found that districts in which adult entertainment uses were located were also areas with higher crime rates, lower property values and diminished quality of life. *See id.*

The DCP Study also analyzed the adult entertainment business in New York City. It found that there had been a rapid growth in the number of adult entertainment uses in New York City from 131 in 1984 to 177 in 1993, *id.* at 309, and that the boroughs seeing the greatest increases in the number of adult entertainment establishments over that decade were Manhattan and Queens—both of which had a 47% increase in adult uses (107 in Manhattan and 44 in Queens)—with far smaller increases in the other boroughs, *id.* at 331. The specific types of adult entertainment establishments varied over that time, but most dramatic was the increase in adult bookstores and the decline of adult theaters, with the number of bookstores (including video stores) consisting of 49[%] of the citywide total number of adult entertainment uses in

14. As Plaintiffs highlight, some of the studies undertaken by other municipalities and summarized in the DCP Study are not particularly analytically rigorous. One study, for example, relies on newspaper anecdotes covering hostility to adult entertainment establishments, rather than data. DCP Study at 314. Moreover, some of the reports—those published by Manatee County, Florida, and New Hanover County, North Carolina, "relied exclusively on studies of adult uses performed by other municipalities." Karnovsky Decl. ¶ 11 n.4. Further, the Minnesota study found that adult establishments concentrated in relatively deteriorated areas, *refuting* the causal link that adult establishments caused a decrease in area property values.

1993," and the proportion of adult theaters declining from 37% in 1984 to 13% in 1993. *Id.* at 333.

The DCP Study also summarized the impacts of sex-related establishments identified by two neighborhood-specific studies conducted in 1993 and 1994: (1) a study of area businesspeople commissioned by the Chelsea Action Coalition and Community Board 4 in Manhattan, which found that secondary harm from adult video establishments included a decline in the overall reputation of the community, a reduction in the economic vitality of individual businesses, a decline in the potential for businesses in the community, and an increase in concern that businesses would leave Chelsea because of the adult video stores, *id.* at 350; and (2) a study by the Times Square Business Improvement District Study regarding the impact of adult entertainment on crime and on property values, *id.* at 353-54.

The DCP Study further summarized the results of the DCP's own community survey aimed at assessing the adverse effects of adult entertainment establishments in New York City specifically.[15] *Id.* at 360-69. The DCP

15. Plaintiffs also submit testimony that highlights the methodological imprecision of the DCP Study's own results, *see, e.g.*, Freeman Aff. ¶¶ 27-33, as well as their own evidence which, they contend, refutes the City's showing that the 1995 Regulations or their successor were sufficiently justified, *see* Dkt. No. 162-9, Ex. 63 ("Freeman Study"), at 1462-65. As explained *infra*, however, these methodological issues are not a basis upon which the Court may find that the City's rationale for the 2001 Amendments to the 1995 Regulations was insufficient.

surveyed local organizations and businesses, real estate brokers, and police officers, and analyzed criminal-complaint and property-assessment data for six study areas around the City.[16] *Id.* at 360. The study did not conclusively reveal links between adult entertainment establishments and increased criminal complaints or decreased property values, but did find that some groups—particularly real estate brokers and community organizations—perceived adult entertainment establishments to have such effects. *Id.* at 360-69. Businesses that responded to the survey, on the other hand, were nearly evenly split as to whether they perceived some sort of harm to their business from the presence of nearby adult entertainment establishments; about half of surveyed businesses either perceived no discernable impact of such establishments on surrounding businesses, or believed even that such establishments drove more traffic to their businesses.

Based on the adverse secondary effects identified in the DCP Study, the DCP filed an application with the CPC for a text change to the Zoning Resolution to establish a one-year moratorium on new adult establishments in November 1994. Dkt. No. 162-5, Ex. 41-3 ("1995 CPC Report"), at 401-02; *see also* Karnovsky Decl. ¶¶ 22-24. The CPC approved the application after determining that the adverse secondary effects identified in the DCP Study warranted regulation of adult establishments. 1995 CPC Report at 402. The moratorium was designed to provide sufficient time to develop and enact permanent zoning

16. Two of the study areas were in Manhattan, with each of the remaining four study areas in a different one of the other four boroughs. DCP Study at 361.

regulations for adult uses. *Id.*; Karnovsky Decl. ¶ 23. The City Council adopted the moratorium by approving the text changes to the Zoning Resolution in November 1994. 1995 CPC Report at 402.

Over the course of the following few months, the DCP formulated what it envisioned would be permanent zoning restrictions aimed at mitigating the secondary effects of adult entertainment establishments. In March 1995, the DCP, partnering with the City Council's Land Use Committee, formally filed an application with the CPC to amend the text of the Zoning Resolution to define the term "adult establishment" as a land use. 1995 CPC Report at 401-05; Karnovsky Decl. ¶ 25. That same year, the DCP conducted an analysis of potential development sites available for adult uses by studying maps of the zoning districts where adult uses were permitted. Karnovsky Aff. ¶ 74. It concluded that there were nearly 5,000 acres of unencumbered land available for adult uses, allowing the operation of more than 500 adult establishments. *Id.* ¶ 75.

The CPC preliminarily approved the 1995 Regulations with minor modifications that September. 1995 CPC Report at 478; Karnovsky Decl. ¶ 26. At the same time, the CPC released a report describing the proposed regulations and explaining the planning considerations. Karnovsky Decl. ¶ 26. The CPC's 1995 Report explained that the CPC concluded that the 1995 Regulations were "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" based on the findings of the DCP Study, the Times Square Business Improvement District Study, and the Chelsea

Business Survey, as well as on the findings of the Task Force on the Regulation of Adult Businesses and public testimony received by the CPC. 1995 CPC Report at 433. The CPC summarized the "substantial adverse secondary effects stemming from the location and concentration of adult uses" as including:

> the negative impact adult establishments have on economic development and revitalization; their tendency to decrease property value, thereby limiting tax revenue; an impediment to economic activity; their tendency to encourage criminal activity, particularly when the establishments are located in concentration; the proliferation of illegal sex-related businesses; their damaging impact on neighborhood character and residents including children; and the costs associated with maintaining and patrolling areas.

Id. at 439. While the 1995 Regulations were addressed to these secondary effects, they aimed to "continue[] to provide ample opportunity for adult establishments to locate and operate throughout New York City." *Id.* at 433. The CPC explained that "[a]dult uses would be able to locate in substantial numbers in all boroughs and in a variety of locations, assuring sufficient access to adult materials." *Id.* at 444. It added that, after taking into account that certain properties—such as wetlands and property occupied by public works or owned by the City—were unlikely to be developed with adult establishments, analyses by DCP staff made "clear that the proposed regulations would allow the opportunity for all currently

operating adult establishments to relocate within the city as well as allowing for expansion of the adult market." *Id.*

The CPC responded to concerns expressed during the public review process that the 1995 Regulations "could be interpreted to allow for enforcement against establishments not intended to be covered" by the regulations, "such as art galleries, legitimate theaters, and book stores with an emphasis on gay and lesbian themes." *Id.* at 448-49. It clarified that "'adult establishments' are intended to be those establishments similar in nature to the types of enterprises described and studied in the DCP Study, namely book and video stores, theaters, eating or drinking establishments and other commercial enterprises with a predominant, on-going focus on sexually explicit materials or activities," and not "general interest book or video stores with a selection of adult materials that is modest in scale as compared to the overall size of the establishment." *Id.* at 449. Foreshadowing a series of regulations, the CPC further explained that "guidelines should direct the enforcement of the adult use regulations." *Id.* In deciding "whether a 'substantial' portion of an establishment is occupied by an adult use or adult materials," the CPC suggested that an enforcement agency should consider: "(1) the overall amount of floor area accessible to customers devoted to adult purposes; (2) the amount of floor area devoted to adult purposes as compared to the total commercial floor area of the establishment; and (3) the amount of stock of a sexually explicit nature as compared to total stock." *Id.* at 450. "As a general guideline," the CPC suggested "that an establishment would need to have at least 40 percent of

its accessible floor area used for adult purposes to make it similar to the establishments studied in the DCP Study and thus be an 'adult establishment' or 'adult bookstore.'" *Id.* But the CPC added that there might be exceptions to that guideline, such as if a bookstore moved "[a] disproportionately large amount of adult materials, as compared to total stock, . . . into a smaller amount of floor area," or where "10,000 or more square feet of commercial space [was] occupied by adult uses or adult materials."[17] *Id.* at 450-51. In those cases, the CPC believed that the establishment would qualify as an adult establishment as defined by the 1995 Regulations. *Id.*

After a further public hearing, the New York City Council gave final approval to the 1995 Regulations on October 25, 1995, at which time they were supposed to become effective. 1995 Z.R. at 34; Karnovsky Aff. ¶ 27.

III. Legal Challenges to the 1995 Regulations

Dozens of businesses challenged the 1995 Regulations in state and federal court. CSF ¶ 8. State court challenges to the 1995 Regulations under the New York state

17. The CPC found some modifications to the proposed text change warranted. First, the CPC recommended modifications that would increase the area available in Manhattan as potential sites for adult establishments to locate, to account for Manhattan's greater proportion of adult establishments and larger audience. 1995 CPC Report at 445-47. Second, the CPC recommended tweaks to the adult-use definitions to "tailor application of the regulations to the types of enterprises studied in the DCP Study." *Id.* at 445; *see id.* at 451-57.

constitution failed. *Id.* The state trial court, rejecting the adult entertainment establishments' claims, found that "the City Council was justified in finding that the present configuration of adult use establishments causes adverse secondary effects, a finding which demonstrates that the Amended Zoning Resolution was based on a compelling state interest related to combating such effects, rather than restricting speech." *Stringfellow's of N.Y., Ltd. v. City of New York*, 171 Misc. 2d 376, 653 N.Y.S.2d 801, 809 (N.Y. Sup. Ct. 1996). It also found that the 1995 Regulations were no broader than necessary to achieve their purposes and allowed reasonable alternative avenues of communication by leaving open nearly 5,000 acres of unencumbered land available for the 148 adult uses that would have to relocate. *Id.* at 810-11. On appeal, both the Appellate Division and, later, the New York Court of Appeals unanimously affirmed the trial court's decision. *Stringfellow's of N.Y., Ltd. v. City of New York*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (N.Y. 1998).

Federal courts, which had held in abeyance the plaintiffs' federal constitutional claims pending resolution by state courts of the state constitutional claims, *see Hickerson v. City of New York*, 932 F. Supp. 550, 559 (S.D.N.Y. 1996), then began resolving the federal constitutional challenges to the 1995 Regulations, Karnovsky Aff. ¶ 39. One such challenge, brought in *Amsterdam Video v. City of New York*, 96-cv-02204-MGC, contended that the failure of the 1995 Regulations to decisively define "substantial portion" as used in the definitions of "adult establishment" and "adult book store"

rendered the 1995 Regulations unconstitutionally vague, CSF ¶ 9.

While *Amsterdam Video* was pending, DOB, the city agency responsible for issuing permits to build new and alter existing buildings in the City of New York, Dkt. No. 212-2 ("Gittens Decl.") ¶ 1,[18] issued in July 1998 Operations Policy and Procedure Notice ("OPPN")[19] 4/98, guidance which purported to clarify the meaning of the phrase "substantial purpose" as it was used in the 1995 Regulations. CSF ¶¶ 10, 13; Dkt. No. 162-1, Ex. 11 ("DOB 1998 Guidance"), at 124-26. With respect to the requirement that a "substantial portion" of a bookstore's stock-in-trade be adult materials, DOB adopted what became known as the "60/40 Rule," providing:

> An establishment shall be deemed a book store if its principal use is selling books, magazines, periodicals or other printed matter or photographs, films, motion pictures, video cassettes, slides or other visual representations, regardless of floor area. If at least 40 percent

18. Plaintiffs object to this Declaration and others on Rule 602, 701, and 802 grounds. *See* Dkt. No. 246. The objections are overruled. The witness is competent to testify about the matters asserted which, for the most part, are based simply on a reading of the relevant regulations. In any case, none of the evidence is critical to the Court's decision.

19. DOB published "OPPNs" to represent official policies of the DOB and assist regulated groups in following operational procedures. Gittens Decl. ¶¶ 15-16. DOB renamed the OPPNs "Buildings Bulletins" in 2008. CSF ¶ 73.

> of the book store's total stock accessible or available ("accessible") for sale or rent to customers is comprised of adult materials, then the book store has a "substantial portion" of its stock in adult materials, and is therefore "an adult book store."
>
> An establishment also includes an adult book store if 40 percent of the establishment's floor area and cellar space accessible to customers contains stock in adult materials.
>
> If 10,000 of more square feet of an establishment is occupied by adult materials, the establishment is deemed to be an "adult book store" regardless of the overall size of the establishment.
>
> General interest stores, including general interest book and video stores, with a section of adult materials that is modest in scale as compared to the overall size or stock of the store, are not intended to be covered by the adult establishment definition in [the 1995 Regulations].

DOB 1998 Guidance at 125. In the same guidance document, DOB also provided guidance applicable to eating or drinking establishments, theaters, and other commercial establishments. It stated:

> The determination whether a "substantial portion" of an eating or drinking establishment,

> theater or other commercial establishment includes an adult use should include consideration of the amount of floor area and cellar space accessible to customers allocated to adult use for performance and viewing purposes as compared to total combined floor area and cellar space accessible to customers.
>
> Thus, if an eating or drinking establishment, a theater or other commercial establishment, has at least 40 percent of the floor and cellar area that is accessible to customers, available for adult performance and viewing purposes, then a "substantial portion" of the establishment is devoted to an adult use and is an "adult eating or drinking establishment", an "adult theater" or an "other adult commercial establishment."
>
> If 10,000 or more square feet of an eating or drinking establishment, a theater or other commercial establishment is occupied by an adult use, the establishment is deemed to be an "adult eating or drinking establishment", an "adult theater" or an "other adult commercial establishment" regardless of the overall size of the establishment. Adult entertainment should be the principal form of entertainment at the establishment.

DOB 1998 Guidance at 125.

During argument on the vagueness challenge in *Amsterdam Videos*, the attorney for the City represented

to the court that a commercial enterprise allocating less than forty percent of its accessible floor area to an adult use complied with the 1995 Regulations and that those guidelines should be read into the text of the 1995 Regulations. *See City of New York v. Show World, Inc.*, 178 Misc. 2d 812, 683 N.Y.S.2d 376, 381 (N.Y. Sup. Ct. 1998). Based on that representation, the plaintiffs in *Amsterdam Video* withdrew their vagueness challenge to the 1995 Regulations. CSF ¶ 12.

DOB revised this guidance less than one month later in OPPN 6/98. *Id.* ¶ 13; Dkt. No. 162-1, Ex. 12, at 127-29. OPPN 6/98 left unchanged the 60/40 Rule as applied to bookstores. *See* Dkt. No. 162-1, Ex. 12, at 128. Perhaps in recognition of the fact that the term "substantial portion" was used in the general definition of "adult establishment" but not specifically in the definition of "adult eating or drinking establishment" in the 1995 Regulations, OPPN 6/98 revised the application of the 60/40 Rule with respect to multi-use establishments:

> The determination as to whether a "substantial portion" of a commercial establishment with two or more uses, at least one of which is not a book store, an eating or drinking establishment, a theater, or an "other adult commercial establishment," includes an adult use should include consideration of (1) the amount of floor area and cellar space accessible to customers allocated to adult use and (2) such amount of floor area and cellar space as compared to total combined floor area and cellar space accessible to customers.

> Thus, if a commercial establishment with two or more uses, at least one of which is not a book store, an eating or drinking establishment, a theater, or an "other adult commercial establishment," has at least 40 percent of the floor and cellar area that is accessible to customers, available for adult use, then a "substantial portion" of the establishment is devoted to an adult use and the commercial establishment is deemed to be an adult establishment.
>
> If 10,000 or more square feet of a commercial establishment with two or more uses, at least one of which is not a book store, an eating or drinking establishment, a theater, or an "other adult commercial establishment," is occupied by an adult use, the commercial establishment is deemed to be an "adult establishment" regardless of the overall size of the establishment.

Id. at 128-29. OPPN 6/98 further stated that the 60/40 Rule "shall not apply to a commercial establishment that is entirely an eating or drinking establishment, a theater, an "other adult establishment," or any combination thereof, *id.*, sowing the seeds for further litigation.

By 1998, the legal challenges to the 1995 Regulations in federal court had failed as well. CSF ¶ 8. The district court denied the plaintiffs' motion for a preliminary injunction on collateral estoppel grounds, finding that plaintiffs were estopped from challenging the factual

findings of the state court in the state challenges to the 1995 Regulations, *see Hickerson v. City of New York*, 997 F. Supp. 418, 423 (S.D.N.Y. 1998), and the Second Circuit affirmed on substantially the same grounds, 146 F.3d 99 (2d Cir. 1998). The Supreme Court declined the plaintiffs' request to entertain an appeal. *Amsterdam Video, Inc. v. City of New York*, 525 U.S. 1067, 119 S. Ct. 795, 142 L. Ed. 2d 658 (1999). Once the Supreme Court declined to weigh in, the stays that had enjoined enforcement of the 1995 Regulations pending determinations as to the constitutionality thereof were lifted. CSF ¶ 14; *see City of New York v. Les Hommes*, 94 N.Y.2d 267, 724 N.E.2d 368, 702 N.Y.S.2d 576 (N.Y. 1999) ("The City's zoning resolution became enforceable on July 28, 1998, when the United States Supreme Court denied an application for a stay in a related case, ending a series of stays that had been in effect to that date.").

IV. Enforcement of the 1995 Regulations and the 60/40 Rule

With the constitutionality of the 1995 Regulations resolved in both state and federal court by 1998, the City took up the task of enforcement. *See* Karnovsky Aff. ¶ 45. Many adult entertainment businesses attempted to comply with the 1995 Regulations by reducing their floor space and stock-in-trade devoted to the sale or presentation of adult materials. CSF ¶ 15. But over the course of the following two years, from 1998 to 2000, the City launched a comprehensive enforcement initiative, an undertaking that involved "the commencement of civil enforcement actions against approximately 100 adult establishments

operating at prohibited locations." Karnovsky Decl. ¶ 44; *see* Karnovsky Aff. ¶ 45. The City was initially successful in obtaining court orders requiring the closure of these establishments, having established that they were "adult establishments" as defined in the 1995 Regulations. Karnovsky Aff. ¶ 45. Several of the regulated businesses permanently closed. CSF ¶ 14.

In enforcing the 1995 Regulations, the City took the position that the "substantial portion" analysis applied only to adult bookstores and multi-use commercial establishments, *i.e.*, only to "a commercial establishment with two or more uses, at least one of which is not a book store, an eating or drinking establishment, a theater," or an "other adult commercial establishment," and that single-use adult eating or drinking establishments could not avail themselves of the 60/40 Rule. Karnovsky Aff. ¶¶ 42, 48. But the New York state courts rejected those arguments. In particular, the New York Court of Appeals rebuffed the City's argument that, in judging whether a "substantial portion" of a commercial establishment included adult uses, the 60/40 Rule applied only to multi-use establishments. *See City of New York v. Dezer Props., Inc.*, 95 N.Y.2d 771, 732 N.E.2d 943, 943, 710 N.Y.S.2d 836 (N.Y. 2000) (finding no merit to the City's argument that the 1995 Regulations applied whenever it sold or presented any adult activity).

Rather than relocating, several of the regulated businesses attempted to avail themselves of the benefits of the 60/40 Rule by reducing their floor space or stock-in-trade devoted to the sale or presentation of adult materials

or entertainment, and by toning down the exterior signage of their businesses. CSF ¶¶ 15, 31; *see* Karnovsky Aff. ¶ 46. In some instances, these reconfigurations were costly. For example, the owner of Club Plaintiff 725 Eatery Corp., known at that time as "Lace," testified that he reconfigured the business premises such that live entertainment could be observed by patrons in less than forty percent of its customer-accessible space at a cost of $20,000; the remainder of the space was used as a liquor-licensed bar featuring televised sports programming. Dkt. No. 83 at 262-64 ("Capeci Decl.") ¶¶ 8-10. Installation of new subdued exterior signage which did not feature the term "XXX" or contain bright or flashing lights cost an additional $5,000. *Id.* ¶ 13. Another one of the Club Plaintiffs, 59 Murray Enterprises, Inc., reconfigured its interior space by erecting opaque partitions and installing televisions viewable from more than 60% of the floor space at a cost of approximately $10,000 in order to conform to the spatial requirements of the 60/40 Rule and avoid enforcement of the 1995 Regulations. Dkt. No. 83 at 265-73 ("Lipsitz Decl.") ¶¶ 7-10. It too installed new subdued exterior signage at a cost of approximately $2,500. *Id.* ¶ 13. Other clubs took similar steps at similar or even greater expense. *See* Lipsitz Decl. ¶¶ 20-23, 26; Dkt. No. 83 at 283-88 ("D'Amico Decl.") ¶¶ 7-11; Dkt. No. 83 at 297-311 ("Kavanaugh Decl.") ¶¶ 8-13. In addition to reconfiguring their spaces to fall within the 60/40 Rule's safe harbor, and beyond merely changing their floor space, stock percentages, and exterior signage, several of the Plaintiff businesses made additional changes (in varying degrees). CSF ¶ 16. Nevertheless, the City concluded that several of the businesses that attempted

to comply with the 1995 Regulations by modifying their floor space and stock percentages had engaged only in "sham" compliance inconsistent with the spirit and intent of the 1995 Regulations. *Id.* ¶ 17; Dkt. No. 162-6, Ex. 45 ("2001 CPC Report"), at 692-94; Karnovsky Decl. ¶ 45 n.11; Dkt. No 162-4, Ex. 42 ("2001 DCP Application") at 484. The City found that the businesses had no reasonable expectation that the non-adult stock would attract customers. Karnovsky Aff. ¶ 46.

V. The 2001 Amendments

In March 2001, the DCP filed an application to amend the 1995 Regulations, CSF ¶ 189, by changing the definitional language to address what it contended were "attempts by adult establishments to remain in operation through superficial measures which do not alter the character of the establishments as enterprises with a 'predominant, on-going focus on sexually explicit materials or activities,'" 2001 DCP Application at 480; *see* Karnovsky Decl. ¶ 71 n.18.[20]

According to the DCP, the 1995 Regulations were intended to address "those establishments similar in nature as to the types of enterprises described and studied in the DCP Study, namely book and video stores,

20. The DCP's application was referred to the City's community boards and borough boards for review and comment in accordance with the procedure required by the City Charter in March 2001. Karnovsky Aff. ¶ 57. Of the three borough boards that responded, the Brooklyn and Queens Boards voted in favor of the proposal, and the Manhattan Board voted against. *Id.*

theaters, eating or drinking establishments, and other commercial enterprises with a 'predominant, on-going focus on sexually explicit materials or activities.'" 2001 DCP Application at 480 (quoting 1995 CPC Report at 449). The 60/40 Rule had proven ineffective at identifying enterprises fitting that definition, and the DCP did not anticipate that the Rule would be used by adult establishments to evade enforcement. Karnovsky Aff. ¶ 75 n.20. The DCP summarized the problem with the 60/40 Rule as to adult bookstores as follows:

> Enforcement efforts since 1998 have demonstrated that a focus on the relative amounts of adult and non-adult books or videos and a comparison of the amount of floor area devoted to each type of material are, alone, insufficient measures of whether a book or video store has a "predominant on-going focus" on sexually explicit materials. In response to enforcement efforts, adult establishment owners have expanded their inventory of non-adult videos in order to bring the adult stock below 40% of the total, in such a way that they cannot be viewed as having a reasonable expectation that patrons will purchase the non-adult materials. This has often been accomplished by buying carton-fulls [sic] of old instructional videos, kung-fu or karate films, cartoons and the like, which are inexpensive to purchase in bulk. Often, dozens of the same title are offered, another economizing measure which nevertheless

> assists in achieving a mathematical compliance. The cartoons have sometimes been left opened on the floor of the bookstore, and in other cases the non-adult titles are simply stacked haphazardly on shelves without any attempt at organization or categorization. A frequent observation of inspectors has been that the non-adult titles are gathering dust. At the same time, these establishments continue to have a physical lay-out or methods of operation which reflect a predominant focus on the sale of adult materials.

2001 DCP Application at 483-84. The DCP further explained that the proposed amendments were, with respect to adult bookstores, intended to "establish objective factors, relating principally to physical lay-out and method of operation, by which a bookstore which has achieved only a facial or superficial compliance with the 'substantial portion' test would be considered an 'adult bookstore.'" *Id.* at 484.

With respect to eating or drinking establishments, the DCP explained that the relevant issue was whether the establishment regularly featured adult entertainment, and not the amount of floor space devoted to adult entertainment, *id.* at 484-85: "there is no basis to conclude that the negative secondary effects of adult establishments are any less present where topless or nude dancers frequent only part of the customer-accessible floor space in an eating or drinking establishment," *id.* at 485. Unlike bookstores, which "were a type of use recognized by the

CPC as sometimes having a mixed presentation of adult and non-adult materials" and thus required consideration of floor space devoted to adult entertainment specifically "to avoid forcing small neighborhood video or bookstores with only a minor amount of adult material to close or move," the amount of floor space that an eating or drinking establishment devoted to adult entertainment was simply not relevant to whether such an establish was properly characterized as an adult use. *Id.* Appropriation of the 60/40 Rule by non-bookstore establishments, the DCP explained, had "led to the artificial separation of adult eating or drinking establishments into purportedly 'adult' and 'non-adult' sections," a result DCP characterized as "absurd[]." *Id.*

The 2001 DCP Application triggered an environmental review pursuant to the New York State Environmental Quality Review Act and the City Environmental Quality Review ("CEQR"). CSF ¶ 190; *see* Dkt. No. 162-5, Ex. 43 ("City Environmental Assessment"). As part of the CEQR, the City also considered whether there would be alternative sites to which such establishments could relocate:

> Since 1995, there have been 11 rezonings which have reduced the amount of land area . . . in which adult establishments are permitted . . . . As a result of these rezonings, the estimated total number of acres in New York City where adult establishments are permitted has been reduced from 4,962 to 4,812, or a 3% reduction. In addition, changes since 1995 in the number

> and location of "sensitive receptors" (houses of worship, schools and day care centers) from which adult establishments must be located at least 500 feet . . . have reduced the total number of acres in New York City where adult establishments are permitted by an estimated 66.26 acres, or a 1% reduction. It is estimated that these rezonings and changes in the number and location of sensitive receptors have reduced the estimated number of potential sites for adult establishments in New York City from 514 to 466, a 9% reduction. As indicated above, the number of adult establishments at prohibited locations which may seek to relocate to permitted locations has decreased from an estimated 148 in 1995 to 101 in 2000, a decline of 32%.

City Environmental Assessment at 529. The City's environmental review concluded that without the proposed amendments, the 101 60/40 adult establishments that were currently in existence would likely remain at their current locations, and new 60/40 establishments could open in locations prohibited by the 1995 Regulations, as 26 establishments had done between 1998 and 2001. *Id.*; *see* Sec. Karnovsky Aff. ¶ 88 n.27.

The proposed changes to the 1995 Regulations, the DCP explained, would benefit the City writ large:

> The proposed action is expected to result in beneficial land use effects and an improved

> quality of life throughout the city . . . . As a result of the proposed action, "60/40" adult establishments would be required to discontinue operations or face closure through enforcement. Implementation of the proposed action could therefore result in discontinuance or closure of 101 of the 136 adult establishments at locations where they were not intended to be allowed under the 1995 Adult Use Regulations will remove the secondary effects of these establishments and is expected to have a revitalizing effect on the business climate as well as help promote an improved residential environment . . . . It is unlikely that all discontinued or closed "60/40" establishments would seek to relocate to permissible locations. However, even if these were the case, there would be sufficient capacity and locational opportunities for these and future adult establishments in commercial and manufacturing areas in which adult establishments are allowed. Assuming adopting of all of the potential rezoning described above in the discussion of future no-action conditions, there would be 4,588 acres and 428 potential sites available for adult establishments at permissible locations.

City Environmental Assessment at 530-31. DCP also considered whether changes to the zoning map between 1995 and 2001 would affect the availability of space for adult entertainment establishments to relocate: as a result

of changes to the zoning map between 1995 and 2001, DCP found that there remained approximately 4,800 acres of unencumbered land available for adult uses in New York City, Sec. Karnovsky Aff. ¶ 87, a minor decline from the 5,000 acres that DCP had determined were available to adult uses in 1995, *id.* ¶ 86. The City did not, however, undertake to conduct a new secondary effects study or update its 1995 study. CSF ¶ 188.

The CPC held a public hearing to consider the community's views on the proposed changes. *Id.* ¶ 193; *see* Dkt. No. 162-6, Ex. 44 ("May 2001 Hearing Transcript"). Most of those who spoke at the hearing—a group of people ranging from representatives of Borough Presidents to business owners—expressed support for the proposed amendments.[21] May 2001 Hearing Transcript at 563-

21. Many of those who spoke in favor of the proposed amendments nevertheless feared that the changes would not adequately safeguard against the "secondary effects" of adult establishments and would permit 60/40 establishments to continue operating in locations that, were they properly characterized as adult establishments, would be illegal. *See, e.g.*, May 2001 Hearing Transcript at 566-67 (representative of Brooklyn Borough President contending that the "benefits" of the proposed amendments would be "subject to the discretion of the Commissioner of Buildings in regard to the pursuit of effective inspections and adjudication" and thus recommending the addition of a provision that would require the DOB to conduct inspections of adult establishments within sixty days of the effective date of the law). Speakers in opposition generally invoked First Amendment principles—some speakers referred to the proposed amendments as "draconian restrictions" on fundamental free-speech rights, *see, e.g., id.* at 581-82; *see also id.* at 583-90, 614, and some opposed the proposed amendments on grounds that they could be used to target LGBTQ+ establishments, *see id.* at 597-600, 610-12.

638. One speaker in opposition argued that the 60/40 establishments, by reducing their stock of adult material and the floor space that could be used to offer sexually explicit material for sale, either eliminated secondary effects or reduced them to a level that was acceptable. *Id.* at 555. Another speaker in opposition argued that the City had not addressed the dispersal of adult businesses effected by the 1995 Regulations in proposing the 2001 Amendments. *Id.* at 581; *see also id.* at 597. The proposed changes were also subject to review by the Community and Borough Boards, CSF ¶ 192; most of which that responded recommended approval of the text changes, *see* 2001 CPC Report at 727-84.

On August 8, 2001, the CPC approved the DCP's application to amend the 1995 Regulations. CSF ¶ 194; *see* 2001 CPC Report. The 2001 CPC Report reiterated the motivating factors for the DCP's application to amend the 1995 Regulations. In its "Consideration" section, it identified that "the principal purpose of the amendments" was "to clarify certain definitions in the text, in order to effectuate the Commission's original intent in response to efforts by the operators of adult establishments to undermine implementation of the 1995 Regulations." 2001 CPC Report at 688. The CPC "reject[ed] the notion it was powerless to respond to pervasive efforts by the operators of adult establishments to subvert the intent of the 1995 regulations" without conducting new studies. *Id.* at 694. The 1995 Regulations, the CPC said, were intended to apply different standards to adult bookstores than to adult nude dancing establishments based on their different natures. *Id.* at 684. As common

sense teaches, a general interest book or video store's "sale of a small amount of adult materials . . . did not render these establishments the type of establishment analyzed in the DCP Study." *Id.* at 689. Thus, to allow for unbiased, objective enforcement of the laws against only those bookstores akin to those studied by the DCP rather than general interest bookstores with small adult sections, the CPC came up with the "substantial portion" test. *Id.* at 689-90. But, the CPC went on, the conduct that rendered an eating or drinking establishment an adult use were different. *Id.* at 690. Unlike book and video stores, which often sold both adult and non-adult media, adult eating or drinking establishments did not generally present adult and non-adult materials. *Id.* The CPC noted that "the DCP Study did not identify the existence of neighborhood bars or restaurants with only 'incidental' topless or nude entertainment," which rendered baseless any conclusion "that the negative secondary effects of adult establishments are any less present where topless or nude dancers frequent only part of the customer-accessible floor space in an eating or drinking establishment." *Id.* at 690-91. Accordingly, the CPC explained, the approach taken by some of the state courts to adult eating or drinking establishments—requiring both a showing that such an establishment regularly featured adult entertainment as well as a showing that a "substantial portion" of the floor area was devoted to adult entertainment—was mistaken. *Id.* "This approach," the CPC explained, "has led to the artificial separation of adult eating or drinking establishments into purportedly 'adult' and 'non-adult' sections," which, in turn, led to absurd results. *Id.* at 695. The proposed

changes to the 1995 Regulations would effectuate their original intent, by requiring the City, in enforcing the 1995 Regulations against an eating or drinking establishment, to show only that the establishment in question regularly featured adult entertainment.

But the approach of the 1995 Regulations to adult book and video stores, the CPC said, was also insufficient. *Id.* Although the 1995 Regulations properly contemplated the import of differentiating between adult bookstores and general interest bookstores with small adult sections, the 1995 Regulations as written had failed to capture bookstores with "a predominant focus on the sale of adult materials." *Id.* at 692. It was "absurd," the CPC said, to suggest "that, in adopting the 'substantial portion' definition of 'adult book store,' the Commission validated superficial and sham compliance undertaken without any intent of making the non-adult aspect of the business a truly functioning part of the operation." *Id.* at 694. The proposed changes, the CPC explained, addressed this problem while still differentiating between adult and general interest bookstores by setting out more specific "objective factors, relating principally to physical lay-out and method of operation, by which a bookstore which has achieved only a facial or superficial compliance with the 'substantial portion' test would be considered an 'adult book store.'" *Id.* at 693.

The 2001 CPC Report also discussed the amortization provisions of the proposed changes. The CPC endorsed the DCP's proposal that "an amortization provision be added to the text to ensure that '60/40' establishments do

not become permanent fixtures at locations where adult establishments were never intended to be." *Id.* at 702. Even though "the purpose of the current amendments is only to clarify the original intent of the 1995 regulations" and "adult establishments were never intended to be allowed to remain in place through superficial compliance measures," the CPC recognized that 60/40 establishments had been found by courts to constitute lawful uses under the 1995 Regulations and had made monetary investments into reconfiguring their spaces to comply with the 60/40 Rule. *Id.* at 701-02. The CPC thus adopted a one-year amortization period for any establishment in existence as of August 8, 2001 that had made an investment in reliance on the 60/40 Rule and was classified as an adult establishment at a prohibited location under the 2001 amendments. *Id.* at 702. The mandatory termination provision protected the adult establishments' investments into achieving 60/40 compliance for one year, while also ultimately effectuating the intent underlying the 1995 Regulations.

The proposed amendments were then referred to the City Council for review and action under the New York City Charter.[22] The Council's Subcommittee on Zoning and Franchises conducted a public hearing on the proposed amendments on October 1, 2001, Dkt. No. 162-6, Ex. 47, at 855, and approved the amendments on October 25, CSF

22. Section 197-d(b)(1) of the New York City Charter provides that changes in zoning resolutions pursuant to sections 200 and 201 are subject to review and action by the City Council. N.Y. City Charter ch. 8 § 197-d(b)(1). The City Council received the 2001 CPC Report, as well as the City Environmental Assessment. CSF ¶ 191.

¶ 196. On October 31, 2001, the City Council approved the CPC's proposal. *Id.* ¶ 198; Karnovsky Decl. ¶ 3; *see* Dkt. No. 162-7, Ex. 51 ("2001 City Council Meeting Transcript").

A. The 2001 Amendments' Definitional Changes

In their final form, the 2001 Amendments change the definition of "adult establishment" and the definitions of the three types of establishments. *See* Dkt. No. 162-1, Ex. 3 ("2001 Z.R.") § 12.10(1). In short, the 2001 Amendments clarify that the 60/40 Rule "is not applicable to adult eating or drinking establishments," and amends its application to adult bookstores. *See* Karnovsky Decl. ¶ 5. For adult eating and drinking establishments and adult theaters, the 2001 Amendments replace the test that—as interpreted by the state courts—focused in part on the amount of floor space devoted to adult uses, with one that focused only on the frequency with which the establishment offered adult entertainment (*i.e.*, whether the establishment "regularly featured" adult entertainment). 2001 Z.R. § 12.10(1)(b), (c). For bookstores, the 2001 Amendments retain the notion that a bookstore is an "adult bookstore" only if a "substantial portion" of the store's stock-in-trade is adult printed or visual material, *id.* § 12.10(1)(a), with the added proviso addressed to the characteristics of a business that the CPC had considered to be emblematic of sham compliance, *id.* § 12.10(2).

The 1995 Regulations had defined an "adult establishment" as any commercial establishment a substantial portion of which was an adult bookstore,

an adult eating or drinking establishment, or an adult theater. *See* 1995 Z.R. § 12.10. The courts interpreted the "substantial portion" language in the 1995 Regulations to subject to the zoning restrictions only those adult establishments that devoted more than 40% of their floor space or stock-in-trade to adult content. The 2001 Amendments, however, define an adult eating or drinking establishment or adult theater by the fare that it regularly features by changing both the definition of "adult establishment" generally and the specific definitions of adult eating or drinking establishments. The 2001 Amendments define an "adult establishment" as "a commercial establishment which is or includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof." 2001 Z.R. § 12-10(1).

The 2001 Amendments then define an "adult eating or drinking establishment" as:

> [A]n eating or drinking establishment which *regularly features* in any portion of such establishment any one or more of the following:
>
> > 1. Live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or
> >
> > 2. Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized

> by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
>
> 3. Employees who, as part of their employment, regularly expose to patrons "specified anatomical areas"; and
>
> which is not customarily open to the general public during such features because it excludes or restricts minors.

Id. § 12-10(1)(b) (emphasis added).[23] The 2001 Amendments thus clarify that establishments that regularly feature adult entertainment may not evade regulation by relying on the 60/40 Rule. *See, e.g., id.*; Karnovsky Aff. ¶ 5; Sec. Karnovsky Aff. ¶ 90. "Specified sexual activities" and "specified anatomical areas" retained their preexisting definitions from the 1995 Regulations. *See* 2001 Z.R. § 12-10(2)(b).

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23. The 2001 Amendments define an "eating or drinking establishment" generally as an establishment that "includes: (i) any portion of a commercial establishment within which food or beverages are offered for purchase, or are available to or are consumed by customers or patrons; and (ii) any portion of a commercial establishment from which a portion of a commercial establishment described in (i) above is accessible by customers or patrons." 2001 Z.R. § 12-10(2)(e).

Appendix B

The 2001 Amendments changed the definition of "adult book store," but retained the use of the "substantial portion" language from the 1995 Amendments.

> An adult book store is a book store that offers "printed or visual material" for sale or rent to customers where a "substantial portion" of its stock-in-trade or "printed or visual material consists of adult printed or visual material," defined as "printed or visual material" characterized by an emphasis upon the depiction or description of "specified sexual activities" or specified anatomical areas."

Id. § 12-10(1)(a).

Unlike its predecessor law, the 2001 Amendments specify what constitutes a "substantial portion" of a bookstore's stock-in-trade. To determine whether a "substantial portion" of a bookstore's stock-in-trade of "printed or visual material" consists of "adult printed or visual material," the following factors are considered:

> (i) the amount of stock of "adult printed or visual material" accessible to customers as compared to the total stock of "printed or visual material" accessible to customers in the establishment; and (ii) the amount of *floor area* and *cellar* space accessible to customers containing stock of "adult printed or visual material"; and (iii) the amount of *floor area* and *cellar* space accessible to customers containing stock "of

> adult printed or visual material" as compared to the amount of *floor area* and *cellar* space accessible to customers containing "printed or visual material" which is not "adult printed or visual material."

Id. § 12-10(2)(d) (emphasis in original). But the 2001 Amendments include an important proviso—a list of eight additional factors—to remedy the superficial compliance that City regulators witnessed:

> "[P]rinted or visual material" which is not "adult printed or visual material" . . . shall not be considered stock-in-trade for purposes of this paragraph where such store has one or more of the following features:
>
> (aa) An interior configuration and lay-out which requires customers to pass through an area of the store with "adult printed or visual material" in order to access an area of the store with "other printed or visual material";
>
> (bb) One or more individual enclosures where adult movies or live performances are available for viewing by customers;
>
> (cc) A method of operation which requires customer transactions with respect to "other printed or visual material" to be made in an area of the store which includes "adult printed or visual material";

(dd) A method of operation under which "other printed or visual material" is offered for sale only and "adult printed or visual material" is offered for sale or rental;

(ee) A greater number of different titles of "adult printed or visual material" than the number of different titles of "other printed or visual material";

(ff) A method of operation which excludes or restricts minors from the store as a whole or from any section of the store with "other printed or visual material";

(gg) A sign that advertises the availability of "adult printed or visual material" which is disproportionate in size relative to a sign that advertises the availability of "other printed or visual material," when compared with the proportions of adult and other printed or visual material offered for sale or rent in the store, or the proportions of floor area or cellar space accessible to customers containing stock of adult and other printed or visual materials;

(hh) A window display in which the number of products or area of display of "adult printed or visual material" is disproportionate in size relative to the number of products or area of display of "other printed or visual material," when compared with the proportions of adult

> and other printed or visual materials offered for sale or rent in the store, or the proportions of floor area or cellar space accessible to customers containing stock of adult and other printed or visual materials;
>
> (ii) Other features relating to configuration and lay-out 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.

Id. § 12-10(2)(d).

B. The 2001 Amendments' Substantive Restrictions on Adult Establishments

In substance, the 2001 Amendments are not significantly different from the 1995 Regulations. Like the 1995 Regulations, the 2001 Amendments permit adult establishments in some commercial zoning districts and most manufacturing zoning districts, but not residential districts. *Id.* § 32-01; Amron Decl. ¶ 6. Adult establishments are prohibited in manufacturing and most commercial districts in which residential uses are permitted. 2001 Z.R. § 42-01; Amron Decl. ¶ 6. Also like the 1995 Regulations, the 2001 Amendments prohibit adult entertainment establishments from locating within 500 feet of a church, school, residential district, or of another adult establishment. 2001 Z.R. § 32-01(b), (c); Dkt. No. 80

("Berzak Decl.") ¶ 9. And adult establishments were still not permitted to locate on more than one zoning lot and were bound to limit their floor space to less than 10,000 square feet. 2001 Z.R. § 32-01(d), (e); Berzak Decl. ¶ 10. An exception is contemplated for bookstores without private booths, which were permitted to remain at locations where adult establishments are prohibited, subject to compliance with the eight additional factors. CSF ¶ 172.

Like the 1995 Regulations, *see* 1995 Z.R. § 52-77, the 2001 Amendments include an "amortization" or "mandatory termination" provision that requires non-conforming adult uses to terminate within one year of the date of City Council adoption, 2001 Z.R. § 72-41. However, adult establishments that made financial expenditures in the wake of the 1995 Regulations to avoid being subject to the substantive provisions of the Regulations were, per the 2001 Amendments, given the opportunity to apply to the Board of Standards and Appeals to operate for a limited time beyond the one-year amortization period. *Id.*; Dkt. No. 162-7, Ex. 53 ("Second Karnovsky Aff.") ¶ 9.

Lastly, the 2001 Amendments addressed the priority between competing uses that are located within 500 feet of each other in violation of the ordinance—*i.e.*, they addressed which of two uses should enjoy priority when an adult establishment and a sensitive use seek to locate within 500 feet of one another including the ability (or lack thereof) of a sensitive use to dislodge an adult entertainment use for which a permit had already been granted. Sections 32-01 and 42-01 of the Zoning Resolution provide that an adult establishment is deemed

to be in existence "upon the date of a permit issued by the [DOB] therefor, or in the case of an adult establishment in existence prior to August 8, 2001, as determined by the [DOB], subject to rules as the department of buildings may prescribe regarding the failure to perform work authorized under a permit or to commence operation pursuant to a permit and the discontinuance of an adult establishment." 2001 Z.R. §§ 32-01, 42-01. Under New York City Rules (R.C.N.Y.) Section 9000-01, vesting priority is established by which of an adult use or a sensitive use first obtains "an appropriate Department permit." 1 R.C.N.Y. § 9000-01. Under the rule, either a building permit or a "no work" permit constitutes an "appropriate Department permit." *Id.* § 9000-01(b). An adult use cannot prevent a school or house of worship from opening nearby; by contrast, if a school or house of worship obtains priority, it can prevent an adult use from opening within 500 feet of its location.

In sum, the 2001 Amendments principally repeal the 60/40 method of compliance, rendering at least some of the 60/40 businesses non-conforming uses that must either move to an area where they are allowed, or close down in accordance with the one-year mandatory termination requirement. Restaurants and bars that "regularly feature" adult entertainment are subject to the Zoning Resolution's restrictions, regardless of the amount of floor space used for adult purposes. 2001 Z.R. § 12-10. As to bookstores, the 2001 Amendments clarify that all stores with peep booths are governed by the Zoning Resolution; bookstores without peep booths that do not have adult-printed or visual materials comprising a substantial

portion of their stock-in-trade, and that otherwise do not have any of the indicia set forth in the definition of "adult establishment," are not considered adult establishments within the meaning of the Zoning Resolution and are not required to comply therewith. *Id.*

VI. Legal Challenges to the 2001 Amendments

Like the 1995 Regulations, the 2001 Amendments were challenged in both state and federal court as unconstitutional.[24] *See* CSF ¶ 20. Lengthy litigation ensued in the state courts. There, several 60/40 establishments contended that the City had not adequately justified the 2001 Amendments because it had not studied whether 60/40 establishments specifically had the same adverse secondary effects as 100% adult establishments.

In September 2003, the New York State Supreme Court granted summary judgment to a theater and video store offering adult materials on the basis that the 2001 Amendments were unconstitutional, finding that the City had failed to show a correlation between 60/40 establishments and adverse secondary effects, and failed to show that the 2001 Amendments were narrowly tailored to address the secondary effects created by

24. The new wave of constitutional challenges to the 2001 Amendments includes the three federal actions brought by Club Plaintiffs at issue here. The federal cases were stayed pending resolution of the constitutional challenges brought in the state courts. Dkt. Nos. 43, 46. The 2001 Amendments have not been enforced since they were enacted due to a combination of court orders and litigation agreements. CSF ¶ 21.

those institutions. *See For the People Theatres of N.Y., Inc. v. City of New York*, 1 Misc. 3d 394, 768 N.Y.S.2d 783, 785-86 (N.Y. Sup. Ct. 2003). On appeal, the Appellate Division reversed and deemed the 2001 Amendments constitutional. *For the People Theatres of N.Y., Inc. v. City of New York*, 20 A.D.3d 1, 793 N.Y.S.2d 356, 371 (1st Dep't 2005). The court rejected the plaintiffs' argument that the City was required to conduct a new study demonstrating the secondary effects of 60/40 establishments in particular, and found that "a review of the legislative record indicates that the [City] Council reasonably believed that the nature of the 60/40 establishments, with a predominant focus on sexually explicit materials and/or featuring topless or nude women, remained unchanged, and that the 2001 amendments were necessary to effectuate the original legislative purpose." *Id.* at 368. It added that the City "need not distinguish between different types of adult uses, or a new type of adult use, so long as the evidence relied upon the by the municipality is reasonably believed to be relevant to the problems addressed by the ordinance." *Id.* The plaintiffs appealed to the New York Court of Appeals, which reversed and held that issues of fact remained outstanding. *For the People Theatres of N.Y., Inc. v. City of New York*, 6 N.Y.3d 63, 843 N.E.2d 1121, 1131, 810 N.Y.S.2d 381 (N.Y. 2005). The Court of Appeals, like the Appellate Division, rejected the notion that the City needed to conduct a new secondary effects study concerning the impact of 60/40 establishments specifically.[25] *Id.* at 1132-

25. But in dissent, Chief Judge Kaye took the opposing view that the 2001 Amendments constituted an entirely new law rather than merely a fix of the loophole left open by the 1995 Regulations, and reasoned on that basis that the City would not, on remand, be

33; *see also id.* at 1133 (holding that the City did not have a constitutional obligation "to perform a formal study or statistical analysis, or to establish that it has looked at a representative sample of 60/40 businesses in the city"). The Court of Appeals found that the City had "satisfied its burden to justify a secondary-effects rationale for the City's 2001 Amendments," which moved the burden to the plaintiffs to refute the evidence. *Id.* at 1131. The Court of Appeals found that the plaintiffs furnished enough evidence disputing the City's rationale to shift the burden back to the City to supplement the record with evidence supporting the zoning resolution. *Id.* at 1132. It accordingly remanded for a factual determination as to whether the City had fairly supported its position on sham compliance and whether "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." *Id.* at 1133.

Following remand and a bench trial, in 2010 the New York Supreme Court upheld the constitutionality of the 2001 Amendments as they related to adult bookstores and adult eating and drinking establishments. *For the People Theatres of N.Y. Inc. v. City of New York*, 27 Misc. 3d 1079, 897 N.Y.S.2d 618, 625 (N.Y. Sup. Ct. 2010).[26] The court

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able to provide additional facts that could substantiate the law that it had not already been given the opportunity to present. 843 N.E.2d at 1134 (Kaye, C.J., dissenting).

26. The trial court found the 2001 Amendments unconstitutional with respect to adult theaters. 897 N.Y.S.2d at 625.

found that the City had "provided substantial evidence that [the 60/40 businesses'] dominant, ongoing focus is on adult matters." *Id.* On appeal one year later, the Appellate Division reversed, this time finding that the trial court's "extremely terse decision" did not sufficiently resolve "whether the 60/40 establishments are similar in nature to adult establishments that have been shown by means of empirical data to cause negative 'secondary effects.'" *For the People Theatres of N.Y. Inc. v. City of New York*, 84 A.D.3d 48, 923 N.Y.S.2d 11, 17-18 (1st Dep't 2011). It therefore returned the case to the state trial court for a decision setting forth its findings of fact. *Id.* at 18.

On second remand, the trial court struck down the 2001 Amendments as facially unconstitutional under both the federal Constitution and its state analogue. *For the People Theatres of N.Y., Inc. v. City of New York*, 38 Misc. 3d 663, 954 N.Y.S.2d 801, 809 (N.Y. Sup. Ct. 2012). The court found "significant and distinct differences between the 1994 adult entities and the 60[/]40 entities," such that "the current establishments no longer resemble their 1994 predecessors." *Id.* at 810. A divided panel of the Appellate Division affirmed, reasoning that, as an evidentiary matter, the City had not satisfied criteria that the court had previously identified for assessing whether a 60/40 establishment retained a predominant ongoing sexual focus. *For the People Theatres of N.Y. Inc. v. City of New York*, 131 A.D.3d 279, 14 N.Y.S.3d 338, 346 (1st Dep't 2015).

In 2017, the case was again appealed to the Court of Appeals. It was only then, after nearly two decades of litigation, and three trips through New York's state

courts, however, that the state high court upheld the 2001 Amendments as constitutional. *See For People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340, 57 N.Y.S.3d 69, 79 N.E.3d 461 (N.Y. 2017). In a unanimous decision, the Court of Appeals held that, contrary to determination of the Appellate Division, the City had adequately demonstrated that the 60/40 establishments retained a predominant focus on sexually explicit materials or activities. *Id.* at 463. It determined that the lower court had erroneously held the City to a higher burden of proof than required under existing Supreme Court case law regarding the focus of 60/40 establishments. *Id.* at 475.

On February 20, 2018, the United States Supreme Court denied the plaintiffs' petition for a writ of certiorari from the decision of the New York Court of Appeals. *Ten's Cabaret, Inc. v. City of New York*, 583 U.S. 1118, 138 S. Ct. 994, 200 L. Ed. 2d 252 (2018). With the state cases resolved, the federal litigation, proceeding in this Court, was free to move forward. *See* Dkt. No. 51.

VII. The Decline in the Number of Adult Establishments in New York City

Since New York City began subjecting adult entertainment establishments to zoning limitations in 1995, the number of adult establishments in New York City has dramatically decreased. In 1993, there were 177 known adult establishments operating in New York City, each of which was considered to be a 100% adult establishment as the law made no distinction between 100% adult establishments and establishments that devoted less

than all of their floor space or stock-in-trade to adult entertainment. CSF ¶ 160. 68 of those establishments were what would now be called an "adult eating and drinking establishment" and 86 were described as adult bookstores or video stores. *Id.* The remaining 23 adult establishments were categorized as adult "movie and live theaters." *Id.* By 2000, after the adoption of the 1995 Regulations, there were 136 known adult establishments in New York City, 35 of which were "100% adult establishments" and the remaining 101 of which were "60/40 establishments." *Id.* ¶ 161. Of the 136 known adult establishments, 57 were eating or drinking establishments, 35 were bookstores, and 44 were theaters. *Id.* The majority in each category were 60/40 establishments. *Id.*

There has been an even more dramatic decrease in the number of adult establishments in Manhattan specifically. *See* Sec. Karnovsky Aff. ¶ 88 n.28. In 1993, there were 107 known 100% adult establishments operating at locations in Manhattan alone, of which 21 were what would, under the 1995 Regulations, be deemed an "adult eating or drinking establishment" and 69 were adult bookstores (including video stores) or peep shows. CSF ¶ 166. By 2000, there were 69 adult establishments in Manhattan. *Id.* ¶ 162. 14 of the adult establishments in Manhattan were adult eating and drinking establishments (of which 11 were 60/40 eating and drinking establishments), *id.* ¶ 163, and the remaining 55 were adult bookstores, 31 of which had private booths (of which 26 were known 60/40 establishments), and 24 of which did not have private booths (of which 19 were 60/40 bookstores), *id.* ¶¶ 164-65.

The record is silent as to the reasons why the number of adult establishments decreased citywide, including whether the decrease was attributable to the 1995 Regulations, to a decrease in the demand for adult entertainment, or to the presence of alternative avenues for obtaining adult entertainment such as through the internet, to none of those factors or to a combination of those factors. It is fair to assume, given the dramatic decrease in establishments in Manhattan and the operation of the zoning regulations in Manhattan, that at least a portion of the decrease in the number of adult establishments in Manhattan is attributable to the 1995 Regulations, although some of the decline was also driven by external factors such as redevelopment of Times Square. Karnovsky Aff. ¶ 77 n.23.

The decline of adult entertainment establishments has continued into the twenty-first century. As of February 1, 2019, there were 45 known 60/40 businesses in New York City that would have needed to relocate under the 2001 Amendments, reflecting a marked decrease from the number of 60/40 establishments known in 2000. CSF ¶ 169. As of May 23, 2022, there were 32 known 60/40 businesses in New York City which would have to relocate if the 2001 Amendments were allowed to take effect, of which 19 were located in Manhattan. *Id.* ¶¶ 170, 173. Of the 19 60/40 businesses in Manhattan, 5 are known adult eating and drinking establishments and 14 are known 60/40 bookstores with or without video booths. *Id.* ¶ 174. Plaintiffs assert that there are 9 lots in Manhattan to which adult establishments can simultaneously relocate and that at least 10 of the 60/40 businesses currently in

Manhattan would need to relocate from the borough. *Id.* ¶ 175. As of the same May 2022 date, there were 4 known 100% adult businesses operating in permissible locations in Manhattan, of which 3 were adult eating and drinking establishments and one was an adult bookstore without private video booths. *Id.* ¶ 168. It thus is possible that the number of establishments in Manhattan offering predominantly sexual fare will decrease from 23 to 13 if the 2001 Amendments become effective.

PROCEDURAL HISTORY

The Club Plaintiffs—adult establishments that would not have been considered adult establishments under the prevailing interpretation of the 1995 Regulations, but would be so classified under the 2001 Amendments—filed their actions in 2002 and moved for preliminary injunctive relief and summary judgment in late 2002 and early 2003. *See, e.g.*, Dkt. Nos. 13, 14. Following the state trial court's initial invalidation of the 2001 Amendments in late 2003, however, Judge Pauley, the judge then assigned to the federal actions, administratively closed the cases on consent of the parties while the state court litigation was proceeding. Dkt. No. 43.

In April 2018, after the United States Supreme Court denied the petition for a writ of certiorari to the New York Court of Appeals, the Court reopened the Club Plaintiffs' actions following a request by the Club Plaintiffs for a conference. Dkt. No. 51. Days later, the Bookstore Plaintiffs filed their Complaint. *See* CM-ECF 18-3732, Dkt. No. 1. After several extensions, Plaintiffs

in all four actions simultaneously moved for preliminary injunctive relief in late 2018 to enjoin enforcement of the 2001 Amendments pending a final disposition of the case on the merits. *See, e.g.*, CM-ECF 02-cv-4431, Dkt. No. 78. Plaintiffs contended, in arguments partially echoed now, that the 2001 Amendments improperly burdened their speech in violation of the First Amendment. Dkt. No. 79 at 24-30. Noting the myriad tests that the Supreme Court has articulated at various times and with varying degrees of agreement, Plaintiffs asserted that regardless of which test the Court deemed applicable, the 2001 Amendments failed to pass constitutional muster and warranted injunctive relief. *Id.* at 13-16.

On September 30, 2019, Judge Pauley granted Plaintiffs' motion for preliminary injunctive relief and enjoined Defendants from enforcing the 2001 Amendments. *725 Eatery Corp.*, 408 F. Supp. 3d at 424.[27]

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27. [27] Judge Pauley's conclusions are generally not binding on this Court by the law of the case. "The law of the case doctrine . . . holds thatwhen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case," absent "cogent and compelling" reasons to the contrary. *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002), *cert. denied*, 539 U.S. 902, 123 S. Ct. 2246, 156 L. Ed. 2d 110 (2003) (internal citations quotation marks omitted). However, the Court is not now "bound by its conclusions at the preliminary injunction stage, particularly given that a preliminary injunction focuses on the interim time period before trial, and usually is determined on a less developed record." *Alpha Cap. Anstalt v. ShiftPixy, Inc.*, 432 F. Supp. 3d 326, 337 n.13 (S.D.N.Y. 2020); *see also Garten v. Hochman*, 2010 U.S. Dist. LEXIS 59699, 2010 WL 2465479, at *3 n.1 (S.D.N.Y. June 16, 2010) ("[T]he law of the case doctrine is not typically applied

Applying the three-step test that the Supreme Court articulated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), Judge Pauley found at step one that the 2001 Amendments were appropriately considered time, place, and manner regulations because they did not categorically ban adult establishments, 408 F. Supp. 3d at 460-61, and at step two, that the 2001 Amendments were content-neutral in that they were justified by the aim to reduce the adverse secondary effects of adult establishments rather than the speech itself, *id.* at 461-62. Accordingly, the Court applied intermediate scrutiny to the 2001 Amendments at *Renton*'s third step. *Id.* at 462-63. The Court found that the City's "stated interest of reducing the negative secondary effects of establishments with predominant, ongoing focus on adult-oriented expression certainly qualifie[d] as a 'substantial governmental interest,'" and that the City had met its "burden of providing evidence that support[ed] a link between the regulated speech and the asserted secondary effects," satisfying the first requirement of intermediate scrutiny. *Id.* at 465. But the City had failed to satisfy the second requirement—showing that reasonable alternative sites for relocation of the 60/40 establishments existed in 2019. *Id.* at 468-69. Judge Pauley "reject[ed] Plaintiffs' unsupported contention that the availability of adequate sites must, as a categorical matter, be considered on a county-by-county basis," and specifically that "Defendants must demonstrate alternative channels for adult expression in Manhattan." *Id.* at 467. However, Defendants had submitted only the DCP's analyses

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in connection with preliminary determinations, such as a ruling for a preliminary injunction.:).

of available city lots from 1995 and 2001, and had not supplemented it with any more current information. *See id.* at 468-69. And the information that Defendants did submit did not account for how the amount of available land would be affected by the 2001 Amendments' requirements that adult establishments be located at least 500 feet from sensitive receptors or other adult establishments. *Id.* at 469-70. Plaintiffs' evidence showing that the potential alternative sites for adult businesses had substantially diminished since 1995 bolstered Judge Pauley's conclusion that Defendants had not met their burden of showing that reasonable alternative sites were available. *Id.*

Following Judge Pauley's decision granting preliminary injunctive relief, the parties proceeded through discovery. *See* Dkt. No. 120. In May 2023, Defendants moved for summary judgment, and Plaintiffs cross-moved for partial summary judgment. *See* Dkt. Nos. 219-223. The parties agreed to a bench trial on the written record, in lieu of resolving the motions for summary judgment.[28] The parties filed a Consolidated Statement of Stipulated Facts. Dkt. No. 216-1. Plaintiffs designated as the directed testimony upon which they intended to rely at trial: (1) the declarations and affidavits (including reply declarations)

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28. So long as all parties consent, a district court may make findings of fact and conclusions of law on the written record alone. *See, e.g.*, *Pristine Jewelers NY, Inc. v. Broner*, 567 F. Supp. 3d 472, 474 n.1 (S.D.N.Y. 2021); *see also Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 142-43 (2d Cir. 1998). The parties agreed to the Court's consideration of written submissions in lieu of direct testimony, Dkt. No. 211, and have waived their right to cross-examine witnesses, Dkt. No. 243.

submitted in connection with their preliminary injunction motion, which included testimony by Michael Berzak, a licensed architect, Hugh Kelly, Lance Freeman, and the establishment owners; (2) the declarations and affidavits submitted in connection with their motion for partial summary judgment which included further declarations of Berzak and the establishment owners; and (3) a supplemental declaration of Berzak. Dkt. Nos. 211, 214. For their part, Defendants designated: (1) the declaration of Frank Ruchala, the DCP Zoning Director, submitted in connection with Defendants' summary judgment motion; and (2) the declarations of three City employees—Susan E. Amron, DCP General Counsel, Rodney Gittens, the Bronx Borough Commissioner of DOB, and Matthew Croswell, a Geographic Information Systems Team Lead and Open Data Coordinator at DCP—and the exhibits offered through those witnesses. Dkt. Nos. 211, 212. Both sides eschewed cross-examination and agreed that the case could be decided on the papers and oral argument. 11/9/2023 Minute Entry.[29] The Court has considered the parties' briefs on the motions for summary judgment as addressing the issues presented for trial.

CONCLUSIONS OF LAW

Plaintiffs bring suit under 42 U.S.C. § 1983 for alleged deprivations of their First and Fourteenth Amendment rights, and seek permanent injunctive relief enjoining

29. The parties have stipulated that Plaintiffs' various complaints in all of the suits should be deemed conformed to include allegations that DOB's permitting procedures are more onerous for adult establishments. Dkt. No. 208 at 2.

enforcement of the amortization provision and the vesting and permitting provision of the 2001 Amendments. *See, e.g.*, Dkt. No. 77 ¶¶ 178, 197, 205, 221; Dkt. No. 222 at 17, 50. The operative complaint in each action advances materially the same theories, on the view that the 2001 Amendments, if enforced, would decimate—and already have dramatically reduced—adult-oriented expression in violation of the First Amendment Free Expression Clause and the Fourteenth Amendment's Equal Protection Clause. *See* Dkt. No. 77; CM-ECF 02-cv-4432, Dkt. No. 26; CM-ECF 02-cv-8333, Dkt. No. 42; CM-ECF 18-cv-3732, Dkt. No. 78. Plaintiffs principally assert that the 2001 Amendments violate their First Amendment free expression rights by suppressing protected expression without any concomitant reduction in secondary effects and by failing to provide sufficient alternative avenues for adult expression. Dkt. No. 222 at 36. Plaintiffs claim that the number of adult establishments that would need to relocate is greater than the number of potential permissible sites for adult establishments that the regulations leave open.

Plaintiffs specifically allege that, by singling out non-conforming adult establishments for termination, the City's mandatory termination provisions violate the Fourteenth Amendment's equal protection guarantee and constitute an invalid content-based restriction in violation of the First Amendment. *See, e.g.*, *id.* at 31-49. Plaintiffs also challenge the permitting provisions of the 2001 Amendments, claiming that by imposing more onerous permitting rules on adult establishments, the Amendments afford sensitive receptors such as houses

of worship and schools a virtual "heckler's veto" over an adult use because such sensitive receptors would be able to establish priority ahead of an adult establishment that began the process earlier while the adult establishment is required to wait for approval of its application. *See, e.g.*, *id.* at 51-60. Plaintiffs further contend that the permitting scheme constitutes an impermissible prior restraint on speech in violation of the First Amendment and deprives them of equal protection of laws under the Fourteenth Amendment. *Id.* at 60-71.

The Bookstore Plaintiffs add that the 2001 Amendments deprive them of procedural and substantive due process in violation of the Fourteenth Amendment. CM-ECF 18-3732, Dkt. No. 78 ¶¶ 179, 184, 188; Dkt. No. 178 at 9-17. Specifically, they contend that the 2001 Amendments deprive them of a constitutionally protected property interest and ignore intervening changes to both the City and the bookstores arbitrarily. CM-ECF 18-3732, Dkt. No. 178 at 9-17.

To warrant permanent injunctive and declaratory relief, Plaintiffs "must succeed on the merits and 'show the absence of an adequate remedy at law and irreparable harm if the relief is not granted.'" *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) (Sotomayor, J.) (quoting *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) ("[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an

irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."). The Court thus begins with the merits. The Court first summarizes the legal standards against which the 2001 Amendments must be measured. It then analyzes each of Plaintiffs' merits arguments in turn. Because the Court ultimately concludes that Plaintiffs have not succeeded on the merits, the Court has no occasion to address the questions of adequate remedy at law and irreparable harm.

I. Constitutional Standards Applicable to Zoning Regulations That Target Adult Establishments

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. The Free Speech Clause has been incorporated against the States through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). "The First Amendment generally prevents government from 'proscribing speech . . . because [it] disapproves of the ideas expressed,' or mandating speech because it seeks to promote particular views." *Brokamp v. James*, 66 F.4th 374, 390-91 (2d Cir. 2023) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)). "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Ashcroft v. ACLU, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002). "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). Not all expression, however, is entitled to the same level of constitutional protection.[30] Political speech, because it is essential to a free and democratic society, enjoys the greatest constitutional protection. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 198, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992). Although the First Amendment's protection extends to sexually explicit films, presentations, and printed material,[31] *see, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)

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30. Commercial speech, for example, enjoys "only 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.'" *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 93 (2d Cir. 2010) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)).

31. Adult entertainment is distinct from obscenity, which is, broadly speaking, a category of speech that does not receive First Amendment protection. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (holding that the government may regulate speech as obscene if it (1) under community standards, appeals to the prurient interest; (2) taken as a whole, is a patently offensive depiction or description of sexual conduct; and (3) lacks serious literary, artistic, political, or scientific value). The parties here do not dispute that the entertainment at issue in this case is not obscene.

(motion pictures portraying nudity are protected); *Kois v. Wisconsin*, 408 U.S. 229, 231-32, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972) (sexually explicit poetry is protected), "the High Court has often treated adult entertainment establishments and the activities they support as different from 'core' First Amendment speech," and has upheld against constitutional challenge "restrictions that would almost certainly be unconstitutional if applied to pure political speech." *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 21 (2d Cir. 2010); *see Buzzetti v. City of New York*, 140 F.3d 134, 138 (2d Cir.), *cert. denied*, 525 U.S. 816, 119 S. Ct. 54, 142 L. Ed. 2d 42 (1998) (noting that a plurality of the Supreme Court had concluded that erotic materials are far from the "core" of First Amendment protections).[32] In particular, in a trilogy of cases beginning in the mid-1970s, the Supreme Court upheld against constitutional challenge zoning restrictions that single out adult entertainment establishments for differential treatment on the basis of their purported secondary effects on the neighborhoods in which they are located.

In its first decision on the subject in 1976, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310, the Supreme Court upheld, against free expression and equal protection challenges, a Detroit zoning provision that attempted to disperse adult

32. One might imagine a constitutional vision in which the celebration of the naked body enjoys greater protection than the Supreme Court now accords it. *See Miller v. Civil City of South Bend*, 904 F.2d 1081, 1090-1104 (7th Cir. 1990) (Posner, J., concurring). But, as discussed *infra*, that is not the interpretation that the Supreme Court has adopted.

entertainment establishments by prohibiting new adult theaters from locating within 1,000 feet of any two other adult uses, or within 500 feet of a residential area. *Id.* at 52, 63. The provision was an amendment to the city's "Anti-Skid Row Ordinance," which had been adopted ten years earlier based on findings by the Detroit Common Council that some uses of property, when concentrated, were especially injurious to their surrounding neighborhoods. *Id.* at 52-53. Five Justices agreed that the ordinance was constitutional, but no one rationale garnered the assent of a majority.

In his plurality opinion, Justice Stevens concluded that the zoning regulation was constitutional after concluding that it addressed only "where sexually explicit films may be exhibited" and did not totally suppress erotic materials, *id.* at 70, and that it was not directed at avoiding the dissemination of "offensive" speech but to the "secondary effect" of adult movie theaters in "caus[ing] the [surrounding] area to deteriorate and become a focus of crime," *id.* at 71 n.34. The plurality believed that the differential treatment accorded to speech of an erotic nature was "justified by the city's interest in preserving the character of its neighborhoods" and that, on the record before it, there was a "factual basis" for concluding that the ordinance would "have the desired effect." *Id.* at 71. Justice Stevens noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech," highlighting that the district court found that the burden on First Amendment rights would be "slight" because the zoning restrictions only applied to *new* businesses, not existing

ones, and, in any case, there remained "myriad locations" in Detroit in which new adult movie theaters could operate. *Id.* at 71 n.35.

Justice Powell, concurring, reached the same conclusion that the ordinance was constitutional, but through a different doctrinal route. Assessing the constitutionality of the ordinance under the test articulated in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), for regulation of conduct that only incidentally burdens speech,[33] Justice Powell concluded that the interests furthered by the ordinance were "both important and substantial"—"[w]ithout stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values." *Young*, 427 U.S. at 80 (Powell, J., concurring in the judgment). Justice Powell agreed with the plurality that the governmental interest in regulating adult establishments was "wholly unrelated to any suppression of free expression," and concluded that "the degree of incidental encroachment

33. *O'Brien* was not an adult entertainment case; it involved instead a Vietnam War protestor who claimed that the act of burning a draft card was constitutionally protected expression. 391 U.S. at 369-70. The Supreme Court rejected his claim, explaining that regulation of expressive conduct is sufficiently justified if (1) it is "within the constitutional power of the Government"; (2) "it furthers an important or substantial governmental interest"; (3) the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376-77.

upon such expression was the minimum necessary to further the purpose of the ordinance." *Id.* at 80-82. And while the constraints of the ordinance with respect to location "may indeed create economic loss for some who are engaged in this business" and "some prospective patrons may be inconvenienced by th[e] dispersal" required by the ordinance, Justice Powell concluded that the First Amendment "is not concerned with economic impact" but rather with "the effect of th[e] ordinance upon freedom of expression." *Id.* at 78-79. Justice Powell stressed that there was no indication in the record that application of the ordinance "to adult theaters has the effect of suppressing production of, or, to any significant degree, restricting access to adult movies." *Id.* at 77. A majority of Justices thus endorsed the proposition that zoning ordinances restricting where adult entertainment businesses are located could be justified by reference to its unwanted effects.[34]

The Supreme Court next confronted zoning ordinances regulating sexually oriented businesses ten years later in 1986, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, which ultimately built the reference to "secondary effects" from a footnote of the plurality opinion in *American Mini Theatres* into an analytical framework used to determine whether zoning ordinances that restrict the locations that adult establishments may operate comport with the First

34. In a decision five years after *American Mini Theatres*, the Supreme Court held that outright bans on adult entertainment establishments *did* violate the First Amendment. *See Schad v. Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981).

Amendment. The ordinance challenged in *Renton* resembled the ordinance at issue in *American Mini Theatres*—Renton, a small town in Washington, passed a zoning law preventing adult movie theaters from locating within 1,000 feet of any residential area, park, or church, or within one mile of a school.[35] *Id.* at 44. But, unlike in *American Mini Theatres*, Renton city leaders enacted the law without conducting any research to determine the alleged harmful impact of adult businesses in their jurisdiction, and instead relied on the experience and studies of other cities, such as nearby Seattle. *Id.* at 44-45.

Then-Justice Rehnquist, writing for the majority, upheld the zoning ordinance and articulated a three-step framework for reviewing the validity of a municipal zoning ordinance regulating adult entertainment establishments under the First Amendment. Step one of *Renton*'s test instructs courts reviewing zoning regulations of adult entertainment establishments to consider first whether the challenged rule constitutes an all-out ban on adult commercial activity. *Id.* at 46. If an ordinance "does not ban adult theaters altogether" but merely bans them from locating in certain parts of a municipality, the ordinance is properly understood as a time, place, and manner restriction. *Id.* Second, the court must determine whether the ordinance should be considered content-neutral or content-based. *Id.* at 46-47. To do so, the court

35. Although the Renton ordinance did not, by its terms, exempt existing adult businesses from its zoning rules as in the ordinance challenged in *American Mini Theatres*, it functioned that way, because at the time that it was enacted, Renton had no adult establishments. *See Renton*, 475 U.S. at 44.

must examine the municipality's purpose in enacting the ordinance. *Id.* at 47-48; *see Buzzetti*, 140 F.3d at 139 (holding that step two of *Renton* looks "to the overall purpose of the ordinance"). If the municipality justifies the ordinance by reference to the secondary effects caused by the adult entertainment establishments and not by reference to the content of the regulated speech, then the ordinance is appropriately judged as a content-neutral regulation. *Renton*, 475 U.S. at 48. At the third step, the court reviews the ordinance under either intermediate scrutiny or strict scrutiny. If the ordinance is deemed content-neutral at step two, the court, at step three, applies intermediate scrutiny and considers whether the "ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50. But if the law is deemed content based, the court applies strict scrutiny, under which the ordinance is presumptively invalid. *See id.* at 46-47; *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 817, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2009) ("Content-based regulations are presumptively invalid." (quoting *R.A.V.*, 505 U.S. at 382)).

Applying this test, the Supreme Court concluded that Renton's ordinance did not run afoul the First Amendment. At step one, the Court concluded that, because the ordinance did not ban adult theaters altogether, it was properly treated as a time, place, and manner restriction. *Renton*, 475 U.S. at 46. Turning to whether the ordinance was content-neutral at step two, the Court examined the motive underlying the ordinance. *Id.* at 46-47. Finding that the city's "predominate intent" in enacting the law was to pursue valid interests unrelated to the suppression of

expression, such as preventing crime, the Court deemed the law content-neutral. *Id.* at 47-48. Justice Rehnquist rejected the lower court's position that if "a motivating factor in enacting the ordinance was to restrict . . . First Amendments rights[,] the ordinance would be invalid." *Id.* at 47 (internal alterations and quotation marks omitted). So long as the municipality's predominate intent was not to suppress speech, other subordinate motivating factors were not fatal to the law. Satisfied that the law was content-neutral, the *Renton* Court found that the law survived both prongs of intermediate scrutiny at step three: it was narrowly tailored to serve a substantial government interest and allowed for reasonable alternative avenues of communication. *See id.* at 47. Reciting from the *American Mini Theatres* plurality opinion, the *Renton* Court reiterated that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect,'" and, further, deemed that government interest "vital." *Id.* at 50 (quoting *Am. Mini Theatres*, 427 U.S. at 71 (plurality opinion)). The fact that Renton had not undertaken its own study assessing the secondary effects of the adult establishments did not, on its own, diminish that substantial interest—"[t]he First Amendment does not require a city, before enacting . . . an [adult zoning] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The Court further found that the ordinance at issue was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Id.* at 52 (quoting

Schad, 452 U.S. at 75). Finally, the *Renton* majority concluded that the ordinance satisfied the second prong of intermediate scrutiny analysis. Because the ordinance left 520 acres, or approximately five percent of Renton's land area, open to use as adult theater sites, the Court found that the ordinance left available reasonable alternative avenues for communication. *Id.* at 53. It was irrelevant that the land was already occupied by existing businesses and that, in general, there were "no commercially viable adult theater sites within the 520 acres left open by the Renton ordinance." *Id.* (internal quotation marks omitted). The First Amendment, the Court resolved, did not require cities to make available sites only "at bargain prices." *Id.* at 54. Rather, "the First Amendment requires only that Renton refrain from effectively denying [adult entertainment establishments] a reasonable opportunity to open and operate an adult theater within the city." *Id.* The Renton ordinance, the Court resolved, "easily meets this requirement." *Id.*

Nearly two decades passed after *Renton* before the Supreme Court next addressed the constitutionality of adult zoning restrictions.[36] In 2002, the Supreme Court addressed the specific evidentiary burden that a municipality would have to shoulder to sustain a zoning ordinance directed at adult entertainment in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425,

36. Between its decisions in *Renton* and *Alameda Books*, the Supreme Court did reference the secondary effects doctrine in other opinions. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002), the last in its trilogy of adult entertainment zoning cases. At issue was the constitutionality of a Los Angeles ordinance that prohibited more than one adult entertainment business from operating in the same building or structure. *Id.* at 429. In 1978, the city passed an ordinance aimed at dispersing adult entertainment establishments by requiring, *inter alia*, any such business to be at least 1,000 feet from another such business. *Id.* at 430. The law was based on a study that Los Angeles had conducted in 1977, which found that concentrations of adult businesses were associated with higher rates of crime. *Id.* But, as adopted, the ordinance permitted multiple adult enterprises to locate in a single structure. *Id.* at 431. Concerned that allowing multiple adult businesses to congregate in one building could defeat the goal of the original ordinance, the city closed this apparent loophole by amending the ordinance to prohibit the operation of more than one adult entertainment business in the same building or structure. *Id.* at 429, 431. The Supreme Court rebuffed a First Amendment challenge to the amended ordinance based on the fact that the city had not conducted a study of the alleged harmful secondary effects of such multiple-use establishments specifically, holding that Los Angeles had proffered sufficient evidence to avoid summary judgment. As in *American Mini Theatres*, however, no line of reasoning garnered a majority of the votes.

Writing for the plurality, Justice O'Connor focused primarily on step three of the *Renton* analysis, and undertook "to clarify the standard for determining whether an ordinance serves a substantial government

interest under *Renton*." *Id.* at 433. The plurality concluded that it was "reasonable[] for Los Angeles to suppose [from the 1977 study] that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity." *Id.* at 436. It was thus "rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Id.* Below, the Ninth Circuit had held that the Los Angeles ordinance flunked the third step of the *Renton* test because the study upon which Los Angeles relied, which supported the original ordinance, could not support the logic upon which the amended ordinance was based—that the combination of adult businesses in one building specifically was associated with the harmful secondary effects that the study identified. *Id.* at 435. But, in reversing, the Supreme Court found that the Ninth Circuit set too high an evidentiary bar for the city. *Id.* at 438. To show a substantial government interest, it is sufficient, the Court said, that the "municipality's evidence . . . fairly support the municipality's rationale for its ordinance." *Id.* If the municipality does so, the burden shifts to the law's challengers to "cast direct doubt on this 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." *Id.* at 438-39. "If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to

the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

Justice Kennedy, concurring in the judgment, agreed with the plurality that the central holding of *Renton* was "sound" and that "[a] zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* at 448 (Kennedy, J., concurring in the judgment). But the Justice wrote separately to clarify the second step of the three-step *Renton* test. Specifically, he agreed with the dissent of Justice Souter, on behalf of himself and three other Justices, that zoning ordinances regulating adult entertainment are in fact content based, and that *Renton*'s categorization to the contrary was a legal "fiction." *Id.*; *see also id.* at 455 (Souter, J., dissenting). But, despite being content based, an adult zoning restriction "that is designed to decrease secondary effects and not speech," Justice Kennedy explained, was properly reviewed under intermediate, not strict, scrutiny. *Id.* at 448-49. Justice Kennedy went on to identify the showing he believed that a municipality must make at *Renton* step two in order to be entitled to the more deferential intermediate scrutiny review at step three. *See id.* at 449 (addressing the question of "what proposition [must] a city . . . advance in order to sustain a secondary-effects ordinance?"). He opined that "in order to justify a content-based zoning ordinance, . . . a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at

449. "A city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* It was insufficient in his view that a zoning ordinance would cause inconvenience that would "reduce demand and fewer patrons will lead to fewer secondary effects." *Id.* at 450. While agreeing with the plurality's assessment of the weight of the evidence that a municipality must show to support a substantial government interest at step three, Justice Kennedy explained that the plurality omitted the threshold question, at step two of the *Renton* framework, into "how speech will fare." *Id.* at 449-50. In order to enjoy intermediate scrutiny in the first place, the zoning ordinance must be designed to "reduce the costs of secondary effects without substantially reducing speech." *Id.*

The Second Circuit's most recent post-*Alameda* opinion on the standards to be applied to zoning restrictions on adult businesses is *TJS of New York, Inc. v. Town of Smithtown*, 598 F.3d 17 (2d Cir. 2010). There, the Second Circuit addressed the standards to be applied to a First Amendment challenge to a zoning ordinance that limited adult entertainment businesses to three kinds of zoning districts (shopping center business, light industry, and heavy industrial), that set a four-year amortization period, and that required adult entertainment uses to be located at least 500 feet from each other and from any residential district, park, playground, school, church, or similar place of public assembly. *Id.* at 19-20. The Circuit, recognizing that adult entertainment establishments are accorded "differential treatment" under the First Amendment, held that "if a zoning ordinance serves

'a substantial governmental interest *and allows for reasonable alternative avenues of communication*,' the First Amendment is satisfied." *Id.* at 21 (emphasis in original) (quoting *Renton*, 475 U.S. at 50). Addressing the third part of the three-part *Renton* test, Judge Calabresi then held that "in assessing the adequacy of alternative sites left open by a zoning ordinance, courts must consider the adequacy of alternatives available at the time the ordinance is challenged" and that "[t]his evaluation should account for circumstances as they exist at the time the court issues its judgment, or as close as is practicable to that time in light of the need for discovery and the presentation of evidence, as managed by the district court." *Id.* at 22-23. The court also addressed the standards to be applied in determining the adequacy of alternative sites. "[W]hether the acquisition or use of land [is] unprofitable or commercially impracticable [is] not relevant to [the] concept of availability." *Id.* at 27. In particular, "whether or not sites fit the specific needs of adult businesses—or any other precise type of commercial enterprise—is constitutionally irrelevant." *Id.* at 28. The availability inquiry turns upon "whether proposed sites are physically and legally available, and whether they are part of an actual commercial real estate market in the municipality." *Id.* at 27. "Sites that meet these criteria can qualify as available, even if they are in industrial and manufacturing zones." *Id.* at 28.

The parties spar over the standards to be applied to zoning ordinances directed to adult entertainment. In Plaintiffs' view, Dkt. No. 222 at 39, under Justice Kennedy's opinion and the Supreme Court's later decision

in *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), the 2001 Amendments are properly categorized as content based and thus subject to strict scrutiny, under which commercial practicability *is* relevant. On that view, as further expressed at oral argument, the Plaintiffs argue that the Second Circuit's *TJS* decision that commercial practicability is irrelevant did not take sufficient account of Justice Kennedy's plurality opinion and, in any case, that it cannot stand in light of *Reed*. Dkt. No. 222 at 39; Dkt. No. 229 at 22. Plaintiffs further contend that the appropriate question for the Court is how their protected speech will fare in fact based upon market conditions today if the 2001 Amendments are permitted to go into effect and whether that restriction on their speech can be justified today based upon any benefits the 2001 Amendments will have in reducing secondary effects. Plaintiffs argue that the 2001 Amendments flunk that test—speech will in fact be reduced and that reduction is disproportionate to any secondary effects that will be redressed. *See, e.g.*, Dkt. No. 222 at 34-39.

In this Court's view, Plaintiffs misread the law and the applicable precedents. As Justice Kennedy's vote was essential to the Court's judgment and as his opinion concurring in the judgment ruled on the narrowest grounds, it is entitled to controlling weight. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (explaining the significance of opinions concurring in the judgment and providing that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent

of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"); *see also Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1354 n.7 (11th Cir.), *cert. denied*, 563 U.S. 1033, 131 S. Ct. 2973, 180 L. Ed. 2d 247 (2011); *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1002 n.3 (9th Cir. 2007); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 722 (7th Cir. 2003). But neither Justice Kennedy's concurrence in *Alameda Books* nor the Supreme Court's decision in *Reed* require a zoning ordinance directed at sexually explicit expression to satisfy strict scrutiny, or otherwise alter the third step of the *Renton* test, and the law does not require the municipality to show commercial practicability at step two. In fact, Justice Kennedy noted several times that, so long as the municipality had the appropriate rationale and designed the ordinance to address the secondary effects, intermediate scrutiny applied. *Alameda Books*, 535 U.S. at 448 ("A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny."); *id.* at 449 ("[W]e apply intermediate rather than strict scrutiny."). Nor did *TJS* disregard Justice Kennedy's concurrence (and, in any event, this Court is not permitted to indulge the assumption that the Second Circuit did not take sufficient account of the current Supreme Court jurisprudence). *TJS* specifically took account of Justice Kennedy's *Alameda Books* concurrence. Citing to Justice Kennedy's concurrence, the *TJS* Court stated that determining whether zoning ordinances that target adult uses "are in fact content neutral is a tricky question," and noted that

"[t]he Court's assertion of the time, place, and manner test in [*American Mini Theatres*] notably omitted that test's traditional content-neutrality requirement." 598 F.3d at 22 n.5. Notwithstanding that it was "by no means clear whether or how the content-neutrality requirement that is central in time, place, and manner cases applies in adult entertainment cases," *id.* at 22, the court subjected the ordinance before it to the intermediate scrutiny test of *Renton*, *id.* at 22 n.5, under which the relevant question at step three was physical and legal availability rather than commercial practicability, *id.* at 27.

The Supreme Court's decision in *Reed* does not change that analysis or subject the 2001 Amendments to any greater scrutiny than that required by *TJS*. In *Reed*, in addressing a municipal sign code that treated certain signs differently from others depending on the category into which the sign fell (ideological, political, or temporary directional), the Supreme Court held that the sign code was "content based on its face" because the code's restrictions applied differently to different signs "depend[ing] entirely on the communicative content of the sign." 576 U.S. at 164. The Court explained that "[g]overnment regulation of speech is content based *if a law applies to particular speech because of the topic discussed* or the idea or message expressed," *id.* at 163 (emphasis added), and that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech," *id.* at 165. Plaintiffs reason that while it might have been unclear at the time of *TJS* whether strict

scrutiny applied to a zoning ordinance targeted at adult entertainment, that ambiguity was eliminated by *Reed*. Dkt. No. 222 at 33 n.27. Because the 2001 Amendments require the City to examine the content of the fare offered by Plaintiffs (and other like businesses) in determining where they are permitted to locate, Plaintiffs contend they are content based on their face and thus subject to strict scrutiny; the "reasonable alternatives" test of *TJS* and *Renton* is no longer sufficient. *Id.* at 38-41.

To the contrary, the Supreme Court has recently rejected an expansive reading of *Reed*, overruling a decision by an appellate court that read *Reed* broadly. In *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), the Fifth Circuit, deciding a case that, like *Reed*, involved restrictions on signage, read *Reed* as stating a categorical rule wherein the designation of a law as content based or content-neutral necessarily determines the degree of scrutiny applied: "[i]f [a law] is content neutral, then it is subject to intermediate scrutiny," but if it "is content based, then it is . . . subject to strict scrutiny." *Id.* at 702. From that, the Fifth Circuit decided that *Reed* abrogated much of its own First Amendment precedent that extended well beyond sign restrictions, including several of its previous secondary-effects decisions. *Id.* at 703 n.3. But the Supreme Court rejected the Fifth Circuit's approach as "too extreme" and reversed, finding that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 69-72, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022). And, more

fundamentally, Justice Breyer, who joined the majority opinion in full but also wrote separately, pointed out in his concurring opinion that the formalistic treatment of content-based laws as automatic triggers for strict scrutiny may well disserve First Amendment values. *Id.* at 78 (Breyer, J., concurring). As the Third Circuit noted in interpreting *City of Austin*, the decision simply "reaffirmed that classifications that consider function or purpose are not always content based." *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 149 (3d Cir. 2022), *cert. denied*, 144 S. Ct. 76, 217 L. Ed. 2d 13 (2023).

Judge Pauley, evaluating Plaintiffs' motion for a preliminary injunction, considered the same arguments Plaintiffs raise here, and concluded that "irrespective of the precise label that applies to adult-use zoning ordinances," the 2001 Amendments should be analyzed "through the lens of intermediate scrutiny." *725 Eatery Corp.*, 408 F. Supp. 3d at 463. The Court agrees. In the first instance, the Court "must follow a precedential opinion of the Second Circuit 'unless and until it is overruled . . . by the Second Circuit itself or unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit.'" *Grytsyk v. Morales*, 527 F. Supp. 3d 639, 653 (S.D.N.Y. 2021) (quoting *United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015), *aff'd*, 854 F.3d 197 (2d Cir. 2017)); *see also DoorDash, Inc. v. City of New York*, 2023 U.S. Dist. LEXIS 166408, 2023 WL 6118229, at *14 n.3 (S.D.N.Y. Sept. 19, 2023) ("[D]istrict courts are bound to follow controlling Second Circuit precedent unless that precedent is overruled or reversed." (internal quotation marks omitted)); *Medwig*

v. Long Island R.R., 2007 U.S. Dist. LEXIS 42001, 2007 WL 1659201, at *4 (S.D.N.Y. June 6, 2007) ("[E]ven if the [defendant's] prognostication as to the Supreme Court's thinking were correct, existing Second Circuit case law is squarely to the contrary. It is settled law that a district court in this Circuit is bound by such decisions unless and until they have been overruled by the Supreme Court or the law is otherwise changed." (internal citations omitted)). The Court is thus bound by the Second Circuit's decision in *TJS*. And even the Second Circuit is limited with respect to how it must treat Supreme Court precedent: "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

Reed did not effect a sea change in the First Amendment law to be applied to zoning ordinances directed at adult entertainment or undermine the foundations of *TJS*.[37] Well before *Reed* and before *TJS*, a majority of the Supreme Court recognized that to call zoning ordinances directed to adult entertainment content neutral was something of a misnomer. *See Am. Mini Theatres*, 427 U.S. at 67 (plurality opinion); *id.* at 76 (Powell, J., concurring). The

37. Indeed, the Second Circuit has read *Reed* narrowly not to upset "well settled precedent that 'restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.'" *Brokamp*, 66 F.4th at 396 (quoting *Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. at 72).

Second Circuit itself recognized that point in *TJS*. 598 F.3d at 22 n.5. The *American Mini Theatres* plurality studiously avoided justifying its decision on grounds of content neutrality. The plurality opinion recognized that the ordinance at issue discriminated on the basis of the content of speech, reasoning that "a difference in content may require a different governmental response," *Am. Mini Theatres*, 427 U.S. at 66, but nonetheless concluded that the appropriate questions were whether the ordinance was supported by a substantial governmental interest and provided alternative avenues for communication. In *Alameda Books* also, a majority of the Court—the dissent and Justice Kennedy in his concurrence—concluded that zoning ordinances addressed to adult entertainment are content based. *Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16-17, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (looking to the votes of dissenting Justices, combined with votes from the concurring opinion, to determine the applicable legal rule). In his dissent in *Alameda Books*, Justice Souter, joined by three other Justices, recognized that an adult zoning law has an "obvious relationship" to the content expressed by the adult business and that "while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content," that thus should be considered "content correlated." 535 U.S. at 456-57 (Souter, J., dissenting). Justice Kennedy agreed with the four dissenters, calling *Renton*'s step-two designation of the law at issue there as content-neutral a "fiction" that had only inconsistently been adhered to, and stating that, facially, regulations that targeted adult entertainment establishments "are content

based, and we should call them so." *Id.* at 448 (Kennedy, J., concurring). Nonetheless, five Justices—the plurality and Justice Kennedy—concluded that intermediate scrutiny was appropriately applied to the ordinance. *Id.* at 440 (plurality opinion); *id.* at 447 (Kennedy, J., concurring).

Thus, *Reed* did not change the law applicable to adult entertainment zoning ordinances. Although *Reed* may well have disclaimed the reasoning underlying the secondary effects doctrine, *Flanigan's Enters., Inc. v. City of Sandy Springs*, 703 F. App'x 929, 935 (11th Cir. 2017), *cert. denied*, 584 U.S. 1032, 138 S. Ct. 2623, 201 L. Ed. 2d 1027 (2018); *Free Speech Coalition, Inc. v. AG United States*, 825 F.3d 149, 160-61 (3d Cir. 2016), because *Reed* did not address the secondary-effects doctrine outright, the Court cannot now read it to abrogate any secondary-effects precedent, *see, e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) ("We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment."); *see also Ass'n of Club Execs. of Dall., Inc. v. City of Dallas*, 83 F.4th 958, 964 (5th Cir. 2023).

But even accepting Plaintiffs' position that *Reed* changed the applicable law as to whether ordinances are properly considered content neutral or content based, their argument still ultimately fails. Even if, under *Reed*, zoning laws such as the 2001 Amendments are not content neutral, a majority of the Supreme Court previously presupposed in *Alameda Books* that such zoning amendments are not content neutral and nonetheless held that they are subject to more relaxed scrutiny than that applied to, for example,

content-specific laws directed at political speech. Indeed, in her concurrence in *Reed*, Justice Kagan, joined by Justices Ginsburg and Breyer, recognized that the Court has sometimes been "less rigid . . . in applying strict scrutiny to facially content-based laws," and specifically cited *Renton* as one of those cases which involved a content-based law but to which the Court applied intermediate scrutiny. *Reed*, 576 U.S. at 183-84 (Kagan, J., concurring). And Justice Breyer, in his solo concurrence, noted persuasively that "content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny." *Id.* at 176 (Breyer, J., concurring). Plaintiffs' argument that *Reed* effectively overruled *TJS* or requires the Court to examine the commercial practicability of the alternative sites in assessing whether or not speech is content-neutral is thus without merit.

Justice Kennedy's concurrence in *Alameda Books* articulated different tests than that articulated by the plurality. But those tests do not require this Court to consider the current commercial practicability of alternative sites or how Plaintiffs' protected speech currently would fare in New York City relative to the benefits of the 2001 Amendments in addressing secondary effects. In his *Alameda Books* concurrence, Justice Kennedy addressed the second, not the third, step of the *Renton* test: specifically, "the claim a city must make in order to justify a content-based zoning ordinance," 535 U.S. at 449, or in other words, "what is the necessary rationale for applying intermediate scrutiny," *id.* at 450; *see also Peek-A-Boo Lounge of Bradenton, Inc. v.*

Manatee County, 337 F.3d 1251, 1264 (11th Cir. 2003), *cert. denied*, 541 U.S. 988, 124 S. Ct. 2016, 158 L. Ed. 2d 491 (2004) (holding that, under *Alameda Books*, the reviewing court must determine whether the ordinance is a time, place, and manner regulation; whether it should be subject to intermediate or strict scrutiny; and whether, if subject to intermediate scrutiny, it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication). His concurrence can only be understood in the context of the opinion to which he was responding. The *Alameda Books* plurality believed that the claim necessary to establish content neutrality and to justify intermediate scrutiny was a relatively modest one. It stated that an ordinance would be deemed content neutral so long as it "was aimed not at the content of the films shown at adult theaters but rather at the secondary effects of such theaters." *Alameda Books*, 535 U.S. at 434 (citing *Renton*, 475 U.S. at 47-49). Nothing more was necessary. It is this proposition that Justice Kennedy took aim at in his opinion concurring in the judgment. In his view, the plurality's analysis "fail[ed] to capture an important part of the inquiry." *Id.* at 450. On its face, labeling as content neutral an adult entertainment zoning ordinance because it is aimed at the secondary effects of adult theaters could "justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer side effects." *Id.*; *see also id.* at 445 ("[A] city may not regulate the secondary effects of speech by suppressing the speech itself."). It could be said that such a tax was content neutral and, on the plurality's understanding, would support intermediate scrutiny because it was aimed at secondary effects.

Indeed, on the plurality's reasoning, an absolute ban could be said to be aimed at secondary effects. But in Justice Kennedy's view, more was necessary to justify applying intermediate scrutiny: "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech." *Id.* at 450. The aim had to be to reduce secondary effects without substantially reducing speech and not just to reduce secondary effects, *vel non*.

Plaintiffs would have it that the effect of the ordinance in reducing secondary effects as well as its impact on speech is judged after the fact—at the time the ordinance is challenged—and that if the ordinance is ineffective at addressing secondary effects or if the burden on speech outweighs its amelioration of secondary effects at the time of the litigation, then the ordinance is subject to strict scrutiny, a rigorous standard that the City cannot meet. Dkt. No. 222 at 35-36, 42; Dkt. No. 225 at 19; Dkt. No. 226 at 5-6. They assert that Defendants must show "a net gain in reduction of secondary effects which *substantially* outweighs any impact in reducing expression." Dkt. No. 226 at 6. Justice Kennedy's opinion in *Alameda Books*, however, cannot bear the weight Plaintiffs place on it. In Justice Kennedy's view, the relevant question at step two of the *Renton* test is not how speech fares in fact at the time of the litigation, but the rationale of the municipality for the ordinance in the first place, and the municipality's consideration of how speech will fare. Step two of *Renton* looks to the municipality's justification and whether there is some evidence to support it. Just as the municipality

must have some pre-enactment evidence of secondary effects, *see White River Amusement Pub., Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007), so too must it have some pre-enactment information regarding how speech will fare under the ordinance, *see Tollis, Inc. v. County of San Diego*, 505 F.3d 935, 940 (9th Cir. 2007), *cert. denied*, 553 U.S. 1066, 128 S. Ct. 2514, 171 L. Ed. 2d 788 (2008). If the municipality's rationale is one to redistribute the locations where speech occurs without reducing its volume or quantity in order to address secondary effects and not simply to ban or reduce speech outright, then the ordinance is subject to intermediate scrutiny and the alternative avenues for communication are judged at step three of *Renton* based on physical and legal availability at the time of the litigation.

This conclusion is supported by a close reading of Justice Kennedy's opinion in *Alameda Books*. The Justice himself recognized that the exercise was a predictive one. He stated: "A zoning measure can be consistent with the First Amendment if it is *likely* to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech." *Alameda Books*, 535 U.S. at 445 (emphasis added). The question, Justice Kennedy explained, is "how speech *will* fare," not how it has fared. *Id.* at 450 (emphasis added). The opinion is replete with references to the purpose of the ordinance, its design, and its underlying motive. *Id.* at 447 ("[A] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it."); *id.* at 448 (describing the purpose of the ordinance in *Renton*); *id.* ("A zoning restriction that is designed to decrease

secondary effects and not speech should be subject to intermediate rather than strict scrutiny."); *id.* at 449 ("[Z]oning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose."); *id.* ("The zoning context provides a built-in legitimate rationale."); *id.* at 449-50 ("The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech."). This reading also is consistent with the notion in Justice Kennedy's opinion, expressed with respect to the third step, that "a city must have latitude to experiment, at least at the outset." *Id.* at 451. Although there is some ambiguity in that latter statement, it suggests—as common sense does—that a municipality need not know the result of its experiment before the ordinance it has adopted is entitled to intermediate scrutiny. *See Imaginary Images, Inc. v. Evans*, 612 F.3d 736 (4th Cir. 2010) (finding that a municipality "may demonstrate the efficacy of its method of reducing secondary effects 'by appeal to common sense,' rather than 'empirical data'" (quoting *Alameda Books*, 535 U.S. at 439-40 (plurality opinion))). Thus, the relevant question here is the City's rationale at the time of adoption and whether at the time of adoption there is "sufficient evidence to support the proposition," *Alameda Books*, 535 U.S. at 451 (Kenendy, J., concurring), and not any post-hoc analysis of either the effectiveness in reducing secondary effects or the impact in fact on speech.

This reading of *Renton* and of Justice Kennedy's concurrence in *Alameda Books* is also not inconsistent with *TJS*. It simply adds another layer to the analysis.

The *TJS* Court assumed that an ordinance targeting adult uses would satisfy "whatever content-neutrality requirement may apply to adult entertainment zoning ordinances." 598 F.3d at 22 n.5. It stated broadly that "if a zoning ordinance serves 'a substantial governmental interest *and allows for reasonable alternative avenues of communication*,' the First Amendment is satisfied." *Id.* at 21 (emphasis in original) (quoting *Renton*, 475 U.S. at 50). It then addressed the third part of the *Renton* test and what specifically is required by the "reasonable alternative avenues of communication" requirement and when it should be measured, concluding that it should be measured at or as near as possible to when the court issues its judgment. *Id.* at 23. *TJS* left open the question whether the adequacy of the sites left available by an ordinance at the time of the ordinance's passage was relevant to the constitutional analysis. 598 F.3d at 24. In this Court's view, Justice Kennedy's concurrence in *Alameda Books* answers that question, but with a twist. The question is relevant, but it is relevant to step two of the *Renton* analysis (which looks to expectations at the time of passage), and is part of a broader inquiry into the municipality's reasonable expectations regarding how speech will fare when the ordinance is given effect. The municipality cannot know for sure how an ordinance will affect speech before the ordinance is adopted.

The Court's interpretation that *Alameda Books* requires consideration, at step two, of whether the municipality considered how speech would fare under its contemplated ordinance also gives independent meaning to Justice Kennedy's opinion concurring in the judgment.

The Court thus respectfully disagrees with the opinions of other courts to the extent that they suggest that the Kennedy concurrence did not add anything to the analysis of the majority in *Alameda Books* and *Renton*. *See, e.g.*, *Ctr. for Fair Pub. Pol'y v. Maricopa County*, 336 F.3d 1153, 1162 (9th Cir. 2003), *cert. denied*, 541 U.S. 973, 124 S. Ct. 1879, 158 L. Ed. 2d 468 (2004) ("Given his emphatic reaffirmance of *Renton*, we are not persuaded that Justice Kennedy meant to precipitate a sea change in this particular corner of First Amendment law."). The Court does not assume that an opinion concurring in the judgment adds nothing to the reasoning expressed in the plurality opinion. Justice Kennedy concurred in the judgment without joining the plurality opinion. The Court also disagrees with those courts that have concluded that Justice Kennedy's opinion concerns step three of the *Renton* analysis.[38] *See, e.g.*, *Ass'n of Club Execs. of Dall.*, 83 F.4th at 969 ("It is mostly [with respect to the alternative avenues of communication part of *Renton*] that Justice Kennedy's controlling opinion in *Alameda Books* differs from the plurality."); *World Wide Video*

38. There is one part of Justice Kennedy's concurrence in *Alameda Books* that does appear to speak to the results of the ordinance. In laying out the general principles applied before a zoning ordinance is given intermediate scrutiny, Justice Kennedy announced that "[t]he purpose *and effect* of a zoning ordinance must be to reduce secondary effects and not to reduce speech." *Alameda Books*, 575 U.S. at 445 (emphasis added). That dictum, however, cannot be read in context to require the municipality to show at the time of challenge that the ordinance has not, in fact, resulted in any decrease in adult speech. Immediately after that sentence, Justice Kennedy makes clear that the inquiry is prospective and looks to the effect that the ordinance is "likely" to have. *Id.*

of Wash., Inc. v. City of Spokane, 368 F.3d 1186, 1195 (9th Cir. 2004) (holding that Kennedy inquiry "dovetails with the requirement that an ordinance must leave open adequate ample alternatives of communication" at step three of *Renton*); *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 409 n.4 (7th Cir. 2004). *Renton*'s third step concerns the government's interest in enacting the law, and whether, as a legal matter, the zoning ordinance leaves open alternative avenues for communication—an inquiry that, as *TJS* establishes, is measured at the time of the litigation. Collapsing Justice Kennedy's opinion into step three would deprive it of any force—while Justice Kennedy asked about how speech would fare under an adult zoning ordinance, *Renton* step three, at least as articulated in *TJS*, is directed to reasonable alternatives in fact and does not require commercial practicability. In the Court's judgment, Justice Kennedy's opinion goes to an issue different but no less important than whether the law leaves reasonable alternatives—the City's motivation at the time of the ordinance's passage at *Renton*'s second step. Before a zoning ordinance is entitled to intermediate scrutiny at all, the ordinance must be based on a reasoned judgment based on fact that its effect will not be to substantially reduce the quantity and accessibility of protected speech. *See Tollis*, 505 F.3d at 940 (holding that Justice Kennedy's requirement that the quantity of speech not be substantially undiminished requires the municipality "at the time of enactment" to have "some reasonable basis to believe that interested patrons would, for the most part, be undeterred by the geographic dispersal of the adult establishments").

With the relevant legal framework and standards in hand, the Court turns to Plaintiffs' claims that the 2001 Amendments violate the First Amendment. The Court first analyzes whether the 2001 Amendments are unconstitutional on their face. Concluding that the 2001 Amendments do not run afoul the First Amendment, the Court turns next to the definitional portions of the whether the definitional provisions of the 2001 Amendments or the amortization provisions of the 2001 Amendments render the 2001 Amendments unconstitutional, before turning to Plaintiffs' challenges to the permitting and vesting requirements.

II. Plaintiffs' Challenge to the Definitional Portions of the 2001 Amendments

Plaintiffs challenge the constitutionality of the definitional change contemplated by the 2001 Amendments, which, by eliminating the 60/40 exemption, would place 60/40 businesses within the purview of the adult-specific zoning restrictions. Dkt. No. 225 at 3-33. But the Court, applying the *Renton* test as clarified by Justice Kennedy's concurrence in *Alameda Books*, finds that the definitional portions of the 2001 Amendments do not violate the First Amendment. The 2001 Amendments do not ban protected speech, are properly deemed content-neutral, are supported by a substantial governmental interest, and leave available ample alternative avenues for speech.

Appendix B

A. *Renton* Step One: Time, Place, and Manner Restriction

The Court's first inquiry under *Renton*'s test, left untouched by *Alameda Books*, is whether the 2001 Amendments constitute a time, place, and manner restriction. *Renton*, 475 U.S. at 46. There is no dispute that the 2001 Amendments do not impose an all-out ban on protected speech. The 2001 Amendments are zoning rules that function to exclude adult entertainment establishments from operating in certain locations in New York City while permitting them elsewhere. They are exactly the type of restriction that *Renton* and lower courts have uniformly found to constitute time, place, and manner restrictions. *See, e.g.*, *id.*; *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 870 (11th Cir. 2007), *cert. denied*, 552 U.S. 1183, 128 S. Ct. 1246, 170 L. Ed. 2d 66 (2008); *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 58 (1st Cir. 1999), *cert. denied*, 529 U.S. 1110, 120 S. Ct. 1965, 146 L. Ed. 2d 796 (2000). In other words, the 2001 Amendments regulate where such speech can be delivered within the City of New York but not whether it can be delivered at all. The 2001 Amendments thus constitute a time, place, and manner restriction under the first part of the *Renton* test.

B. *Renton* Step Two: Content Neutrality

The second step of *Renton*, as refined by Justice Kennedy's concurrence in *Alameda Books*, looks to the overall purpose of the zoning ordinance rationale of the municipality in enacting the ordinance and whether the

regulation is "targeted not at the activity, but at its side effects." *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring in the judgment). Under the *Renton* test, the 2001 Amendments are properly considered content-neutral.

As Justice Kennedy instructed in *Alameda Books*, step two of the *Renton* test requires the municipality to demonstrate that it targeted the side effects of adult entertainment and has made a reasoned judgment that its ordinance will address the secondary effects caused by sexually explicit speech without substantially decreasing the quantity or accessibility of such speech. 535 U.S. at 448-49 (Kennedy, J., concurring in the judgment); *see Mastrovincenzo v. City of New York*, 435 F.3d 78, 98 (2d Cir. 2006) ("Regulations that target 'only [the] potentially harmful secondary effects of speech' are . . . content-neutral and trigger intermediate, rather than strict, scrutiny." (quoting *Hobbs v. County of Westchester*, 397 F.3d 133, 148 (2d Cir.), *cert. denied*, 546 U.S. 815, 126 S. Ct. 340, 163 L. Ed. 2d 51 (2005))); *see also Alameda Books*, 535 U.S. at 440-41 (plurality opinion) (explaining that *Renton*'s inquiry at step two "requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech]'" (quoting *Renton*, 475 U.S. at 47)). As the Court reads Justice Kennedy's test, it also requires the municipality to show that it had a sufficient basis to support its beliefs both that the adult entertainment businesses are associated with negative secondary effects, and that its ordinance would leave the quantity of the speech of the adult businesses substantially

undisturbed and available. *See Alameda Books*, 535 U.S. at 448-49.

In adopting the 2001 Amendments, the CPC and the City Council sought to regulate the locations where sexually explicit speech would be available in New York City, not the amount of sexually explicit speech that would be available. The record establishes that the City acted, not out of hostility toward the content of the speech purveyed by vendors of adult entertainment, but out of concern for the secondary effects of that speech. The DCP Study, the 1995 CPC Report, and the 2001 CPC Report, individually and together reflect a reasoned view by the City that adult entertainment as then currently zoned created pernicious secondary effects on the urban environment and an effort by the City to address those secondary effects by changing the locations where adult entertainment could be seen rather, than by reducing the volume of adult entertainment. The DCP Study recited that numerous studies in other localities found that adult entertainment uses have negative secondary effects. DCP Study at 302. That finding was repeated in the 1995 CPC Report. *See* 1995 CPC Report at 433-39. As the CPC explained, each provision of the 1995 Regulations was "designed to minimize the potential for adverse secondary effects throughout the city and provide additional protection to . . . uses particularly vulnerable to the negative effects of adult uses." *Id.* at 442. Specifically, the anti-concentration provision, requiring adult uses to maintain at least 500 feet of distance between each other, "guarantee[d] that no community will see a concentration of adult uses." *Id.* The size limitation, restricting the

maximum size of adult entertainment establishments to 10,000 square feet, further ensured, according to CPC, that no community would "see a 'de facto' concentration of adult uses within a single establishment." *Id.* And the requirement that adult establishments maintain at least 500 feet of distance from residential areas and sensitive receptors such as schools "protects sensitive residential areas" as well as "families and children from the detrimental effects of adult establishments." *Id.* at 442-43. But, the CPC explained, "the regulations continue to provide ample opportunity throughout the city for the location and relocation of adult uses" to sites easily accessible by public transportation. *Id.* at 444. The 2001 Amendments are, in substance, nearly identical to the 1995 Regulations. There was little reason to think, then, that the 2001 Amendments would burden speech in a way that the 1995 Amendments did not. But Defendants nevertheless undertook studies and hearings in 2001 to evaluate the effect of the 2001 Amendments. For example, in its environmental review, the City found that the 2001 Amendments would "remove the secondary effects of these establishments and is expected to have a revitalizing effect on the business climate as well as help promote an improved residential environment." City Environmental Assessment at 530. These studies reflect that the City had a basis for believing that establishments that regularly offer predominantly sexually explicit fare foster urban delay and generate pernicious side effects, including crime, reduced real estate values, and decreased quality of living. The City also confirmed that there was adequate space for adult entertainment establishments that would be forced to relocate under the 2001 Amendments. *See, e.g.*, Sec. Karnovsky Aff. ¶ 87.

The CPC and the City Council were not oblivious to the effects of the 2001 Amendments on the amount and accessibility of sexually explicit speech. In the course of proposing the amendments, the City expressly considered whether there would be alternative sites to which adult establishments could relocate if the ordinance were passed, and concluded that there would be; of the 101 60/40 establishments operating in prohibited locations, the City estimated that there were over 400 sites to which they could relocate. *Id.* It concluded that even if all 101 adult establishments sought to relocate, "there would be sufficient capacity and locational opportunities for these and future adult establishments in commercial and manufacturing areas in which adult establishments are allowed," even accounting for potential rezoning. *Id.* at 531. The City thus was cognizant of the First Amendment interests at stake and sought to protect them.

Plaintiffs complain that the 2001 CPC Report in particular did not contain any independent findings regarding the secondary effects of adult entertainment establishments generally and 60/40 establishments specifically. Dkt. No. 225 at 13, 17; Dkt. No. 253 ("Nov. 29 Oral Arg. Tr.") at 12-13. The argument echoes those presented at the CPC hearings regarding the 2001 Amendments. Plaintiffs reason that, had the City looked at the 60/40 clubs in particular, it would have found that they were fewer in number, Dkt. No. 222 at 5-7, and "not creating the kinds of problems that they had in mind when they did the 1995 ordinance," Nov. 29 Oral Arg. Tr. at 12-13; *see* Dkt. No. 226 at 11. In short, Plaintiffs assert that the 60/40 businesses "were not causing significant

problems for the City." Dkt. No. 222 at 7. That argument, however, holds the City to an improperly high burden and is effectively foreclosed by *Renton* and *Alameda Books*. *Renton* established that cities may rely on the studies, reports, and experiences of other cities "that [are] reasonably believed to be relevant to the problem." 475 U.S. at 51-52; *see Exec. Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 796 (6th Cir. 2004). By extension, then, *Renton* forecloses any argument that a municipality is obligated to find a link between the *specific* adult entertainment establishments that it seeks to regulate and negative secondary effects. The City was not required to update the 1994 and 1995 findings in order to remedy what it concluded was a loophole in the 1995 Regulations in 2001, just as Los Angeles was not required to update its study to justify its zoning amendment in *Alameda Books*. In *Alameda Books*, the plurality and Justice Kennedy agreed that a five-year-old study that did not study the exact type of regulated business could be used to draw inferences to support the amended ordinance, 535 U.S. at 436 (plurality opinion); *id.* at 451 (Kennedy, J., concurring in the judgment). Lower courts have reached the same conclusion. *See, e.g., Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512, 522-23 (6th Cir. 2009); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003), *cert. denied*, 543 U.S. 812, 125 S. Ct. 49, 160 L. Ed. 2d 16 (2004).

Here, the evidence that Defendants relied on to justify the zoning law is sufficient to meet their burden. The studies summarized by the DCP and relied upon

to justify the 1995 Regulations, including the studies of other municipalities, supported the inclusion of 60/40 establishments within the definition of an adult establishment. *Cf. Andy's Rest. & Lounge, Inc. v. City of Gary*, 466 F.3d 550, 555 (7th Cir. 2006) (concluding that the municipality had met its burden by asserting "numerous studies evidencing the secondary effects of sexually oriented businesses"). Those studies did not limit themselves to adult establishments that devoted more than 40% of its floor space to an adult use—"[f]or purposes of the DCP survey, an adult entertainment establishment is a commercial use that defines itself as such through exterior signs and other advertisements." DCP Study at 312. The DCP Study acknowledged that "[t]here is a vast array of businesses that may be considered 'adult,'" and that "'adult use' is technically defined differently from municipality to municipality, but generally refers to a commercial establishment that purveys materials or services of a sexual nature." *Id.* at 312-13. But the DCP nonetheless concluded from the studies, including those of other municipalities, which spanned over a decade, that businesses that predominantly offered sexually explicit fare generated secondary effects that could be addressed through zoning that supported the 1995 Regulations. *See id.* at 314-20, 370-72; *see also* 1995 CPC Report at 449 ("[C]ommercial enterprises with a predominant, on-going focus on sexually explicit materials or activities [which] were analyzed in the DCP Study and found to have adverse secondary effects."). The City was no less entitled to rely on the same studies to reach the same conclusion just a few years later in 2001 that those types of businesses generated secondary effects that could be productively addressed through zoning.

The City also was not required, in 2001, to analyze the secondary effects of 60/40 businesses in particular to make out the showing necessary to trigger intermediate scrutiny. Just as Los Angeles could rely on evidence from its study, conducted five years before the ordinance at issue was enacted and not addressed to the specific type of adult use, to justify its law, *Alameda Books*, 535 U.S. at 440 (plurality opinion), the City here may rely on the DCP Study, conducted seven years before the 2001 Amendments were enacted, to justify its law. The 1995 CPC Report, summarizing the DCP Study, explained that the DCP had concluded that establishments "with a predominant, on-going focus on sexually explicit materials or activities," including book and video stores, theaters, eating or drinking establishments and other commercial enterprises, generated negative secondary effects. 1995 CPC Report at 449. The DCP's conclusion was based on a review of studies in other jurisdictions that were not particular to the floor space devoted to sexually explicit fare or the portion of the enterprise that sold sexually explicit material relative to the portion that did not. DCP Study at 314-22. It also was based on reviews of the effects of adult establishments in Times Square and Chelsea that were indifferent to the portion of floor space addressed to adult entertainment. *Id.* at 372-73. Although the CPC opined that "[a]s a general guideline, . . . an establishment would need to have at least 40 percent of its accessible floor area used for adult purposes to make it similar to the establishments studied in the DCP Study and thus be an 'adult establishment' or 'adult bookstore,'" that was only as an attempted refinement of the point that it was establishments with

a "predominant, on-going focus" on sexually explicit materials specifically that created secondary effects. 1995 CPC Report at 449-50. The studies of other municipalities and the City's own examination support the reasonable judgment that 60/40 establishments—no less than 100% adult establishments—generated secondary effects. *Cf. Zibtluda, LLC v. Gwinnett County*, 411 F.3d 1278, 1286 (11th Cir. 2005) (finding that the county sufficiently supported its ordinance by citing to studies from different locations, conducting a public hearing, and collecting testimony from law enforcement and economics experts); *Gammoh*, 395 F.3d at 1126 (finding that municipality had met its initial burden by relying upon judicial decisions in other cases, reports and studies from other jurisdictions, and testimony by municipality employees and people affected by the regulations); *Ben's Bar*, 316 F.3d at 725-26 (holding that city had met its initial burden by relying upon studies, reports and judicial decisions from other locations); *McKibben v. Snohomish County*, 72 F. Supp. 3d 1190, 1196 (W.D. Wash. 2014) (where regulatory body "held at least ten meetings; reviewed studies of the secondary effects of adult entertainment, sample ordinances from other jurisdictions, and federal and state court decisions; heard testimony from law enforcement officers and community members regarding the effects of adult entertainment businesses' held a public hearing; and authored a final report proposing certain regulations of adult businesses," it has met its constitutional obligation to link its ordinance with the negative secondary effects it sought to eradicate).

The City thus was within its rights to determine that the 2001 Amendments were necessary to patch the

loophole created by the 1995 Regulations and by the two DOB guidance documents. The 1998 DOB OPPNs were not themselves based on any judgment by DOB or the CPC or City Council that 60/40 establishments did *not* generate negative secondary effects. The OPPNs were addressed to a different issue—the concern that the zoning regulations as drafted in 1995 were vague and might inadvertently draft in non-adult establishments that offered some small portion of adult fare, *i.e.*, establishments that would not be considered to be adult bookstores even under the 2001 Amendments. *See, e.g.*, Dkt. No. 162-1, Ex. 12, at 128 (providing that "[g]eneral interest stores, including general interest book and video stores, with a section of adult materials that is modest in scale as compared to the overall size or stock of the store, are not intended to be covered by the adult establishment definition" in the 1995 Regulations). In fact, the DCP Study, conducted in 1994, flagged that "newsstands, bookstores and many general interest video stores also provide adult viewing material." DCP Study at 370. And the 1995 CPC Report said expressly stated that "adult sections in general interest video and bookstores will be unaffected by the regulations and will provide an additional outlet for adult materials. 1995 CPC Report at 445. As the CPC later summarized, "[a]doption of the 'substantial portion' floor area test . . . was . . . considered important to avoid forcing small neighborhood video or bookstores with only a small amount of adult material to close or move." 2001 CPC Report at 690. The City consistently took the view that establishments that predominantly offered sexual fare, if not zoned, would generate negative secondary effects. *See, e.g.*, Karnovksy Aff. ¶¶ 36, 48.

Appendix B

New York City's judgment in 2001 to regulate 60/40 establishments was based upon on a nearly 200-page report in 2001 addressed almost entirely to the effects of those establishments. *See generally* 2001 CPC Report. In addition to the conclusions from the DCP Study and 1995 CPC Report, the City relied upon additional data collected beginning in 1998, when enforcement of the 1995 Regulations went into place. The 2001 CPC Report concluded that "[e]nforcement efforts . . . since 1998 have demonstrated a need to amend" the 1995 Regulations, explaining that "[i]n the case of book and video stores," a law "which emphasizes the relative amounts of adult and non-adult books or videos and a comparison of the amount of floor area devoted to each type of material is, alone, an insufficient measure of whether a book or video store has a 'predominant on-going' focus on sexually explicit materials." *Id.* at 691. The CPC recounted evasion measures that 60/40 businesses took that revealed the inadequacy of the 60/40 rule. Adult eating and drinking establishments—seemingly never intended to fall within the 60/40 exemption—"erected partitions so as to limit their regularly features adult entertainment to less than 40 percent of the total floor area accessible to customers." Karnovsky Aff. ¶ 47. 60/40 bookstores had, for example, purchased inexpensive books and videos, sometimes dozens of the same title, which were stacked haphazardly around the stores or simply left unopened in their boxes on store floors. 2001 CPC Report at 691-92. The CPC found that adult eating and drinking establishments had also evaded the spirit and intent of the 1995 Regulations and the 60/40 Rule, with clubs claiming compliance through "artificial separation of adult eating or drinking

establishments into purportedly 'adult' and 'non-adult' sections." *Id.* at 695.

In *Alameda Books*, five Justices—whether addressing the point at step two or step three—agreed that the City of Los Angeles was justified in reasoning that evidence that the high concentrations of adult establishments within a particular geographic area was associated with high crime rates in that area to the conclusion that the concentration of adult operations within a single large establishment would also be associated with high crime rates. 535 U.S. at 436 (plurality opinion); *id.* at 451 (Kennedy, J., concurring in the judgment). The plurality clarified that it was "rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, [would] reduce crime rates." *Id.* at 436. It was not necessary for the city to analyze the secondary effects created specifically by adult businesses in one large establishment. That judgment sufficiently satisfied Justice Kennedy that he joined in the conclusion of the plurality. *Id.* at 449 (stating that "[t]he plurality . . . gives the correct answer" to the question).

The same logic applies here. It was rational for the City to conclude that, if a business exclusively devoted to sexually explicit materials would be associated with negative secondary effects, so would a business predominantly focused on sexually explicit materials. The City need not have conducted an analysis of the effects of the 60/40 establishments in particular.

For the foregoing reasons, the Court finds that the City has sufficiently shown that the purpose of the 2001 Amendments was to address secondary effects rather than suppress speech, and that it accounted for how the 2001 Amendments would affect speech. Accordingly, the 2001 Amendments are subject to intermediate scrutiny.

C. *Renton* Step Three: Intermediate Scrutiny

Finally, the 2001 Amendments satisfy the third step of the *Renton* test. "[I]f a zoning ordinance serves 'a substantial governmental interest and allows for reasonable alternative avenues of communication,' the First Amendment is satisfied." *TJS*, 598 F.3d at 21 (quoting *Renton*, 475 U.S. at 50). Unlike *Renton* step two, step three calls for the Court to make an objective inquiry into whether the ordinance in fact serves a substantial governmental interest and whether, at the time of adjudication, there are alternative avenues of communication. Defendants have met their burden to show both. Plaintiffs' studies do not cast doubt on the City's rationale.

1. Substantial Government Interest

The Supreme Court has repeatedly held that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Renton*, 475 U.S. at 50 (quoting *Am. Mini Theatres*, 427 U.S. at 71); *see Buzzetti*, 140 F.3d at 140 ("[T]he Supreme Court has made clear that concerns similar to those advanced by New York City, such as preventing crime, maintaining

property values, and preserving the quality of urban life and the character of city neighborhoods, constitute 'substantial governmental interest[s].'" (quoting *Renton*, 475 U.S. at 48, 50)). In order to withstand constitutional scrutiny under step three of the *Renton* test, it thus is sufficient that a municipality "demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books*, 535 U.S. at 441 (plurality opinion). "[A] municipality may rely on *any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438 (emphasis added) (quoting *Renton*, 475 U.S. at 51-52). If the municipality offers evidence that "fairly support[s] the municipality's rationale for its ordinance," the burden falls to the plaintiff "to cast direct doubt on this 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." *Id.* at 438-39. If the plaintiff succeeds, the burden shifts back to the municipality "to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

In making its case at the outset, "[a] city need not prove that . . . a link exists [between sexually explicit speech and secondary effects] or prove that its ordinance will be effective in suppressing secondary effects." *White River Amusement Pub*, 481 F.3d at 171. The zoning ordinance is reviewed under intermediate scrutiny. Under intermediate scrutiny, although the City may not "get away with shoddy data or reasoning," *Alameda Books*,

535 U.S. at 438 (plurality opinion), it also need not rule out every other theory that would plausibly explain its data, *id.* at 437-38.

Defendants have satisfied this test. The City has presented evidence, which is not contradicted here, that "despite formal compliance with the 60/40 formula, [the 60/40] businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed." *People Theatres*, 79 N.E.3d at 468. Defendants have also presented evidence from the DCP Study that adult uses generally and those businesses with a predominant on-going focus on sexually explicit materials in particular have negative secondary effects such as increased crime rates, depreciation of property values, deterioration of community character, and the quality of urban life. It also has presented and considered evidence from New York City that areas where adult uses are most concentrated have a higher incidence of criminal activity. DCP Study at 309-10. It further presented evidence that the growth of adult businesses was accompanied by a decline in the overall economic vitality of the community. *Id.* at 360-69. As noted, in 2001, DCP reviewed enforcement efforts since 1998 and found that "a focus on the relative amounts of adult and non-adult books or videos and a comparison of the amount of floor area devoted to each type of material are, alone, insufficient measures of whether a book or video store has a 'predominant on-going' focus on sexually explicit materials." 2001 DCP Application at 483-84; *see also* 2001 CPC Report at 691. That evidence is sufficient to show a connection between the explicit speech to be regulated

and a substantial, independent government interest. *See People Theatres*, 79 N.E.3d at 474-75; *White River Amusement Pub*, 481 F.3d at 171 (municipality must rely on some evidence reasonably believed to be relevant); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997) (finding that a city's experience with crime-ridden adult cabaret fifteen years before enactment of adult entertainment zoning ordinance was sufficient evidence of secondary effects).

Plaintiffs have not met the high standard established by *Alameda Books* to rebut that showing. Plaintiffs argue that there is no evidence that 60/40 businesses in particular and viewed in isolation caused secondary effects as to 2001 and that the City conducted no studies of 60/40 businesses. Dkt. No. 222 at 15, 37-39. They point to the fact that the number of adult businesses in New York decreased from 177 in 1994 to 136 in 2000, Dkt. No. 225 at 5, and to evidence from independent studies of 60/40 businesses specifically conducted after the 2001 Amendments were enacted, which assert that (1) after controlling for demographic features of blocks known to be related to crime, "60/40 businesses are a very insignificant source . . . of crime events within their neighborhood in New York City," Dkt. No. 162-9, Ex. 62, at 1424; (2) "there is no consistent significant difference in the assessed values of properties near a 60/40 businesses [sic] and those further away," Freeman Study at 1466; and (3) that residents preferred neighborhoods with subdued facades over neighborhoods with "loud facade" clubs and believed that the former had a better quality of life, Dkt.

No. 162-9, Ex. 64, at 1477.[39] But that evidence does not "cast[] doubt on the municipality's rationale." *Alameda Books*, 535 U.S. at 439 (plurality opinion). "Requiring local governments to produce evidence of secondary effects for all categories created by every articulable distinction is a misapprehension of the [*Alameda Books* plurality opinion] that governments may rely on any evidence 'reasonably believed to be relevant.'" *Richland Bookmart*, 555 F.3d at 525; *see Gammoh*, 395 F.3d at 1127 ("No precedent requires the City to obtain research targeting the exact activity it wishes to regulate."). The City here need not have proved that 60/40 businesses in isolation created secondary effects any more than it would have had to prove that businesses that devoted 35% of its floor space created secondary effects. *See, e.g., G.M. Enters.*, 350 F.3d at 639 ("The plurality [in *Alameda Books*] did not require that a regulating body rely on research that targeted the exact

39. The parties agree that, following enactment of the 1995 Regulations, "the vast majority, if not all, of the businesses which switched to the 60/40 model, also made changes in toning down their signage in compliance with the requirements of that ordinance, even though they did not then consider themselves 'adult' establishments as defined in the ordinance." CSF ¶ 31. Club Plaintiffs argue that their establishments did not use the "gaudy lighting and graphic signage [that] were identified as significant problems addressed by the 1995 Amendments." Dkt. No. 222 at 6. And there is indeed evidence in the record that many establishments "toned down" their signage. *See, e.g.*, CSF ¶ 200. But while the CPC and City Council identified graphic signage as one problem created by adult establishments, it did not limit its conclusions to the signage used by the adult establishments; it also addressed the fare offered by those establishments. As the New York Court of Appeals concluded in *People Theatres*, "[w]hether signs are garish has little bearing on whether a business retains a sexual focus." 79 N.E.3d at 476.

activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to the adverse secondary effects."). *Alameda Books* teaches that the City was entitled to consider whether businesses with a predominant, ongoing focus on sexually explicit materials created secondary effects and, if so, whether the businesses operating under the 60/40 exception had such a focus.

Nor is Plaintiffs' post-enactment evidence sufficient to "cast[] doubt on a municipality's rationale." *Alameda Books*, 535 U.S. at 439 (plurality opinion). The Fourth Circuit, declining to consider "post-enactment data" that adult businesses had submitted, explained that "when cities exercise their power to zone the location of adult establishments, they need not show that each individual adult establishment actually generates the undesired secondary effects." *Indep. News, Inc. v. City of Charlotte*, 568 F.3d 148, 156 (4th Cir.), *cert. denied*, 558 U.S. 992, 130 S. Ct. 507, 175 L. Ed. 2d 349 (2009). It follows that the City "does not have to show that a particular adult establishment generates adverse secondary effects each time it seeks to enforce" its zoning law. *Id.*; *see also BZAPs, Inc. v. City of Mankato*, 268 F.3d 603, 607 (8th Cir. 2001), *cert. denied*, 536 U.S. 904, 122 S. Ct. 2356, 153 L. Ed. 2d 179 (2002) ("[O]nce a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects."); *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1332 n.11 (11th Cir. 2000) ("Courts have frequently upheld the application of new zoning regulations to existing adult businesses with an amortization period.").

Appendix B

Plaintiffs cannot satisfy their burden or overcome the City's evidence by showing that the number of adult establishments has decreased from 1994 to 2001. Plaintiffs offered no evidence that the decrease was a function of the City's zoning regulations. They offered no evidence as to why any adult business closed. Moreover, the City did not conclude in 1994 that the problem with adult establishments was that they, for example, exceeded 150 in total; it concluded that, in whatever number, they led to decreased property values, decreased quality of urban life, and increased levels of crime. The fact that 40 establishments closed after the 1995 Regulations thus does not demonstrate that the City's evidence fails to support its rationale or undermine its factual findings. Nor does it speak to the more pertinent question: whether, if 60/40 establishments are exempted from the zoning regulations imposed on other businesses that predominantly offer sexually explicit fare on an ongoing basis, the effect of those zoning regulations will be undermined and the secondary effects they generate will be left unaddressed. In particular, it is not the existing 60/40 establishments alone that the City was permitted to consider; it was also permitted to consider adult establishments as a class, including 60/40 establishments, and to reach the reasoned judgment that if it created an exception for adult establishments based on the floor space devoted to adult entertainment that exception would thwart the otherwise beneficial effects of its regulation. And, as to the studies, while they present some evidence that, for a limited period of time, that the 60/40 businesses then in operation in New York City did not provably generate adverse secondary effects, the question "is not whether the

[zoning] requirement is perfectly tailored to" Plaintiffs' business model. *Isbell v. City of San Diego*, 258 F.3d 1108, 1115 (9th Cir. 2001). It is whether the requirement "generally serves a substantial government interest." *Id.* Any adult entertainment business, any business at all for that matter, will always be able to contend that as to its particular configuration, the municipality has not generated evidence that it causes secondary effects. It could be argued that evidence that an establishment that offered predominantly explicit sexual fare on an ongoing basis on 40% of its floor space generated negative secondary effects would not prove that an establishment that offered such fare on only 35% of its floor space would generate those same effects. The municipality is not required to prove its case at that specific level of detail. The City has demonstrated that the 60/40 businesses retain a predominant, ongoing focus on sexually explicit activities and materials and that businesses with a predominant, ongoing focus on sexually explicit activities and materials cause secondary effects that can be addressed by zoning. The City thus has met its burden to show that, even if the City cannot prove that the zoning requirements are necessary to address secondary effects in every particular application, the zoning requirement "generally serves a substantial government interest." *Id.*; *see also Tollis*, 505 F.3d at 940 (rejecting expert challenge to county's evidence of secondary effects).

Plaintiffs also argue that whatever secondary effects might have justified the zoning regulations in 2001, those effects would have significantly ameliorated by now. Dkt. No. 222 at 37-39. There are even fewer adult establishments

that would justify zoning regulation today than in 2001: in 2000, there were 136 known adult establishments and in 2023, there were only 42. Dkt. No. 225 at 6. "[T]he applicable standard as it relates to the secondary effects rationale requires only that a city show that, 'in *enacting* its adult [establishment] zoning ordinance,' the city relied on evidence that is 'reasonably believed to be relevant to the problem [of secondary effects] that the city addresses.'" *Indep. News*, 568 F.3d at 156 (quoting *Renton*, 475 U.S. at 51-52). The relevant question, thus, is not whether the City continues in 2023 to have a substantial interest in regulating adult entertainment establishments or whether the grounds that existed for regulating those businesses in 1995 or 2001 have abated by present day. Those are political questions, more appropriately addressed to the City Council. From a legal perspective, so long as the City preserves adequate alternative avenues for the communication of sexually explicit fare to the residents of and visitors to New York City, it need not periodically renew or update its findings that the zoning of such businesses serves a substantial governmental interest to satisfy the First Amendment. The plurality opinion in *Alameda Books* permits a plaintiff challenging a zoning regulation to offer evidence that "cast[s] doubt on the municipality's rationale" for adopting an ordinance, not on the continued effectiveness of the ordinance. 535 U.S. at 439 (plurality opinion).

Moreover, even if Plaintiffs were allowed to avoid the effect of the 2001 Amendments and to rebut the City's showing of a substantial governmental interest by showing that the interest that justified the zoning

regulations in 1995 and 2001 were no longer substantial in 2023, Plaintiffs have made no such showing. Plaintiffs highlight that they themselves, in the time from 2001 to today, have not been subject to nuisance lawsuits and have not generated negative secondary effects. Dkt. No. 222 at 15. But the question before the Court is not whether each individual business has generated a nuisance. It is whether 60/40 establishments generally, if allowed to operate without zoning restrictions (or without being subject to the regulations applicable to other adult establishments), will generate secondary effects. Plaintiffs have not demonstrated that there is anything different about the nature of their businesses that would cause the City to believe that the effects generated by a business that on an ongoing basis devotes 40% or more of its floor space to predominantly adult entertainment would not also be generated by a business that on an ongoing basis devotes 39% of its floor space to such entertainment.

The Court nevertheless assumes, without deciding, that Plaintiffs are correct that they have shown that their businesses, if left alone, would not undermine the quality of urban life or that the zoning of them to locations other than their present ones would not improve the quality of urban life. But that showing hardly "demonstrate[es] that the municipality's evidence does not support its rationale or . . . furnish[] evidence that disputes the municipality's factual findings." *Alameda Books*, 535 U.S. at 438-39 (plurality opinion). "[W]hen cities exercise their power to zone the location of adult establishments, they need not show that each individual adult establishment actually generates the undesired secondary effects." *Indep. News*,

568 F.3d at 156. Defendants relied on evidence from a number of studies of a number of different municipalities over an extended period of time that showed that businesses that predominantly offer sexually explicit fare on an ongoing basis generate negative secondary effects. From that evidence, the City formulated zoning regulations that apply to adult establishments generally, including those that devote less than all of their floor space and stock-in-trade to adult material. It is sufficient that those regulations are supported by the evidence cited by the City and satisfy a substantial governmental interest. It is not necessary that the City demonstrate that each establishment to which its regulations would apply alone generates a secondary effect. Nor is any particular establishment entitled to an exemption on the grounds that if the City permitted it to stay in place, and no other similarly designed establishment to do so, the secondary effects the City reasonably fears would not ensue. The City may regulate with respect to the class of adult establishments.[40]

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40. Plaintiffs rely, Dkt. No. 225 at 6-8, on two decisions of the Supreme Court interpreting the Voting Rights Act: *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) and *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), for the proposition that a law that was constitutional when adopted may become unconstitutional when the evil to which it was addressed no longer supports the law's enforcement. But that misreads the decisions. Both cases involved Congress's powers to enact the Voting Rights Act under the Fifteenth Amendment. Soon after the Voting Right Act was enacted, in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), the Supreme Court upheld Congress's powers to pass Sections Four and Five of the Voting Rights Act after concluding

Finally, the 2001 Amendments are narrowly tailored to serve this substantial government interest in combating the secondary effects of adult businesses. *Cf. Bronco's Ent., Ltd. v. Charter Township of Van Buren*, 421 F.3d 440, 451 (6th Cir. 2005). The *Renton* Court asked whether the ordinance at issue was "'narrowly tailored' to affect only that *category* of theaters shown to produce the unwanted secondary effects." 475 U.S. at 52 (emphasis added). The Supreme Court concluded that it was. *Id.* The same conclusion follows for the New York City zoning law at issue here.[41] As amended in 2001, the zoning ordinance

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that "exceptional conditions [could] justify legislative measures not otherwise appropriate." *Id.* at 334-35. In *Northwest Austin*, the Supreme Court called into question whether in light of changing conditions since 1965, Congress exceeded its Fifteenth Amendment enforcement powers. 557 U.S. at 203-04. And in *Shelby County*, the Supreme Court concluded that Section Five of the Voting Rights Act fell outside Congress's enforcement powers on the grounds that the statistics that Congress relied upon to reauthorize that law's preclearance formula and requirement in 2006 did not support what the Court believed to be the Act's "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Id.* at 545 (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500-01, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1992)). The test for whether Congress had the power to adopt a federal statute that infringed on the principle of "equal sovereignty" has nothing to do with the test for whether a local ordinance violates the First Amendment.

41. To the extent that Plaintiffs assert that the law is under inclusive under the banner of an equal protection claim by averring that the legislation singles out adult entertainment establishments while leaving other establishments that cause adverse secondary effects, such as bars, free to operate without limitation, this too is unpersuasive. "[I]t is of no constitutional consequence that other

is limited to that category of entertainment that was shown to produce unwanted secondary effects, *viz* those establishments that offer predominantly sexually-explicit fare.

Having found that the City has demonstrated that the 2001 Amendments are narrowly tailored to serve its substantial interest in avoiding the adverse secondary effects associated with adult entertainment establishments, the Court turns, finally, to whether the Amendments "allow[] for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50, 53.

2. Reasonable Alternative Avenues for Communication

"The overarching question . . . in many First Amendment zoning challenges . . . is whether the challenged zoning ordinance preserves 'reasonable alternative avenues of communication' for adult-oriented businesses." *TJS*, 598 F.3d at 21 (quoting *Buzzetti*, 140 F.3d at 140-41). "[T]he reasonableness inquiry requires an assessment of available other locations and whether these alternatives afford a reasonable opportunity to locate and operate such a business." *Id.* The Second Circuit has suggested that "[t]o decide whether constitutionally

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unregulated activities may produce similar secondary effects." *801 Conklin St. Ltd. v. Town of Babylon*, 38 F. Supp. 2d 228, 240 (E.D.N.Y. 1999). As the Supreme Court has long recognized, "[i]t is of no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Ry. Express Agency v. New York*, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949).

sufficient alternatives exist, [a court should] first . . . determine how many sites are available and then determine whether that number is sufficient to afford adult establishments a reasonable opportunity to locate." *Id.* at 21-22 (quoting *Isbell*, 258 F.3d at 1112). "The burden of persuasion is on the City to demonstrate that its ordinance provides reasonable alternative avenues of communication." *Isbell*, 258 F.3d at 1112.

In *TJS*, the Second Circuit explained that in "[f]ollowing *Renton*, federal courts have based the availability inquiry on whether proposed sites are physically and legally available, and whether they are part of an actual commercial real estate market in the municipality." 598 F.3d at 27. *TJS* instructs the Court to consider such factors as the pragmatic likelihood of a site becoming available to a generic commercial enterprise and the site's physical characteristics, including their accessibility to the general public, the surrounding infrastructure, and whether the site is suitable for some generic commercial enterprise. *Id.* at 27-28.

Courts employ a variety of approaches in determining whether there are reasonable alternative avenues available. The *Renton* Court itself appeared to consider both the acreage and the percentage of the city's total land area that was available to adult establishments, but did not foreclose other methods. *See* 475 U.S. at 53. The approach of lower courts has been varied. Some lower courts consider the proportion of sites or amount of land area available relative to the municipality at large, among other factors. *See, e.g., Lund v. City of Fall River*, 714

F.3d 65, 72 (1st Cir. 2013) (Souter, J.) (examining "multiple factors," including "the percentage of acreage within the zone for adult business use compared with the acreage available to commercial enterprises and the number of sites available to adult entertainment businesses, there being no single dispositive evaluative consideration" (internal alterations, citations, and quotation marks omitted)). Some courts consider other factors as well, such as the number of sites available in relation to the population, community needs, and other factors. *See, e.g., Young v. City of Simi Valley*, 216 F.3d 807, 822 (9th Cir. 2000), *cert. denied*, 531 U.S. 1104, 121 S. Ct. 844, 148 L. Ed. 2d 723 (2001); *Int'l Food & Bev. Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1526 (11th Cir. 1986); *Little Mack Ent. II, Inc. v. Township of Marengo*, 625 F. Supp. 2d 570, 584 (W.D. Mich. 2008). Other courts employ an analysis that primarily considers the number of sites available relative to the number of establishments which will have to relocate as a result of the ordinance. *See, e.g., Allno Enters., Inc. v. Baltimore County*, 10 F. App'x 197, 201 (4th Cir. 2001) ("[T]he [C]onstitution does not mandate that any minimum percentage of land be made available for certain types of speech." (quoting *N. Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996), *cert. denied*, 519 U.S. 1056, 117 S. Ct. 684, 136 L. Ed. 2d 609 (1997))). *But see Diamond v. City of Taft*, 215 F.3d 1052, 1056-57 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072, 121 S. Ct. 763, 148 L. Ed. 2d 665 (2001). Of the courts that consider the number of sites available, many will examine only whether the number of sites equals or exceeds the number of businesses that the ordinance requires to relocate. Courts have not agreed on a precise ratio of

establishments that need to relocate and available sites that satisfies the alternative avenues inquiry. That said, some courts have found a 1:1 ratio sufficient—that is, if there are adequate alternative sites to accommodate the existing affected businesses, the ordinance satisfies the First Amendment. *See, e.g., World Wide Video of Wash.*, 368 F.3d at 1195; *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310-11 (11th Cir. 2003).

The Second Circuit's only decisions that touch on this question, *Buzzetti*, decided in 1998, and *TJS*, decided in 2010, did not definitively address this question. *Buzzetti* found that the lower court's reliance, as in *Renton*, on the percentage of total available land area was permissible, and further relied on a comparison between the number of adult establishments then operating and the number of available sites. 140 F.3d at 140-41; *see* Sec. Karnovsky Aff. ¶ 86. With nearly three times as many sites as establishments, the Circuit found there were reasonable alternatives. *TJS*, for its part, primarily addressed itself to the secondary question of which sites were *legally* available. Accordingly, even within this Circuit, courts have taking varying approaches. *See, e.g., Giggles World Corp. v. Town of Wappinger*, 341 F. Supp. 2d 427 (S.D.N.Y. 2004) (considering the percentage of the acreage available to adult entertainment establishments relative to the municipality's total land area) *801 Conklin St.*, 38 F. Supp. 2d at 242 (considering, *inter alia*, the percentage of the town's total land area available to adult uses excluding land unlikely to be developed). If the question to be answered is whether, at the time of the litigation, there exist reasonable alternative avenues for speech, the

answer, it seems, should rest upon a comparison of the number of establishments to be displaced with the number of sites to which those establishments can be placed. Any other numerator (say, the expected future number of establishments) likely would rest upon speculation. And, with respect to the denominator, the number of sites to which the establishments could relocate, a ratio of 1:1 seems to read out of the law the requirement that the alternative avenues for speech be reasonable, by giving each landlord for each site in effect the power to charge whatever it wants to an adult establishment that needs to relocate. But whether the ratio should be 1:1.5 or 1:4 or some other different and more generous proportion, on the facts here, the City has demonstrated that there are reasonable alternative avenues for the existing communication. *See, e.g., MJ Ent. Enters., Inc. v. City of Mount Vernon*, 328 F. Supp. 2d 480 (S.D.N.Y. 2004); *Casanova Ent. Grp., Inc. v. City of New Rochelle*, 375 F. Supp. 2d 321 (S.D.N.Y. 2005), *aff'd*, 165 F. App'x 72 (2d Cir. 2006) (summary order); *Woodall v. City of El Paso*, 49 F.3d 1120, 1126 (5th Cir.), *cert. denied*, 516 U.S. 988, 116 S. Ct. 516, 133 L. Ed. 2d 425 (1995).

The parties jointly identify 32 60/40 establishments presently operating in New York City, including 19 in Manhattan (5 eating and drinking establishments and 14 bookstores), 3 in the Bronx, and 5 in each of Brooklyn and Queens. CSF ¶¶ 167, 170, 174; Nov. 29 Oral Arg. Tr. at 184. Of the 5 60/40 eating and drinking establishments in Manhattan, each "would have to close or relocate if the 2001 Amendments are allowed to take effect." CSF ¶ 174. Similarly, each of the 14 60/40 bookstores in Manhattan

"would have to close, relocate, or conform to the eight factors" outlined in the 2001 Amendments. *Id.*

DCP estimates that there are 1,275 lots in New York City that would be available for use by the 60/40 establishments as adult establishments should the 2001 Amendments go into effect. *Id.* ¶ 243. These include 10 lots in Manhattan and 1,265 in the other boroughs. *Id.* ¶ 244. Of the 1,275 total lots available, 360—more than a quarter of the available sites—are in the Bronx, 240 sites are in Brooklyn, 458 of the 1,275 sites are in Queens, and one in six of the City's proposed alternative sites are on Staten Island. Nov. 29 Oral Arg. Tr. At 187-88. Given that each adult establishment also cannot be within 500 feet of another, up to 204 of those 1,275 lots could be simultaneously occupied by adult establishments (including 110 lots that could be occupied by adult bookstores if, as the Bookstore Plaintiffs assert, adult bookstores are not permitted in M2 or M3 districts). CSF ¶ 245. Of the 204 simultaneously occupiable lots, 5 are in Manhattan and the remainder are in the other boroughs. *Id.* ¶ 246.

Plaintiffs, noting that there are over 850,000 lots in New York City, *see, e.g.*, Gittens Decl. ¶ 3, assert that the potentially available adult sites amount to .5% of city lots, Dkt. 229 at 26. They also argue that the 204 simultaneously occupiable lots represent a "vanishingly small number" compared to the total lots in New York City. *Id.* But Plaintiffs fail to articulate why the ratio of the number of sites available to adult uses relative to the total number of lots in New York City is relevant. A business—any business—is not entitled to a particular

percentage of lots in a municipality in which to relocate; cities are permitted to zone and rezone. And the ratio here of adult establishments to sites to which the adult establishments can relocate far exceeds what is necessary to satisfy constitutional standards.

Plaintiffs challenge DCP's figures on a number of grounds. First, they attempt to underline the reliability of the numbers themselves. They argue that (1) the figures are unreliable because DCP's estimates have changed from 2,800 early in the case, to 1,703 alternative sites at the time summary judgment was briefed, to 1,275, Nov. 29 Oral Arg. Tr. At 48-49; Dkt. No. 229 at 34; (2) the figures are not reliable because they were generated on the basis of building code classifications generated by the tax department that are not binding on the zoning department, Nov. 29 Oral Arg. Tr. At 181; and (3) there are only 3 (and not 5) sites in Manhattan that would be commercially viable and could be simultaneously occupied by adult eating and drinking establishments, Dkt. No. 222 at 34-35; Nov. 29 Oral Arg. Tr. At 182-83.

Plaintiffs' arguments are not persuasive. DCP's numbers are the product of an extensive and rigorous process. The analysis was overseen by the Geographic Information Systems Team Lead and Open Data Coordinator at the DCP, who has worked at that agency since September 2005 and has a bachelor's degree in Urban Planning and Geography and a Graduate Certificate in Geographic Information Systems; the analysis involved eight staff members as well as DCP's data engineering team. Dkt. No. 212-3 ("Croswell Decl.") ¶¶ 1, 10, 12 n.4.

More importantly, the analysis itself was thorough. Beginning in December 2019, DCP undertook a lot-by-lot analysis to determine the sites in the City to which adult establishments could relocate, using a geospatial dataset of tax lot data from various source data files. *Id.* ¶ 3; *see* CSF ¶ 226. That data set identified 857,298 lots in New York City. Croswell Decl. ¶ 3, DCP then identified adult establishment exclusion areas by creating 500-foot buffer areas around zoning districts where adult establishments are not allowed and schools and houses of worship. *Id.* ¶ 4; Amron Decl. ¶ 10; *see* Dkt. No. 220 at 13. After creating a 500-foot buffer around those zoning districts where adult establishments are not allowed, the agency then established 500-foot buffers around the 72 lots that appeared to be adult establishments, as well as two districts in Brooklyn that were proposed for rezoning. Amron Decl. ¶ 8. At that point, 5,009 potential lots remained. *Id.* ¶¶ 8, 10. From there, DCP removed lots that were parks, publicly owned, or that were identified as being used for transportation or utility purposes, as well as lots that were smaller than 5,000 square feet. *Id.* ¶ 10; Dkt. No. 220 ¶ 9. DCP staff then manually reviewed the remaining 2,217 lots, checking the ownership and use of each lot and using various computer programs and their knowledge of the areas to exclude lots that (1) were publicly owned or (2) appeared to contain a sensitive receptor or utility that would render development for an average commercial use improbable; and (3) lacked street frontage or that appeared too irregular to develop. Croswell Decl. ¶ 10; Amron Decl. ¶ 12.[42] This stage resulted in exclusion

42. Plaintiffs object to certain statements made in the declarations submitted by Defendants. Dkt. No. 246-1. The Court overrules the objection to Dkt. No. 212-1 ¶¶ 11-14 based on lack of

of an additional 514 lots, leaving 1,703 lots. Croswell Decl. ¶ 10.

The analysis also was conservative. DCP excluded all lots that it considered to be questionable and all lots less than 5,000 square feet,[43] and it based the analysis on measurements of the 500-foot buffer from the lot line of the 72 lots that appeared to be adult establishments rather than from the principal entrances of the establishments. Amron Decl. ¶ 13. There is no basis to challenge the accuracy of the DCP's figures or the rigor with which they were calculated.

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personal knowledge under Federal Rule of Evidence 602. The witness has set forth the basis for her personal knowledge, including her over three decades of experience working for DCP. Plaintiffs' remaining objections are moot as the Court has not considered and does not rely upon the challenged paragraphs.

As to Defendants' objections, the objections to the following paragraphs of declarations submitted by Plaintiffs are sustained and, where the paragraphs contain hearsay, the content of those paragraphs will not be received for the truth of the matter asserted. CM-ECF 02-cv-8333, Dkt. No. 62 ¶¶ 28, 38; Dkt. No. 157 ¶ 15; Dkt. No. 72 ¶¶ 14, 26-27, 29, 49 (except to the extent the witness is opining about his own business) 66, 69 (except to the extent the witness is opining about his own business), 70, 73 (except to the extent he is opining about his own business), 74-75; Dkt. No. 72 ¶ 15 (except to the extent he is opining about his own business), 26 (except to the extent he is opining about his own business), 33; Dkt No. 190 ¶ 8. The remainder of the objections are overruled.

43. This is not to say, however, that at least some adult entertainment establishments could not relocate to lots less than 5,000 square feet. Some adult bookstores are located in buildings that are less than 5,000 square feet. *See* Laremont Decl. Ex. A.

Plaintiffs' argument that the City's numbers should not be credited because they changed lacks merit. The 2,800 figure cited by Plaintiffs is based on the DCP's analysis in connection with Plaintiff's motion for a preliminary injunction in 2018. *See 725 Eatery Corp.*, 408 F. Supp. 3d at 468; *see generally* Laremont Decl. But, as the Court noted in its decision on the motion for a preliminary injunction, there was reason to question those figures. They were based on dated analyses from 1995 and 2001 and they did "not seem to indicate how the amount of available land would be affected by the requirement that adult establishments be located at least 500 feet from sensitive receptors or other adult establishments." 408 F. Supp. 3d at 468-69. At that early stage in the proceedings, DCP had completed a lot-by-lot analysis of the available areas in Manhattan only. Dkt. No. 176 at 2. The figure of 1,703 lots was proffered by the City, much later, in its summary judgment briefing. Dkt. No. 173 at 2-3. As indicated above, it was the product of the DCP's detailed lot-by-lot analysis City wide. The figure of 1,275 lots was the product of further analysis by DCP, based on issues identified by Plaintiffs. Specifically, in Plaintiffs' opposition to Defendants' motion for summary judgment, Plaintiffs identified what they claimed were "two fatal flaws": (1) in the "manual review" process of DCP's analysis during which DCP eliminated an additional 514 lots, the DCP staff excluded the sites that contained a sensitive receptor without also drawing a 500-foot buffer around those sites; and (2) in the sensitive receptors phase of the analysis, the City did not buffer around mixed-use lots that had houses of worship. Dkt. No. 225 at 25-31. After the summary judgment briefing and in connection

with the bench trial, DCP addressed this critique and drew the requested buffers. The result was to eliminate 428 lots, leaving 1,275 available lots across the City. Croswell Decl. ¶ 12.

In short, what Plaintiffs criticize as changing figures is, in fact, the product of a careful process to refine the numbers to make them ever more accurate. That Defendants responded to Plaintiffs' prior criticisms and have made the figures more conservative provides no basis to attack the City's processes or the figure of 1,275 available lots that was the result of that process.

Plaintiffs also criticize the DCP for using building codes generated by New York City Department of Finance's tax categorizations and not by the Zoning Department in its analysis, CSF ¶ 231, contending that the tax categorizations are not necessarily controlling on the zoning question of whether a use is a house of worship, Dkt. No. 225 at 22-23. But Plaintiffs do not identify any other way that DCP could have done its study other than by using the building codes or any respect in which the use of such codes makes DCP's study unreliable.

Plaintiffs submitted an expert report in November 2018 concluding that the 2001 Amendments would leave only 5 individual sites in Manhattan that would be both legally permissible and commercially viable for the establishment of any eating or drinking establishment featuring live adult entertainment, and only 3 of those could be used by adult businesses simultaneously. Berzak Decl. ¶¶ 6(g), 37. But Plaintiffs' analysis is inconsistent

with *TJS* and *Renton*. Plaintiffs' expert excluded sites that were on unimproved land or that required extensive structural modification without considering whether the sites could be developed for a commercial use. *Id.* ¶ 38. "[T]he need for a site to be developed before an adult entertainment business can relocate does not render the site unsuitable." *TJS*, 598 F.3d at 28; *see also Alexander v. City of Minneapolis*, 928 F.2d 278, 284 (8th Cir. 1991) ("That [the plaintiff] could not secure property meeting his economic or commercial criteria does not render [the zoning ordinance] invalid."); *Daytona Grand*, 490 F.3d at 871 ("[T]he economic feasibility of relocating to a site is not a First Amendment concern." (quoting *David Vincent*, 200 F.3d at 1334)).

Finally, Plaintiffs argues that the City "did not analyze whether the presence of wetlands and/or flood plains precluded a site from being commercially developed." CSF ¶ 145(e); Dkt. No. 225 at 12. While it is true that "land under the ocean, airstrips of international airports, etc.," are not relocation sites likely to ever become available, *TJS*, 598 F.3d at 23, Plaintiffs do not show that any of the lots are actually located on wetlands. Nor do Plaintiffs allege that wetlands and flood plains cannot be developed. And the City has long maintained records of space that is threatened by climate change, and noted the operation of commercial establishments there. *See, e.g.*, Dkt. No. 162-3, Ex. 30, at 214-17.

The remainder of Plaintiffs' challenges to the availability of sites is qualitative and not quantitative. Plaintiffs argue that: (1) the City did not conduct any

analysis of commercial practicability; (2) there are insufficient alternative locations in Manhattan; and (3) the City did not conduct a specific transportation analysis to determine the accessibility of each or any site, nor relate each or any mode of transportation to each or any site," CSF ¶ 145(a), nor did it conduct a basic infrastructure analysis for each site other than to observe that all of the listed sites have street frontage, *id.* ¶ 145(b).[44]

There is no doubt that the implementation of the 2001 Amendments will cause a relocation of 60/40 enterprises within the City of New York. That is the aim of the zoning regulations. There are 6 100% adult establishments and 19 60/40 establishments in Manhattan. CSF ¶ 173. Of the 60/40 establishments, 5 are clubs and 14 are adult bookstores with or without private video booths. *Id.* ¶ 174. All of the clubs would have to close or relocate if

44. Defendants object to the relevance of a number of paragraphs in the CSF, as well as to the corresponding evidence. *See* Dkt. No. 244-1 at 7. Those objections are overruled. "[T]he definition of relevance under Fed. R. Evid. 401 is very broad," *United States v. Certified Env't Servs., Inc.*, 753 F.3d 72, 90 (2d Cir. 2014), and as a result, the standard for relevance is "very low," *United States v. Al-Moayad*, 545 F.3d 139, 176 (2d Cir. 2008); *see United States v. Litvak*, 889 F.3d 56, 68 (2d Cir. 2018). "[S]o long as a chain of inferences leads the trier of fact to conclude that the proffered submission affects the mix of material information, the evidence cannot be excluded at the threshold relevance inquiry." *United States v. Quattrone*, 441 F.3d 153, 188 (2d Cir. 2006). "While standards for admissible evidence are not out the window entirely in a bench trial, all doubts at a bench trial should be resolved in favor of admissibility." *Com. Funding Corp. v. Comprehensive Habilitation Servs.*, 2004 U.S. Dist. LEXIS 17791, 2004 WL 1970144, at *5 (S.D.N.Y. Sept. 3, 2004) (internal quotation marks omitted omitted).

the 2001 Amendments go into effect. *Id.* But there are only between 3 and 5 alternative sites in Manhattan to which they could relocate. More than a quarter of the available sites are in the Bronx, where there are only 3 60/40 businesses at present. Nearly 20% of the available sites are in Brooklyn, where there are presently only 5 60/40 businesses at present. And another third of the potential sites are in Queens, where there are only 5 60/40 businesses at present. Nov. 29 Oral Arg. Tr. at 140. If the 60/40 businesses choose to relocate rather than to close, the practical effect of the 2001 Amendments will be to move the adult enterprises out of Manhattan and to the other boroughs.[45]

Plaintiffs' qualitative arguments, however, are unavailing. The "preference for [operating in a specific location] bears no nexus to whether there are adequate alternative avenues of expression." *McDoogal's East, Inc. v. County Comm'rs*, 341 Fed. Appx. 918, 930 (4th Cir. 2009). The Second Circuit has held that the availability inquiry centers "on whether proposed sites are physically and

45. There is evidence that certain of the Plaintiffs are unwilling to relocated outside of Manhattan and also have been unable to locate available space outside of Manhattan to which they could immediately relocate. *See, e.g.*, Dkt. No. 171 ("Warech Aff.") ¶¶ 14; Dkt. No. 226 at 9. A number of owner operators have testified that they have been advised by local real estate brokers and others in the industry that no locations that contain the minimum of 2,500 square feet which is necessary to realistically conduct business as an adult eating and drinking establishment are currently available and it is likely that it would take a year or more to find and convert a space for use as a club. Warech Aff. ¶ 14; *see also* Lipsitz Decl. ¶ 32 (same); D'Amico Decl. ¶ 16 (same).

legally available, and whether they are part of an actual real estate market in the municipality." *TJS*, 598 F.3d at 27. "[W]hether the acquisition and use of land might be unprofitable or commercially impracticable [is] not relevant to [the] concept of availability." *Id.* "[T]he First Amendment [does not] compel[] the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Renton*, 475 U.S. at 54.[46] "[W]hether or not sites fit the specific needs of adult businesses—or any other precise type of commercial enterprise—is constitutionally irrelevant." *TJS*, 598 F.3d at 28. A site is available even if it is in an industrial or manufacturing zone and even if the site needs to be "developed before an adult entertainment business can relocate." *Id.*

46. Plaintiffs cannot succeed on their argument that "the evidence of the past 27 years makes clear that the sites in the other boroughs would *not*, in fact, be reasonable sites for adult club businesses because there have been 27 years to see if any entrepreneurs would find those sites a 'reasonable opportunity' for establishing an adult club, and instead of a growing number of such clubs in those supposedly reasonable sites, the evidence shows only drastically declining numbers, notwithstanding all those supposedly reasonable relocation sites." Dkt. No. 225 at 34; *see also* Dkt No. 226 at 10. The Constitution prohibits the City from cutting sexually explicit speech off from all reasonable avenues of communication. *See Renton*, 475 U.S. at 50. It does not require the City to subsidize Plaintiffs' speech or to guarantee that such speech will find a successful home in the commercial marketplace. *See id.* at 53-54. "The requirement that 'ample alternative channels exist does not imply that channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand; indeed, were we to interpret the requirement in this way, no alternative channels could ever be deemed 'ample.'" *Mastrovincenzo*, 435 F.3d at 101.

Rather, "whether the challenged restriction leaves open adequate alternative avenues of communication" requires "an assessment of available other locations, and whether those alternatives afford a reasonable opportunity to locate and operate such a business." *Id.* at 21-22. "One factor is 'the pragmatic likelihood of [sites] ever actually becoming available' to a generic commercial enterprise." *Id.* at 27 (quoting *Hickerson*, 146 F.3d at 106). As noted, "[o]ther significant factors relating to sites' physical characteristics include their 'accessibility to the general public, the surrounding infrastructure, . . . and . . . whether the sites are suitable for some generic commercial enterprise.'" *Id.* at 27-28 (quoting *Hickerson*, 146 F.3d at 106). The adequacy of alternatives is assessed at the time that the court is adjudicating the dispute, *id.* at 23, and a municipality need not "identify the exact locations to which adult establishments may locate, 'as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are physically and legally available to accommodate the adult establishments,'" *id.* at 22 n.4 (quoting *Hickerson*, 146 F.3d at 107).

The City's analysis is current and is based on the *TJS* standard regarding availability. The fact that the City "did not determine for each or any of the sites on its list of legally permissible alternative sites the economic burdens which would be incurred in order to use the site as an adult establishment," and "did not determine for each or any site on its list of legally permissible alternative sites how much it would cost to convert the site into what is required for either (1) an adult establishment, or (ii) a commercial

use, generally" is irrelevant. CSF ¶¶ 145(c), (d). The City was not required to identify the exact locations to which the 60/40 businesses could relocate, *TJS*, 598 F.3d at 22 n.4, or to determine the "commercial viability" of those sites, much less their viability for an adult establishment, *id.* at 29; *see also David Vincent*, 200 F.3d at 1334 ("[C]ommercial viability is not an appropriate consideration."). In *Renton*, for example, the Supreme Court examined the amount of land, including roads undeveloped land, that the city left available for adult uses overall. 475 U.S. at 53. The 520 acres of land, slightly more than five percent of the city's total land area, was sufficient, regardless of the fact that the vast majority of it was unavailable. *Id.* at 53-54. Indeed, the Court held that it was irrelevant that there were "no 'commercially viable' adult sites within the 520 acres left open by the Renton ordinance." *Id.* at 53; *see also McDoogal's E., Inc.*, 341 F. App'x at 930 ("A plaintiff must show something greater than mere inconvenience or economic undesirability."). "That [the plaintiffs] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54; *see also David Vincent*, 200 F.3d at 1335 ("[T]he First Amendment is not concerned with restraints that are not imposed by the government itself.").

Plaintiffs maintain that the 2001 Amendments will not leave the accessibility of adult entertainment "substantially intact." *Alameda Books*, 535 U.S. at 449 (Kennedy, J. concurring in the judgment), because five of the six adult eating or drinking establishments are located in Manhattan and their owners or operators have

submitted sworn declarations that they would not relocate out of Manhattan because their clientele would not visit them elsewhere and because Manhattan is "unique" as the "central business and tourist" sector in New York and "an island of superlatives." Dkt. No. 225 at 14-15 (internal quotation marks omitted). That argument, however, reads Justice Kennedy's concurrence out of context. As discussed above, in the portion of the opinion from which Plaintiffs draw their argument Justice Kennedy referred to the "rationale" that the City must have in order to justify a content-based zoning ordinance and to enjoy intermediate scrutiny. Justice Kennedy was not discussing the impact the ordinance would have years later—that is a question that is tested by the third step of the *Renton* test, not the second part, and it requires only that there be alternative avenues for communication and not that they be in the central business and tourist sector of any city. *See PAO Xiong v. City of Moorhead*, 641 F. Supp. 2d 822, 830 (D. Minn. 2009) ("[C[ourts do not measure the reasonableness of an adult use ordinance based upon the economic impact relocation will cause."). It is inherent in every zoning regulation that it does not leave the existing businesses in their existing locations "substantially intact." Leaving aside amortization provisions (discussed *infra*), that is the purpose of every zoning regulation that addresses existing business—to require them to move for the greater benefit of the community. It may be that "some prospective patrons" of Plaintiffs "may be inconvenienced" by the requirement that they move. "But other patrons, depending on whether they live or work, may find it more convenient to view an adult movie [or visit an adult establishment] after the establishments move." *Am. Mini*

Theatres, 427 U.S. at 79 (Powell, J., concurring). So long as the new sites are reasonably accessible, the fact that some existing patrons may be inconvenienced is of no constitutional moment.

Plaintiffs have not shown that the relative shortage of locations in Manhattan relative to other boroughs will deprive them specifically and adult entertainment generally of reasonable alternative avenues for communication. It is true that Manhattan constitutes the City's central business district, home to 2.2 million—59.5%—of New York City's 3.8 million jobs, and further contains many of the City's attractions, including Central Park, the Empire State Building, and the High Line. Kelley Decl. ¶¶ 10-11. Some of the owners of the adult entertainment establishments have stated that they are unwilling to move from Manhattan. *See, e.g.*, Kavanaugh Decl. ¶ 18 & Ex. A. Those adult establishments have established goodwill in Manhattan and derive a substantial portion of their income from domestic and international tourists who book accommodations in Manhattan. *See, e.g., id.* Ex. A ¶ II(a). They point out that there is a high economic value of being located in Manhattan, including the borough's proximity to other entertainment and nightlife venues, high pedestrian traffic, and strong tourism and business markets. *See, e.g., id.* Ex. A ¶ II(B). Many of their patrons work in Manhattan or are there only temporarily on business and find it easy to access businesses in Manhattan. *Id.* Ex. A ¶ II(C); *see also* Dkt. No. 83 at 227-47 ("Talla Decl.") ¶ 35; Dkt. No. 83 at 248-61 ("Warech Decl.") ¶ 14. Accepting Plaintiffs' arguments, should some of the 60/40 businesses choose to stay in Manhattan, there will be 9 adult establishments

on the island after the 2001 Amendments go into effect: 6 100% adult establishments and 3 60/40 enterprises. Plaintiffs claim that because, before the zoning regulations required the adult establishments to move, the majority of adult establishments were located in New York, "demand for adult establishments has always been primarily located in Manhattan." Dkt. No. 229 at 31.

However, the First Amendment test looks to whether there will be alternative avenues for communication within the confines of the municipality and not within any particular district, whether or not it is a tourist, commercial, or business attraction. *Renton* itself approved an ordinance that concentrated businesses in one part of the city. 475 U.S. at 51. Drawing from *Renton*, circuit courts have concluded that precluding adult establishments from operating in commercial areas is also permissible under the First Amendment. *See, e.g., Tollis*, 505 F.3d at 942 (ordinance requiring adult entertainment businesses to disperse to industrial areas of the county not zoned for other commercial uses was constitutional as long as those areas were reasonably accessible to the general public, had a proper infrastructure, and were suitable for some generic commercial enterprise); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053, 120 S. Ct. 1554, 146 L. Ed. 2d 459 (2000) (bans on adult entertainment establishments in residential districts permissible); *BZAPs*, 268 F.3d 603 (same); *Indep. News*, 568 F.3d at 154 (same); *Cheshire Bridge Holdings*, 15 F.4th at 1362 (same); *see also Wolfe v. Village of Brice*, 997 F. Supp. 939, 943-44 (S.D. Ohio 1998). And the Second Circuit has expressly held that the

First Amendment does not require "proof of adequate available sites on a borough-by-borough basis." *Hickerson*, 146 F.3d at 108 n.5. "[T]he fact that a site may not be commercially desirable does not render it unavailable. It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business." *Woodall*, 49 F.3d at 1124; *Alexander*, 928 F.2d at 283 (finding that 6.6% of the city's land area, or 120 sites, was sufficient). "The ideal lot is often not to be found." *David Vincent*, 200 F.3d at 1334; *see also Mastrovincenzo*, 435 F.3d at 102 ("[T]he First Amendment does not require that New York City permit plaintiffs to sell their work directly to the public in an ideal venue."); *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 147 (4th Cir. 1991) ("The decision to restrict adult businesses to a specific area does not oblige the city to provide commercially desirable land."); *Allno Enters.*, 10 F. App'x at 202 ("Examples of impediments to the relocation of an adult business that may not be of constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscape a site; bearing the costs of generally applicable lighting, parking, or green space requirements; making due with less space than one desired; or having to purchase a larger lot than one needs."). As one district court summarized, "numerous courts have rejected the notion that time, manner, and place restrictions are unconstitutional because they damage the economic viability of adult businesses." *MJJG Rest. LLC v. Hoory County*, 102 F. Supp. 3d 770, 789 (D.S.C. 2015).

Moreover, Plaintiffs have not proved their case that the areas to which the adult establishments will be forced to relocate under the 2001 Amendments are not reasonably accessible. The areas in Manhattan permitting adult establishments, such as the Hudson Yards, Meatpacking and Hell's Kitchen neighborhoods, are zoned for and developed with a wide variety of commercial uses and are largely accessible by public transportation. Amron Decl. ¶ 15. The available lots in Brooklyn are in various neighborhoods such as Sunset Park, Coney Island, East New York, Downtown Brooklyn, and Red Hook, that also are zoned for a wide variety of commercial uses and are largely accessible by public transportation; certain of the areas have developed hotels with over 2,000 rooms. *Id.* ¶ 16. The available lots in Queens are located in various neighborhoods, including Long Island City, Sunnyside, Maspeth, and College Point, that provide access to the city's broad customer base through their proximity to multiple subway lines and bus routes. *Id.* ¶ 17. So too the available lots in the Bronx neighborhoods, such as Hunts Point, Port Morris/Mott Haven, and Eastchester. *Id.* ¶ 18. And although the lots in Staten Island are not easily accessible by public transportation, they are accessible by car. *Id.* ¶ 19. Indeed, the record reflects that more than eighty percent of New York City is within a ten-minute walk of one or more subway stations or bus routes. Karnovsky Aff. ¶ 38. But even putting aside New York City's mass public transit system, courts have recognized that the draw of sexually explicit speech is so strong that, even where the alternative locations are located in industrial zones that are not heavily trafficked, patrons will nevertheless visit. *See Tollis*, 505 F.3d at 940.

Many owners of the Plaintiff businesses assert that, should the 2001 Amendments become effective, they will not relocate but will instead shut down. *See, e.g.*, Talla, Warech, Lipsitz, D'Amico and Kavanaugh Declarations; CM-ECF 18-cv-3732 Dkt. Nos. 132 ("Zazzali Decl."), 133 ("Knecht Decl."); Dkt. No. 255 ("Nov. 28 Oral Arg. Tr.") at 117. But these attestations do not undermine the City's showing that reasonable alternative avenues for communication will exist after the 2001 Amendments go into effect.[47] Those declarations are, for the most part, conclusory and self-serving. *See, e.g., District of Columbia v. Murphy*, 314 U.S. 441, 456, 62 S. Ct. 303, 86 L. Ed. 329 (1941) ("One's testimony with regard to his intention is of course to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations and inconsistent acts."). They are inconsistent with the fact that some of the business owners either expanded or attempted to expand their businesses after the 2001 Amendments were enacted. *See, e.g.*, Talla Decl. ¶¶ 26-30. But even insofar as the statements are credible, the statements by Club owners were made in 2018, before DOB changed its permitting and vesting rules.[48] Only one club owner has renewed his statement that he would not relocate since. *See*

47. It is apparently on the basis of these assertions that Club Plaintiffs contend that if the mandatory termination requirements go into effect, only the 10 existing 100% adult businesses will remain in all of New York City. Dkt. No. 222 at 5.

48. Although some of the Bookstore Owners resubmitted their declarations in 2022, after DOB updated its permitting scheme, the Court finds them unpersuasive.

Warech Aff. ¶¶ 6-7. And while some declarations note that the majority of Club patrons are "tourists and business people visiting the Times Square area of Manhattan," *id.* ¶ 14, none of the declarations make more than conclusory statements that it would be uneconomic for the businesses to relocate. Nor do any of the submissions indicate that if these particular owner-operators do not relocate, others will not choose to take advantage of the extant demand for adult entertainment. But even if the declarations *did* establish an economic burden so onerous that it would both result in existing adult businesses shutting down and disincentivize any potential participant from entering into the adult entertainment market, it follows from *Renton* and *TJS* that the alternative sites need not be as economically advantageous as previous locations to satisfy the Constitution, so long as they are reasonably accessible. *TJS*, 598 F.3d at 30 (describing the "legal irrelevance of commercial viability concerns"); *see also Topanga Press, Inc v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030, 114 S. Ct. 1537, 128 L. Ed. 2d 190 (1994) ("[I]t is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business."). And "*Renton* does not require relocation sites to be actually—as opposed to potentially available." *TJS*, 598 F.3d at 27; *see, e.g., Kaye v. N.Y.C. Health & Hosps. Corp.*, 2023 U.S. Dist. LEXIS 57044, 2023 WL 2745556 (S.D.N.Y. Mar. 31, 2023).

Plaintiffs further complain that Defendants "did not conduct a specific transportation analysis to determine the accessibility of each or any site, nor relate each or any

mode of transportation to each or any site," CSF ¶ 145(a), "did not conduct a basic infrastructure (or equivalent) analysis for each or any site other than to observe that all of the listed sites have street frontage," *id.* ¶ 145(b), "did not specifically analyze every listed site as to whether it is suitable for some generic commercial enterprise," *id.* ¶ 145(g), "did not confirm that the listed sites would not be rendered unavailable by virtue of any pending proposed text amendments to the Zoning Resolution," and did not exclude lots that ranged to a maximum of more than seven million square feet, *id.* ¶ 145(i). None of those points is persuasive. The City was not required to identify each or any site specifically to which an adult establishment could move. *See TJS*, 598 F.3d at 22 n.4. Thus, the City was not required to determine separately for each site whether and how it was accessible by transportation or what basic infrastructure existed. As noted, the City did consider that numerous forms of transportation exist within the City of New York. CSF ¶ 145(a). In particular, it has submitted evidence that the zoning districts permitting adult uses are zoned for and developed with a wide variety of commercial uses and are largely accessible by public transportation. Karnovsky Aff. ¶ 78; Amron Decl. ¶¶ 15-18. Plaintiffs have not rebutted that showing. *See Topanga Press*, 989 F.2d at 1531 (holding that it is sufficient that "relocation sites [be] reasonably accessible to the general public," without a case-by-case assessment of the transportation options available). As to infrastructure, the City did conduct visual confirmation of each site using imagery and excluded those sites that appearance unlikely to be available for development. CSF ¶ 145(e). Although it is true that a site that "lacks the basic infrastructure

that is a precondition to private development . . . should not be considered part of the relevant real estate market for purposes of determining availability," *TJS*, 598 F.3d at 28, it also is true that the site need not have been already developed to be "available for development," *see, e.g., McDoogal's E., Inc.*, 341 F. App'x at 930; *Bronco's Ent., Ltd.*, 421 F.3d at 452. In *Renton*, the Court considered raw land to be part of the available market and to be a potential relocation site because it could be developed. 475 U.S. at 53; *see also David Vincent*, 200 F.3d at 1334 ("[T]he land deemed available for adult businesses in *Renton* included acreage in all stages of development form raw land to developed, industrial, warehouse, office, and shopping space."). Plaintiffs here do not allege that any of the lots lack proper infrastructure such as sidewalks, roads and lighting. And given the dense population and lack of undeveloped land within New York City generally and in particular in the commercial and manufacturing districts to which adult entertainment establishments will be limited under the 2001 Amendments, there is every reason to believe that the vast majority, if not all, of the 1,745 non-exclusive and 245 exclusive lots that DCP identifies will have the basic infrastructure necessary for private development. Although Defendants did not analyze each site specifically as to whether it would be suitable for a generic commercial enterprise, all of the sites of the City's list of alternative sites are zoned for use by commercial enterprises. CSF ¶ 145(g).

Plaintiffs point out, Dkt. No. 225 at 13, that Defendants did not exclude lots over 10,000 square feet, CSF ¶ 145(i). *TJS* holds that it was not required to do so. Even if "certain

identified sites [are] better suited to large businesses, like automobile dealerships, than they were to small retail stores, it would not follow that these sites would not be part of a general commercial real estate market. It would mean only, and quite unremarkably, that there are site that would be more profitable for some commercial businesses than for others." *TJS*, 598 F.3d at 29. The *TJS* Court held that "obstacles such as the possibility of 'making due with less space than one desired,' or 'having to purchase a larger lot than one needs,' do not render property unavailable for the purpose of constitutional analysis." *Id.* (quoting *David Vincent*, 200 F.3d at 1335).

Finally, Plaintiffs' suggestion that the 2001 Amendments fail to leave sufficient alternative avenues of communication because "pending proposed text amendments to the Zoning Resolution" may further limit alternative sites, CSF ¶ 145(f), is without merit. The City did exclude sites from its list of available alternative sites that it anticipated would be rendered unavailable by virtue of proposed text amendments. *Id.* Plaintiffs' expert submitted a declaration in November 2018 in which he asserted that the number of available locations for adult entertainment would be reduced as a result of planned rezoning for the Gowanus Canal area in Brooklyn. Berzak Decl. ¶ 34. In its later analysis, DCP addressed the issue and eliminated an M3-1 district in the Brooklyn core covering parts of Greenpoint and Williamsburg along Newtown Creek that was proposed for rezoning (even though the zoning proposal was not adopted) and the manufacturing districts that were proposed to be rezoned in the Gowanus area of Brooklyn. Amron Decl. ¶ 10. In

any event, the question for the Court is not whether in the future there will be available alternative sites; it is whether "at the time the court issues its judgment, or as close as is practicable to that time in light of the need for discovery and the presentation of evidence," there are alternative avenues for communication. *TJS*, 598 F.3d at 23. Defendants have thus satisfied their burden.

III. Mandatory Amortization Provisions of the 2001 Amendments

Plaintiffs also bring First Amendment and Fourteenth Amendment challenges to the amortization or "mandatory termination" provision of the 2001 Amendments specifically on the grounds that the provision burdens protected speech and because the provisions treat them differently from other non-conforming uses by requiring them to close or move within one year of the 2001 Amendments. Dkt. No. 222 at 31-50. Both fail.

A. First Amendment Challenge

Plaintiffs contend that, even if the 2001 Amendments facially satisfy *Renton*, they should be deemed unconstitutional as applied to them specifically because the amortization or "mandatory termination" provision of the 2001 Amendments will require the Plaintiffs to terminate or move within one year of the date that the 2001 Amendments go into effect without any showing that Plaintiffs specifically contribute to secondary effects or will be able to find a home elsewhere in New York City. Dkt. No. 222 at 4, 31-37; Dkt. No. 225 at 6. In other words,

they suggest that the City was required by *Renton* as clarified by *Alameda Books* to study the secondary effects of 60/40 businesses specifically, *see, e.g.*, Dkt. No. 222 at 37, and their similarity to other non-conforming uses, *see, e.g., id.* at 35.

Plaintiffs appear to invoke the constitutional avoidance doctrine. *See* Dkt. No. 222 at 18-19. They assert that their argument is "very limited" as it would seek relief "only for those 60/40 eating or drinking establishments which could validly claim lawful nonconforming use status because they operate on sites which lawfully converted to 60/40 businesses prior to the 2001 Amendments." Dkt. No 222 at 7-8. In short, they ask the Court to "grandfather" them into their current locations without permitting any other businesses that would like to adopt the 60/40 model to take advantage of the same rule. Dkt. No. 222 at 18; Dkt. No. 225 at 2. Plaintiffs' invocation of the constitutional avoidance doctrine, however, is mistaken. The constitutional avoidance doctrine provides that the court should "not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin*, 557 U.S. at 205 (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984)). For example, it "comes into play only when, after the application of ordinary textual analysis, [a] statute is found to be susceptible of more than one construction." *Jennings v. Rodriguez*, 583 U.S. 281, 296, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018); *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). The

doctrine at once reflects respect for the political branches and the presumption that they will not act in violation of the Constitution and expresses judicial restraint, calling on courts to decide questions of constitutional moment only when the case requires a constitutional decision. Stated more broadly, the doctrine goes to the grounds of a court's decision and not alone to the scope of its relief. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) ([F]ederal courts will not pass on the constitutionality of an Act . . . if a construction of the Act is fairly possible by which the constitutional question can be avoided."). Here, the Court is not tasked with choosing between two ambiguous interpretations of the 2001 Amendments, one that implicates the Constitution and one that does not. Plaintiffs do not offer a non-constitutional grounds for deciding the case; they raise a First Amendment question. *Cf. Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 298 (6th Cir. 2008). They ask the Court to determine, and the Court is obligated to address, the claim that the mandatory termination provision of the 2001 Amendments violates the First Amendment. *See, e.g., United States v. Martinez*, 525 F.3d 211, 216 (2d Cir.), *cert. denied*, 555 U.S. 924, 129 S. Ct. 293, 172 L. Ed. 2d 214 (2008) ("Because resolution of these issues does not require this Court to interpret any statute, this case does not invite the application of the doctrine of constitutional avoidance."). Plaintiffs would have the Court declare as a matter of constitutional law that, because they were in operation before the 2001 Amendments, they must be permitted to continue in operation after the law, *i.e.*, that the City is without constitutional power to require them to move. Plaintiffs do not identify any law that would

require that result.[49] Plaintiffs' proposed resolution—grandfathering—still requires the Court to reach the constitutional question and answer it in their favor. The constitutional question presented is no narrower, and no broader, than the question whether the 2001 Amendments, as a whole, violate the First Amendment. The argument merely seeks relief that is "narrower" in that it is less disruptive to the present status quo. Thus, because all of Plaintiffs' claims are constitutional ones that require the Court to address their merits, the doctrine of constitutional avoidance has no application here. *See, e.g., Zobrest*, 509 U.S. at 7-8.

The remainder of Plaintiffs' challenges to the mandatory termination provision are unavailing. As the Eleventh Circuit has explained, "[c]ourts have frequently upheld the application of new zoning regulations to existing adult businesses with an amortization period." *David Vincent*, 200 F.3d at 1332. The amortization provision provides a limited window for 60/40 adult establishments to remain in business at their current locations after the 2001 Amendments go into effect. Adult businesses existing as of the date of the CPC proposal on August 8, 2001, but that made financial expenditures to avoid becoming subject to the 1995 Regulations and prior to the CPC decision are permitted to remain in place

49. Plaintiffs insist that the harm to the City would be minimal if equitable relief were granted. Dkt. No. 222 at 15-17. The Court need not consider that issue—or the other factors of injunctive relief—because Plaintiffs have not established a claim that prevails on the merits. *Cf. N.B. v. United States*, 552 F. Supp. 3d 387, 404 (E.D.N.Y. 2021).

for one year following the City Council's adoption of the 2001 Amendments, or to October 31, 2002. Karnovsky Aff. ¶ 74. There is one proviso: a business can appeal to the Board of Standards and Appeals for permission to continue in place for a limited period beyond one year. *Id.* Nonconforming adult establishments and certain non-conforming signs are the only uses that are required to terminate as early as one year from the date it becomes non-conforming. CSF ¶ 42. And many non-conforming uses are not subject to mandatory termination provisions at all, *id.* ¶ 40; only non-conforming adult establishments, non-conforming signs, certain non-conforming uses in residential districts, and some non-conforming uses which may remain in place only if walls are built around them (for example, salvage yards), have mandatory termination periods. All other non-conforming uses in New York City must terminate "only if they have been discontinued for two years or expanded or increased in intensity." *Id.* ¶ 43; *see* Z.R. § 52-73 (in residential districts the following uses that are not in a completed enclosed building below a certain assessed valuation must have terminated within ten years of December 15, 1961, or when the use became non-conforming: "coal storage; dumps, marine transfer stations for garbage, or slag piles; junk or salvage yards . . . ; lumber yards . . . ; manure, peat, or topsoil storage; [and] scrap metal, junk, paper or rages storage, sorting or bailing").

New York law provides constitutional protection to nonconforming uses that predate the enactment of a restrictive zoning ordinance. *See Edelhertz v. City of Middletown*, 943 F. Supp. 2d 388, 394 (S.D.N.Y. 2012),

aff'd, 714 F.3d 749 (2d Cir. 2013). Where an owner has made an investment in a use of property that subsequently has become non-conforming, the owner's right to use that property may not be terminated unless he is given "a reasonable period, during which the owner may have a fair opportunity to amortize his investments and to make future plans." *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 561, 152 N.E.2d 42, 176 N.Y.S.2d 598 (N.Y. 1958); *see Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 224, 542 N.Y.S.2d 139 (N.Y. 1989) ("The intractable problem of eliminating nonconforming uses, however, has led [New York] courts . . . to sustain amortization provisions if the period allowed to recapture the investment in the use is reasonable."); *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 261-62, 402 N.Y.S.2d 359 (N.Y. 1977) ("[B]y permitting a limited period during which an existing nonconforming use may be continued, rather than requiring its termination immediately, amortization provides an owner with an opportunity to recoup his investment and avoid substantial financial loss."). This rule is codified in the Zoning Resolution, which permits the City to set "a reasonable statutory period of life . . . in order to permit the owner gradually to make his plans for the future during the period when he is allowed to continue the nonconforming uses of his property, thereby minimizing any loss." Dkt. No. 201 ¶ 6 (quoting Z.R. § 51-00).

Plaintiffs do not claim that they have been denied a reasonable period of time to recoup their investment. Nor could they. The 2001 Amendments required non-conforming adult entertainment establishments to

terminate by October 31, 2002. Karnovsky Decl. ¶ 5. As a result of the injunction that has prevented the 2001 Amendments from being applied to them, Plaintiffs have had over twenty years to recoup their investment. Courts have consistently found time periods far shorter sufficient to recoup losses. *See, e.g., Cricket Store 17, L.L.C. v. City of Columbia*, 676 F. App'x 162, 165 (4th Cir.), *cert. denied*, 583 U.S. 822, 138 S. Ct. 116, 199 L. Ed. 2d 32 (2017) (two years); *Abilene Retail No. 30, Inc. v. Bd. of Comm'rs of Dickinson Cty.*, 492 F.3d 1164, 1169 (10th Cir. 2007), *cert. denied*, 552 U.S. 1296, 128 S. Ct. 1762, 170 L. Ed. 2d 540 (2008) (two years); *David Vincent*, 200 F.3d at 1328 (five years); *Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858 (8th Cir. 1994) (three years); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 830 (4th Cir. 1979), *cert. denied*, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980) (six months). Rather, Plaintiffs claim that the amortization provisions of the 2001 Amendments, because they apply only to adult entertainment and not to other nonconforming uses, violate the First Amendment under *Reed, Renton*, and the guarantee of the Fourteenth Amendment to equal protection of the laws. Dkt. No. 77 ¶¶ 189-94.

Plaintiffs' arguments fail for the same reason that Plaintiffs' arguments regarding the unconstitutionality of the 2001 Amendments at large fail. If New York City can, with proper justification, treat adult establishments differently from other establishments for zoning purposes, it follows that New York City can require adult establishment businesses to move when it does not require other businesses to move. *See, e.g., TJS*, 598 F.3d at 21. In

fact, the ordinance at issue in *Alameda Books* "force[d] certain adult businesses to relocate," as the plurality opinion expressly noted. 535 U.S. at 438. Contrary to Plaintiffs' argument, Dkt. No. 226 at 14, the Court need not measure the relative noxious effects of each other business that either is considered to be conforming or that is non-conforming but that is grandfathered into its current location. *See, e.g., Imaginary Images*, 612 F.3d at 742 ("[O]fficials 'need not show that each individual adult establishment actually generates the undesired secondary effects.'" (quoting *Indep. News*, 568 F.3d at 156)); *MJJG Rest.*, 11 F. Supp. 3d at 568. That is a judgment for the CPC and for the City Council. *Renton* teaches that a zoning regulation can treat adult entertainment different from other commercial uses under the First Amendment if the zoning regulation does not entirely ban adult entertainment expression, it is deemed content-neutral, it is supported by a substantial governmental interest, and it permits reasonable alternative avenues for communication. Plaintiffs' argument to the contrary notwithstanding, Dkt. No. 222 at 40, the City has demonstrated that there will be alternative avenues for the communication of Plaintiffs' speech even if the 2001 Amendments are applied to them.

The fact that a particular adult entertainment business might be grandfathered may bear on the question of whether reasonable alternative avenues for communication are preserved by the zoning regulation. *See Am. Mini Theatres*, 427 U.S. at 70 n.35 (plurality opinion) (noting that the Detroit ordinance did not have the effect of suppressing or "greatly restricting access to" lawful speech because the ordinance did not affect the operation

of existing businesses but only the location of new ones). Indeed, an amortization period may be insufficient "if it puts a business in an impossible position due to a shortage of relocation sites." *World Wide Video of Wash.*, 368 F.3d at 1200. But, in that instance, the zoning law would fail the *Renton* test for the absence of reasonable alternative avenues of communication. The City is neither required to grandfather existing businesses in order to comply with the First Amendment nor is it required to show that it has a compelling interest with respect to Plaintiffs' particular businesses. *Daytona Grand*, 490 F.3d at 872 n.17 ("The Constitution does not require a 'grandfathering' provision for existing non-conforming businesses."). A municipality need not show that adult eating and drinking establishments "have greater secondary effects beyond their property line than . . . traditional bars and nightclubs," before singling out adult eating and drinking establishments for zoning and not traditional eating and drinking establishments. Dkt. No. 226 at 16. It follows that the City can also require non-conforming adult entertainment businesses to move within one year without imposing a similar requirement on non-adult businesses. In short, the "issue is conceptually indistinguishable from the First Amendment requirement of alternative avenues of communication." *Id.*; *see, e.g.*, *Indep. News*, 586 F.3d at 156-57 (upholding zoning regulation with amortization provision); *Jake's Ltd., Inc. v. City of Coates*, 284 F.3d 884, 889 (8th Cir.), *cert. denied*, 537 U.S. 948, 123 S. Ct. 413, 154 L. Ed. 2d 292 (2002) (same). If the City can satisfy the constitutional requirements with respect to future businesses, the Constitution does not require it to make an exception for existing businesses. "The Constitution . . .

does not require [a] 'grandfathering' clause for existing non-conforming businesses." *David Vincent*, 200 F.3d at 1332.[50]

B. Fourteenth Amendment Challenge

Plaintiffs further assert that the mandatory termination provision of the 2001 Amendments is also invalid under the Equal Protection Clause of the Fourteenth Amendment, Dkt. No. 222 at 47-49, which commands that the government not "deny to any person within its jurisdiction the equal protection of laws," U.S. Const. amend. XIV, § 1. Specifically, Plaintiffs contend that the mandatory termination provision treats adult entertainment businesses differently from other establishments by requiring adult establishments that do not conform to the 2001 Amendments to close within one year of the date that the law goes into effect, while allowing other non-conforming uses to operate indefinitely or for longer periods of time. Dkt. No. 222 at 47-49.

The Equal Protection Clause does not outright prohibit government classifications but "simply keeps

50. For the reasons stated *supra*, the Court rejects the arguments, Dkt. No. 222 at 39-42, that *Reed* and *Austin* require the City to satisfy a test different from what the City must satisfy under *Renton* for existing businesses, and that the Constitution prohibits the City from subjecting adult establishments to zoning requirements not applicable to other non-conforming uses. *American Mini Theatres, Renton*, and *Alameda Books* all permit municipalities to subject adult establishments to zoning requirements not applicable to other businesses that do not generate the same secondary effects. *See, e.g., Andy's Rest. & Lounge*, 466 F.3d at 555-56.

governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). The degree of scrutiny a court must apply turns on the rights at issue and the nature of the classification, *Winston v. City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018), with the government receiving wide discretion in fashioning acceptable classifications, *Suffolk Parents of Handicapped Adult v. Wingate*, 101 F.3d 818, 824-25 (2d Cir. 1996), *cert. denied*, 520 U.S. 1239, 117 S. Ct. 1843, 137 L. Ed. 2d 1047 (1997). A law that neither burdens a fundamental right nor targets a suspect class is subject only to rational basis review. *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Although the right to freedom of speech protected by the First Amendment is a fundamental right, *see Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968), because Plaintiffs fail to demonstrate that the zoning regulations impinge their First Amendment rights, and because adult entertainment establishments "are obviously not a suspect class entitled to heightened protection," *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir. 2002), *cert. denied*, 537 U.S. 823, 123 S. Ct. 109, 154 L. Ed. 2d 33 (2002), the regulations are subject only to rational basis review, *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); *see Lederman v. N.Y.C. Dep't of Parks & Recreation*, 2010 U.S. Dist. LEXIS 71425, 2010 WL 2813789, at *11 (S.D.N.Y. July 16, 2010).

Under rational basis review, the law at issue "'is presumed constitutional' and 'the burden is on the one

attacking the legislative arrangement to negative every conceivable basis which might support it." *Winston*, 887 F.3d at 560 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)). Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller*, 509 U.S. at 319 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). Rather, the Court must uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320 (citing *Nordlinger*, 505 U.S. at 11).

The City not only has a rational basis for its decision, it has, as noted *supra*, a substantial interest in that decision—to limit what it has determined are the secondary effects of adult establishments. *See, e.g., LaTrieste Rest. v. Village of Port Chester*, 188 F.3d 65 (2d Cir. 1999), *cert. denied*, 528 U.S. 1187, 120 S. Ct. 1240, 146 L. Ed. 2d 99 (2000); *see also Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951 (8th Cir. 2019); *Stardust, 3007 v. City of Brookhaven*, 899 F.3d 1164 (11th Cir. 2018); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1272 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989); *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County*, 256 F. Supp. 2d 385, 400 (D. Md. 2003). The Zoning Resolution's differential treatment of adult entertainment establishment—mandating non-conforming uses to terminate within one year while permitting other establishments to continue operating indefinitely or terminate within ten years—is thus justified by reference to the secondary effects.

See, e.g., Lim v. City of Long Beach, 217 F.3d 1050, 1056 (9th Cir. 2000), *cert. denied*, 531 U.S. 1191, 121 S. Ct. 1189, 149 L. Ed. 2d 105 (2001); *Hart Book Stores*, 612 F.2d at 831 ("Special regulation of one commercial enterprise with particular externalities but not of other enterprises lacking those secondary effects has long been recognized not to violate equal protection, precisely because the enterprises are not similarly situated and the differential treatment is warranted by the different secondary effects." (internal citations omitted)). And because "limiting secondary effects" is as a substantial government interest, the amortization provision readily satisfies the Equal Protection Clause. *See DLS, Inc.*, 107 F.3d at 411 n.7 ("[I]f a sufficient rationale exists for the ordinance under the First Amendment, then the City has demonstrated a rational basis for the alleged disparate treatment under the Equal Protection Clause."); *see also Maages Auditorium v. Prince George's County*, 681 F. App'x 256 (4th Cir. 2017). Although *Renton* "dealt with a First Amendment challenge to a separation ordinance, its speech-neutral reason for permitting adult businesses to be treated differently from others also refutes an equal protection challenge." *Isbell*, 258 F.3d at 1116.

The amortization period for adult entertainment uses in New York City is shorter than that for other uses that either have a longer period of amortization, *see* 2001 Z.R. § 52-74 (requiring amortization within ten years of enactment of uses such as open-air dumps, lumber yards, manure storage, and scrap metal heaps), or that need not relocate at all. But the City has articulated a rational basis for that distinction: adult establishments generate

different secondary effects than, for example, open-air dumps. The City need do no more to satisfy the Equal Protection Clause.

IV. Permitting Provisions of the 2001 Amendments

In the alternative to their mandatory termination challenge, Plaintiffs claim that the permitting procedures necessary to obtain an alternative location are unconstitutional or render the 2001 Amendments unconstitutional. Dkt. No. 222 at 50-72. In particular, Plaintiffs assert that the process for obtaining building permits from DOB—a prerequisite to construction, renovation, and occupancy—constitutes an unconstitutional prior restraint on expression in violation of the First Amendment and discriminates against adult establishments in violation of the Fourteenth Amendment. *See, e.g.*, Dkt. No. 77 ¶¶ 112-26; Dkt. No. 222 at 41-45.

Defendants respond that Plaintiffs "lack standing to facially challenge the applicable permitting procedures as they are content neutral and applied to adult and nonadult-establishments alike, and not specific to expressive activity," and cannot bring an as-applied challenge until they have applied for a permit. Dkt. No. 220 at 5, 51. To the extent that Plaintiffs do have standing, Defendants assert that on the merits, the permitting restrictions pass constitutional muster because they are content-neutral and provide reasonably specific and objective standards that DOB must consider in reviewing a permitting application. Dkt. No. 220 at 45-49; Dkt. No. 224 at 19-21. Defendants contend that, although there are "no specific

time limits for [the DOB] . . . to review applications," the City's administrative code limits the amount of time DOB may take to approve construction documents specifically. Dkt. No. 224 at 20.

A. DOB's Permitting Rules

The dimensions of the City's permitting have changed significantly over the years this case has been pending. In the first case filed, Plaintiffs raised several challenges to both the procedure that adult entertainment establishments must follow in order to obtain zoning approval, and the City's rules that determine whether an adult establishment was "established" before a sensitive use and thus permitted to remain within 500 feet of the sensitive use notwithstanding the 2001 Amendments. *See* Dkt. No. 77 ¶¶ 112-126. But not all of these provisions still present "live controversies" adjudicable by the Court under Article III of the Constitution. *See, e.g., Stafford v. Int'l Bus. Machs. Corp.*, 78 F.4th 62, 66-67 (2d Cir. 2023) (explaining that Article III's limitation of judicial power to "Cases" and "Controversies" prevents federal courts from adjudicating disputes that are no longer live).

1. Permit Applications

In their operative complaints, filed in 2018, Plaintiffs contested the constitutionality of the procedures an adult entertainment establishment must follow to obtain zoning approval. *See, e.g.*, Dkt. No. 77 ¶ 112-26. Plaintiffs contended that the permitting procedure differed "in two key respects" from those required of non-adult

businesses: (1) architects for building permit applicants for non-adult uses could self-certify zoning compliance, whereas under DOB OPPN 7/02, no permit could be issued to serve as priority for an adult establishment based on a professionally certified application; and (2) all zoning permit applications for adult establishments were required to be reviewed by the City's legal counsel for zoning compliance, a requirement that did not apply to non-adult businesses. Dkt. No. 77 ¶ 116. Plaintiffs complained that the lack of any time limits for final approval by the City's legal counsel, and the open-ended zoning approval procedures that were applicable to *only* adult entertainment establishments but not to non-adult establishments constituted a content-based prior restraint on expression. *Id.* ¶ 118.

But in 2020, DOB changed its permitting procedure so that it no longer differentiated between adult entertainment establishments and non-adult uses. After the New York Court of Appeals' final decision in *For the People Theatres* definitively resolved the constitutionality of the 2001 Amendments, DOB issued Buildings Bulletin 2020-005,[51] Dkt. No. 162-2, Ex. 17 ("2020 Rule"), at 157, which prospectively and partially superseded OPPN 7/02, CSF ¶ 72. The 2020 Rule specifies that, once the 2001 Amendments become enforceable, the use of self-certification will not be prohibited solely

51. DOB replaced OPPNs with "Buildings Bulletins" in 2008. CSF ¶ 73. Whatever the name, the functional effect of these rules is the same, *id.* ¶ 74, to "set[] forth new policies and procedures related to operations to assist DOB customers and employees," Gittens Decl. ¶ 15.

because the applications propose adult establishments, and applications by adult entertainment establishments will not be subject to additional legal review by DOB. 2020 Rule at 157; *see* Gittens Decl. ¶ 14. Currently, DOB prohibits adult establishments from professionally certifying construction documents, citing the need to independently verify the layouts of 60/40 establishments. Gittens Decl. ¶ 8. Professional certification, as opposed to permitting for plans that are not professionally certified, generally allows faster final completion of a building permit application.[52] CSF ¶¶ 76, 82-83. Once the 2001 Amendments are in place, obviating the 60/40 Rule, DOB plan examiners will not have to undertake to review the layout of adult establishment construction plans in order to determine compliance with the Zoning Resolution, unless the applicant chooses to seek such review.[53] Gittens Decl. ¶ 13. DOB also dispensed with the legal review of the plans of only adult entertainment establishments. DOB has formally changed its procedures such that its applicable rule no longer requires adult entertainment establishments seeking permits to gain approval by the agency's legal counsel. CSF ¶¶ 84-86; Nov. 28 Oral Arg. Tr. at 98. As the Bronx Borough Commissioner of the

52. Sensitive uses such as schools and houses of worship are allowed, under DOB's rules, to seek permits through professional certification by their architects. CSF ¶ 96.

53. After any professional certification, DOB conducts "a zoning audit of each application . . . prior to acceptance," CSF ¶ 210, and "[a]dditional targeted audits are performance of professionally certified applications pursuant to Buildings Bulletin 2016-010-4-A-1 based on receipt of a complaint . . . or at the discretion of the Commissioner," *id.* ¶ 213.

DOB testified, "adult establishment applications are no longer subject to routine review by the [DOB's] General Counsel's Office." Gittens Decl. ¶ 14.

Plaintiffs' challenge to these two key aspects of the permitting procedures is now moot, as Defendants argue. *See* Dkt. No. 220 at 40-42; Dkt. No. 224 at 16. "A case becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (per curiam)); *see also Haley v. Pataki*, 60 F.3d 137, 141 (2d Cir. 1995) ("[I]t is axiomatic that there must be a continuing controversy capable of redress by this Court.").

As Plaintiffs themselves appear to recognize at least in part, DOB's 2020 Rule remedies the problems protested in the operative complaints.[54] *See* Dkt. No. 225 at 59 ("[T]he City's repeal of that . . . provision has removed the [self-certification] issue from the case."); *id.* at 61 (acknowledging that the 2020 Rule "states that 'routine' review by DOB's general counsel is no longer 'required'"). "Constitutional challenges to statutes are routinely found moot when a statute is amended." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992) (citing *Massachusetts v. Oakes*, 491

54. For Plaintiffs' challenge to be moot, the Court must determine whether the 2020 Rule leaves "open the possibility that new and related claims might arise under the new [regulatory] scheme." *Chrysafis v. Marks*, 15 F.4th 208, 214 (2d Cir. 2021). Here, as discussed *infra*, the 2020 Rule does not.

U.S. 576, 582, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989)). The Second Circuit has expressly extended this rule to zoning ordinances. *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 376-77 (2d Cir. 2004) (Sotomayor, J.) ("Mindful of the deference due the legislative body, we are hesitant to hold that a significant amendment or repeal of a challenged provision that obviates the plaintiff's claims does not moot a litigation, absent evidence that the defendant intends to reinstate the challenged statute after the litigation is dismissed, or that the municipality itself does not believe that the amendment renders the case moot."); *see also Chrysafis*, 15 F.4th at 213 ("The argument for mootness would seem to be even stronger when the challenged statute has expired and a new statute, endeavoring to remedy the defect of the old one, has been enacted.").

Plaintiffs nevertheless invoke the voluntary-cessation doctrine, submitting that "voluntarily ceasing any type of constitutionally challenged procedure during litigation does not moot constitutional claims." Dkt. No. 229 at 29. However, "[t]he voluntary cessation of allegedly illegal activities will usually render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (quoting *Granite State Outdoor Adver., Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002)).

Both elements are met here: the City "has taken official action to rescind the [alleged] unlawful policy,"

and the evidence reveals that any effects of the alleged violation have abated. *Saba v. Cuomo*, 535 F. Supp. 3d 282, 296 (S.D.N.Y. 2021).[55] Although the City may still subject

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55. Plaintiffs argue that their challenge to the permitting procedure by DOB is not moot because (1) under the 2020 Rule, DOB's General Counsel retains discretionary authority to review building applications, Dkt. No. 226 at 27-33; and (2) the cessation of DOB's preexisting policy is a change in the face of litigation rather than a *bona fide* change in law, *id.* 29 n.28. As to Plaintiffs' first contention, that even DOB's 2020 Rule singles out adult entertainment establishments by stating that "Adult Establishments need not be subject to routine review" by DOB's General Counsel, Dkt. No. 226 at 29-30, the Rule, as noted above, was promulgated to "prospectively and partially supersede" DOB's preexisting rule, CSF ¶ 72; Dkt. No. 162-2, Ex. 17, at 157, which expressly subjected adult entertainment establishments to more burdensome permitting requirements, *see* Dkt. No. 162-1, Ex. 14, at 136-38. It stands to reason then, that the superseding rule would also single out adult entertainment establishments as *not* subject to more onerous requirements. Plaintiffs' view that the 2020 Rule gives DOB the power to engage in discretionary delays is pure speculation. Plaintiffs submit no evidence that, once the 2001 Amendments become effective and the 2020 Rule applies, DOB will treat adult entertainment establishments differently from any other type of establishment. Indeed, the fact that review of construction documents (including review by the General Counsel) is limited to 40 days undermines any claim that, going forward and under the new rules, the General Counsel nonetheless will subject adult establishments to any greater review than that to which any other business might be subjects. CSF ¶ 104 (citing N.Y.C. Admin. Code § 28-104.2.7). As to Plaintiffs' second argument, it is not surprising that DOB promulgated the 2020 Rule only in 2020. It was not until 2018 that the United States Supreme Court denied the petition for certiorari on the state-court challenge to the 2001 Amendments. 538 U.S. 1118 (2018). The following year, Judge Pauley suspended the effects of the 2001 Amendments. 408 F. Supp. 3d at 424. There would have been no reason for the City to creates rules that for the

adult entertainment establishments to additional legal review, there is no reasonable expectation that the City will revert to its previous differential treatment of adult establishments. Plaintiffs withdrew their argument that "there is no guarantee that removal of the professional-certification bar for adult business applicants will ever actually happen should the 2001 Amendments become enforceable." Dkt. No. 228 at 1-2. And, Defendants represented in their brief, Dkt. No. 220 at 40-41, and at oral argument, Nov. 28 Oral Arg. Tr. at 98, that they have no intention to subject adult business applicants to differential treatment. Of course, the Court need not

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administration of its zoning regulations after the 2001 Amendments went into effect when there was, at that time, no certainty as to when and whether those amendments would go into effect. Indeed, since the first suit in this case was instituted in 2002, DOB has amended its review procedures several times, *see, e.g.*, Dkt. No. 162-1, Ex. 13, at 130-35 (detailing DOB's 2005 rule clarifying procedures for professional certification), and the changes did not "appear to track the development of this litigation." *Mhany Mgmt., Inc.*, 819 F.3d at 604. Moreover, DOB officials testified that DOB's practice, if not its written policy, changed in 2016—while this case was stayed pending resolution of parallel claims in state court. *See Dean v. Blumenthal*, 577 F.3d 60, 64-65 (2d Cir. 2009), *cert denied*, 559 U.S. 1058, 130 S. Ct. 2347, 176 L. Ed. 2d 577 (2010) (relying partially on changes in government's practice to support mootness claim). "Since February 2016, DOB's General Counsel [has] no longer review[ed] permit applications that propose adult establishments." Gittens Decl. ¶ 14. The fact that DOB did not formally amend its permitting scheme until 2020 does not establish that the change was made in order to guard against the "threat of liability" reemerging from this case, *Mhany Mgmt., Inc.*, 819 F.3d at 604, but rather only the fact that the case was nearing resolution and that the City was looking ahead to possible enforcement of the 2001 Amendments, under which routine DOB General Counsel review was no longer necessary.

unquestionably accept Defendants' representations. *Saba*, 535 F. Supp. 3d at 297. However, such a representation, when combined with the government's "voluntary practice of not enforcing" for several years—as DOB did here by not enforcing its previous rule requiring General Counsel review beginning in 2016—supports a finding of mootness. *See, e.g., Dean v. Blumenthal*, 577 F.3d 60, 64-65 (2d Cir. 2009), *cert. denied*, 559 U.S. 1058, 130 S. Ct. 2347, 176 L. Ed. 2d 577 (2010). Indeed, Defendants' representations "in [their] brief and confirmed . . . at oral argument . . . . are entitled to some deference." *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 110 (2d Cir. 2016) (per curiam). Even if the City "had an incentive to revert to" its previous differential treatment of adult entertainment establishments, "there would still be no reasonable expectation" that it would do so. *Id.* Plaintiffs put forth no evidence suggesting that the City intends to reinstate the challenged permitting provisions. *See Lamar Adver. of Penn*, 356 F.3d at 377. In particular, the City has gone a step further than merely stopping the challenged conduct, it has affirmatively replaced its previous rule subjecting adult entertainment establishments to additional legal review with a rule that states that, when the 2001 Amendments go into effect, "[a]pplications that propose Adult Establishments need not be subject to routine review by the [DOB's] General Counsel's Office." 2020 Rule at 157. Unlike instances in which the government has allegedly "ceased" its conduct by issuing a non-binding announcement which have been held insufficient to moot a claim, *Am. Council of Blind of N.Y., Inc. v. City of New York*, 495 F. Supp. 3d 211, 248-49 (S.D.N.Y. 2020), here DOB has issued an official rule using

the proper procedures. "The fact that the government has taken official action to rescind the unlawful policy means that under current law the violation cannot occur and lends force to the representation that in the future the violation will not recur." *Saba*, 535 F. Supp. 3d at 296. Defendants also meet the second element of the voluntary cessation doctrine by showing that the interim relief has eradicated the effect of the alleged violation. To return to its previous rule, DOB will have to undertake to promulgate a new rule. The Court is convinced that Defendants have "altered [their] conduct in a manner sufficient to present a fundamentally different controversy." *Am. Freedom Def. Initiative*, 815 F.3d at 109. Accordingly, Plaintiffs' present challenge to DOB's requisite legal review of permitting applications by adult entertainment establishments is moot.

Should Defendants revert to the permitting provision in effect when Plaintiffs brought this suit, either formally or in practice, Plaintiffs are not without recourse. "Where, as here, a[n] [intervening] regulation moots an action, the challenger can 'cure[] its mootness problem by simply starting over again—by challenging the regulation currently in force.'" *New York v. Raimondo*, 2021 U.S. Dist. LEXIS 69285, 2021 WL 1339397, at *3 (S.D.N.Y. Apr. 9, 2021) (quoting *Akiachak Native Cmty. v. United States DOI*, 827 F.3d 100, 113, 423 U.S. App. D.C. 458 (D.C. Cir 2016)).

2. Vesting Provisions

Separately, Plaintiffs also objected to the Defendants' process for determining whether an adult entertainment

establishment was established before a nearby sensitive use. Dkt. No. 77 ¶ 119. Plaintiffs complain that DOB's rules for determining the establishment date for adult businesses and sensitive uses—which, for both, is tied to the date of the issuance of a building permit—provide "an easy avenue for any sensitive use, adult business competitor, or any other person or entity who may be staunchly opposed to the establishment of a new adult eating or drinking establishment to block it from opening." *Id.* ¶ 125. A later-arriving sensitive user could achieve priority even though the permit application of the adult entertainment establishment was filed first by the expedient of obtaining a building permit—a "sensitive use veto." *Id.*

As noted, the City's adult zoning provisions prohibit adult entertainment establishments from locating within 500 feet of any existing sensitive uses and gave DOB rule-making authority to determine the priority of rights as between an adult establishment that located in a particular lot and a sensitive use such as a school or house of worship. CSF ¶¶ 95-99; Dkt. No. 162-1, Ex. 3, at 68. Under DOB's rules, the right of an establishment to locate on a given lot turn upon the date of establishment. 1 R.C.N.Y. § 9000-01. If an adult business's date of establishment precedes that of the school or house of worship, the school or house of worship cannot divest the adult establishment of its rights by locating within 500 feet of the adult establishment. *See id.* But, if the school or house of worship's date of establishment precedes that of the adult establishment, an adult business must maintain at least 500 feet of distance. *See id.* Adult establishments,

houses of worship, and schools not in existence and operating prior to August 8, 2001, are "established" by "the date of issuance of an appropriate department permit" provided that (1) "significant progress [is] shown toward completion of the work under the permit"; and (2) "the use or operation for which the building is constructed or altered must commence within six months after the issuance of a temporary certificate of occupancy or, if applicable, within six months after a department signoff has been completed," with the further provision that the Commissioner of DOB may extend that six-month period for an additional six months. *Id.* § 9000-01(b)(1).[56] The Commissioner of DOB has the authority to rescind a building permit or construction document approval "based on receipt of a complaint" or at her discretion, CSF ¶ 214, but only on limited prescribed bases and, generally, only after notice and the opportunity for a hearing, *id.* ¶ 218. In particular, on written notice to the permit holder, the Commissioner may revoke a permit for failure to comply with the provisions of the building code "or other applicable laws or rules . . . or whenever there has been any false statement or any misrepresentation as to a material fact in the application or submittal documents upon the basis

56. DOB has promulgated different rules for institutions that existed before August 8, 2001—the date that CPC approved the 2001 Amendments, *see* CSF ¶ 194—and institutions that only came into existence after, *see* Gittens Decl. ¶ 23. For adult establishments, houses of worship, or schools in existence and operating prior to August 8, 2001, the date of establishment is defined to be the date of issuance of an appropriate department permit or, if no permit was required, the date that it commenced operation as determined by DOB.

of which . . . approval was issued; or whenever a permit has been issued in error and conditions are such that the permit should not have been issued." N.Y.C. Admin. Code § 28-105.10.1. In such an instance, the permit holder is entitled to notice and the right to present to the Commissioner "information as to why the permit should not be revoked" before any action is taken. *Id.* It is only when "an imminent peril to life or property" presents itself that the Commissioner may immediately suspend a permit or application without prior notice. N.Y.C. Admin. Code § 28-105.10.2. And even then, the permit holder must be afforded notice and opportunity to be heard after the permit has been suspended. *See id.*

Focusing on the effect of the City's permitting scheme on new establishments, Plaintiffs allege that they will be chilled from relocating. *See* Dkt. No. 222 at 51-60. Since building permit applications are public records readily available online, CSF ¶¶ 97-98, in the interim time between when an adult entertainment establishment applies for a building permit and the time such permit is granted, a sensitive use can learn of an adult establishment's plan and effectively veto their application by obtaining a building permit before they do. Dkt. No. 222 at 51-60; Dkt. No. 225 at 75-78. Plaintiffs worry that, without a time limit for the issuance of a building permit, DOB can prolong the permitting process for an adult use while accelerating review of a sensitive-use application. Dkt. No 222 at 69-71. Plaintiffs contend that DOB will grant the sensitive user a building permit once an adult entertainment establishment has filed an application, even if the sensitive user's application for a permit postdates

that of the adult establishment. Dkt. No. 222 at 51-59. Running vesting rights from the date of permit *issuance* rather than from the date of permit *application*, Plaintiffs say, "is a fatal defect which renders the mandatory termination provisions unenforceable because it denies the Club Plaintiffs a reasonable opportunity to relocate." Dkt. No. 222 at 52. Under the City's current vesting rules, Plaintiffs state that "any nearby sensitive use could defeat the prospective adult use's application if it gets its permit granted first, even if it filed its application long after the adult business did." *Id.*

B. Standing

As Defendants argue, Dkt. No. 224 at 9-15, Plaintiffs have not established that they have standing to challenge the permitting procedures on a standalone basis. Standing—"the personal interest that must exist at the at commencement of the litigation," *Davis v. FEC*, 554 U.S. 724, 732, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)—"is the threshold question in every federal case, determining the power of the court to entertain the suit," *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). "[A] plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006).

The "irreducible constitutional minimum" of standing contains three elements: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2)

"a causal connection between the injury and the conduct complained of"; and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks and citations omitted). As the party seeking the federal court's jurisdiction, Plaintiffs bear the burden of establishing each step of the tripartite standing inquiry. *See id.* at 561. At the trial stage of litigation, to establish standing, a plaintiff must set forth by affidavit or other evidence specific facts which must be supported adequately by the evidence adduced. *Id.*; *see also Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). To the extent that Plaintiffs challenge provisions of the permitting scheme that operate in different ways, Plaintiffs must establish standing to challenge each provision. *Brokamp*, 66 F.4th at 389; *see also Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 892 (9th Cir. 2007) (finding that the plaintiff "must meet all three [standing] requirements for any claim it wishes to make").

1. Injury In Fact

Plaintiffs here fail to establish the first element of standing—injury in fact—which requires that the plaintiff be "the proper party to bring th[e] suit." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997).

What a plaintiff must prove to establish standing depends on the nature of the claim. *See, e.g., Antonyuk v. Chiumento*, 89 F.4th 271, 309 (2d Cir. 2023). Where, as here, a plaintiff brings a facial challenge to the permitting

procedure under the First Amendment, the standing requirements have been given a specific gloss. *See Beal v. Stern*, 184 F.3d 117, 125 (2d Cir. 1999) ("Although facial challenges are generally disfavored, they are more readily accepted in the First Amendment context."). In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), the Supreme Court held that a business engaged in protected expression does have standing to challenge a licensing statute before it is applied "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity." *Id.* at 755. In that limited circumstance, "one who is subject to the law may challenge it facially Without the necessity of first applying for, and being denied, a license." *Id.* at 755-56. The Court explained the dual reasons for allowing this type of facial challenge: "[f]irst, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. "Second, the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its legitimate abuse of censorial power." *Id.* at 758. "Standards," the Supreme Court explained, "provide the guideposts that check the licensor." *Id.*

Importantly, *City of Lakewood* did not abrogate or undermine any of the traditional three elements required by Article III to establish standing, including the injury in fact requirement. *See, e.g., Members of City of Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S.

Ct. 2118, 80 L. Ed. 2d 772 (1984); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1020 (9th Cir. 2009), *cert. denied*, 559 U.S. 936, 130 S. Ct. 1569, 176 L. Ed. 2d 110 (2010); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269-72 (11th Cir. 2006); *Osediacz v. City of Cranston*, 414 F.3d 136, 141 (1st Cir. 2005). *City of Lakewood* itself recognized that a purely theoretical threat of self-censorship was not alone sufficient injury within the meaning of Article III. Instead, the Justices stressed that a plaintiff had to show that the law "pose[d] a real and substantial threat to *identified* censorship risks." 486 U.S. at 759.

To have standing to mount a facial challenge, *City of Lakewood* requires Plaintiffs to establish that (1) the law that they challenge confers "unbridled discretion in the hands of a government official or agency" and that the discretion has "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks,"; and (2) the challenged provision applies to their conduct. 486 U.S. at 757, 759; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 69 F.3d 650, 658 (2d Cir. 1995); *Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012).

a. Discretion

Plaintiffs do not satisfy the *City of Lakewood* test for standing. In the first place, the permitting scheme does not give the City "unbridled discretion," nor is it "directed narrowly and specifically at expression or conduct commonly associated with expression." *City*

of Lakewood, 486 U.S. at 760. It is rather a "law[] of general application . . . not aimed at conduct commonly associated with expression and do[es] not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken." *Id.* at 760-61. The mere existence of some measure of discretion does not itself render a licensing scheme constitutionally suspect. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) ("[P]erfect clarity and precise guidance have never been required."); *Turley v. Police Dep't of City of New York*, 167 F.3d 757, 762 (2d Cir. 1999). Indeed, "'flexible' standards granting 'considerable discretion' to public officials can pass constitutional muster." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 179 (2d Cir. 2006) (quoting *Ward*, 491 U.S. at 794).

In determining whether a permitting scheme vests a government official with "unfettered discretion," courts weigh various elements of government decision-making: if and how the challenged law or regulation places restraints on government action, whether there are temporal limits on the action, and whether the action requires justification. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801-03, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) (striking down state law that required professional fundraisers to obtain a license before engaging in solicitation because there were no express or well-established customary time limits constraining the decision-maker); *Atlanta J. & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310-11 (11th Cir. 2003) (en banc) (invalidating licensing scheme which allowed a government agency to "cancel a

publisher's license for any reason whatsoever"); *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996), *cert. denied*, 522 U.S. 912, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997) (finding unconstitutional an ordinance that employed broad and abstract language in structuring the government's discretion and that lacked any requirement that officials provide some "evidence to support the conclusion that a particular structure . . . is detrimental to the community").[57] The Court may "not simply presume that an agency or official will adhere to standards not evident on the regulation's face or embodied in authoritative decisions or practice," *Beal*, 184 F.3d at 127 n.7, rather, the limits of government authority must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice," *City of Lakewood*, 486 U.S. at 770.

The City's permitting scheme sets limits on DOB's discretion to approve or deny permits. The City Administrative Code requires a permit to perform certain work on all building or structures in New York City without a written permit. Prior to the issuance of a permit, which is required to perform certain work on buildings or structures in New York City, N.Y.C. Admin. Code § 28-105.1; Gittens Decl.¶ 3, Section 28-104.1 of the New York City Administrative Code requires DOB approval of *all* construction documents, not just those for adult establishments, N.Y.C. Admin. Code § 28-104.1;

57. Many courts that have addressed this issue have rejected similar First Amendment challenges on their merits, rather than on standing grounds. Accordingly, the Court's analysis is also relevant to its discussion of the merits section *infra*.

Gittens Decl. ¶ 4. To do so, DOB must employ "qualified registered design professionals, experienced in building construction and design" to "examine the construction documents promptly after their submission . . . . for compliance with the provisions of th[e] [Administrative Code] and other applicable laws and rules." N.Y.C. Admin. Code § 28-104.2. The applicable laws and rules that DOB's plan examiners assure compliance with do not allow for consideration of the content of expressive activity. Gittens Decl. ¶ 5. Rather, DOB reviews construction documents for compliance with the applicable use regulations under the Zoning Resolution, including requirements related to signs and proximity regulations, and for compliance with the Construction Codes. *Id.*; *see* Nov. 28 Oral Arg. Tr. at 96-98. This is far from the expansive, permissive, or abstract statutory language that courts rightfully find raises the specter of censorship. *See, e.g., Moreno Valley*, 103 F.3d at 819 (language that required government officials to find structure would not "have a harmful effect upon the health or welfare of the general public" vested unfettered discretion in officials); *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066, 115 S. Ct. 1697, 131 L. Ed. 2d 560 (1995) (finding ordinance unconstitutional on its face because its use of the word "may" rather than "shall" did not impose an actual requirement on government Officials); *Epona v. County of Ventura*, 876 F.3d 1214, 1224 (9th Cir. 2017) (language that required a permit for a proposed use must be "consistent with the intent and provisions" of the municipality's general zoning law and "compatible with the character of surrounding, legally established development" conferred unbridled discretion on government officials). The City's

permitting requirements, by contrast, contain appropriate standards cabining the City's discretion. *See, e.g., Desert Outdoor Adver., Inc. v. City of Oakland*, 506 F.3d 798, 807 (9th Cir. 2007).

Further, DOB's decision-making process is not opaque and unreviewable. If DOB rejects an application, it is required to provide written notice "stating the grounds of rejection" to the applicant. N.Y.C. Admin. Code § 28-104.2.7. The scheme's meaningful reason-giving requirement facilitates effective review and protects against arbitrary decision-making. *See, e.g., G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1083 (9th Cir.), *cert. denied*, 549 U.S. 822, 127 S. Ct. 156, 166 L. Ed. 2d 38 (2006) (upholding sign code that required officials to "state the reasons for [each] decision to either grant or deny a permit so as to facilitate effective review"). Although DOB is not required to give reasons "with any degree of specificity," *City of Lakewood*, 486 U.S. at 771, the law itself imposes standards and Plaintiffs' own evidence shows that DOB has an established practice of giving specific reasons, *see* Dkt. No. 172-7 (listing reasons for revocation of adult entertainment establishment's permit).

The City's permitting scheme also sets temporal limits on DOB's authority. Relying on the Supreme Court's plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), that "a scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech" and thus is a species of

unbridled discretion sufficient to confer standing to bring a facial challenge, Plaintiffs make the faulty assertion that there are no time limits for the issuance of a building permit. Dkt. No. 222 at 64-66; Dkt. No. 225 at 64-65. But the permitting scheme is not as Plaintiffs describe. The Administrative Code does place time limits for the approval of construction documents and the issuance of objections if construction documents do not meet all requirements. Gittens Decl. ¶ 6. In addition to the requirement that DOB review construction documents "promptly" after submission, N.Y.C. Admin. Code § 28-104.2, Section 28-104.2.7 of the Administrative Code provides, in relevant part, as follows:

> § **28-104.2.7 Time period for review**. Completed construction documents complying with the provisions of this code and other applicable laws and rules shall be approved by the [C]ommissioner [of DOB] and written notice of approval shall be given the applicant promptly and no later than 40 calendar days after the submission of a complete application.
>
> Exception[]:
>
> On or before the fortieth day, the commissioner may, for good cause shown and upon notification to the applicant, extend such time for an additional 20 calendar days.

N.Y.C. Admin. Code § 28-104.2.7; *see also* CSF ¶¶ 104-105; Gittens Decl. ¶ 6.

Plaintiffs cannot rescue their standing argument by alleging that their willingness to relocate as required by the 2001 Amendments has been chilled by the risk of sensitive-use veto that the permitting provisions allegedly put forth, Dkt. No. 222 at 59-60, because they do not substantiate this claim with sufficient objective evidence of harm or threat of specific future harm. *See Brokamp*, 66 F.4th at 387-88. Although Plaintiffs submit evidence of burdensome delay owing to Defendants' *preexisting* permitting scheme, *see* Dkt. No. 172, they submit no evidence that DOB's new permitting scheme—which removes the previous barriers impeding speedy approval of permitting applications—will have the same effects. As the Supreme Court has explained, "subjective chill [of First Amendment rights] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). "Rather, to establish standing . . ., a plaintiff must proffer some objective evidence to substantiate his claim that the challenged [regulation] has deterred him from engaging in protected activity." *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999) (quoting *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991)). Plaintiffs rely specifically on the experience of one adult establishment, known as "Sapphire 2," that applied for a permit in 2014 but was beset by numerous delays totaling over two years—partially the result of a purported sensitive use obtaining a permit before Sapphire even though the adult use had filed an application months before the sensitive use. Dkt. No. 222 at 53-55; Dkt. No. 172. As Sapphire 2's architect testified, however, at least some of the delays that

Sapphire 2 faced were caused by errors that DOB made rather than DOB policy. Dkt. No. 172 ¶¶ 7-8. Moreover, as the City points out, Sapphire 2 underwent the permitting process in 2014—when DOB rules barred adult uses from utilizing the speedier professional-certification application process and uniformly subjected adult uses to review by DOB's General Counsel. Dkt. No. 224 at 13-14. DOB's revised rule, promulgated in 2020, will not subject adult uses to the delays that Sapphire 2 experienced. *Id.* at 14. DOB will be bound to the same time limit for permitting all establishments. Nov. 28 Oral Arg. Tr. at 98.

b. Nexus to Expression

Nor does the regulated conduct here—generally applicable permitting of buildings—bear "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood*, 486 U.S. at 759. "In determining whether expressive conduct is at issue" the Court examines "whether the activity in question is commonly associated with expression." *Id.* at 769; *see also Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1188 (9th Cir. 2022) (explaining that facial First Amendment challenges "are allowed against laws aimed at expressive conduct but disallowed against laws of general application not aimed at conduct commonly associated with expression"). The fact that expression is sold, rather than given away, does not itself reduce the degree of First Amendment protection. *City of Lakewood*, 486 U.S. at 756 n.5; *see Mastrovincenzo*, 435 F.3d at 92-93. Courts have found the requisite association with expression in

a wide range of activities: parades, *MacDonald v. Safir*, 206 F.3d 183, 189 (2d Cir. 2000); the business of tattooing, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010); and the sale of books, *Weinberg v. City of Chicago*, 310 F.3d 1029, 1044-45 (7th Cir. 2002), *cert. denied*, 540 U.S. 817, 124 S. Ct. 78, 157 L. Ed. 2d 34 (2003). In fact, a plurality of the Supreme Court has itself found that the adult entertainment establishments could facially challenge a general business licensing scheme because it was "more onerous" on sexually oriented businesses than others. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (plurality opinion); *see also H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 617 (6th Cir. 2009) ("Where . . . businesses protected by the First Amendment must equivalent to a licensing process that effectuates a prior restraint upon protected expression."). But, as here, where a permitting scheme is equally applicable to all establishments, courts have declined to find such a nexus, finding that "laws of general application that are not aimed at conduct commonly associated with expression—such as laws requiring building permits—'carry with them little danger of censorship' and are thus 'too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.'" *Spirit of Aloha Temple*, 49 F.4th at 1189 (quoting *City of Lakewood*, 486 U.S. at 761); *see, e.g., Dean v. Town of Hempstead*, 527 F. Supp. 3d 347, 410 (E.D.N.Y. 2021) (finding that the plaintiffs, there, adult cabaret establishments, lacked standing to challenge a generally applicable zoning ordinance); *The Tool Box v. Ogden City Corp.*, 355 F.3d 1236, 1242-43 (10th Cir. 2004).

Once the 2001 Amendments go into effect, adult establishments will be subject to the same permitting requirements and procedures to which all other establishments are subject. Gittens Decl. ¶ 24. Accordingly, the City's permitting scheme is not one that "permit[s] communication in a certain manner for some but not for others." *City of Lakewood*, 486 U.S. at 761. Here, although the adult entertainment itself offered is associated with expression, because the permitting rules are applicable to all establishments—including those that are not associated with expression—the provisions are not closely associated with expression.

c. "Subject To"

Several Plaintiffs also fail to satisfy the second part of *Lakewood*'s test—that they are "subject to" the law. 486 U.S. at 755. Plaintiffs do not produce evidence that they were denied a permit or that they spent money and time trying to obtain a permit, as plaintiffs in other cases have. *See, e.g., Simi Valley*, 216 F.3d at 815. That is for an understandable reason—the law that they challenge is not yet in effect. *FW/PBS* recognized that the future threat of enforcement of a regulation may satisfy Article III's injury in fact requirement. Accordingly, "there is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance," *MacDonald v. Safir*, 206 F.3d 183, 189 (2d Cir. 2000); the challenging party must merely be "subject to" to the ordinance, *see City of Lakewood*, 486 U.S. at 755; *see also Van Wagner Bos., LLC v. Davey*, 770 F.3d 33, 37-38 (1st Cir. 2014) (collecting cases). Many of the Plaintiffs have testified

that, if the 2001 Amendments become enforceable, they would close rather than attempt to relocate. Warech Decl. ¶ 13; Lipsitz Decl. ¶ 31; D'Amico Decl. ¶ 15; Kavanaugh Decl. ¶ 18; Zazzali Decl. ¶ 10; Knecht Decl. ¶ 7. By these Plaintiffs' own evidence, then, they are not subject to the permitting rules. *See Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) ("'The identification of a credible threat sufficient to satisfy the imminence requirement of injury in fact necessarily depends on the particular circumstances at issue,' and will not be found where 'plaintiffs do not claim that they have ever been threatened with prosecution, that prosecution is likely, or even that a prosecution is remotely possible.'" (quoting *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015))); *cf. NRDC, Inc. v. United States FDA*, 710 F.3d 71, 85 (2d Cir. 2013) ("[A] plaintiff may not establish injury for standing purposes based on a 'self-inflicted' injury."). In other words, these Plaintiffs are not "[o]nes who might have had a license for the asking." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). Those Plaintiffs are not "threatened by the enforcement" of the permitting rules. *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2508, 206 L. Ed. 2d 463 (2020); *see Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 390 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073, 122 S. Ct. 1952, 152 L. Ed. 2d 855 (2002). As to these Plaintiffs, any injury is purely hypothetical.

2. Causation

Further, Plaintiffs here lack the second requirement of standing: causation. As Defendants point out, Nov. 28

Oral Arg. Tr. at 117, none of the challenged permitting provisions themselves require Plaintiffs to move or relocate, and Plaintiffs cannot assert injury on that basis. *See, e.g., Casanova*, 375 F. Supp. 2d at 335. In other words, Plaintiffs have not sufficiently alleged causation because their inability to operate in their present locations cannot be traced to the procedures for obtaining a special-use permit. *See, e.g., id.*; *cf. Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) ("Since most of the content[-]based restrictions and procedural mechanisms which [plaintiff] claims violate the First Amendment rights . . . were not factors in the denial of its own permit applications, it cannot show causation with respect to them."). Rather, Plaintiffs' compulsory relocation is mandated by the 2001 Amendments. Plaintiffs may not disguise their arguments as opposition to the permitting provisions in order to level another challenge against the 2001 Amendments. Nor can Plaintiffs trace any of their other alleged injuries to the permitting scheme specifically.

C. First Amendment Merits

In any event, even if Plaintiffs did have standing, Plaintiffs have failed to identify a constitutional defect in the City's permitting provisions on the merits.[58] *Cf. Prayze*

58. Although Plaintiffs' lack of standing necessarily deprives the Court of subject-matter jurisdiction, and, by extension, power to adjudicate the merits of the case, *Carter*, 822 F.3d at 54-55, this case has been pending for over two decades and may be subject to further review. In similar situations, courts have reviewed the merits of a claim for the sake of judicial economy. *See, e.g., D.H. v. City of*

FM v. F.C.C., 214 F.3d 245, 252 (2d Cir. 2000) ("Of course, to say that [a party] has standing to assert a facial challenge is not to say that the facial challenge is meritorious."). Plaintiffs level two distinct challenges at those provisions. They argue that the provisions (1) establish a sensitiveuse veto in violation of the First and Fourteenth Amendments contrary to *Young v. City of Simi Valley*, 216 F.3d 807, 814 (9th Cir. 2000); Dkt. No. 222 at 51-60; and (2) lack the necessary procedural safeguards to prevent censorship by delay under *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), Dkt. No. 222 at 60-73. Neither argument has merit.

1. Sensitive Use Veto

Plaintiffs contend that Defendants' vesting provisions are facially unconstitutional as they allow for a "sensitive use veto." Dkt. No. 222 at 51-56. Specifically, Plaintiffs state that "the applicable procedures insure[] that the time needed to be issued the permit which provided vesting would be substantially greater for an adult use than a sensitive use," thus allowing a sensitive use to obtain vesting priority by virtue of having their permitting applications approved more quickly. Dkt. No. 222 at 55. The Court disagrees, and finds that the permitting provisions challenged in this case do not establish a sensitive use veto.

New York, 309 F. Supp. 3d 52, 69 n.1 (S.D.N.Y. 2018); *"Q"-Lungian Enters., Inc. v. Town of Windsor Locks*, 272 F. Supp. 3d 289, 295 (D. Conn. 2017); *cf. Clementine Co., LLC v. Adams*, 74 F.4th 77, 83 (2d Cir. 2023). The Court's conclusion that Plaintiffs do not succeed on the substance of their permitting challenges serves as an alternate basis for its ruling.

Appendix B

The concept of a sensitive use veto—that disfavored speech may be unconstitutionally barred by proximity to certain establishments—is drawn from *City of Simi Valley*, which, Plaintiffs urge, presents identical issues. Dkt. No. 222 at 52-56. In *Simi Valley*, the Ninth Circuit invalidated on First Amendment grounds an ordinance that required an adult business to obtain a special-use permit before opening and required the adult business to maintain a certain amount of distance between itself and various sensitive receptors like houses of worship and other religious organizations, as well as schools, playgrounds, and youth-oriented businesses. 216 F.3d at 812. The plaintiff, who sought to open an adult establishment, chose a site and was preliminarily informed by the city that a specific site did not, at that time, violate the distance requirements set forth in the ordinance. *Id.* at 812-14. The plaintiff then began a yearlong effort to comply with the city's special-use permit requirements that cost him thousands of dollars, only to be informed that his application was denied for violating the law's distance requirements in two ways: it was too close to both a newly established religious organization and a karate school. *Id.* The religious organization, which opposed the adult establishment, had filed an application to operate an adult bible study class in a nearby building the day before the plaintiff's application was deemed complete, and the city had granted it the next day—the same day that the plaintiff's application was completed after a yearlong process. *Id.* at 813. The karate school that the adult site was too close to had already existed when the city initially informed plaintiff that the site was not within the buffer zone barred by the ordinance, but a subsequent city

investigation revealed that the school constituted a youth-oriented business. *Id.* Both the preexisting karate school and the religious organization, which gained approval the same day as plaintiff's application was completed, would have independently foreclosed an adult business at the site that plaintiff had chosen. *Id.* In litigation concerning the matter, testimony by a city official indicated that, at any point during the application process, a sensitive use "could apply for and receive an over-the-counter zoning approval and block [the plaintiff] from completing his project." *Id.* at 814. The court concluded that the ordinance was unconstitutional because it "delegate[d] to certain favored private parties the unfettered power to veto, at any time prior to governmental approval [of the adult uses] and without any standards or reasons, another's right to engage in constitutionally protected freedom of expression." *Id.* at 817.

By its terms, however, *Simi Valley* is distinguishable. First, the provisions here do not functionally delegate authority to third parties to determine where adult uses may locate. As the Ninth Circuit later summarized, *Simi Valley* "condemned a 'sensitive use veto' . . . because of the potential for third parties to invoke it arbitrarily." *Teixeira v. County of Alameda*, 822 F.3d 1047, 1062 n.8 (9th Cir. 2016), *rev'd on other grounds*, 873 F.3d 670 (9th Cir. 2017) (en banc). But here, the vesting provisions do not delegate any *authority*—either formal or ad hoc—to private parties. As Plaintiffs themselves recognize, the vesting provisions do not distinguish between adult uses and sensitive uses—"whenever an adult use or a sensitive use obtains 'an appropriate [DOB] permit,' that

qualifies to establish its vesting authority." Dkt. No. 222 at 51 (quoting 1 R.C.N.Y. § 9000-1(b)). The second key differentiating factor between the unconstitutional zoning scheme in *Simi Valley* and the scheme before the Court is that the process by which one use or another obtains priority is not standardless. *Simi Valley*'s scheme allowed "at any point during the [adult use] application process" a sensitive-use establishment to "apply for and receive an over-the-counter zoning approval and block [the adult use] from completing [the] project." 216 F.3d at 814. But the challenged provisions here do not permit a sensitive use to receive a permit as a matter of course while subjecting adult uses to more onerous requirements. An application obtains priority only after it is reviewed by DOB and after the planning examiners have determined that submitted construction documents meet applicable zoning and construction standards. *See* 1 R.C.N.Y. § 9000-01(b). Thus, while it is true, as Plaintiffs argue, that "any nearby sensitive use could defeat the prospective adult use's application if it gets its permit granted first," Dkt. No. 222 at 53, it also is true that if the adult use gets its permit first, the sensitive use will have no right to bar the adult use, even if it opens next door. And, whether it is a sensitive use or an adult use, the business will have priority only if it is able to satisfy an independent decisionmaker on the basis of regulations that are both content-neutral and generally applicable. *See* 1 R.C.N.Y. § 9000-01(b). If, in the future, the Defendants apply those content-neutral rules in a way that discriminates impermissibly against protected speech, a club or bookstore owner who has been deprived a permit may bring a challenge based on its individual facts. *See, e.g., Field Day*, 463 F.3d 167. But on

these facts, Plaintiffs have not, at this point, established a basis to challenge the permitting provisions on their face.[59]

Tellingly, Plaintiffs' only evidence of the "sensitive use veto" is the experience of Sapphire 2, the adult use that was blocked from operating for two years partially due to a sensitive use which opposed Sapphire 2 and received a permit before Sapphire 2 despite applying for one well after Sapphire 2 had. Dkt. No. 222 at 55-59. However, as noted above, the regulations in effect at the time that Sapphire 2 applied for a permitting application that functionally afforded a sensitive use veto power—which, concededly, resemble the ones at issue in *Simi Valley*—are no longer in effect. Accordingly, the permitting scheme before the Court today does not pose the same problems. Plaintiffs' "sensitive use" challenge fails.

2. Prior Restraint

Plaintiffs argue that the permitting scheme, as a prior restraint, fails the demanding scrutiny to which it is necessarily subject. Because, however, the Court finds that the permitting procedures are content-neutral and provide reasonably specific and objective standards for DOB to grant a permit, they do not violate the First Amendment.

The Supreme Court has long held that a prior restraint exists when a law gives "public officials the power

59. For those reasons, Plaintiffs' argument that the permitting procedures deny them a reasonable opportunity to relocate, Dkt. No. 226 at 21, is without merit.

to deny use of a forum in advance of actual expression." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). Plaintiffs are, of course, correct that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), subject to exacting judicial scrutiny, *Lusk v. Village of Cold Spring*, 475 F.3d 480, 485 (2d Cir. 2007). The precise degree of scrutiny, however, depends on whether the law is content-based or content-neutral. *Citizens United v. Schneiderman*, 882 F.3d 374, 386-87 (2d Cir. 2018). The Second Circuit has explained "[a] 'prior restraint' on speech is a law, regulation or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech's content and in advance of its actual expression." *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005) (Sotomayor, J.). The Circuit's definition "reflects the two traditional types of prior restraint: (1) preventing the printed publication of disfavored information, and (2) a facially-neutral law that sets up an administrative apparatus with the power and discretion to weed out disfavored expression before it occurs." *Schneiderman*, 882 F.3d at 386-87. The first type of prior restraint is content based, while the second is not. *See id.* at 387; *see also Beal*, 184 F.3d at 124 ("A regulation may constitute a prior restraint even if it is not content[ ]based.").

In *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, the Supreme Court held that a prior restraint must contain certain procedural protections

in order to comport with the dictates of the First Amendment. *Id.* at 60. Deciding the constitutionality of a licensing scheme that required the government licensor to pass judgment on the content of speech, the Court articulated three specific procedural safeguards: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 227 (citing *Freedman*, 380 U.S. at 58-60).

But, the Supreme Court later clarified that not all prior restraints need meet all three of *Freedman*'s requirements. In *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002), the Court decided that *Freedman*'s procedural protections did not apply to content-neutral time, place, and manner restrictions. In *Thomas*, groups that had sought permits from the city of Chicago to hold rallies sued on the basis that the city's regulations governing rallies in city parks were facially unconstitutional under the First Amendment for failing to meet *Freedman*'s procedural requirements. *Id.* at 320. The Supreme Court rejected the challenge, explaining that *Freedman* was not applicable because Chicago's licensing scheme was a content-neutral time, place, and manner restriction. Such restrictions do "not raise the censorship concerns that prompted [the *Freedman* Court] to impose the extraordinary procedural safeguards [that were imposed] on the film licensing process," and therefore need not satisfy *Freedman*'s

procedural requirements. *Id.* at 322-23. Instead, it is sufficient that they provide "reasonably specific and objective" standards for the licensing authority "and do not leave the decision 'to the whim of the administrator.'" *Id.* at 324 (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992)); *see Field Day*, 463 F.3d 167.[60]

Thomas thus supports Defendants' position that certain government regulation of adult entertainment establishments—that which is content-neutral—does not present the grave "dangers of a censorship system" confronted in *Freedman. See, e.g.*, *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 617 (6th Cir. 2009); *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1282 (11th Cir. 2003), *cert. denied*, 541 U.S. 1086, 124 S. Ct. 2816, 159 L. Ed. 2d 247 (2004); *Gold Diggers, LLC v. Town of Berlin*, 469 F. Supp. 2d 43, 56 (D. Conn. 2007). So long as the government regulation is not content based, and is rather a content-neutral time, place, and manner restriction, the restrictions need only (1) adequately limit the decision-maker's discretion, *Thomas*, 534 U.S. at 323; and (2) satisfy the traditional First Amendment test applied to time, place, and manner rules: narrowly tailoring to serve a significant government interest and leave open ample alternatives for expression, *id.* at 323 n.3.

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60. In addition, "the permit scheme 'must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives to communication.'" *Thomas*, 534 U.S. at 322 n.2 (quoting *Forsyth County*, 505 U.S. at 130).

Appendix B

There is no serious dispute that the DOB permitting scheme is content-neutral and provides reasonably specific and objective standards for DOB. On its face, the permitting scheme is content-neutral. Plaintiffs contend that the permitting procedures are content based, underscoring the fact that DOB's permitting procedures require adult establishments to submit an area diagram showing all existing uses within 500 feet of the adult establishment and that DOB engages in "exhaustively long examinations" of such diagrams. Dkt. No. 222 at 64. However, the diagram requirement is merely a function of the zoning regulations. *Cf. McCullen v. Coakley*, 573 U.S. 464, 480, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) ("It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the inevitable effect of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." (internal citations and quotation marks omitted)). "Whether [the regulated parties] violate the [scheme] 'depends' not 'on what they say,' but simply on where they say it." *Id.* at 479 (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)). The incidental burden that the buffer zone and the related permitting diagrams have on adult speech does not render the permitting scheme content based. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 762-63, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994). If the disparate treatment of adult establishments is itself constitutional, the fact that the City enforces that disparate treatment is constitutional. *See Stringfellow's*, 694 N.E.2d at 412-13. The DOB is to review construction

documents against the Zoning Resolution and against the Construction Codes. Gittens Decl. ¶ 5. If the applicant satisfies the Resolution and the Construction Codes, the construction documents will be approved and a building permit will be issued. Nov. 28 Oral Arg. Tr. at 99-100. In other words, once the construction documents are approved, DOB issues a permit strictly as a "ministerial matter." *Id.* If the applicant does not satisfy the law, then, regardless of whether the establishment is an adult establishment or a non-adult establishment, no building permit will issue.

Plaintiffs further contend that the regulations are defective because they do not provide time limits for the issuance of a permit needed to vest an adult use and do not provide an effective remedy for enforcement of any time limits. Dkt. No. 222 at 67. The argument lacks merit several times over. As a threshold matter, under *Thomas*, there need be no time limits. *See, e.g., Granite State Outdoor Advert.*, 348 F.3d at 1282 ("[T]he lack of time limits is constitutionally acceptable."); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1138 (9th Cir. 2003), *cert. denied*, 546 U.S. 826, 126 S. Ct. 367, 163 L. Ed. 2d 73 (2005); *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 435 (4th Cir. 2007), *cert. denied*, 552 U.S. 1100, 128 S. Ct. 914, 169 L. Ed. 2d 731 (2008); *Advantage Media*, 456 F.3d at 804; *H.D.V.-Greektown*, 568 F.3d at 624-25. But even if *Thomas* did require time limits, the administrative rules provide just that. Under Administrative Code § 28.104.3.7, DOB must render a decision on an applicant's construction plans "no later than 40 calendar days after the submission of a complete

application." CSF ¶ 104. Whether or not it takes DOB longer to review the application for an adult use than for a non-adult use, *see* Dkt. No. 226 at 36-38, all are subject to the same 40-day period. Plaintiffs' only evidence that the Defendants will fail to comply with the requisite time limit as to adult establishments is the experience of Sapphire 2 in 2014, in which DOB took more than two months to address the submission. *Cf. Big Dipper Ent., L.L.C. v. City of Warren*, 641 F.3d 715, 720-21 (6th Cir. 2011) ("That the city took 24 days rather than 20 to act on [the adult entertainment business's] is immaterial for constitutional purposes."). But this one instance does not constitute "a pattern of unlawful favoritism" by Defendants. *Thomas*, 534 U.S. at 325; *see also Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1222 (11th Cir. 2017) (upholding constitutional validity of ten-day generally applicable time limit). "[I]f and when [such] a pattern of unlawful favoritism appears," Plaintiffs may bring an as-applied challenge. *Thomas*, 534 U.S. at 325; *see Long Beach Area Peace Network*, 574 F.3d at 1043. Plaintiffs next claim that the lack of time limits on permit issuance specifically renders the scheme invalid. Dkt. No. 222 at 50. While some courts have invalidated zoning laws that required partial or preliminary approval within a specific period of time for failing to require a deadline for the "final decision," *see Lady J. Lingerie*, 176 F.3d at 1361-62, Defendants here have represented without contradiction that the permit issues immediately upon approval of the construction documents,[61] so there is no risk that DOB's issuance of a

61. When evaluating a First Amendment facial challenge, the Second Circuit has instructed courts "to consider the well-established practice of the authority enforcing the ordinance," in

final permit is delayed by the lack of express time limit in the provision. Plaintiffs further complain about the lack of administrative remedies should DOB not meet the time limit on DOB's review of construction documents. Dkt. No. 222 at 70; Nov. 28 Oral Arg. Tr. at 96. But if DOB fails to act within the requisite forty days, Plaintiffs are entitled, as a matter of course, to expeditious judicial review under state law—namely, Article 78. Under Article 78, if DOB fails to meet those time limits, or otherwise fails to meet its express obligations, the remedy of mandamus readily applies.[62] N.Y. C.P.L.R. Art. 78; *see N.Y. C.L. Union v.*

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addition to the text and agency interpretation of the challenged provision. *MacDonald*, 206 F.3d at 191.

62. Plaintiffs insist that the availability of Article 78 relief cannot substitute for a strict limit on the time between approval of construction documents and permit issuance, citing to *City of Lakewood*, 486 U.S. at 771. But that misreads *Lakewood*. The flaw of the ordinance in *Lakewood* was that the ordinance at issue accorded the City "unbridled discretion" to prohibit conduct with a close nexus to speech or commonly associated with expression. *Id.* at 759-61, 764. It was in that context that the Court rejected the availability of mandamus if the City did not act with reasonable dispatch in not reviewing a permit application. The Court held that judicial review was insufficient because (1) it was not available until *after* the City denied a permit and (2) there were no "concrete standards to guide the decision-maker's discretion." *Id.* at 771. Here, judicial review is available to compel the DOB to act on a permit even before a final decision is made, including, as here, where the agency fails to act within specified time limits. *N.Y. State Nat'l Org. for Women v. Pataki*, 261 F.3d 156, 168 (2d Cir. 2001), *cert. denied*, 534 U.S. 1128, 122 S. Ct. 1066, 151 L. Ed. 2d 969 (2002); *Long Island Pine Barrens Soc'y, Inc. v. Plan. Bd. of Town of Brookhaven*, 78 N.Y.2d 608, 585 N.E.2d 778, 781, 578 N.Y.S.2d 466 (N.Y. 1991); *see also King v. Chmielewski*, 76 N.Y.2d 182, 556 N.E.2d 435, 437, 556 N.Y.S.2d 996

State, 4 N.Y.3d 175, 824 N.E.2d 947, 953, 791 N.Y.S.2d 507 (N.Y. 2005); *Katz v. Klehammer*, 902 F.2d 204, 207 (2d Cir. 1990); *see also Nenninger v. Village of Port Jefferson*, 509 F. App'x 36, 39 (2d Cir. 2013) (summary order); *Infinty Outdoor, Inc. v. City of New York*, 165 F. Supp. 2d 403, 430 (E.D.N.Y. 2001); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 213 (E.D.N.Y. 1998). Unlike instances in which the aggrieved applicants may proceed to court only with the court's discretionary permission, *Deja Vu of Nashville*, 274 F.3d at 401, there is thus opportunity for "prompt judicial review," *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1290 (10th Cir.), *cert. denied*, 537 U.S. 947, 123 S. Ct. 411, 154 L. Ed. 2d 291 (2002).

In sum, the permitting provisions thus satisfy *Thomas* and are constitutional. *See, e.g., GEFT Outdoor, LLC v. Monroe County*, 62 F.4th 321, 330 (7th Cir.), *cert. denied*, 144 S. Ct. 96, 217 L. Ed. 2d 24 (2023) ("A wholly non-discretionary land-use permit scheme that moves quickly to provide applicants with permits (and, thus, an opportunity to speak) is unlikely to pose constitutional problems even when operating alongside a variance scheme that affords limited discretion to local officials.").

(N.Y. 1990) (explaining that an agency's "failure to act within the tightly prescribed time limits itself results in approval by operation of law"). "[T]he First Amendment does not require special 'adult business' judicial review rules." *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004); *see Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 787 (6th Cir. 2005), *cert. denied*, 546 U.S. 1089, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (2006). And, as detailed *supra*, there are standards for a reviewing court to apply.

Having established that the permitting scheme constitutes a content-neutral time, place, and manner restriction that limits government decision-makers' discretion, the Court turns to the intermediate scrutiny test. *Thomas*, 534 U.S. at 323 n.3. For substantially the same reasons that the 2001 Amendments serve a narrowly tailored substantial government interest, the permitting scheme does as well. And, as noted above, the permitting provisions, in conjunction with the 2001 Amendments, leave open 204 simultaneously occupiable lots in the City. CSF ¶ 246.

D. Fourteenth Amendment Merits

To the extent Plaintiffs maintain that Defendants' permitting scheme is violative of the Equal Protection Clause of the Fourteenth Amendment, Dkt. No. 222 at 50; Dkt. No. 225 at 80-81, that too fails. The Court's conclusion that the permitting provisions do not violate the First Amendment forecloses the Plaintiffs' other facial attacks on the statute. *See, e.g., Young v. Ricketts*, 825 F.3d 487, 494-95 (8th Cir. 2016); *Brown v. City of Pittsburgh*, 586 F.3d 263, 283 (3d Cir. 2009); *McGuire v. Reilly*, 260 F.3d 36, 49-50 (1st Cir. 2001); *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000); *Hoover v. Morales*, 164 F.3d 221, 227 n.3 (5th Cir. 1998); *DLS, Inc.*, 107 F.3d at 411 n.7. "The fact that the [permitting scheme] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Supreme Court has] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

V. Bookstore Plaintiffs' Due Process Challenge

Finally, Bookstore Plaintiffs argue that the 2001 Amendments deprive them of their property rights in violation of their rights to due process under the Fourteenth Amendment. *See* CM-ECF 18-3732, Dkt. No. 178 at 9, 15. Whether viewed as a procedural due process challenge or as a substantive due process challenge, the challenge falls short.

A. Procedural Due Process

"A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process." *Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 218 (2d Cir. 2012), *cert. denied*, 569 U.S. 958, 133 S. Ct. 2022, 185 L. Ed. 2d 885 (2013). The Bookstore Plaintiffs' procedural due process claim fails at the first step because the Bookstore Plaintiffs have not established that they have a protectable property right to purvey sexually explicit materials in the places where they currently are located. "Property rights . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The rights asserted may not be *de minimis*; rather, it must "rise[] to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Harrington v. County of Suffolk*, 607 F.3d 31, 34 (2d Cir. 2010).

Bookstore Plaintiffs opened their establishments in the face of a provision of the New York City Zoning Resolution that explicitly gives the CPC the authority to propose changes to zoning regulations "upon its own initiative at any time." N.Y. City Charter § 200.a.1. Thus, they enjoyed no property right to be free from such zoning regulations. In fact, the Second Circuit has held that "New York zoning law appears to take into account the somewhat intuitive concept that 'a property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir. 1998). When a government body exercises significant discretion in enacting zoning regulations, the Circuit has rejected due-process challenges where the government has significant discretion to enact zoning regulations. *See, e.g., Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 504 (2d Cir. 2001). It can hardly be said, then, that Bookstore Plaintiffs had a protectable interest that rose to the level of entitlement to being free of regulation.

B. Substantive Due Process

The 2001 Amendments also did not violate Bookstore Plaintiffs' rights to substantive due process. Substantive due process "is the right to be free of arbitrary government action *that infringes a protected right*." *O'Connor v. Pierson*, 426 F.3d 187, 200 n.6 (2d Cir. 2005) (emphasis in original). In examining whether a government rule or regulation infringes a substantive due process right, "the first step is to determine whether the asserted

right is 'fundamental,'" meaning the right is "implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003). When the right infringed is fundamental, the Court must apply strict scrutiny to the challenged law, but where a claimed right is not fundamental, the Court applies rational basis review, under which the government regulation need only be reasonably related to a legitimate state objective. *Goe v. Zucker*, 43 F.4th 19, 30 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 1020, 215 L. Ed. 2d 188 (2023).

1. Step One: Fundamental Right

As with their procedural due process challenge, Plaintiffs' substantive due process challenge fails at the first step of the inquiry. There is no substantive due process right to operate a business, much less a substantive due process right to operate a business free from government regulation. The Supreme Court has held that "*the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (emphasis in original). And [t]he right to conduct a business, or to pursue a calling may be conditioned." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 107, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978); *see Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial

coalitions, because they may be unwise, improvident, or out of harmony with a particular school of thought."). "The right to conduct a business or engage in a chosen profession does not entitle plaintiff to operate its business free from government regulation." *Columbus Ale House, Inc. v. Cuomo*, 495 F. Supp. 3d 88, 94 (E.D.N.Y. 2020).

Plaintiffs nevertheless contend that this view "loses sight of the reality that bookstores do more than endeavor to make a profit—they employ workers, pay taxes, and disseminate constitutionally protected expression and information to the public." CM-ECF 18-cv-3732 Dkt. No. 178 at 15. But Plaintiffs may not circumvent the due-process inquiry by simply claiming that the individual components inherent in running a business, such as paying taxes and employing workers, are fundamental rights. And Plaintiffs cite no support for their position that the traditional functions of a business—employing workers and paying taxes—are entitled to different constitutional treatment than the standard applied to all businesses operating to make a profit. In fact, courts have found that "[a]ction that merely harms one's professional or business interests does not, alone, infringe a federally-protected right, and thus does not implicate due process." *Montalbano v. Port Authority of N.Y. & N.J.*, 843 F. Supp. 2d 473, 483 (S.D.N.Y. 2012) (quoting *Giammatteo v. Newton*, 452 F. App'x 24, 30 (2d Cir. 2011) (summary order)), *see also Everest Foods Inc. v. Cuomo*, 585 F. Supp. 3d 425, 439 (S.D.N.Y. 2022) (no property interest protected by substantive due process in right to earn a living). Bookstore Plaintiffs have "no absolute right to continue to operate [their] business at the same location." *Ambassador Books*, 20 F.2d at 865.

And although freedom of expression certainly is a fundamental right, *see, e.g., Schneider v. New Jersey*, 308 U.S. 147, 161, 60 S. Ct. 146, 84 L. Ed. 155 (1939), the appropriate vehicle for challenging a law that allegedly infringes on that right is through the First Amendment, not the Fourteenth. Because the Supreme Court has "always been reluctant to expand the concept of substantive due process," it has held that "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analysis these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). The 2001 Amendments would not constitute "complete prohibition" of a substantive due process right. *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). The 2001 Regulations, as detailed at length, do not completely prohibit Plaintiffs from partaking in any of the activities—they may still employ workers, pay taxes, and disseminate constitutionally protected expression.

To the extent Plaintiffs assert a property interest in the 1995 Regulations remaining in place without amendment, or a property interest in the zoning law generally, this argument also fails. "The Second Circuit uses a 'strict entitlement test to determine whether a party's interest in land-use regulation is protectable under the Fourteenth Amendment.'" *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir. 2007) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d

Cir. 1995)). And "[i]n assessing a substantive due process claim in the context of land use regulation, this Court is always 'mindful of the general proscription that 'federal courts should not become zoning boards of appeal to review no constitutional land-use determinations by . . . local legislative and administrative agencies.'" *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996) (quoting *Zahra*, 48 F.3d at 679-80). Plaintiffs had no protectible interest in a zoning regulation that advanced their interests relative to establishments that offered 100% adult entertainment. Nor did they have a protectible interest in being free from zoning regulation going forward. While there exists a property right in land ownership, there is no substantive due process right against enforcement of a zoning law. *See RRI Realty Corp. v. Southampton*, 870 F.2d 911, 915-16 (2d Cir.), *cert. denied*, 493 U.S. 893, 110 S. Ct. 240, 107 L. Ed. 2d 191 (1989). To the contrary, it is well-established that state and local governments have wide latitude to exercise their police power to enact zoning regulations. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926).

2. Step Two: Rational Basis Review

Because Bookstore Plaintiffs have failed to assert a cognizable fundamental right that is implicated by the 2001 Amendments, the Court applies rational basis review—considering whether the law is reasonably related to a legitimate state objective—in assessing its constitutional validity. *Goe*, 43 F.4th at 30. The 2001 Amendments easily

clear that standard. As detailed exhaustively above, the prevention of secondary effects is more than a legitimate interest—it is a substantial interest. *See, e.g.*, *Renton*, 475 U.S. at 50; *Pap's A.M.*, 529 U.S. at 296 ("The asserted interest[] of . . . combating the harmful secondary effects associated with nude dancing are undeniably important."). And the law, which aims to reduce those secondary effects while still permitting adult entertainment establishments to operate, is reasonably related to Defendants' interest.

CONCLUSION

The Court finds in favor of Defendant on each of Plaintiffs' claims and directs judgment in favor of Defendant, dismissing Plaintiffs' claims. The Court will stay the effect of this ruling for a period of fourteen days for the parties to consider next steps.

SO ORDERED.

Dated: February 9, 2024
New York, New York

/s/ Lewis J. Liman
LEWIS J. LIMAN
United States District Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 30, 2019

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02cv4431

725 EATERY CORP. D/B/A "LACE", AND 689 EATERY, CORP. D/B/A "SATIN DOLLS",

Plaintiffs,

-against-

CITY OF NEW YORK, BILL DE BLASIO, AS MAYOR OF THE CITY OF NEW YORK, AND RICK D. CHANDLER, AS COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK,

Defendants.

02cv4432

59 MURRAY ENTERPRISES, INC. A/K/A 59 MURRAY CORP. D/B/A "NEW YORK DOLLS", AAM HOLDING CORP. D/B/A "PRIVATE EYES", WEST 20TH ENTERPRISES CORP. D/B/A "VIP CLUB NEW YORK", AND JNS VENTURES LTD. D/B/A "VIXEN",

Plaintiffs,

Appendix C

-against-

CITY OF NEW YORK, BILL DE BLASIO, AS MAYOR OF THE CITY OF NEW YORK, AND RICK D. CHANDLER, AS COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK,

Defendants.

02cv8333

CLUB AT 60TH ST., INC., AND JACARANDA CLUB, LLC D/B/A "SAPPHIRE",

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

18cv3732

336 LLC D/B/A "THE EROTICA", CHELSEA 7 CORP., GOTHAM VIDEO SALES & DISTRIBUTION INC., RAINBOW STATION 7 INC., VIDEO LOVERS INC., VISHARA VIDEO, INC., EXPLORE DVD LLC, VISHANS VIDEO, INC., 725 VIDEO OUTLET INC., JAYSARA VIDEO, INC., DCD EXCLUSIVE VIDEO INC., AND 557 ENTERTAINMENT INC.,

Plaintiffs,

Appendix C

-against-

CITY OF NEW YORK, HON. BILL DE BLASIO, AS MAYOR OF THE CITY OF NEW YORK, AND RICK D. CHANDLER, AS COMMISSIONER OF BUILDINGS, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,

Defendants.

September 30, 2019, Decided;
September 30, 2019, Filed

OPINION AND ORDER

WILLIAM H. PAULEY III, Senior United States District Judge

Plaintiffs—the owners and operators of gentlemen's cabarets (or in lay terms, strip clubs) and adult bookstores primarily located in Manhattan—challenge the constitutionality of amendments to sections of the Zoning Resolution of the City of New York (the "Zoning Resolution," and the "City") that define and apply to adult establishments. Tracing its origins to the City's early 1990s crusade against adult entertainment businesses, this litigation has been ensnared in a time warp for a quarter century. During that interval, related challenges to the City's Zoning Resolution have sojourned through various levels of the state and federal courts.

Plaintiffs seek to preliminarily enjoin the City, the Mayor of the City, and the City's Commissioner of Buildings

from enforcing the amendments, which would subject them to the City's stringent zoning and permitting scheme for adult establishments. In connection with Plaintiffs' motions, the parties have offered a Homeric record of affidavits, documentary evidence, and stipulations. Having reviewed the briefing and evidentiary submissions by the parties, this Court makes the following findings of fact and conclusions of law pursuant to Rules 52(a)(2) and 65 of the Federal Rules of Civil Procedure. Plaintiffs' motions for preliminary injunctions are granted, as specified in the conclusion of this Opinion & Order.

BACKGROUND

While a far cry from political speech "entitled to the fullest possible measure of constitutional protection," *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), nude dancing and erotic materials nevertheless fall within the ambit of the First Amendment's free speech guarantees, *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (plurality opinion) (explaining that nude dancing may constitute expressive conduct that "falls only within the outer ambit of the First Amendment's protection"); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (plurality) ("[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .").

Appendix C

These consolidated actions represent the latest installment in a decades-long dispute between purveyors of adult entertainment and the City that pits the First Amendment rights of private citizens against the government's interest in regulating the harmful secondary effects that may be engendered by that speech. The plaintiffs in these actions are part of an adult entertainment industry boom that began in the mid-1960s. The City—like many other municipalities across the United States—sought to contain the fallout of increased crime, lowered property values, and decreased quality of life by regulating where adult establishments could be located. Consequently, in 1995, the City adopted regulations that barred adult establishments from certain districts, prohibited them from being located near sensitive receptors such as schools and churches, and sought to disperse them.

The kaleidoscopic litigation that ensued ultimately upheld the constitutionality of the City's efforts. But it also resulted in a determination by New York's highest court that the regulatory scheme did not apply to adult establishments so long as they limited their adult component to less than 40 percent of their floor area and stock-in-trade. Unsurprisingly, many adult establishments did just that. In response to what it viewed as a naked attempt to skirt the adult-use regulations through nothing more than formalistic compliance, the City amended its regulations in 2001. According to the City, these amendments more faithfully effectuate the regulations, which it maintains were always intended to apply to establishments with a predominant, ongoing focus

on sexually explicit content. On the other hand, the adult establishments principally argued that the City needed to—but did not—demonstrate some nexus between the reconfigured adult establishments and the negative secondary effects it identified in the early 1990s.

At center stage in these actions is the constitutionality of the City's 2001 amendments to its adult-use regulations. The plaintiffs may generally be cleaved into two groups. The first set of challengers to the City's adult-use regulations are owners and operators of gentlemen's clubs that present exotic dancing in at least part of their establishments (collectively, the "Club Plaintiffs"). The second set of challengers own and operate bookstores that contain private booths for patrons to view adult films (collectively, the "Bookstore Plaintiffs," and together with the Club Plaintiffs, the "Plaintiffs"). For background, this Court describes the City's iterative efforts to regulate adult establishments and the legal challenges mounted by those establishments before turning to the facts of this case.

I. Adult Entertainment Regulation in New York City

The events underlying these actions begin in the early 1990s, when the City undertook efforts to regulate where adult businesses could be located.[1] (Second Amended

1. The Club Plaintiffs' operative complaints contain materially identical recitations of the facts and legal theories. Likewise, Defendants filed an identical set of documents in opposition to Plaintiffs' motions for preliminary injunction in all four actions. (*See* ECF Nos. 101, 102, 103, 105, 02cv4431; ECF Nos. 58, 59, 60, 62,

Complaint of Plaintiff 725 Eatery, Corp. and Initial Complaint of 689 Eatery, Corp., ECF No. 77, 02cv4431 ("4431 Compl."), ¶¶ 11-13; Amended Complaint, ECF No. 20, 18cv3732 ("3732 Compl."), ¶¶ 43-47.) Before that time, the City's Zoning Resolution did not distinguish between adult establishments and non-adult commercial establishments for zoning purposes. In late 1993, however, the City's Department of City Planning ("DCP") undertook an "Adult Entertainment Study," which was completed in September 1994. (*See* Declaration of Kerri A. Devine, ECF No. 101, 02cv4431 ("Devine Decl."), Ex. J (the "DCP Study").)

A key question in these actions (and parallel challenges to the City's adult-use regulations) is whether the DCP Study may be used to justify the City's 2001 amendments. Thus, this Court reviews the DCP Study in considerable—though not exhaustive—depth.

A. The 1994 Adult Entertainment Study

The purpose of the DCP Study was to evaluate the nature and extent of adverse impacts that adult establishments have on surrounding communities. (DCP Study at 1.) To that end, the DCP Study focused on three types of adult uses, defined generally as commercial establishments dealing in materials or activities of a

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02cv4432; ECF Nos. 83, 84, 85, 87, 02cv8333; ECF Nos. 50, 51, 52, 54, 18cv3732.) For the sake of simplicity, this Opinion & Order cites to the 4431 Complaint when referring to the Club Plaintiffs' identical allegations and to the ECF numbers corresponding to the 02cv4431 docket when referring to documents submitted by Defendants.

sexual nature adult video and bookstores; adult theaters showing film or live entertainment; and topless or nude bars. (DCP Study at 1-2.)

1. The Experience of Other Municipalities

The DCP Study briefly canvassed impact studies from several other municipalities—namely, Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota. (*See* DCP Study at 3-9.) The DCP Study also reviewed methods other municipalities employed to regulate where adult establishments could be located, generally by concentrating adult uses in specified locations or by dispersing adult establishments throughout the municipality. (*See* DCP Study at 9-15.) Most of the impact studies from other municipalities appeared to find some correlation between the existence of adult establishments and increased crime, lowered commercial and residential property values, and/or lowered quality of life in surrounding commercial areas and residential neighborhoods. However, several additional observations are warranted.

First, the DCP's scant treatment of each impact study spans only a few paragraphs, and the DCP Study's survey of these studies does not flesh out the causal link between adult establishments and negative secondary effects. (*See, e.g.*, DCP Study at 4 (noting that in the Los Angeles study, police department statistics indicated a "greater proportion of certain crimes in Hollywood

(where the largest concentration of adult establishments is found in the city) compared with the city as a whole").) Second, the correlations observed in some of the impact studies can best be described as tepid. For instance, the Los Angeles study conceded that "there was insufficient evidence to support the contention that concentrations of sex-related businesses have been the primary cause of [property devaluation]." (DCP Study at 62.) Likewise, the Minnesota study observed that adult establishments concentrate in relatively deteriorated areas and "at most, they may slightly contribute to the continued depression of property values." (DCP Study at 8.) Third, the decrease in property values suggested by some of the impact studies is based on surveys of real estate professionals regarding what they believed the impact of an adult establishment would be. Moreover, several of the impact studies rely on the experiences of and studies by other municipalities.

2. The Antediluvian State of Affairs in Adult Entertainment

The DCP Study also reviewed the adult entertainment industry as a whole and as it existed in New York City. As for the former, the DCP Study observed the explosion in adult video sales and rentals beginning in the 1980s, along with the rise in upscale topless clubs and bars catering to a young, affluent clientele in the early 1990s. (DCP Study at 16-19.) With respect to New York City, the DCP charted the substantial growth of adult establishments from 9 such establishments in 1965 to 177 in 1993. (DCP Study at 20.) In line with nationwide trends, the number of adult bookstores or video stores and adult topless or nude

bars increased between 1984 and 1993. (DCP Study at 21.) The DCP Study also found that the vast majority of adult establishments were located in Manhattan and Queens, especially in the Times Square and Chelsea neighborhoods in Manhattan. (DCP Study at 20-23.)

In response to the proliferation of adult establishments in Times Square (particularly massage parlors, somewhat euphemistically referred to as "adult physical culture establishments"), the City undertook efforts to regulate adult businesses in the mid- to late-1970s. As the DCP Study explains, these efforts culminated in a proposal by the City Planning Commission (the "CPC") to establish five categories of adult uses, restrict those uses to particular districts, and subject them to other distance, concentration, signage, and amortization requirements.[2] (DCP Study at 31-32.) Notably, the CPC's proposal contained a safety valve under which the City's Board of Standards and Appeals and the CPC could exempt existing and new adult uses from these restrictions after making findings to ensure that any adverse impacts would be minimized. (DCP Study at 32.) Nonetheless, the City's early foray into comprehensive adult-use regulation proved only partially successful. In particular, the CPC's proposal functionally pushed the City's adult establishments outside Manhattan and concentrated them in the outer boroughs, resulting in a public outcry that scuttled the proposed legislation. (*See* DCP Study at 33 (statement by then—CPC counsel that "[t]he Commission

2. The five categories proposed by the CPC were adult bookstores, adult motion picture theaters, peep show providers, topless bars, and massage parlors. (DCP Study at 31.)

was accused [by citizens of the four boroughs other than Manhattan] of fostering 'red light districts' in the outer boroughs[,] and the cry was raised ever more loudly to restrict adult uses to Manhattan") (second alteration in original).) Thus, while the City eventually succeeded in eliminating massage parlors as a permitted use city-wide following a 1978 proposal by the CPC, "only part of the effort to control the location of adult uses was adopted legislatively." (DCP Study at 33.)

3. Impacts of Adult Entertainment Businesses in New York City

Importantly for purposes of Plaintiffs' motions, the DCP Study catalogues the impacts of adult uses identified by various studies and sources, starting with those identified by the CPC in 1977. Specifically, the CPC had justified its 1970s regulatory efforts on the basis that they would "reduce the adverse economic and social effects that these concentrations produce." (DCP Study at 34 (citation omitted).) These impacts included "economic factors, increased criminal activity, the damaging influences on minors and the disruptive effects that adult uses have on neighboring residential communities and the youth of such communities." (DCP Study at 34-35 (citation omitted).)

The CPC's findings were generally corroborated by subsequent sources reviewed by the DCP Study. For instance, the 1983 Annual Report of The Mayor's Office of Midtown Enforcement highlighted the increased criminal activity occurring in districts with adult establishments. (DCP Study at 35-36.) Ten years later, a survey of

businesses conducted by the Chelsea Action Coalition and Community Board No. 4 revealed widespread perceptions by the business community that adult establishments negatively impact Chelsea's reputation and the economic vitality of its businesses. (DCP Study at 37-38.) Property and business owners surveyed by the Times Square Business Improvement District (the "TSBID") in an April 1994 study also expressed their view that adult businesses negatively affect property values and contributed to declining business.[3] (DCP Study at 41.) The TSBID study also found a direct correlation between crime and the concentration of adult establishments based on a review of crime statistics. (DCP Study at 41.) Similarly, during a 1993 public hearing conducted by Manhattan's Task Force on the Regulation of Sex-Related Businesses, members of the community testified to increased crime and decreased quality of life wrought by adult establishments, especially in residential neighborhoods. (DCP Study at 38-39.) These community objections based on crime and quality of life concerns are also generally echoed in newspaper reports summarized by the DCP. (*See* DCP Study at 41-46.)

In addition to relying on these extraneous sources, the DCP conducted its own community survey and analysis of criminal complaint statistics and property value data for six study areas to assess the impact

3. The TSBID's review of data for assessed property values is somewhat inconclusive on this issue, remarking that "while it may be that the concentration of adult use establishments has a generally depressive effect on the adjoining properties . . . we do not have sufficient data to prove or disprove this thesis." (DCP Study at 40-41 (ellipses in original).)

of adult establishments.[4] As to the former, the DCP surveyed community organizations, businesses, real estate brokers, police officers, and sanitation department officials in the study areas. The results of the survey were mixed, suggesting that adult uses may negatively impact businesses, property values, quality of life in the community, and crime to different degrees.[5] (DCP Study at 47-51.) For example, over 80% of responding community organizations believed that adult establishments negatively impacted the community in some fashion. (DCP Study at 49.) Similarly, over 80 percent of responding real estate brokers reported that an adult establishment tended to decrease property values within a 500-foot radius, though several brokers acknowledged that the impact would be minimal or that other factors contributed to property values in the surrounding areas. (DCP Study at 50-51.) On the other hand, only roughly half of responding businesses believed that their business would be negatively affected by adult establishments, while a nearly equal number believed that their business would be positively affected by more bars, theaters, videos, or bookstores of any kind. (DCP Study at 49-50.) And at the other end of the

4. For each of the six areas—two in Manhattan and one in each of the other boroughs—the DCP compared survey blockfronts containing at least one adult use with similar control blockfronts without any adult uses. Three of the areas studied contained only one adult use. (DCP Study at 47.)

5. Twenty-three out of twenty-eight community organizations responded, compared with seventy out of ninety-seven businesses. The sample sizes for real estate brokers, police officers, and sanitation department officials were comparatively smaller—namely, thirteen real estate brokers in total and one police officer and sanitation department official for each survey area. (*See* DCP Study at 48-51.)

spectrum, the responding police officers "generally did not link higher incidents with adult uses," and four out of six respondents thought that adult uses had no effect on crime. (DCP Study at 50.)

The results of the DCP Study's analysis of criminal complaint data for the three-month period beginning on June 1, 1993 also failed to conclusively link adult establishments with increased crime rates. (DCP Study at 52-53.) After controlling for differences in land use and the number of blockfronts examined, the DCP Study found that in three of the six study areas, the blockfronts with adult uses had fewer criminal complaints than those without adult uses. In one study area, neither the blockfront with adult uses nor the blockfront without adult uses had any criminal complaints. And in only two study areas, the number of criminal complaints was higher for the blockfronts with adult uses than those without adult uses. Thus, the DCP Study found no causal link between adult establishments and criminal complaints, explaining as follows

> In summary, it was not possible to draw definitive conclusions from the analysis of criminal complaints. Land uses other than adult entertainment establishments, e.g. subway station access, appear to have a far stronger relationship to criminal complaints. It was not possible to isolate the impact of adult uses relative to criminal complaints.

(DCP Study at 54.)

With respect to property values, the DCP compared the percentage change in property assessed valuations between 1986 and 1992 in survey blockfronts with the percentage change in control blockfronts, the community district, and the borough as a whole. As with its analysis of crime rates, the DCP Study found the impact of adult establishments on property values to be inconclusive, notwithstanding the responses by real estate brokers to the DCP's survey. (DCP Study at 54.) In the four study areas outside of Manhattan, the total assessed valuation increased by a greater percentage in the blockfronts with adult uses than those without adult uses. (DCP Study at 54-55.) However, in the two Manhattan study areas, the valuation for the non-adult-use blockfronts "substantially exceeded" the change in the assessed valuation for the adult-use blockfronts. (DCP Study at 54.) As the DCP Study explains,

> [i]t would appear that if adult entertainment uses have negative impacts, they are overwhelmed by other forces that increased property values overall, at least as measured by assessed values . . . . While the total assessed values on the survey blockfronts [*i.e.*, those with adult uses] may be influenced to some extent by the presence of adult entertainment uses, demonstrating such effects is very difficult.

(DCP Study at 54; *see also* DCP Study at 55 (listing reasons why the DCP's assessed value findings "are necessarily ambiguous").)

4. The DCP's Conclusions and Recommendations

Despite the inconclusive results of its own analysis of crime statistics and property values, the DCP "believe[d] it appropriate to regulate adult entertainment establishments differently from other commercial establishments." (DCP Study at 65.) Though it disclaimed "[c]onsideration of the specific nature and extent of regulations that would be appropriate for adult entertainment establishments" in the City, it suggested that "restrictions on the location of adult uses in proximity to residential areas, to houses of worship, to schools and to each other" as other municipalities had done merited further consideration "in light of the negative impacts of adult uses in concentration." (DCP Study at 65.)

Specifically, the DCP Study noted that "[n]umerous studies in other localities found that adult entertainment uses have negative secondary impacts such as increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life."[6] (DCP Study at 63; *see also* DCP Study at 56-58 (describing the negative secondary impacts found in studies conducted

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6. There is nothing inherently problematic with the DCP Study's reliance on studies conducted by other municipalities. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) ("The First Amendment does not require a city . . . to conduct new studies or produce new evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.").

by various municipalities).) The DCP Study reiterated that the number of adult establishments in the City had increased substantially from 131 establishments in 1984 to 177 in 1993, and that adult uses often tended to cluster together. (*See* DCP Study at 56, 64.) In particular, it observed that the Times Square and Chelsea neighborhoods—with their higher concentrations of adult establishments—had more severe negative secondary effects than areas with sparser concentrations of adult establishments. (*See* DCP Study at 64.) In so concluding, the DCP summarized the studies, newspaper articles, and other sources that documented the secondary effects of adult establishments in the City. (*See* DCP Study at 58-60, 64.) Finally, it pointed to the results of its own survey, [7] in which a substantial majority of real estate brokers and community organizations complained about the negative impact that adult establishments had on property values and the community. (*See* DCP Study at 61, 63-65.)

B. The 1995 Adult-Use Regulations

On November 23, 1994, the Council of the City of New York (the "City Council") adopted an application submitted by the DCP and approved by the CPC for a

7. To be certain, the DCP acknowledged that especially for the study areas with only one adult establishment, "the DCP survey did not yield conclusive evidence of a direct relationship between the adult use and the urban ills affecting the community." (DCP Study at 62; *cf.* 4431 Compl. ¶ 13.) However, it attributed this result to "the fact that, in a city as dense and diverse as New York, it is difficult to isolate specific impacts attributable to any particular land use"—an issue that also plagued other municipal studies. (DCP Study at 62.)

text amendment to the Zoning Resolution to define the term "adult establishment" as a land use. (Plaintiffs' Joint Appendix in Support of Plaintiffs' Motion for Preliminary Injunction ("PJA") at 1473.[8]) The adopted application imposed a one-year moratorium on the establishment of new adult businesses and the extension or enlargement of existing adult businesses to allow permanent adult-use zoning regulations to be developed, in part, as a result of the DCP Study. (4431 Compl. ¶ 12; 3732 Compl. ¶ 47; *see* Devine Decl., Ex. L (the "1995 CPC Report"), at 1-5.) The Club Plaintiffs allege that the studies and ordinances referenced by the DCP Study were not provided to the City Council when it enacted the moratorium. (4431 Compl. ¶ 14.) This section outlines the City's efforts during the one-year moratorium to create a set of permanent regulations governing the types of adult establishments studied by the DCP, as well as the morass of litigation that followed.

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8. The parties have submitted over 2,000 pages of affidavits and documentary evidence in connection with Plaintiffs' motions. This record includes the PJA and the sequentially numbered Plaintiffs' Joint Reply Appendix in Support of Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Preliminary Injunction ("PJRA"). These materials may be found at ECF Nos. 80-96, 98, and 112-115 in case number 02cv4431; ECF Nos. 34-51, 54, and 69-72 in case number 02cv4431; ECF Nos. 59-75, 80, and 97-100 in case number 02cv8333; and ECF Nos. 29-45, 47, and 61-64 in case number 18cv3732. For the sake of simplicity, this Court cites to the record page when referring to a document that is part of the PJA or PJRA unless expressly stated otherwise.

Appendix C

1. The 1995 CPC Report and Proposed Amendments

On March 21, 1995, the DCP and the City Council's Land Use Committee filed a joint application to amend the Zoning Resolution. (PJA at 1475; Devine Decl., Ex. I (the "Karnovsky Decl."), ¶ 25.) The CPC approved the proposed zoning regulations (with modifications in response to public comment) in a September 18, 1995 report describing the regulations and explaining their bases, which this Court refers to as the "1995 CPC Report." As explained in the preamble to the 1995 CPC Report, the proposed regulations would discontinue the one-year moratorium and "provide permanent regulations governing the siting of adult establishments in a manner which works to protect against the adverse secondary effects of adult establishments while allowing sufficient opportunity for and access to adult materials." (1995 CPC Report at 1; *see also* 1995 CPC Report at 5.)

As described by the CPC, the proposed regulations were referred to the City's community and borough boards and the borough presidents for review and comment. (1995 CPC Report at 13-23.) Out of thirty-nine community boards, eleven voted in favor of the proposed zoning regulations, eleven others voted in favor but wanted to make the zoning proposal more restrictive (for example, by increasing the buffer zones or adding additional sensitive receptors), four voted in favor but wanted to make the zoning proposal less restrictive (for example, by decreasing the buffer zones or cabining the list of sensitive receptors), and thirteen voted against the

proposal. (1995 CPC Report at 13-16.) Of the thirteen community boards voting against the proposal, six still sought some restrictions on adult uses, and four wanted adult establishments banned entirely. (1995 CPC Report at 13.) The borough presidents for the Bronx and Staten Island recommended approval of the proposed regulations with modification, while the borough president for Manhattan recommended against approval. (1995 CPC Report at 17-19.) Similarly, the Bronx, Queens, and Staten Island borough boards voted to approve the proposed regulations with modification, whereas the Brooklyn and Manhattan borough boards voted against approval. (1995 CPC Report at 19-21.)

The CPC also conducted public hearings on the proposed regulations on July 26 and 27, 1995. (1995 CPC Report at 23-33.) Of the eighty speakers who testified, twenty-four testified in favor of the proposal, while fifty-six opposed. As a general matter, those in favor of the proposal pointed to the adverse secondary effects of adult establishments, such as decreased quality of life, increased crime, adverse economic impacts on businesses and property values, and the intrusion of adult establishments (and with them, gaudy or inappropriate signage) on the character of residential and commercial areas. (1995 CPC Report at 25-30.) It should be noted that while some speakers who opposed the proposed regulations cited constitutional concerns and the fear that such regulations would disproportionately target the gay and lesbian communities, the "great preponderance of testimony" against the proposed regulations actually "reflected the perception that the proposal was not restrictive enough

and that adult uses should be prohibited in more areas of the City" based on some of the same secondary-effects rationales. (1995 CPC Report at 25-30.)

Ultimately, the CPC found the proposed zoning regulations (with modifications) to be "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" identified by the DCP Study, the studies conducted in the City and in other municipalities, and public testimony. (*See* 1995 CPC Report at 33-42.) It explained how the locational, anti-concentration, signage, and amortization provisions were designed to target each of the identified adverse effects stemming from adult establishments. (*See* 1995 CPC Report at 42-43.) Referencing analyses conducted by the DCP,[9] the CPC believed that the proposed regulations would continue to allow adult establishments to locate and operate in "substantial numbers in all boroughs and in a variety of locations, assuring sufficient access to adult materials." (1995 CPC Report at 44.) Nonetheless, the CPC found modifications warranted in response to comments by the public. First, the CPC recommended modifications that would increase the number of potential sites in Manhattan without significantly impairing the efficacy of the proposed regulations to account for Manhattan's greater share of adult establishments and potential users. (1995 CPC Report at 45-48.) Second, the CPC recommended modifications that would clarify the adult-use definitions to "tailor application of the

9. The version of the 1995 CPC Report submitted by the parties does not appear to attach the DCP analysis, nor does it cite to any particular document.

regulations to the types of enterprises studied in the DCP Study." (1995 CPC Report at 45; *see* 1995 CPC Report at 48-57.)

On October 25, 1995, the City Council passed Resolution No. 1322, adopting the CPC's approval of the proposed regulations (the "1995 Regulations"). In broad strokes, §§ 32-01 and 42-01 of the Amended Zoning Resolution ("AZR") subjected adult establishments in commercial and manufacturing zones to special locational, anti-concentration, signage, and amortization provisions on top of the existing regulations that governed non-adult commercial uses in those districts. (PJA at 353, 356; 1995 CPC Report at 6-7.) With respect to location, AZR §§ 32-01 and 42-01 barred adult establishments from residential districts as well as commercial and manufacturing districts that permitted new residential uses. (PJA at 354, 356; 1995 CPC Report at 7.) In the specified commercial and manufacturing districts in which adult establishments would be allowed, AZR §§ 32-01 and 42-01 required each establishment to be located at least 500 feet from certain sensitive receptors (*i.e.*, an existing house of worship, school, or daycare center); another adult establishment; or certain districts in which new residences were permitted-though houses of worship, schools, or daycare centers subsequently established within 500 feet of a conforming adult establishment would generally not render it non-conforming. (PJA at 354, 356-57; 1995 CPC Report at 7-8.) The 1995 Regulations also limited the number of adult establishments per zoning lot to one establishment, not to exceed 10,000 square feet of floor area and cellar space. (PJA at 354, 357; 1995 CPC Report at 7-8.)

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Under AZR §§ 52-734 and 52-77, non-conforming existing adult establishments would generally be required to terminate or change their operations to conform within one year of the effective date of the regulations or within one year of a subsequent map change to allow business owners to recoup their investment in the adult portion of the establishment. (PJA at 359-60; 1995 CPC Report at 11.) The amortization provisions set forth in AZR § 72-40 allowed owners to apply the Board of Standards and Appeals at least 120 days before the termination date for additional time to amortize their establishments. (PJA at 361-62; 1995 CPC Report at 11.) Existing adult establishments made non-conforming solely by virtue of being located within 500 feet of another adult establishment, being located in the same zoning lot as another adult establishment, or exceeding 10,000 square feet of floor area and cellar space were not subject to the termination provisions. (PJA at 355, 357; 1995 CPC Report at 9.)

Of course, these special restrictions apply only to "adult establishments." On that score, the 1995 Regulations amended AZR § 12-10 to define the term "adult establishment" and four types of adult establishments distinguished primarily by their emphasis on "specified sexual activities" and "specified anatomical areas."[10] (*See* 1995 CPC Report at 6.) Specifically, the

10. "Specified sexual activities" were defined as "(i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals pubic region, buttock, anus or female breast." (PJA at 352.) "Specified

proposed regulations defined an "adult establishment" as a commercial establishment in which a "substantial portion" of the establishment includes an "adult book store," "adult eating or drinking establishment," "adult theater," or other "adult commercial establishment." (PJA at 351.) In turn, AZR § 12-10 defined an "adult book store" as a book store that has a "substantial portion" of its stock-in-trade printed matter or visual representations characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas." (PJA at 351.) An "adult eating or drinking establishment" was defined in the ordinance as an eating or drinking establishment that "regularly features" live performances or films characterized by an emphasis on "specified anatomical areas" or "specified sexual activities," or employees who, as part of their employment, "regularly expose" to patrons "specified anatomical areas." (PJA at 351-52.) Similarly, AZR § 12-10 defined an "adult theater" as a theater that "regularly features" live performances or films characterized by an emphasis on "specified anatomical areas" or "specified sexual activities," and included "commercial establishments where such materials or performances are viewed from individual enclosures." (PJA at 352.)

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anatomical areas" were defined as "(i) less than completely concealed and opaquely concealed (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed." (PJA at 353.) As the 1995 CPC Report explains, these terms were "used in most zoning ordinances throughout the country." (1995 CPC Report at 6.)

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Importantly for purposes of subsequent legal challenges to the City's adult-use regulations, AZR § 12-10 also offered guidance in determining whether a "substantial portion" of a commercial establishment includes an adult use or whether a "substantial portion" of a book store's stock-in-trade contains the materials enumerated in the ordinance. The former required a consideration of the following factors:

> (1) the amount of floor area and cellar space accessible to customers and allocated to such uses; and (2) the amount of floor area and cellar space accessible to customers and allocated to such uses as compared to the total floor area and cellar space accessible to customers in the establishment.

(PJA at 353.) As for the latter, AZR § 12-10 prescribed the following considerations:

> (1) the amount of such stock accessible to customers as compared to the total stock accessible to customers in the establishment; and (2) the amount of floor area and cellar space accessible to customers containing such stock; and (3) the amount of floor area and cellar space accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment.

(PJA at 353.)

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The 1995 CPC Report explains why the CPC embraced a quantitative test based on floor area rather than a qualitative test. Specifically, the 1995 CPC Report noted that "[p]articular concern was expressed regarding the use of the word 'substantial' in the definitions of adult book stores and of adult establishments. Certain speakers questioned whether the word provided sufficient guidance to an enforcement official to allow enforcement in an objective, non-biased, manner." (1995 CPC Report at 50.) To allay these concerns, the 1995 CPC Report recommended that "substantial" be defined in terms of floor area:

> To further the general intent of the adult use regulations, the [CPC] believes an enforcement agency should consider the following factors to establish whether a "substantial" portion of an establishment is occupied by an adult use or adult materials (1) the overall amount of floor area accessible to customers devoted to adult purposes; (2) the amount of floor area devoted to adult purposes as compared to the total commercial floor area of the establishment; and (3) the amount of stock of a sexually explicit nature as compared to the total stock. *As a general guideline, the [CPC] believes that an establishment would need to have at least 40 percent of its accessible floor area used for adult purposes to make it similar to the establishments studied in the DCP Study and thus be an "adult establishment" or "adult bookstore*."

(1995 CPC Report at 50 (emphasis added).) In sum, the CPC embraced a floor-area approach due to its objective nature, specifically rejecting an approach based on the nature or prominence of adult materials vis-a-vis non-adult materials as overly subjective. (*See* 1995 CPC Report at 51 ("Other factors, such as the nature or prominence of display of adult materials, would reinsert a level of discretion into an enforcement effort which the [CPC] believes is unnecessary and should be avoided.").)

One final point is worth noting. Notwithstanding the preeminence of what eventually became known as the "60/40 Standard," the 1995 CPC Report acknowledged that "there may be exceptions to this general guideline," such as an establishment that moves a disproportionate amount of adult materials into a small floor area or one with over 10,000 square feet of floor area devoted to adult purposes, irrespective of the overall size of the establishment. (1995 CPC Report at 50-51.) The overarching theme is that the regulations "[were] not intended to cover general interest book or video stores with a section of adult materials that is modest in scale as compared to the overall size of the establishment." (1995 CPC Report at 51.) Rather, the CPC reiterated that "adult establishments" were "intended to be only those establishments similar in nature to the types of enterprises described and studied in the DCP Study, namely book and video stores, theaters, eating or drinking establishments and other commercial enterprises with a predominant, on-going focus on sexually explicit materials or activities."[11] (1995 CPC Report at 49.) In

11. In a similar vein, the terms "regularly" and "characterized by an emphasis" were meant to circumscribe the applicability of the proposed regulations to establishments "that have a principal focus

other words, the CPC emphasized that this "limited range of establishments" analyzed in the DCP Study and found to give rise to adverse secondary effects "are the only establishments covered by the adult use regulations." (1995 CPC Report at 49.)

2. Legal Challenges to the 1995 Regulations

The 1995 Regulations opened a Pandora's box of litigation by over 100 owners and operators of adult establishments as well as patrons of such establishments. (*See* 4431 Compl. ¶¶ 27-28.) Defendants removed two of those actions—*Amsterdam Video, Inc. v. City of New York* and *Hickerson v. City of New York*-to the Southern District of New York. The court remanded the claims arising under the New York state constitution in both actions and held in abeyance the federal constitutional claims pending the determination of the state constitutional claims in state court. *See Hickerson v. City of New York*, 932 F. Supp. 550, 559 (S.D.N.Y. 1996). Subsequently, *Amsterdam Video* and *Hickerson* were consolidated with a third case filed in New York state court—*Stringfellow's of New York, Ltd. v. City of New York*.

On summary judgment, the state court upheld the 1995 Regulations under the state constitution, applying the standards set forth by New York's highest court in *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (N.Y. 1989). *Stringfellow's of N.Y., Ltd.*

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on sexual activities or anatomy as entertainment" and those "that have adult entertainment on a frequent, on-going basis." (1995 CPC Report at 51-52.)

v. City of New York, 171 Misc. 2d 376, 653 N.Y.S.2d 801, 814 (N.Y. Sup. Ct. 1996). In particular, the *Stringfellow's* court determined that the 1995 Regulations were content-neutral, that defendants proffered sufficient evidence of adverse secondary effects, that the 1995 Regulations were no broader than necessary to achieve a significant governmental purpose, and that defendants demonstrated an adequate number of available alternative locations. Both the New York Appellate Division and the New York Court of Appeals unanimously affirmed. *Stringfellow's of N.Y., Ltd. v. City of New York*, 241 A.D.2d 360, 663 N.Y.S.2d 812 (N.Y. App. Div. 1997) (memorandum), *aff'd* 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406 (N.Y. 1998).

Following the New York Court of Appeals' decision in *Stringfellow's*, the *Hickerson* court denied plaintiffs' motion for a temporary restraining order and preliminary injunction staying enforcement of the 1995 Regulations. The court found that plaintiffs failed to demonstrate a likelihood of success on the merits because the collateral estoppel effect of the state court factual findings in *Stringfellow's* would also be dispositive of plaintiffs' federal constitutional claims. *Hickerson v. City of New York*, 997 F. Supp. 418, 424 (S.D.N.Y. 1998). The Second Circuit affirmed, agreeing that plaintiffs could not show a likelihood of success on the merits because "the New York courts' rejection of plaintiffs' state constitutional claims forecloses plaintiffs from relitigating, in the form of a First Amendment claim in federal court, the same issues that were resolved against them in state court." *Hickerson v. City of New York*, 146 F.3d 99, 103 (2d Cir. 1998). In so holding, the Second Circuit rejected plaintiffs'

contention that collateral estoppel ought not to apply, explaining that "the issues decided and the standards applied by the New York state courts . . . are the same that would be applicable to plaintiffs' First Amendment claim." *Hickerson*, 146 F.3d at 104.

Though the Second Circuit's holding in *Hickerson* was principally procedural, another panel of the Second Circuit upheld the 1995 Regulations against facial challenges under the First Amendment and Equal Protection Clause of the Fourteenth Amendment less than three months earlier. *See Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1998). In *Buzzetti*-litigated roughly contemporaneously with the cases meandering their way through the state courts—the proprietor of a strip club and a female topless dancer sought to preliminarily enjoin the enforcement of the 1995 Regulations, as relevant here, on the basis that the regulations constituted a presumptively invalid content-based restriction. The district court denied plaintiffs' motion, holding that because the 1995 Regulations withstood the intermediate-scrutiny test governing content-neutral time, manner, and place regulations under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), plaintiffs failed to establish a likelihood of success on the merits. *Buzzetti v. City of New York*, 1997 U.S. Dist. LEXIS 4383, 1997 WL 164284, at *2-3, *6 (S.D.N.Y. Apr. 8, 1997). The Second Circuit affirmed the district court's First Amendment holding for largely the same reasons. # 4/98, further refined the meaning of the phrase*Buzzetti*, 140 F.3d at 139-41.

3. The 60/40 Standard

At the same time that federal and state courts grappled with the constitutionality of the 1995 Regulations, the City's Department of Buildings ("DOB") periodically provided enforcement guidance in the form of Operations Policy and Procedure Notices ("OPPNs"), which further interpreted various aspects of the 1995 Regulations. As relevant here, Appendix A to OPPN # 6/96—issued on October 25, 1996—echoed the factors set forth in AZR § 12-10 for determining whether a "substantial portion" of an establishment was devoted to an adult establishment or whether a "substantial portion" of an establishment's stock-in-trade was devoted to specified materials. (PJA at 488.) It did not, however, reference the CPC's "general guideline" that an establishment "would need to have at least 40 percent of its accessible floor area used for adult purposes" to constitute an "adult establishment" or "adult bookstore." (1995 CPC Report at 50.)

On July 22, 1998—on the heels of the New York Court of Appeals' decision in *Stringfellow's* and the Second Circuit's decisions in *Buzzetti* and *Hickerson*—the DOB issued OPPN # 4/98 to tease out the meaning of "substantial portion" as used in AZR § 12-10. (*See* PJA at 502.) In particular, OPPN # 4/98 explained that an establishment included an adult bookstore "if 40 percent of the establishment's floor area and cellar space accessible to customers contains stock in adult materials."[12] (PJA at 503.)

12. Separately, a bookstore would also be considered an "adult book store" if a "substantial portion," defined as "at least 40 percent of the book store's total [accessible stock]," was "comprised of adult materials." (PJA at 503.)

With respect to adult eating or drinking establishments, the DOB advised that whether a "substantial portion" of an eating or drinking establishment included an adult use should depend on "the amount of floor area and cellar space accessible to customers allocated to adult use for performance and viewing purposes as compared to total combined floor area and cellar space accessible to customers." (PJA at 503.) Thus, according to OPPN # 4/98, a "substantial portion" of an establishment "is devoted to an adult use"—making the establishment an "adult eating or drinking establishment"—if it "has at least 40 percent of the floor and cellar area that is accessible to customers[] available for adult performance and viewing purposes." (PJA at 503.)

The DOB's issuance of OPPN # 4/98 appears to have been motivated (at least in part) by developments in the *Amsterdam Video* litigation proceeding in this district. In a hearing on plaintiff's preliminary injunction motion just two days after the release of OPPN # 4/98, the City represented to the court that any commercial establishment with less than 40 percent of its stock-in-trade or accessible floor area devoted to adult uses would comply with the 1995 Regulations—ostensibly, to avert plaintiff's constitutional vagueness challenge to the "substantial portion" language in AZR § 12-10. (4431 Compl. ¶¶ 33-35; 3732 Compl. ¶¶ 63-65; *see* PJA at 1675-76.) Thus, according to Plaintiffs, the 1995 Regulations did not apply to any adult business so long as it complied with the 60/40 Standard. Less than a week after the DOB issued OPPN # 4/98, the 1995 Regulations became enforceable on July 28, 1998 when the U.S. Supreme Court denied a

stay in *Amsterdam Video*, thereby ending the judicial stays that had been in effect. *See City of New York v. Les Hommes*, 94 N.Y.2d 267, 724 N.E.2d 368, 370, 702 N.Y.S.2d 576 (N.Y. 1999).

OPPN # 6/98, which the DOB released on August 13, 1998 to supersede OPPN # 4/98, further refined the meaning of the phrase "substantial portion." (*See* PJA at 506.) Although OPPN # 6/98 left unchanged the guidance set forth by OPPN # 4/98 with respect to adult bookstores, it restated the "substantial portion" test with respect to commercial establishments with two or more uses in part as follows:

> The determination as to whether a "substantial portion" of a commercial establishment with two or more uses, at least one of which is not a book store, an eating or drinking establishment, a theater, or an "other adult commercial establishment," includes an adult use should include consideration of (1) the amount of floor area and cellar space accessible to customers allocated to adult use and (2) such amount of floor area and cellar space as compared to total combined floor area and cellar space accessible to customers.
>
> Thus, if [such a commercial establishment] has at least 40 percent of the floor and cellar area that is accessible to customers available to adult use, then a "substantial portion" of the establishment is devoted to an adult use and

> the commercial establishment is deemed to be an adult establishment.

(PJA at 507.) Of note—and somewhat inconsistent with the City's representations in *Amsterdam Video*—OPPN # 6/98 stated that this 60/40 Standard "shall not apply to a commercial establishment that is entirely an eating or drinking establishment, a theater, an 'other adult establishment,' or any combination thereof," (PJA at 508), sowing the seeds for additional litigation.

In this regulatory milieu, many adult establishments modified their interior configurations to comply with the 60/40 Standard. Eating and drinking establishments erected partitions to separate their establishments into adult and non-adult sections or otherwise reduced the amount of accessible floor space devoted to adult uses. (*See* 4431 Compl. ¶ 37; PJA at 229-30, 263-64, 267, 269-70, 285-86, 299-300.) Likewise, bookstores redesigned their floor space and interiors or reduced the number of private viewing booths in which patrons could view sexually explicit films. (*See* 3732 Compl. ¶ 66; PJA at 1622-23, 1645, 1664.) Notwithstanding its position in *Amsterdam Video*, the City commenced nuisance abatement proceedings against certain of these so-called "60/40 establishments" that it believed to be engaged in sham compliance with the 60/40 Standard. The City argued that the "substantial portion" test applied only to adult bookstores and multi-use commercial establishments, not single-use eating or drinking establishments regularly featuring adult entertainment. All three levels of the New York state judiciary rejected the City's contention that a single-use

eating or drinking establishment with any adult component fell outside the 60/40 Standard.[13] *See City of New York v. Dezer Props., Inc.*, 95 N.Y.2d 771, 732 N.E.2d 943, 943, 710 N.Y.S.2d 836 (N.Y. 2000) (memorandum) (reasoning that as a matter of statutory interpretation, "the interpretation urged by the City would effectively excise the 'substantial portion' component from the enactment in cases of eating or drinking establishments").

C. The 2001 Zoning Amendments

As previewed earlier, the adoption of the 60/40 Standard raised the issue of whether the 1995 Regulations applied to establishments that—at least literally—complied with the 60/40 Standard but essentially retained their non-conforming nature. As it did in *Dezer Properties*, the New York Appellate Division suggested that an adult bookstore's sham compliance with the 60/40 Standard did not place it outside the reach of the 1995 Regulations.

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13. Notably, although the New York Appellate Division rejected the City's argument that the 60/40 Standard did not apply to any single-use establishment with an adult component, it found that the establishment nevertheless "failed to prove compliance with the [60/40 Standard]" despite having only 28 percent of its total floor space dedicated to adult entertainment because its attempt to comply was, "as a matter of law, a sham" that left the non-conforming nature essentially intact. *City of New York v. Dezer Props., Inc.*, 259 A.D.2d 116, 697 N.Y.S.2d 41, 45 (N.Y. App. Div. 1999), *rev'd* 95 N.Y.2d 771, 732 N.E.2d 943, 710 N.Y.S.2d 836 (N.Y. 2000). The New York Court of Appeals reversed, holding that whether the establishment actually complied with the 60/40 Standard was not properly before the Appellate Division and consequently could not be reached by the high court. *Dezer Props.*, 732 N.E.2d at 943.

See City of New York v. Les Hommes, 258 A.D.2d 284, 685 N.Y.S.2d 49, 50 (N.Y. App. Div. 1999) (memorandum), *rev'd* 94 N.Y.2d 267, 724 N.E.2d 368, 702 N.Y.S.2d 576 (N.Y. 1999). The New York Court of Appeals reversed, emphasizing the need to enforce the plain language of the City's guidelines as written—namely, by considering only floor area and stock-in-trade. *Les Hommes*, 724 N.E.2d at 371-72. Stated differently, because neither the 1995 Regulations nor the City's guidance mentioned other factors that might be germane to a determination of bona fide compliance with the 60/40 Standard, "inject[ing] those considerations into the mix" was improper. *Les Hommes*, 724 N.E. 2d at 371-72. Confronted with these judicial decisions, the City opted again to amend the Zoning Resolution.[14]

1. The 2001 CPC Report and Proposal

On August 8, 2001, the CPC approved an application by the DCP to amend the 1995 Regulations. In substance, the application sought to eliminate the 60/40 Standard principally by amending the definitions of

14. OPPN # 6/98 was itself superseded by OPPN # 1/00. (*See* PJA at 506.) OPPN # 1/00 "stated explicitly that it was intended to address the Court of Appeals decision in *Les Hommes*, and that it 'sets forth additional considerations or factors not specifically set forth in [the prior OPPN] to assure that the adult use provisions are not undermined by sham efforts at compliance." *City of New York v. Warehouse on the Block, Ltd.*, 183 Misc. 2d 489, 703 N.Y.S.2d 900, 901-02 (N.Y. Sup. Ct. 2000) (alteration in original). Nonetheless, because it is immaterial to this Court's decision and because the parties do not address it in their briefing or even appear to have included it in the record, this Court declines to consider it.

"adult establishment" and "adult eating or drinking establishment." The City Council passed Resolution No. 2096 on October 31, 2001, thereby adopting the CPC's approval of these amendments (the "2001 Amendments"). (*See* PJA at 379-83.) Like the 1995 Regulations, the 2001 Amendments were also accompanied by a CPC report that explained the amendments and the reasons behind them. (*See generally* PJA at 709-834 ("2001 CPC Report").)

According to the CPC, the 1995 Regulations needed to be amended "to address attempts by adult establishments to remain in operation through superficial measures which do not alter the character of the establishments as enterprises with a 'predominant, on-going focus on sexually explicit materials or activities,'" as well as "several court rulings [that] have narrowed the scope and application of the [1995 Regulations] in a manner which the [DCP] believes is contrary to the original intent." (2001 CPC Report at 3-4.) The CPC noted that as of 2000, 101—or 74 percent—of the City's 136 adult establishments were 60/40 establishments. (2001 CPC Report at 6.) Out of those 101 establishments, 75 were pre-existing establishments that had subsequently adopted 60/40 configurations. (2001 CPC Report at 9-10.) While the total number of adult establishments decreased city-wide between 1993 and 2000, Times Square still housed the greatest concentration of adult establishments. (2001 CPC Report at 6-8.)

As with the 1995 Regulations, the 2001 Amendments were referred to the City's community boards, borough boards, and borough presidents for review and comment.

Of those voting, twelve community boards voted to approve the proposal, two voted to approve but recommended more restrictive provisions, five—all located in Manhattan—voted against the proposal, and one voiced qualified opposition. (2001 CPC Report at 20-23.) The voting for the borough boards and borough presidents followed a similar pattern, with the Queens borough board and borough president voting in favor of the application, the Brooklyn borough board also voting in favor, and the Manhattan borough board and borough president voting in opposition. (2001 CPC Report at 23-24.)

Public support for the 2001 Amendments waned in comparison to the 1995 Regulations. At a May 23, 2001 public hearing conducted by the CPC, five speakers testified in favor of the application compared to thirteen who opposed it. (2001 CPC Report at 24.) Broadly speaking, those who supported the proposal lamented the exploitation of the 60/40 Standard by adult establishments and the judicial interpretations of the 1995 Regulations that they claimed undermined the intent of the regulations. (2001 CPC Report at 24-25.) On the other hand, those who testified against the proposed amendments asserted that the record did not demonstrate any correlation between 60/40 establishments and adverse secondary effects, that the proposed amendments were overbroad and raised the specter of bias in enforcement, and that adult establishments had already made substantial financial expenditures in reliance on the 60/40 Standard. (2001 CPC Report at 25-28.)

Nevertheless, the CPC found the proposed amendments (with modifications) appropriate to "clarify certain

definitions in the text, in order to effectuate the [CPC's] original intent in response to efforts by the operators of adult establishments to undermine implementation of the 1995 Regulations." (2001 CPC Report at 29.) It emphasized that the 1995 Regulations were adopted to address the negative secondary effects flowing from establishments similar to those described in the DCP Study—that is, establishments "with a predominant, on-going focus on sexually explicit materials or activities." (2001 CPC Report at 30 (quoting 1995 CPC Report at 49).)

With respect to bookstores, the CPC explained that the "substantial portion" qualifier and the "general guideline" that eventually morphed into the 60/40 Standard enabled enforcement officials to distinguish in an objective, non-biased manner between adult bookstores and neighborhood bookstores with a small amount of adult material. (2001 CPC Report at 30-31.) However, it pointed to the increasing clarity that the 60/40 Standard "[was], alone, an insufficient measure of whether a book or video store has a 'predominant on-going focus' on sexually explicit materials" in light of efforts by adult establishment owners to achieve superficial, mathematical compliance while maintaining "a physical lay-out or methods of operation which reflect a predominant focus on the sale of adult materials."[15] (2001 CPC Report at 32-34.) In rejecting

15. The CPC detailed some of these tactics, which include buying inexpensive instructional videos, martial arts films, or cartoons in bulk and leaving opened cartons of titles on the floors or "stacked haphazardly on shelves without any attempt at organization or categorization." (2001 CPC Report at 32-33.) As indicia of a predominant focus on the sale of adult materials, the CPC cited

the argument that it first needed to demonstrate adverse secondary effects by 60/40 establishments, the CPC noted the lack of any indication that sham compliance somehow ameliorated those secondary effects or transformed adult bookstores into non-adult establishments. (2001 CPC Report at 34-35.)

In contrast with the definition for adult bookstores, the definition for an "adult eating or drinking establishment" did not contain the "substantial portion" language or any consideration of floor area because the DCP Study did not identify any "neighborhood bars or restaurants with only 'incidental' topless or nude entertainment." (2001 CPC Report at 31.) Therefore, the CPC had found "no basis to conclude that the negative secondary effects of adult establishments are any less present where topless or nude dancers frequent only part of the customer-accessible floor space in an eating or drinking establishment." (2001 CPC Report at 31-32.) But the 2001 CPC Report faulted the courts with propagating an erroneous interpretation of the "substantial portion" test that was "plainly inconsistent" with the intent of the 1995 Regulations "that it is immaterial how much floor space in the eating or drinking establishment is used for the presentation of adult entertainment, such as topless dancing." (2001 CPC Report at 35-37 & n.3.)

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layouts requiring customers to pass through an adult section to reach a non-adult section, a greater selection of adult material than non-adult material, or layouts requiring customers to consummate any transactions in adult sections of the establishment. (2001 CPC Report at 33.)

Appendix C

The 2001 Amendments left intact the basic locational and anti-concentration provisions of the 1995 Regulations applicable to adult establishments. Critically, however, they expanded the reach of the 1995 Regulations to encompass at least some 60/40 establishments. The 2001 Amendments struck the "substantial portion" language from AZR § 12-10's definition of "adult establishment," now defining it as "a commercial establishment *which is or includes* an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof . . . ." (PJRA at 1916 (emphasis added); 2001 CPC Report at 15-16, 38.) AZR § 12-10 now defined an "adult eating or drinking establishment" as one that "regularly features *in any portion*" of the establishment live performances or films characterized by an emphasis on "specified anatomical areas" or "specified sexual activities," or employees who, as part of their employment, "regularly expose" to patrons "specified anatomical areas." (PJRA at 1917-18 (emphasis added); *see* 2001 CPC Report at 14-15, 37.) With respect to adult theaters, the 2001 Amendments now clarified that "commercial establishments where [live performances or films characterized by an emphasis on 'specified anatomical areas' or 'sexual activities'] are viewed from *one or more* individual enclosures." (PJRA at 1918-19 (emphasis added); *see* 2001 CPC Report at 37.)

As for adult bookstores, the 2001 Amendments left the "substantial portion" language from the 1995 Regulations but established criteria relating to layout and method of operation through which a bookstore that facially complied with the "substantial portion" test would nevertheless

fall within the purview of the adult-use regulations. (*See* 2001 CPC Report at 11-14, 34.) Specifically, the 2001 Amendments provided that non-adult materials would not be considered stock-in-trade for purposes of the "substantial portion" assessment if the establishment had any of several enumerated features—namely (1) a layout requiring customers to pass through areas containing adult materials to access non-adult materials; (2) one or more peep booths in which patrons can view adult films or live performances; (3) requiring transactions for non-adult materials to be made in areas with adult materials; (4) offering non-adult materials only for sale but offering adult materials for sale *or* rental; (5) a greater variety of adult materials than non-adult materials; (6) restricting minors from the bookstore or from any section of the bookstore offering non-adult material; (7) disproportionately larger advertisements of adult materials than non-adult materials; (8) disproportionately larger window displays of adult materials than non-adult materials; or (9) other features relating to layout and method of operation determined by the Commissioner of Buildings to suggest that adult materials are a "substantial purpose of the business conducted" in the establishment. (PJRA at 1920-24.)

The 2001 Amendments also added a specific amortization provision to allow adult establishments that had made financial expenditures to comply with the 60/40 Standard to recoup their investments. The CPC explicitly rejected the alternative course of allowing existing 60/40 establishments to remain indefinitely, noting that 60/40 establishments were never intended to be allowed under the 1995 Regulations, which the 2001 Amendments purported to clarify. (2001 CPC Report at 42-43.) Thus,

AZR § 72-41 established a one-year amortization period for any adult establishment existing as of August 8, 2001 in a prohibited location that had made investments in reliance on the 60/40 Standard. (PJRA at 1929-31 ; *see* 2001 CPC Report at 43-44.) AZR § 72-41—like AZR § 72-40—afforded such 60/40 establishments an opportunity to apply to the Board of Standards and Appeals at least 120 days before the October 31, 2002 termination date for extensions of time.

Finally, the 2001 Amendments also amended AZR §§ 32-01 and 42-01 to define the locational restrictions by reference to an adult business's establishment, as opposed to the terms "located" and "existed." (PJRA 1924-25, 1926-28.) The CPC explained that this change would address "interpretive problems where there is a conflict as to priority between two competing establishments." (2001 CPC Report at 40.) Thus, the 2001 Amendments added identical provisions to AZR §§ 32-01 and 42-01 explaining that an adult establishment would be deemed established

> upon the date of a permit issued by the department of buildings therefor, or, in the case of an adult establishment in existence prior to August 8, 2001, as determined by the department of buildings, subject to rules as the department of buildings may prescribe regarding the failure to perform work authorized under a permit or to commence operation pursuant to a permit and the discontinuance of an adult establishment.

(PJRA at 1926, 1928; *see* 2001 CPC Report at 16-19, 40-41.)

2. Legal Challenges to the 2001 Amendments

The 2001 Amendments spawned a fresh wave of federal and state constitutional challenges by 60/40 establishments, including the three federal actions brought by the Club Plaintiffs.[16] While the state court litigation resulted in the New York Court of Appeals upholding the constitutionality of the 2001 Amendments in 2017, its "long, complicated, and confusing history" featured three trips through the New York appellate courts. *For the People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340, 57 N.Y.S.3d 69, 79 N.E.3d 461, 463 (N.Y. 2017), *cert. denied* 138 S. Ct. 994, 200 L. Ed. 2d 252 (2018) and 138 S. Ct. 1000, 200 L. Ed. 2d 252 (2018). To provide a better understanding of the arguments and issues at play in these cases—many of which are recycled from the state court litigation—this Court traces the contours of the state court litigation.

On October 29 and 30, 2002-just before the expiration of the one-year termination period—the New York Supreme Court issued a temporary restraining order enjoining the enforcement of the 2001 Amendments against 60/40 establishments. (4431 Compl. ¶ 52; *see also* 3732 Compl. ¶ 79.) In late 2003, the New York Supreme Court granted summary judgment in favor of 60/40 establishments challenging the 2001 Amendments. The trial court noted that the City did not offer any evidence

16. A fourth action brought by owners and operators of another gentlemen's cabaret, captioned *Pulse Nite Club, Inc. v. City of New York*, was voluntarily dismissed on April 26, 2018. (*See* ECF No. 3, 02cv6193.)

justifying the 2001 Amendments, highlighting the City's concession that it had not studied the impact of 60/40 establishments. *For the People Theatres of N.Y., Inc. v. City of New York*, 1 Misc. 3d 394, 768 N.Y.S.2d 783, 785 (N.Y. Sup. Ct. 2003). It also rejected the City's reliance on the DCP Study on the rationale that 60/40 establishments arose *after* the 1995 Regulations, and thus could not have been studied by the DCP in 1993. *For the People Theatres of N.Y.*, 768 N.Y.S.2d at 786. Thus, the trial court held the 2001 Amendments to be unconstitutional because the City failed to demonstrate that the predominant purpose of the 2001 Amendments was to address negative secondary effects and because the 2001 Amendments were "broader than needed to achieve the City's purpose of ameliorating negative secondary effects." *For the People Theatres of N.Y.*, 768 N.Y.S.2d at 785 (citing *Town of Islip*, 540 N.E.2d at 218).

The New York Appellate Division reversed and declared the 2001 Amendments constitutional. *For the People Theatres of N.Y., Inc. v. City of New York*, 20 A.D.3d 1, 793 N.Y.S.2d 356, 371 (N.Y. App. Div. 2005). The Appellate Division found unpersuasive plaintiffs' contention that the City provided no evidence or study linking 60/40 establishments and the negative secondary effects identified in the DCP Study. It reasoned that the City was not required to conduct its own study of 60/40 establishments, and that the City was entitled to rely on the DCP Study and studies by other municipalities so long as that evidence was reasonably believed to be relevant to the problem at hand. *For the People Theatres of N.Y.*, 793 N.Y.S.2d at 367-68. Accordingly, the Appellate

Division upheld the 2001 Amendments because the City reasonably believed that 60/40 establishments retained their essential nature and predominant focus on sexually explicit expression, plaintiffs failed to cast doubt on the City's rationale, and the 2001 Amendments left open sufficient areas for lawful speech. *For the People Theatres of N.Y.*, 793 N.Y.S.2d at 368-71.

A divided New York Court of Appeals agreed that the City proffered enough evidence in the first instance that 60/40 establishments retained their essential nature creating negative secondary effects.[17] *For the People Theatres of N.Y. v. City of New York*, 6 N.Y.3d 63, 843 N.E.2d 1121, 1131, 810 N.Y.S.2d 381 (N.Y. 2005). However, the majority found that plaintiffs also furnished evidence disputing the City's rationale and remanded for a factual determination as to whether the 60/40 establishments were "so transformed in character that they no longer resemble the kinds of adult uses found . . . to create negative secondary effects . . . or whether these business' technical compliance with the 60/40 formula is merely a sham . . . ." *For the People Theatres of N.Y.*, 843 N.E.2d at 1132-33. As relevant here, the Court of Appeals rejected the notion that the City needed to conduct a new study

17. The dissent disagreed that the 2001 Amendments functioned merely as a clarification of the 1995 Regulations, instead characterizing them as creating "new law." *For the People Theatres of N.Y.*, 843 N.E.2d at 1134 (Kaye, C.J., dissenting). Similarly, because it saw 60/40 establishments as fundamentally different from the pre-1995 adult establishments, it argued that the 2001 Amendments could not be justified by reference to the 1995 Regulations. *For the People Theatres of N.Y.*, 843 N.E.2d at 1136.

connecting 60/40 establishments with negative secondary effects. For the People Theatres of N.Y., 843 N.E.2d at 1132, 1133.

Following remand and a bench trial, the New York Supreme Court upheld the constitutionality of the 2001 Amendments as they related to adult bookstores and adult eating and drinking establishments.[18] For the People Theatres of N.Y., Inc. v. City of New York, 27 Misc. 3d 1079, 897 N.Y.S.2d 618, 625 (N.Y. Sup. Ct. 2010). It noted that the City's burden "was a 'light' one" and that the City had "provided substantial evidence that [plaintiffs'] dominant, ongoing focus is on adult matters." *For the People Theatres of N.Y.*, 897 N.Y.S.2d at 625. The New York Appellate Division once again reversed, vacated the lower court's determination of constitutionality, and remanded with further instructions. In particular, the Appellate Division faulted the trial court's "extremely terse decision" with failing to adequately explain "whether the 60/40 establishments are similar in nature to adult establishments that have been shown by means of empirical data to cause negative 'secondary effects.'" *For the People Theatres of N.Y., Inc. v. City of New York*, 84 A.D.3d 48, 923 N.Y.S.2d 11, 17-18 (N.Y. App. Div. 2011).

Following a second remand, the trial court struck down the 2001 Amendments as facially unconstitutional

18. The trial court found the 2001 Amendments unconstitutional with respect to adult theatres and entered a permanent injunction. The City did not appeal this portion of the judgment.

under the federal and state constitutions.[19] *For the People Theatres of N.Y., Inc. v. City of New York*, 38 Misc. 3d 663, 954 N.Y.S.2d 801, 809 (N.Y. Sup. Ct. 2012). The court found "significant and distinct differences between the 1994 adult entities and 60-40 entities," such that "the current establishments no longer resemble their 1994 predecessors." *For the People Theatres of N.Y.*, 954 N.Y.S.2d at 810. Based on its conclusion that 60/40 establishments did not predominantly focus on sexual matters, the court determined that "there [was] no need for the 2001 amendments." *For the People Theatres of N.Y.*, 954 N.Y.S. 2d at 810.

A divided panel of the New York Appellate Division affirmed. The majority restated four criteria it previously identified for assessing whether a 60/40 establishment retained a predominant, ongoing sexual focus—that is, the (1) "presence of large signs advertising adult content"; (2) a "significant emphasis on the promotion of materials 'specified sexual activities' or 'specified anatomical areas'"; (3) the "exclusion of minors from the premises on the basis of age"; and (4) "difficulties in accessing nonadult materials." *For the People Theaters of N.Y. v. City of New*

19. In a separate dicta section, the court doubted that "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." *For the People Theatres of N.Y.*, 954 N.Y.S.2d at 810. It lambasted the City's "fictionalized reliance on the [DCP Study]" and remarked that the 2001 Amendments should have been struck down as urged by the New York Court of Appeals' dissent. *For the People Theatres of N.Y.*, 954 N.Y.S.2d at 810.

York, 131 A.D.3d 279, 14 N.Y.S.3d 338, 346 (N.Y. App. Div. 2015) (citation and quotation marks omitted). The Appellate Division concluded as an evidentiary matter that the City satisfied only the second factor for both adult bookstores and adult drinking and eating establishments, and thus failed to carry its burden.[20] *For the People Theaters of N.Y.*, 14 N.Y.S.3d at 346-49.

On June 6, 2017-almost fifteen years after the state court litigation commenced—the New York Court of Appeals unanimously reversed, holding that the City demonstrated that the 60/40 establishments "retained a predominant focus on sexually explicit materials or activities." *For the People Theatres of N.Y., Inc. v. City of New York*, 29 N.Y.3d 340, 57 N.Y.S.3d 69, 79 N.E.3d 461, 463 (N.Y. 2017). The Court of Appeals faulted the lower courts with conflating intermediate scrutiny with the proper evidentiary standard under the burden-shifting framework set forth by the plurality opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). *For the People Theatres of N.Y.*, 79 N.E.3d at 475. It explained that the lower courts held the City to an erroneously high burden of proof in

20. The dissenters took issue with the majority's "mechanical and mathematical approach" in considering the factors the Appellate Division previously identified. *For the People Theaters of N.Y.*, 14 N.Y.S.3d at 355-56. In their view, the City only needed to demonstrate that the essential nature of the 60/40 establishments—*i.e.*, a predominant, ongoing focus on sexually explicit materials or activities—had not changed to sustain the 2001 Amendments. *For the People Theaters of N.Y.*, 14 N.Y.S.3d at 354, 358 (Andrias, J., dissenting).

applying a "rigidly mechanical approach" to assessing the predominant focus of 60/40 establishments. *For the People Theatres of N.Y.*, 79 N.E.3d at 475. Based on its agreement that the City satisfied the second factor identified by the Appellate Division, it affirmed that "the City had relevant evidence reasonably adequate to support its conclusion that the adult establishments retained a predominant, ongoing focus on sexually explicit activities or materials." *For the People Theatres of N.Y.*, 79 N.E.3d at 475-76.

II. The Club Plaintiffs' and Bookstore Plaintiffs' Actions

Following the New York Court of Appeals' decision in *For the People Theatres*, the City agreed not to enforce the 2001 Amendments against Plaintiffs while the state court plaintiffs sought re-argument before the New York Court of Appeals and certiorari before the U.S. Supreme Court. (4431 Compl. ¶¶ 64-68; 3732 Compl. ¶¶ 88-92.) The New York Court of Appeals denied re-argument on September 12, 2017, though it purportedly left the motion by the adult bookstores unresolved. (4431 Compl. ¶ 67; 3732 Compl. ¶ 88.) On February 20, 2018, the Supreme Court denied certiorari, bringing the state court litigation to a close. (4431 Compl. ¶ 69; 3732 Compl. ¶ 93.)

A. The Plaintiffs

These actions are brought by plaintiffs that would not be considered "adult establishments" under the 1995 Regulation but would apparently be so classified under the 2001 Amendments. The Club Plaintiffs are comprised of

the following entities. Plaintiffs 725 Eatery, Corp. and 689 Eatery, Corp. own and operate gentlemen's clubs located in the Times Square area of Manhattan—respectively, Platinum Dolls and Satin Dolls. (4431 Compl. ¶¶ 4-5.) Plaintiffs 59 Murray Enterprises, Inc., AAM Holding Corp., West 20th Enterprises Corp., and JNS Ventures Ltd. also own and operate gentlemen's clubs scattered across New York City—respectively, New York Dolls in the Tribeca area of Manhattan (now known as "Flashdancers Downtown"), Private Eyes in Manhattan's Hell's Kitchen (now known as "Flashdancers NYC"), VIP Club New York in Manhattan's Flatiron District, and Vixen in the Ridgewood area of Queens. (Second Amended & Supplemental Complaint, ECF No. 26, 02cv4432 ("4432 Compl."), ¶¶ 7-10; PJA at 266.) Finally, Plaintiffs Club at 60th, Inc. and Jacaranda own or operate Sapphire, a gentlemen's club located in Manhattan. (Second Amended Complaint for Declaratory and Injunctive Relief Under 42 U.S.C. § 1983, ECF No. 42, 02cv8333 ("8333 Compl."), ¶¶ 7-8, 10-16.) The Club Plaintiffs are all 60/40 establishments who, under AZR § 32-01 or AZR § 42-01, would be required to terminate under the Zoning Resolution based on their current location. (4431 Compl. ¶¶ 4-5; 4432 Compl. ¶¶ 7-10; 8333 Compl. ¶¶ 7-8, 10-16; PJA at 228-31, 248-50, 262-63, 266-69, 284-85, 298-99.)

The Bookstore Plaintiffs are 336 LLC, Chelsea 7 Corp., Gotham Video Sales & Distribution Inc., Rainbow Station 7 Inc., Video Lovers Inc., Vishara Video, Inc., Explore DVD LLC, Vishans Video, Inc., 725 Video Outlet Inc., Jaysara Video, Inc., DCD Exclusive Video Inc., and 557 Entertainment Inc. As discussed, the Bookstore

Plaintiffs operate bookstores in Manhattan, Brooklyn, and Queens that contain private viewing booths in which patrons may discreetly view sexually explicit films on a screen within the enclosed booth, including those that may be judged by society as deviant. (3732 Compl. ¶¶ 10-28, 95-99; PJA 1619-21.) The Bookstore Plaintiffs offer non-adult information and retail stock, as well as some adult-oriented information. (3732 Compl. ¶ 31; PJA at 1617, 1644.) Like the Club Plaintiffs, the Bookstore Plaintiffs would be required to terminate under the City's adult-use regulations based on their location. (3732 Compl. ¶¶ 10-28; PJA at 1628-29, 1645, 1663-64.)

The defendants in these actions are the City, Mayor Bill de Blasio, and Commissioner of Buildings Melanie E. La Rocca. Defendant de Blasio succeeded defendant Michael Bloomberg, who was Mayor when the Club Plaintiffs commenced their actions. Defendant La Rocca succeeded defendant Rick D. Chandler, who was Commissioner of Buildings when the operative complaints in these actions were filed. Both individual defendants, who are automatically substituted for their predecessors under Rule 25(d) of the Federal Rules of Civil Procedure, are the principal municipal officers charged with enforcing the Zoning Resolution. (4431 Compl. ¶ 9; 3732 Compl. ¶¶ 35-36.) Finally, the City is responsible for drafting and enacting the Zoning Resolution through its various departments and agencies. (3732 Compl. ¶ 33-34.)

B. The Claims

Plaintiffs assert causes of action under 42 U.S.C. § 1983 to vindicate the alleged deprivations of their First

Amendment and Fourteenth Amendment rights.[21] Though the operative complaints (especially those filed by the Club Plaintiffs) are engorged by legal arguments and conclusions more appropriate for a brief, they advance materially the same theories when stripped to their core. Accordingly, this Court reviews them in the aggregate.

The central theme that undergirds the Club Plaintiffs' and Bookstore Plaintiffs' complaints is that the 2001 Amendments, if enforced, would decimate—and have already dramatically reduced—adult-oriented expression. For instance, the Club Plaintiffs allege that the fifty-seven adult eating or drinking establishments existing at the time the City adopted the 2001 Amendments have now been culled to as few as twenty such establishments. (4431 Compl. ¶¶ 76-80.) And for their part, the Bookstore Plaintiffs claim that of the roughly forty adult bookstores with booths that existed at the time of the 2001 Amendments, only twenty to twenty-five bookstores currently exist. (3732 Compl. ¶¶ 96, 100; PJA at 1626, 1649.) These bookstores would be considered "adult establishments" under the 2001 Amendments based on the

21. Section 1983 provides a private right of action against "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. To state a § 1983 claim, a plaintiff must "allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Defendants do not dispute that Plaintiffs may properly bring their claims under § 1983.

presence of booths, but might not have been considered "adult establishments" under the 1995 Regulations so long as they limited their booths to a portion of their establishment. (3732 Compl. ¶¶ 96, 100; PJA at 1624.) Of these bookstores, virtually none are located in permissible areas. (3732 Compl. ¶ 97.)

The other side of the equation, according to Plaintiffs, is that the number of adult establishments that would need to relocate if the City enforced the 2001 Amendments dwarfs the number of potential permissible sites for adult establishments that the regulations leave open, especially when factoring in the anti-concentration requirements. (4431 Compl. ¶ 81, 108-110; 3732 Compl. ¶¶ 101-102.) Plaintiffs maintain that this "musical chairs" scenario is exacerbated by the fact that the permissible areas for relocation have only been shrinking since 1995 (when the City last assessed potential alternative sites) based on the subsequent re-zoning of previously allowable sites into prohibited zones and changes in the number and location of sensitive receptors.[22] (*See* 4431 Compl. ¶¶ 82-96; 3732 Compl. ¶¶ 104-127.) Moreover, Plaintiffs aver that the potential areas where adult establishments would be nominally permissible consist largely of remote or undeveloped areas in the City unsuitable for retail commercial enterprises, such as areas designated for

22. In connection with the 1995 Regulations, the DCP generated maps of the permissible areas where adult establishments could relocate. (3732 Compl. ¶¶ 104-106.) These maps represented that approximately 4 percent of its total area remained available for adult uses. (3732 Compl. ¶ 107; *accord* 4432 Compl. ¶¶ 86-87; 8333 Compl. ¶¶ 87-88.)

amusement parks or heavy industry or areas containing toxic waste. (*See* 4431 Compl. ¶¶ 97-107; 3732 Compl. ¶¶ 140-158.)

Accordingly, Plaintiffs claim that the 2001 Amendments violate their First Amendment free speech rights by suppressing protected expression without any concomitant reduction in secondary effects and by failing to provide sufficient alternative avenues for adult expression. (4431 Compl. ¶¶ 48-50, 135-169; 3732 Compl. ¶¶ 164-168.) Separately, the Club Plaintiffs claim that by singling out non-conforming adult establishments for termination, the City's mandatory termination provisions violate the Fourteenth Amendment's equal protection guarantees and also constitute an invalid content-based restriction in violation of the First Amendment. (4431 Compl. ¶¶ 179-194.) Finally, the Bookstore Plaintiffs also assert a cause of action for deprivation of property under the Fourteenth Amendment's Due Process Clause. (3732 Compl. ¶¶ 173-174.)

Plaintiffs also challenge the constitutionality of the provisions of the 2001 Amendments that key AZR §§ 32-01 and 42-01's locational and anti-concentration provisions of the adult use regulation to the date that a business receives a permit from the DOB. (4431 Compl. ¶¶ 118-119; 3732 Compl. ¶¶ 131-134.) In substance, they allege that the process for adult establishments to obtain a permit from the DOB differs from the process for non-adult establishments in two significant ways. First, adult establishments may not use a self-certification procedure that substantially expedites the DOB approval process.

(4431 Compl. ¶¶ 115-116; 3732 Compl. ¶ 135.) Second, permit applications by adult establishments must be reviewed by the City's legal counsel for zoning compliance, for which there is no time limit. (4431 Compl. ¶ 116.) The result is that permit applications by adult establishments may take over a year—if ever—to resolve, further deterring adult establishments from attempting to relocate. (4431 Compl. ¶ 117; 3732 Compl. ¶ 135; *see also, e.g.*, PJA at 300.)

According to Plaintiffs, the amendments to AZR §§ 32-01 and 42-01 are also problematic because they give sensitive receptors such as schools or churches a *de facto* veto over an adult use, through which a sensitive receptor that opposes an adult establishment may establish priority ahead of the adult establishment by simply obtaining a permit while the adult establishment waits (possibly forever) for approval of its application.[23] (4431 Compl. ¶¶ 119-126; 3732 Compl. ¶¶ 136-139.) Based on the foregoing, Plaintiffs contend that the City's permitting scheme constitutes an impermissible prior restraint on speech in violation of the First Amendment and deprives them of equal protection of the laws in violation of the Fourteenth Amendments. (4341 Compl. ¶¶ 116, 118, 198-202; 3732 Compl. ¶¶ 169-172.)

Ultimately, Plaintiffs seek to enjoin Defendants from enforcing the 2001 Amendments, as well as a judgment declaring the 2001 Amendments to be facially

23. Though not specifically addressed in the Zoning Resolution, a sensitive receptor is also deemed established based on the date the DOB issues a permit. (Declaration of DOB Deputy Borough Commissioner Rodney Gittens, ECF No. 103 ("Gittens Decl."), ¶ 16.)

unconstitutional. (*See* 4431 Compl., at 62; 4432 Compl., at 61; 8333 Compl., at 61-62; 3732 Compl., at 60.) The Club Plaintiffs also seek declaratory and injunctive relief relating to the termination provisions codified at AZR §§ 52-77 and 72-41. (*See* 4431 Compl., at 62; 4432 Compl., at 61; 8333 Compl., at 61-62.) Finally, all Plaintiffs seek attorney's fees under 42 U.S.C. § 1988. (*See* 4431 Compl., at 62; 4432 Compl., at 61; 8333 Compl., at 62; 3732 Compl., at 61.)

C. Procedural History

The Club Plaintiffs originally filed their actions in 2002 and subsequently moved for preliminary injunctive relief and summary judgment in late 2002 and early 2003. (ECF No. 13, 02cv4431; ECF No. 11, 02cv8333.) Following the New York Supreme Court's initial invalidation of the 2001 Amendments in late 2003, however, this Court administratively closed the Club Plaintiffs' cases on September 26, 2003 on consent of the parties but allowed the cases to be reopened for good cause on petition by any party. (ECF No. 43, 02cv4431.) The Club Plaintiffs' actions lay dormant for the next fifteen years while the constitutionality of the 2001 Amendments ping-ponged through the New York state courts.

By Order dated April 23, 2018, this Court reopened the Club Plaintiffs' actions following a request by the Club Plaintiffs for a conference. (ECF No. 51, 02cv4431; ECF No. 12, 02cv4432; ECF No. 40, 02cv8333.) The Bookstore Plaintiffs commenced their action days later. (*See* ECF No. 1, 18cv3732.) Following the granting of several

extensions, Plaintiffs simultaneously filed their motions for preliminary injunctions. (ECF No. 78, 02cv4431; ECF No. 32, 02cv4432; ECF No. 57, 02cv8333; ECF No. 27, 17cv3732.) The parties jointly informed this Court that they did not believe an evidentiary hearing to be necessary and that no party requested such a hearing. (*See* ECF No. 117, 02cv4431; ECF No. 81, 02cv4432; ECF No. 105, 02cv8333; ECF No. 69, 17cv3732.) Accordingly, this Court resolves the preliminary injunction motions on the parties' briefs, documentary exhibits, and stipulations of fact. *See trueEx, LLC v. MarkitSERV Ltd.*, 266 F. Supp. 3d 705, 720 n.108 (S.D.N.Y. 2017) (deeming parties' explicit waiver of an evidentiary hearing as "consent[ing] to the making of findings entirely on the paper record before the Court" (citations omitted)); *accord Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) (noting that a party "may, of course, waive its right to an evidentiary hearing, but it is not entitled to have the court accept its untested representations as true if they are disputed" (internal citations omitted)).

DISCUSSION

I. Matters Considered

In the Second Circuit, courts "routinely consider hearsay evidence in determining whether to grant preliminary injunctive relief," including affidavits, depositions, and sworn testimony. *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (collecting cases); *accord Park Irmat Drug Corp. v. Optumrx, Inc.*, 152 F. Supp. 3d 127, 132 (S.D.N.Y. 2016) (citation omitted) (explaining that in deciding a motion for a preliminary injunction, a "court

may consider the entire record[,] including affidavits and other hearsay evidence"). As the Supreme Court has observed, "the decision of whether to award preliminary injunctive relief is often based on 'procedures that are less formal and evidence that is less complete than in a trial on the merits.'" *Mullins*, 626 F.3d at 51-52 (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)). Nonetheless, "motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed issues of fact." *Davis v. N.Y.C. Hous. Auth.*, 166 F.3d 432, 437-38 (2d Cir. 1999).

Based on the foregoing principles, this Court considers the evidentiary record submitted by the parties, though it addresses three additional matters in greater detail. First, Plaintiffs request that this Court take judicial notice of over eighty documentary exhibits, categorized as follows (1) City Council resolutions amending the City's Zoning Resolution; (2) provisions of the AZR; (3) provisions of the New York City Administrative Code pertinent to the City's permitting scheme; (4) DOB materials, including directives, OPPNs, bulletins, handbooks, and rules; (5) portions of the legislative history of the 2001 Amendments, which includes the DCP's application, reports accompanying the application, and transcripts of City Council and CPC hearings; (6) portions of the case record for the state court challenges to the 2001 Amendments, including maps and studies admitted into the evidentiary record; (7) portions of the DCP's website; (8) studies purporting to demonstrate the uniqueness of Manhattan; and (9) stipulations and agreements between the parties to stay enforcement of the 2001 Amendments. (*See* PJA at 339-47, 1685-90; PJRA at 1882-90.) Each set

of plaintiffs also requests that this Court take judicial notice of certain adjudicative facts.

Rule 201 of the Federal Rules of Evidence authorizes courts to, at any stage of the proceeding, "judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (d). While a court has discretion to take judicial notice of a fact, it "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

This Court need not take judicial notice of the documentary exhibits because it can consider those documents as part of the record on these motions. To the extent that Plaintiffs seek judicial notice of adjudicative facts contained within those documentary exhibits, they have not identified such facts. *Cf.* Wright & Miller, 21B Fed. Prac. & Proc. Evid. § 5107.1 (2d ed. 1995) (advising that though the rule "does not state what the request for judicial notice must contain in order to make judicial notice mandatory[,] [a]t a bare minimum, the request should specify precisely the adjudicative fact that the court should notice, state whether [the] fact can be noticed as a matter of common knowledge, and, if not, cite the court to some source of reasonably indisputable accuracy in which the noticed fact may be found" (footnote omitted)).

Absent additional specificity from Plaintiffs, this Court declines the invitation to sift through the record to divine what facts Plaintiffs seek to establish. *See Kortright*

Capital Partners LP v. Investcorp Inv. Advisers Ltd., 327 F. Supp. 3d 673, 688 (S.D.N.Y. 2018) (reiterating that "'[j]udges are not like pigs, hunting for truffles buried in' the record" (citation omitted) (alteration in original)). In any event, as discussed above, courts may consider even inadmissible evidence in assessing the propriety of preliminary injunctive relief, be it in the form of affidavits or documentary evidence. *Accord Flores v. Town of Islip*, 2019 U.S. Dist. LEXIS 60319, 2019 WL 1515291, at *2 (E.D.N.Y. Apr. 8, 2019) (concluding that "at a threshold level, declarations, depositions, and other documentary evidence may be considered at the preliminary injunction stage"). Thus, the documents subject to Plaintiffs' judicial notice request may properly be considered.

As for the Plaintiffs' proffered adjudicative facts, this Court will take judicial notice of the fact that the 2001 Amendments have not been enforced against any of the Plaintiffs through the present date. The record contains a Litigation Management Agreement dated September 25, 2017 between the Club Plaintiffs and Defendants making such a representation. (PJA at 1462-64.) Similarly, the Bookstore Plaintiffs and Defendants entered into a Stipulation and Agreement dated August 2, 2017 that reflects the City's forbearance from enforcing the 2001 Amendments. (PJA at 1879-80.) Finally, the parties have stipulated to the accuracy of this fact. (*See* Stipulation re Club Plaintiffs' Judicial Notice Requests ("Club Plaintiffs' Stipulation"), ¶ 4(a); Stipulation Relating to Judicial Notice ("Bookstore Plaintiffs' Stipulation"),[24] ¶ 2.)

24. The Club Plaintiffs' Stipulation is docketed at ECF No. 119 in 02cv4431, ECF No. 79 in 02cv4432, and ECF No. 104 in 02cv8333.

On the other hand, this Court declines to take judicial notice of the Club Plaintiffs' proposed fact that

> [t]he City's analysis, in response to the constitutional challenge to the [1995 Regulations], that there were in excess of 500 potential sites to which adult establishments could relocate under the [1995 Regulations], did not include consideration of the 500-foot buffer zone being imposed around all then-existing and new adult establishments.

(PJA at 345.) As an initial matter, the Club Plaintiffs simply make this assertion in their opening and reply briefs without making any effort to point this Court to a source from which this fact may be "accurately and readily determined." Fed. R. Evid. 201(b). But even setting that aside, this Court's independent review of the Plaintiffs' Joint Appendix reveals some ambiguity in the veracity of this fact. (*Compare* PJA at 1446 (representation in City's appellate brief before the New York Court of Appeals that the DCP "also took into account . . . the requirement that an adult establishment be located a 500-foot distance from . . . other adult establishments"), *with* PJA at 1457 (deposition testimony by the DCP's then—Director of Zoning and Urban Design that the DCP made no effort to analyze the impact of adult establishments on the location of other adult establishments).) Against this

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The Bookstore Plaintiffs' Stipulation is docketed at ECF No. 67 in 18cv3732.

backdrop, judicial notice would be improper.[25] This Court has reviewed the remainder of Plaintiffs' requests for judicial notice and to the extent not expressly addressed herein, denies them as unnecessary to its disposition of the preliminary injunction motions without prejudice to renewal at a later time.

Second, though the parties have submitted expert affidavits and analyses, as well as other affidavits that border on lay opinion testimony, such evidence has been considered on the basis that courts may consider inadmissible evidence in context of a preliminary injunction. *E.g., Flores*, 2019 U.S. Dist. LEXIS 60319, 2019 WL 1515291, at *2 (citing, *inter alia, Mullins*, 626 F.3d at 52). Third, the parties have stipulated that various documents are true and accurate copies of the originals.[26] (*See* Club Plaintiffs' Stipulation ¶¶ 1-2, 5; Bookstore Plaintiffs' Stipulation ¶¶ 1, 3.) The parties also stipulate that the portions of the City's Administrative

25. In any event, the Club Plaintiffs and Defendants have stipulated that the maps the City generated in the mid-1990s "did not depict the then-existing adult businesses or the 500' buffer areas around them where new adult uses were prohibited, as [indicated] in the asterisked footnote on those maps." (Club Plaintiffs' Stipulation ¶ 4(b).) The asterisked footnote referenced in paragraph 4(b) states that "[r]estrictions from existing adult entertainment uses [are] not shown." (*See* PJA at 1811-15.)

26. These are Exhibits 1-53, 2A-5A, and 82-88 to the Club Plaintiffs' request for judicial notice; Exhibit H to the Gittens Declaration, submitted by Defendants; Exhibits I-L to the Devine Declaration, submitted by Defendants; and Exhibits 54-81 to the Bookstore Plaintiffs' request for judicial notice.

Code submitted as Exhibits 16-19 to the Club Plaintiffs' request for judicial notice were repealed in 2008, and that since 2008, "there is no legal provision imposing a specific number of days in which DOB is to issue a building alteration permit following approval of all construction documents or plans and following submission of a proper and complete application for such a permit." (Club Plaintiffs' Stipulation ¶ 4(c)(d).)

II. Legal Standard

A preliminary injunction has been characterized as an "extraordinary and drastic remedy" that "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (per curiam); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A party seeking a preliminary injunction must typically establish (1) the likelihood of irreparable harm in the absence of injunctive relief; (2) either a likelihood of success on the merits, or sufficiently serious questions going to the merits of its claims to make them fair ground for litigation; (3) that the balance of hardships tips in the movant's favor; and (4) that a preliminary injunction is in the public interest. *N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015); *see also Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010).

But where, as here, "a preliminary injunction is sought against government action taken in the public interest pursuant to a statutory or regulatory scheme,

the less-demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999) (citation omitted); *accord Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010) (discussing three limited exceptions to the general preliminary injunction standard). This "higher standard reflects the judicial deference toward 'legislation or regulations developed through presumptively reasoned democratic processes.'" *Forest City Daly Hous.*, 175 F.3d at 149 (citation omitted). Fundamentally, the "purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087, 198 L. Ed. 2d 643 (2017) (internal citation omitted).

III. Analysis

A. Irreparable Injury

Irreparable harm has been described as "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F. 3d 110, 118 (2d Cir. 2009) (citations and quotation marks omitted). A plaintiff must demonstrate that absent preliminary injunctive relief, it is likely to "suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Habitat for Horses v. Salazar*, 745 F. Supp. 2d

438, 448 (S.D.N.Y. 2010) (quotation mark omitted) (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)). Nevertheless, a plaintiff "need only show a '*threat* of irreparable harm, not that irreparable harm already [has] occurred.'" *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 480 (S.D.N.Y. 2019) (alterations in original) (quoting *Mullins*, 626 F.3d at 55).

Defendants do not dispute the presumption that a movant has established irreparable harm in the absence of injunctive relief where, as here, the claims involve an alleged deprivation of a constitutional right. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). Indeed, as the Second Circuit has reaffirmed, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."[27] *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373,

27. [27] In abrogating the presumption of irreparable injury that courts in this circuit routinely applied to copyright infringement claims, the Second Circuit has explained that courts "must not adopt a 'categorical' or 'general' rule or presume that the plaintiff will suffer irreparable harm." *Salinger*, 607 F.3d 68, 80 (2d Cir. 2010) (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391, 393-94, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)). Although the Second Circuit suggested that *eBay* would apply "with equal force to an injunction in *any* type of case," it still limited its holding to the copyright infringement context. *Salinger*, 607 F.3d at 78 & n.7 (emphasis in original). Thus, absent precedent from the Supreme Court and Second Circuit directly on point, this Court joins others in this district that have continued to presume irreparable injury based on an alleged constitutional deprivation. *See, e.g., Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 276 (S.D.N.Y. 2019); *Airbnb, Inc.*, 373 F. Supp. 3d at 498.

96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). Thus, assuming that the 2001 Amendments—which purportedly impose a direct limitation on speech—violate the Constitution, Plaintiffs have demonstrated irreparable harm. *Accord Monserrate v. N.Y. State Senate*, 695 F. Supp. 2d 80, 90 (S.D.N.Y. 2010).

B. Likelihood of Success on the Merits

To establish a likelihood of success on the merits, Plaintiffs "need not show that success is an absolute certainty," but only that "the probability of [their] prevailing is better than fifty percent." *Airbnb, Inc.*, 373 F. Supp. 3d at 480 (alteration in original) (quoting *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988)). Further, Plaintiffs need not demonstrate a likelihood of success on the merits of every claim—rather, they need only "show a likelihood of success on the merits of at least one of [their] claims." *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 618 (S.D.N.Y. 2018) (citations omitted). Because this Court finds that Plaintiffs are more likely than not to succeed on the merits of their First Amendment free speech claims—the crux of their complaints—it does not address their alternative theories for finding the 2001 Amendments unconstitutional. *See Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp. 484, 487 (S.D.N.Y. 1997) (declining to address other claims based on finding that certain claims "provide a basis for granting a preliminary injunction").

1. Legal Principles

The First Amendment to the U.S. Constitution prohibits Congress from making laws abridging the

freedom of speech. U.S. Const. amend. I. The First Amendment's protections apply to the states and municipalities like the City through the Due Process Clause of the Fourteenth Amendment. *See Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963) (collecting cases). As a prefatory matter, this Court also notes that while Plaintiffs carry the burden of persuading this Court that they are entitled to a preliminary injunction, *Mazurek*, 520 U.S. at 972, Defendants bear the burden of justifying the governmental infringement on speech protected by the First Amendment, *Nakatomi Invs., Inc. v. City of Schenectady*, 949 F. Supp. 988, 991 (N.D.N.Y. 1997); *see United States v. Playboy Entmt. Grp., Inc.*, 529 U.S. 803, 816, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *N.Y. Youth Club v. Town of Harrison*, 150 F. Supp. 3d 264, 272 (S.D.N.Y. 2015).[28]

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28. The Club Plaintiffs appear to argue that in the First Amendment context, a plaintiff seeking a preliminary injunction must be deemed likely to prevail unless the government shows that plaintiffs' proposed less restrictive alternatives would be less effective than the statute, citing to the Third Circuit's decision in *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). This Court finds *Reilly* to be inapplicable to the extent the Club Plaintiffs argue that Defendants must show that less restrictive alternatives would be less effective than the 2001 Amendments. For that proposition, *Reilly* quoted the Supreme Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). But *Ashcroft* dealt with a content-based restriction on speech, and those must use the least restrictive means available in order to survive strict scrutiny. Because this Court determines that the 2001 Amendments are content-neutral—or at least properly analyzed under intermediate scrutiny-this proposition has no application here.

Appendix C

The Second Circuit has explained that "[a]t the heart of our First Amendment jurisprudence lies the concern that if the government were able to impose content-based burdens on speech, it could effectively drive certain ideas or viewpoints from the marketplace." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97-98 (2d Cir. 2006) (quotation marks omitted) (quoting *Hobbs v. County of Westchester*, 397 F.3d 133, 148 (2d Cir. 2005)). Thus, content-based restrictions on speech are presumptively invalid and must withstand strict scrutiny. *See Mastrovincenzo*, 435 F.3d at 98 & n.15 (explaining that a content-based restriction must "serve[] a compelling governmental interest, [be] necessary to serve the asserted [compelling] interest, [be] precisely tailored to serve that interest, and [be] the least restrictive means readily available for that purpose" (citation omitted) (third alteration in original)). On the other hand, "regulations of expressive activity that are not based on content" trigger only intermediate scrutiny. *Mastrovincenzo*, 435 F.3d at 98 (citation omitted). In other words, content-neutral regulations may "limit the time, place, or manner of expression—whether oral, written, or symbolized by conduct—even in a public forum, so long as the restrictions are reasonable, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information." *Mastrovincenzo*, 435 F.3d at 98.

In the context of First Amendment challenges to adult entertainment zoning regulations, this Court is also guided by the Supreme Court's secondary-effects doctrine developed by *Young v. American Mini Theatres, City of Renton v. Playtime Theatres*, and their

progeny.[29] In its seminal *Young* decision, the Supreme Court upheld Detroit's zoning ordinance for adult films against First Amendment and Fourteenth Amendment challenges, explaining that "[r]easonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment."[30] *Young*, 427 U.S. at 63 n.18 (majority). Thus, it held that apart from treating "adult theaters differently from other theaters and the fact that the classification is predicated on the content of the material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment." *Young*, 427 U.S. at 63. A plurality of the Court also upheld the ordinance on equal protection grounds, concluding that because "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, . . . the city's interest in

29. The Club Plaintiffs advance several "tests" drawn from disembodied snippets of various opinions by the Supreme Court and individual Justices under which the 2001 Amendments purportedly fail. In this Court's view, the Supreme Court's jurisprudence with respect to time, place, and manner regulations more generally, and adult zoning ordinances in particular, is largely consistent. Accordingly, it declines the Club Plaintiffs' invitation to analyze the constitutionality of the 2001 Amendments separately under each of these "tests."

30. To be sure, while the Court omitted any mention of alternative channels of expression from its articulation of the relevant legal standard, a plurality of the Court observed that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Young*, 427 U.S. at 71 n.35 (plurality).

the present and future character of its neighborhoods adequately supports its classification of motion pictures" based on "the nature of its content." *Young*, 427 U.S. at 70-72 (plurality) (footnote omitted).

The Supreme Court built upon this framework in *Renton*, which it viewed as "largely dictated by [its] decision in [*Young*]." *Renton*, 475 U.S. at 46. Under *Renton*, the Supreme Court first characterized the ordinance at issue as a time, place, and manner regulation because it "does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of [certain sensitive receptors]." *Renton*, 475 U.S. at 46. After finding the time, place and manner regulation to be content-neutral, the majority framed the relevant inquiry as whether the ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 47-50. A majority of the Supreme Court subsequently reaffirmed *Renton*'s core intermediate scrutiny framework. *See Alameda Books*, 535 U.S. at 440 (plurality); *Alameda Books*, 535 U.S. at 448-49 (Kennedy, J., concurring in the judgment).

2. Application

As an initial matter, this Court finds that the City's adult-use regulations are "properly analyzed as a form of time, place, and manner regulation" because they do not categorically ban adult establishments, but principally restrict their location. *Renton*, 475 U.S. at 46-47. Following the Supreme Court's lead in *Renton*, this

Court next determines the content-neutrality of the City's adult-use regulations before applying the appropriate level of scrutiny.

a. Content-Neutrality

The "principal inquiry" for content-neutrality purposes is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Lederman v. N.Y.C. Dept. of Parks & Recreation*, 731 F.3d 199, 202 (2d Cir. 2013) (citation omitted) (alteration in original). An ordinance that regulates "expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Mastrovincenzo*, 435 F.3d at 98 (citation omitted); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). Even if a regulation "has an incidental effect on some speakers or messages but not others," it is content-neutral so long as it "serves purposes unrelated to the content of expression." *Ward*, 491 U.S. at 791. Accordingly, "[r]egulations that target 'only [the] potential harmful secondary effects of speech' are . . . content-neutral and trigger intermediate, rather than strict, scrutiny." *Mastrovincenzo*, 435 F.3d at 98 (second alteration in original) (citation omitted).

Here, this Court concludes that the City's adult-use regulations are content-neutral. Despite the fact that they *apply* only to adult establishments, the 1995 Regulations

and the 2001 Amendments are at bottom *justified* by the desire to reduce the adverse secondary effects of adult establishments, based on a fair read of the 1994 DCP Study, the 1995 CPC Report, and the 2001 CPC Report. *See Renton*, 475 U.S. at 47 (finding ordinance to be content-neutral because it was "aimed not at the *content*" of adult films shown in adult theaters, "but rather at the *secondary effects*" of adult theaters on the surrounding community" (emphasis in original)). Stated differently, the purpose of the adult-use regulations is not to suppress adult expression based on its content. *Accord Buzzetti*, 140 F.3d at 140 (finding the 1995 Regulations to be content-neutral); *Stringfellow's of N.Y.*, 694 N.E.2d at 416-17 (same). This Court's determination is further bolstered by other courts that have reached the same conclusion in analyzing adult entertainment ordinances. *See, e.g., Renton*, 475 U.S. at 47-48; *Giggles v. World Corp. v. Town of Wappinger*, 341 F. Supp. 2d 427, 430 (S.D.N.Y. 2004).

To be certain, Plaintiffs' assertion that the 2001 Amendments should be considered content-based restrictions on speech that are subject to strict scrutiny has some appeal. For instance, even the *Renton* majority acknowledged that the ordinances at issue in that case and *Young* "[did] not appear to fit neatly into either the 'content-based' or the 'content-neutral' category," *Renton*, 475 U.S. at 47, and its determination that such ordinances are content-neutral is hardly undisputed, *see Renton*, 475 U.S. at 56-57 (Brennan, J., dissenting) (describing the *Renton* majority's content-neutrality analysis as "misguided" because the ordinance on its face "imposes special restrictions on certain kinds of

speech on the basis of *content*" (emphasis in original)); *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring in the judgment) ("The fiction that this sort of ordinance is content neutral-or 'content neutral'-is perhaps more confusing than helpful . . . . These ordinances are content based, and we should call them so."); *Alameda Books*, 535 U.S. at 457 (Souter, J., dissenting) (describing laws applicable "selectively only to speech of particular content" as "content correlated"); *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 22 (2d Cir. 2010) (describing the determination of whether zoning ordinances that target adult uses "are in fact content-neutral" as "a tricky question").

And as Plaintiffs point out, the Supreme Court recently reemphasized-albeit in a different context than here—that facially content-based regulations must survive strict scrutiny, even if they are justified without reference to a content-based purpose. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28, 192 L. Ed. 2d 236 (2015). In striking down a municipal code that subjected different categories of signs to different restrictions based on the information they conveyed, the Supreme Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Thus, courts must first "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys" before considering the regulation's purported justifications or motives. *Reed*, 135 S. Ct. at 2227-28 (citation omitted).

Yet the federal courts of appeals that have considered *Reed*'s impact on the Supreme Court's secondary-effects doctrine have roundly rejected the notion that *Reed* changed the applicable law for zoning ordinances like the 2001 Amendments. For instance, the Eleventh Circuit acknowledged that "Reed has called into question the reasoning undergirding the secondary-effects doctrine" but nevertheless adhered to the Supreme Court's secondary-effects cases as "directly control[ling]." *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 703 F. App'x 929, 935-36 (11th Cir. 2017) (per curiam) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)); *cf. Cricket Store 17, LLC v. City of Columbia*, 676 F. App'x 162, 167 (4th Cir. 2017) (affirming district court's content-neutrality determination under the *Renton* rubric without any discussion of *Reed*). Likewise, the Seventh Circuit expressed doubts that "*Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection." *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015); *accord Free Speech Coalition, Inc. v. Attorney Gen. U.S.*, 825 F.3d 149, 161 n.8 (3d Cir. 2016).

Finally, despite Justice Kennedy's differences with the *Alameda Books* plurality, he endorsed the "central holding of *Renton*" that "[a] zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny" because zoning regulations-even if content based-"have a prima facie legitimate purpose." *Alameda Books*, 535

U.S. at 448 (Kennedy, J., concurring in the judgment). Therefore, irrespective of the precise label that applies to adult-use zoning ordinances, this Court analyzes the 2001 Amendments through the lens of intermediate scrutiny.

b. Narrow Tailoring

For the intermediate scrutiny inquiry, the "narrow tailoring requirement is satisfied so long as the . . . [content-neutral] regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation," *Mastrovincenzo*, 435 F.3d at 98 (emphasis removed) (alterations in original) (citation and quotation mark omitted). The regulation need not be "the least restrictive or least intrusive means of [achieving the stated governmental interest]." *Hobbs*, 397 F.3d at 149 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). In the free speech context, a "content-neutral 'time, place, or manner' restriction will be considered narrowly tailored unless 'a substantial portion of the burden on speech does not serve to advance its goals.'" *Mastrovincenzo*, 435 F.3d at 98 (quoting *Ward*, 491 U.S. at 799); *see TJS of N.Y.*, 598 F.3d at 22 (describing the adult zoning cases as descended from and "bear[ing] a strong family resemblance" to the time, place, and manner cases). Stated differently, "the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273 (2017) (citation omitted).

In *Alameda Books*, the Supreme Court clarified the evidentiary standard for "determining whether an

ordinance serves a substantial governmental interest" under *Renton*. *Alameda Books*, 535 U.S. at 433 (plurality). After restating *Renton*'s holding that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest," a plurality of the Court articulated the following framework (1) as an initial matter, the "municipality's evidence must fairly support the municipality's rationale for its ordinance"; (2) "[i]f plaintiffs fail to cast direct doubt on this 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," the municipality satisfies the *Renton* standard; and (3) "[i]f plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 438-39. Though this evidentiary burden is not a high bar, "[t]his is not to say that a municipality can get away with shoddy data or reasoning." *Alameda Books*, 535 U.S. at 438; *accord Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment) (stating that "very little evidence is required" to allow municipalities "latitude to experiment").

Before applying these principles to the 2001 Amendments, this Court briefly discusses Justice Kennedy's concurrence in *Alameda Books* given its importance to Plaintiffs' briefs. In relevant part, Justice Kennedy agreed with the correctness of the plurality's

evidentiary framework but argued that the plurality gave short shrift to the antecedent question of "what proposition . . . a city need[s] to advance in order to sustain a secondary-effects ordinance." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring in the judgment). He emphasized that "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 449. Put another way, a municipality may not propose to "reduce secondary effects by reducing speech in the same proportion," but rather, the "rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech." *Alameda Books*, 535 U.S. at 450.

While the Second Circuit has not weighed in, other courts of appeals have—without extensive analysis—regarded Justice Kennedy's concurrence as the controlling opinion under the rule articulated by *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). *See, e.g., Connection Distrib. Co. v. Holder*, 557 F.3d 321, 361-62 (6th Cir. 2009); *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 722 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 n.1 (8th Cir. 2003); *Ctr. for Fair Pub. Pol'y v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1264 (11th Cir. 2003). *Marks* provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who

concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (quotation marks omitted). This rule only applies when "one opinion is a logical subset of other, broader opinions"—that is, "only when the narrow opinion is the common denominator representing the position approved by at least five justices." *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King v. Palmer*, 950 F.2d 771, 781, 292 U.S. App. D.C. 362 (D.C. Cir. 1991) (en banc)).

Concededly, the precedential import of Justice Kennedy's concurrence is somewhat unclear, despite the general consensus among the federal circuit courts. For one thing, the "common denominator representing the position approved by at least five justices" is arguably the plurality's evidentiary framework, the soundness of which Justice Kennedy expressly noted. *Alcan Aluminum Corp.*, 315 F.3d at 189. But in any event, this Court does not understand Justice Kennedy's concurrence to have fundamentally altered the Supreme Court's secondary-effects framework. *Accord Ctr. for Fair Pub. Pol'y*, 336 F.3d at 1163 (collecting cases "explicitly stat[ing] that Justice Kennedy's separate decision did little, if indeed anything, to the traditional *Renton* framework"); *see also Ben's Bar*, 316 F.3d at 721 (describing the difference between Justice Kennedy's concurrence and the plurality opinion as "quite subtle"). Rather, this Court views the concurrence's "how speech will fare" discussion as clarifying or restating familiar analytical principles, including that a time, place, and manner regulation must leave open adequate alternative channels for the regulated speech. *Accord Alameda Books*, 535 U.S. at

443 (plurality) (considering concurrence's views as "simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manger regulation and not a ban"); *World Wide Video of Wa., Inc. v. City of Spokane*, 368 F.3d 1186, 1195 (9th Cir. 2004) ("Conceptually, this question dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication.").

Applying these principles here, Defendants' stated interest of reducing the negative secondary effects of establishments with predominant, ongoing focus on adult-oriented expression certainly qualifies as a "substantial governmental interest." *See Alameda Books*, 535 U.S. at 436 (finding that "reducing crime is a substantial government interest"); *Renton*, 475 U.S. at 50 (regarding a municipality's "interest in attempting to preserve the quality of urban life [as] one that must be accorded high respect" (quoting *Young*, 427 U.S. at 71 (plurality))); *Buzzetti*, 140 F.3d at 140 ("[C]oncerns similar to those advanced by New York City, such as preventing crime, maintaining property values, and preserving the quality of urban life and the character of city neighborhoods, constitute 'substantial governmental interest[s].'" (second alteration in original)). Thus, the pertinent question is whether the 2001 Amendments are sufficiently tailored to that interest.

The Club Plaintiffs contend that the 2001 Amendments fail to satisfy the narrow tailoring requirement based on the lack of evidence of new or continuing secondary effects from 60/40 establishments. In particular, they rehash the

argument raised in the *For the People Theatres* litigation that the DCP never studied the secondary effects of 60/40 establishments and that in fact, some individuals testified to their belief that 60/40 establishments did not result in any significant impacts. In this Court's view, the Club Plaintiffs ask too much of Defendants, who need only demonstrate that the 2001 Amendments promote the City's interest in reducing secondary effects more effectively than if they did not exist.

Defendants have met their burden of providing evidence that supports a link between the regulated speech and the asserted secondary effects. *Alameda Books*, 535 U.S. at 441 (plurality). The DCP Study certainly demonstrates some nexus between deleterious secondary effects and establishments with a predominant, ongoing focus on adult-oriented expression-both through its survey of the experiences of other municipalities as well as its own surveys and analysis. And the 2001 CPC Report, which cites to judicial determinations that mechanical compliance with the 60/40 Standard leaves the essentially non-conforming nature of the adult business intact, fairly supports the underlying rationale for the 2001 Amendments that 60/40 establishments may still have a predominant and ongoing focus on adult-oriented expression. (2001 CPC Report at 33-35.) *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (relying on findings in judicial opinions and the municipality's own findings). Therefore, Defendants had a reasonable basis to infer that regulating the location of 60/40 establishments would alleviate the negative secondary effects associated with establishments

with a predominant, ongoing focus on sexual activity or materials.

Although the Club Plaintiffs correctly observe that certain individuals opposed the 2001 Amendments because they did not perceive any negative secondary effects from 60/40 establishments, (*see, e.g.*, 2001 CPC Report at 23, 25-26), the First Amendment does not require a municipality to "conclusively prove its theory for establishing . . . a connection" between the regulated speech and the secondary effects sought to be abated. *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 170 (2d Cir. 2007). Likewise, the Club Plaintiffs' suggestion that the City must furnish evidence linking 60/40 establishments with secondary effects runs afoul of the notion that "a city need not prove that such a link exists or prove that its ordinance will be effective in suppressing secondary effects." *White River*, 481 F.3d at 171. Because Defendants have shown that they "relied on some evidence 'reasonably believed to be relevant' to the problem of negative secondary effects" in enacting the 2001 Amendments, they have "demonstrate[d] that [they] further[] a substantial government interest." *White River*, 481 F.3d at 171 (citation omitted).

c. Reasonable Alternative Channels

In the adult entertainment context, the Second Circuit has reaffirmed that "whether the challenged restriction leaves open adequate alternative avenues of communication" requires "an assessment of available other locations, and whether those alternatives afford

a reasonable opportunity to locate and operate such a business." *TJS of N.Y.*, 598 F.3d at 21-22 (citing *Hickerson*, 146 F.3d at 107-08 and *Buzzetti*, 140 F.3d at 140-41). A municipality need not "identify the exact locations to which adult establishments may locate, 'as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are physically and legally available to accommodate the adult establishments.'" *TJS of N.Y.*, 598 F.3d at 22 n.4 (quoting *Hickerson*, 146 F.3d at 107).

This availability inquiry centers on "whether proposed sites are physically and legally available, and whether they are part of an actual commercial real estate market in the municipality." *TJS of N.Y.*, 598 F.3d at 27. Though this determination is fact dependent and somewhat nebulous, the Second Circuit has summarized some of the relevant considerations. These factors include the (1) "pragmatic likelihood of [sites] ever becoming available to a generic commercial enterprise," which connotes "genuine possibility"; (2) "accessibility to the general public"; (3) "the surrounding infrastructure"; and (4) "whether the sites are suitable for some generic commercial enterprise." *TJS of N.Y.*, 598 F.3d at 27-28 (citations and quotation marks omitted) (alteration in original).

Availability does not mean that the acquisition or use of land must be profitable or commercially practicable, and sites are not rendered unavailable simply by being "'already occupied by existing businesses,' not 'currently for sale or lease' or otherwise not 'commercially viable,'" *TJS of N.Y.*, 598 F.3d at 27 (quoting *Renton*, 475 U.S. at

53-54). Similarly, the fact that a site must be developed or is located in an industrial or manufacturing zone does not make it unsuitable. *TJS of N.Y.*, 598 F.3d at 28; *see Renton*, 475 U.S. at 53 (finding reasonable alternative avenues of communication based on "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads" (citation omitted)). On the other hand, land may be excluded as unavailable if "the physical features of a site or the manner in which it has been developed are 'totally incompatible with *any* average commercial business,' or the site lacks the basic infrastructure that is a precondition to private development." *TJS of N.Y.*, 598 F.3d at 28 (citations omitted) (emphasis in original). In other words, the touchstone is whether "sites are part of the commercial market generally," irrespective of whether they meet the needs of adult businesses specifically. *TJS of N.Y.*, 598 F.3d at 28.

With respect to the temporal dimension of this prong, the Second Circuit held that "courts must consider the adequacy of alternatives available at the time the ordinance is challenged." *TJS of N.Y.*, 598 F.3d at 22. In other words, a court "should account for circumstances as they exist at the time the court issues its judgment, or as close as is practicable to that time . . . ." *TJS of N.Y.*, 598 F.3d at 23. As the Second Circuit observed, the "First Amendment does not allow courts to ignore post-enactment, extralegal changes and the impact they have on the sufficiency of alternative avenues of communication." *TJS of N.Y.*, 598 F.3d at 23. It reasoned that the First Amendment inquiry

must "be attuned to [the] realities" that "[t]he alternatives available when a statute is passed can disappear" or that "if a municipality opens up new land to development, the availability of alternative sites might very well increase." *TJS of N.Y.*, 598 F.3d at 23.

Finally, this Court rejects Plaintiffs' unsupported contention that the availability of adequate sites must, as a categorical matter, be considered on a county-by-county basis-namely, that Defendants must demonstrate the presence of sufficient alternative channels for adult expression in Manhattan. *See Hickerson*, 146 F.3d at 108 n.5 (rejecting argument that "the First Amendment requires proof of adequate available sites on a borough-by-borough basis" as "without foundation and unsupported by case law"); *cf. Mastrovincenzo*, 435 F.3d at 101 (explaining that the "requirement that 'ample alternative channels' exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand"). Whatever the merits of Plaintiffs' arguments as to Manhattan's uniqueness with respect to real estate, entertainment, or culture, (*e.g.*, PJA at 161-211), the First Amendment simply "does not guarantee the right to communicate one's views at all times and places and in any manner that may be desired," *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). With these guiding principles in mind, this Court turns to the current alternative relocation sites throughout the City.

Defendants submit a declaration by the DCP's Executive Director along with analyses completed by

the DCP as to the areas in each borough where adult establishments could relocate. (Declaration of Anita Laremont, ECF No. 102 ("Laremont Decl."), ¶¶ 1, 11.) This analysis purports to account for encumbered lots unlikely to be developed for commercial use, lots located within 500 feet of sensitive receptors or existing adult establishments, and lots subject to rezoning. (Laremont Decl. ¶ 11.) The DCP's analysis concludes that over 2,800 lots larger than 2,500 square feet exist in which adult establishments may be located, which appears to represent 2.8% of the City's land. (Laremont Decl. ¶ 11 & n.7.) By borough, the DCP identified 36 lots in Manhattan, over 700 lots in Brooklyn, nearly 1,000 lots in Queens, over 550 lots in the Bronx, and over 550 lots in Staten Island that could accommodate adult businesses. (Laremont Decl. ¶¶ 12-13, 16-19; Stipulation Among All Parties re Certain Undisputed Facts, ECF No. 118, 02cv4431.) According to the DCP, these areas are transit-accessible and have established patterns of commercial development. (Laremont Decl. ¶¶ 14, 16-19.)

This Court also recognizes that courts assessing the constitutionality of the 1995 Regulations and the 2001 Amendments have found that they allowed sufficient alternative channels for communication. *Buzzetti*, 140 F.3d at 140-41; *Stringfellow's of N.Y.*, 694 N.E.2d at 418-19; *see For the People Theatres of N.Y.*, 793 N.Y.S.2d at 371 (concluding without analysis that "sufficient area is available so that the amendments do not have the effect of suppressing, or greatly restricting access to, lawful speech"). In particular, the DCP estimated that as of 1995, nearly 5,000 acres of unencumbered land—or 500 sites of

over 10,000 square feet-representing 4% of the City's land area remained available for the 148 establishments that would need to relocate under the 1995 Regulations. (*See* Karnovsky Decl. ¶ 71.) And as of 2001, the DCP calculated that 101 displaced establishments would have had roughly 4,800 unencumbered acres and 450 sites in which to relocate. (Karnovsky Decl. ¶¶ 72-73.) Nonetheless, the available percentage of the municipality's land area or acreage are not necessarily dispositive. *Cf. MJ Entmt. Enters., Inc. v. City of Mount Vernon*, 328 F. Supp. 2d 480, 485 (S.D.N.Y. 2004) (recognizing that "there is no bright line test for how much land ensures reasonable alternative avenues of communication"); *T & A's, Inc. v. Town Bd. Of Town of Ramapo*, 109 F. Supp. 2d 161 173-74 (S.D.N.Y. 2000) (same).

On this preliminary record, this Court is skeptical that the 2001 Amendments leave open sufficient alternative avenues of communication. With respect to the outer boroughs, the DCP generated a map for each borough identifying the areas allowing and prohibiting adult establishments as October 31, 2018. (*See* Laremont Decl., Exs. D-G.) For areas permitting adult establishments, the DCP distinguished between privately owned lots with non-transportation or utility land uses and lots that were either publicly owned or had transportation or utility land uses, such as John F. Kennedy International Airport and LaGuardia Airport. Compared to the maps the DCP created in connection with the 1995 Regulations, the 2018 maps appear to offer slightly less available space for adult entertainment.

But the City's maps do not seem to indicate how the amount of available land would be affected by the requirement that adult establishments be located at least 500 feet from sensitive receptors or other adult establishments. *Accord Cochran v. Town of Marcy*, 143 F. Supp. 2d 235, 238 (N.D.N.Y. 2001) (issuing preliminary injunction in part based on "substantial questions . . . as to whether any locations exist within the Town to which plaintiff's business could legally relocate"). Indeed, the DCP's analysis concedes that when accounting for the impact of an adult establishment on the location of other adult establishments, only a maximum of thirteen adult establishments could co-exist in Manhattan,[31] even though the DCP identified thirty-six lots in Manhattan. (Laremont Decl. ¶ 15.) When extrapolated to the City as a whole, this statistic suggests that not assessing the effect of the AZR's anti-concentration provisions may lead to a substantial overestimation of the alternative avenues for speech. *See TJS of N.Y.*, 598 F.3d at 22 n.4 (requiring a municipality to prove at minimum that the "general areas that remain available . . . contain enough potential relocation sites that are physically and legally available").

The maps submitted by the Club Plaintiffs' expert, Michael Berzak, support this intuition. (*See* PJA at 19-46.) As Berzak explains, his maps demonstrate the effect of subsequent zoning changes for each borough. And for Manhattan, Berzak's maps progressively superimpose the effect of subsequent zoning changes,

31. Defendants do not appear to have included a current map reflecting the permissible areas for relocation in Manhattan.

existing sensitive receptors and adult establishments, sites unavailable for *any* commercial use, and the AZR's anti-concentration provisions. (PJA at 2, 9-13.) A review of Berzak's Manhattan maps—which Defendants do not appear to refute-indicates that the potential alternative sites for adult businesses to relocate has substantially diminished since 1995, and there is no reason to believe that this result would not similarly be felt in the outer boroughs. Based on this evidence, this Court finds that Plaintiffs have sufficiently demonstrated at this stage that the enforcement of the 2001 Amendments will deny them adequate alternative channels to offer their adult expression.

C. Balance of Hardships and the Public Interest

The preliminary injunction inquiry also requires courts to "balance the competing claims of injury[,] . . . consider the effect on each party of the granting or withholding of the requested relief, and pay particular regard [to] the public consequences in employing the extraordinary remedy of preliminary relief." *Amarin Pharma, Inc. v. U.S. Food & Drug Admin.*, 119 F. Supp. 3d 196, 237-38 (S.D.N.Y. 2015) (internal citations and quotation marks omitted). Because "[t]hese factors merge when the Government is the opposing party," *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 436 (E.D.N.Y. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)), this Court considers them in tandem.

This Court determines that the balance of hardships weighs in favor of Plaintiffs and the issuance of preliminary

injunctive relief would not disserve the public interest. Many of the Club Plaintiffs and Bookstore Plaintiffs have submitted affidavits attesting to the hardship they may face if the 2001 Amendments were enforced, including the loss of their businesses, the potential breach of their contracts and leases, the possibility that their employees will lose their jobs, the threat of criminal prosecution, and the financial and time costs of relocation. (*See* PJA at 227-311, 1616-1669 .) Moreover, granting the requested relief would not result in any harm to Defendants, who have already refrained from enforcing the 2001 Amendments for eighteen years. While this Court credits Defendants' contention that the 2001 Amendments are designed to abate the pernicious secondary effects of adult establishments, it also recognizes that the City "does not have an interest in the enforcement of an unconstitutional law."[32] *N.Y. Progress & Prot. PAC*, 733 F.3d at 488 (quotation marks omitted) (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)). Rather, as this circuit has recognized, "securing First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC*, 733 F.3d at 488; *see also Ligon v. City of New York*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013) ("[T]he public interest lies with the enforcement of the Constitution.").

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32. Of course, this Court's "findings are provisional in the sense that they are not binding on a motion for summary judgment or at trial and are subject to change as the litigation progresses." *trueEx, LLC*, 266 F. Supp. 3d at 720 n.108; *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

Appendix C

CONCLUSION

The adult-use regulations that are the subject of these now-revived constitutional challenges are a throwback to a bygone era. The City's landscape has transformed dramatically since Defendants last studied the secondary effects of adult establishments twenty-five years ago. As Proust might say, the "reality that [the City] had known no longer existed," and "houses, roads, [and] avenues are as fugitive, alas, as the years." Marcel Proust, Swann's Way, in Remembrance of Things Past (C.K. Scott Moncrieff trans., 1922) (1913).

This Court reiterates that its determination of this motion says nothing about whether Plaintiffs will in fact succeed on the merits of their claims. However, for the reasons stated above, Plaintiffs' motions for preliminary injunctions are granted. Defendants are enjoined from enforcing the 2001 Amendments pending a final judgment on the merits. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307, 195 L. Ed. 2d 665 (2016) (reiterating the propriety of an injunction prohibiting the enforcement of a facially unconstitutional statute). Because Defendants do not identify any "costs or damages" they may incur if wrongfully enjoined, this Court waives the Rule 65(c) bond requirement in its discretion. *Accord Christian Fellowship Ctrs. of N.Y., Inc. v. Vill. of Canton*, 377 F. Supp. 3d 146, 167 n.16 (N.D.N.Y. 2019); *see Rex Medical L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 626 (S.D.N.Y. 2010) ("It is well-settled that a district court has 'wide discretion in the matter of security and it has been held proper for the court to require no bond

where there has been no proof of likelihood of harm [to the non-movant].'" (citations omitted)).

The parties in all four actions are directed to appear for a status conference on October 31, 2019 at 11 00 a.m. and to file a joint status report by October 24, 2019 detailing their respective positions on how to proceed with the balance of this action. Counsel are further directed to confer with each other prior to the conference regarding all of the subjects to be considered pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and to outline their discovery plan pursuant to that Rule in their joint status report.

The Clerk of Court is directed to terminate the motions pending at ECF No. 78 in 02cv4431, ECF No. 32 in 02cv4432, ECF No. 57 in 02cv8333, and ECF No. 27 in 18cv3732 and file a copy of this Opinion & Order on all four dockets. SO ORDERED

Dated: September 30, 2019
New York, New York

/s/ William H. Pauley III
WILLIAM H. PAULEY III

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 21, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos:
24-621 (Lead)
24-623 (Con)
24-636 (Con)
24-640 (Con)

557 ENTERTAINMENT INC., DCD EXCLUSIVE VIDEO INC., VIDEO LOVERS INC., *et al.*,

Plaintiff-Appellants,

v.

CITY OF NEW YORK, HON. ERIC ADAMS, e*t al.*,

Defendants-Appellees.

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*

IT IS HEREBY ORDERED that the petition is denied.

Appendix D

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
Catherine O'Hagan Wolfe

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 23, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

02 CIVIL 4431 (LJL)

689 EATERY CORP., *etc. et ano*,

Plaintiffs,

-v-

CITY OF NEW YORK, *et al.*,

Defendants.

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02 CIVIL 4432 (LJL)

59 MURRAY ENTERPRISES, INC. *etc., et ano.*,

Plaintiffs,

-v-

CITY OF NEW YORK, *et al.*,

Defendants.

Appendix E

02 CIVIL 8333 (LJL)

CLUB AT 60TH STREET, *et al.*,

Plaintiffs,

-v-

CITY OF NEW YORK,

Defendant.

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18 CIVIL 3732 (LJL)

336 LLC, *etc.*, *et al.*,

Plaintiffs,

-v-

CITY OF NEW YORK,

Defendant.

JUDGMENT

It is, **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated February 9, 2024, the Court's Stipulation and Order dated February 22, 2024, and the Court's

Appendix E

Order dated February 22, 2024, the Court finds in favor of Defendant on each of Plaintiffs' claims and judgment is entered in favor of Defendant, dismissing Plaintiffs' claims; accordingly, the cases are closed.

Dated: New York, New York
February 23, 2024

RUBY J. KRAJICK

Clerk of Court

BY: s/ K. Mango
Deputy Clerk