

No. _____

In the Supreme Court of the United States

59 MURRAY ENTERPRISES, INC., ET AL., APPLICANTS

v.

CITY OF NEW YORK, ET AL., RESPONDENTS

**ON APPLICATION FOR INJUNCTION
DIRECTED TO THE HONORABLE SONIA SOTOMAYOR,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
CIRCUIT JUSTICE FOR THE SECOND CIRCUIT**

**APPLICATION FOR INJUNCTION PENDING
WRIT OF CERTIORARI**

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RULE 29.6 STATEMENT

All of the Applicants are privately held corporations. None of them have any parent corporation and none of the stockholders of the Applicants owning 10% or more of the corporation's stock are publicly traded.

PARTIES TO THE PROCEEDING

Applicants (plaintiffs-appellants below) are 59 Murray Enterprises, Inc. a/k/a 59 Murray Corp., d/b/a New York Dolls; AAM Holding Corp., d/b/a Private Eyes; JNS Ventures Ltd., d/b/a Vixen; Twenty West Partner, Inc., d/b/a Wonderland; 689 Eatery Corp., d/b/a Satin Dolls; and 725 Eatery Corp., substituting for MLB Enterprises Corp., d/b/a Platinum Dolls.

Respondents (defendants-appellees below) are the City of New York; Hon. Eric Adams, as Mayor of the City of New York; James S. Oddo, as Commissioner of Buildings; and the Department of Buildings of the City of New York.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

725 Eatery Corp. et al. v. City of New York, et al.,

Nos. 02-cv-4431, 02-cv-4432, 02-cv-8333, and 18-cv-3732 (September 30, 2019) (granting preliminary injunction)

689 Eatery Corp, etc., et al. v. City of New York, et al.,

Nos. 02-cv-4431, 02-cv-4432, 02-cv-8333, and 18-cv-3732 (final judgment of dismissal)

United States Court of Appeals (2nd Cir.):

557 Entertainment Inc. et al. v. City of New York, et al.,

Nos. 24-621(L), 24-623(C), 24-636(C), and 24-640(C) (July 8, 2025) (summary order of affirmance) (1a)

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Preliminary Statement

Applicants move pursuant to the All Writs Act, 28 U.S.C. § 1651, for an injunction pending the filing of their petition for a writ of certiorari to review the Summary Order of the U.S. Court of Appeals issued July 8, 2025, affirming the February 9, 2024 Judgment of the U.S. District Court for the Southern District of New York (Lewis Liman, D.J.), dismissing Applicants' constitutional challenges to the 2001 Amendments to the New York City Zoning Resolution.

As developed below, without emergency relief the City of New York could bring actions to close businesses offering constitutionally protected adult expression, based on controversial amendments to the City's Zoning Resolution that were enacted back in 2001, which have never been enforced. This could result in Petitioners and other businesses suffering irreparable and substantial injury. It also serves the public's interest to maintain the *status quo* of no enforcement that has existed for a generation during the relatively short time it will take this Court to consider the merits of the constitutional issues presented. This case raises a critically important question of federal law and First Amendment jurisprudence: Whether the substantial governmental interest required to justify an ordinance that impacts free expression under a municipality's police power must exist when it is enforced, or merely when it is enacted, where there have been significant changed circumstances and the facts that justified the original ordinance no longer exist.

Specifically, Applicants seek to enjoin enforcement of the challenged—and never enforced—municipal ordinance provisions from 2001, which radically change

the definition of “adult establishment” in New York City’s Zoning Resolution to severely limit the public’s access to constitutionally protected expression. The asserted factual predicate for these changes—namely, the negative secondary effects allegedly caused by adult establishments—date back to 1994. And there have been *significant* changes in the last 30 years such that any adverse secondary effects which justified the City’s adult zoning restrictions when amended, have long-since ceased to exist -- rendering them subject to constitutional challenge at this time under *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938) (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”).

Moreover, in adjudicating a contemporaneous State constitutional challenge, New York Courts expressly found that the form of businesses targeted by the 2001 Amendments, which minimize their adult concentration to less than 40% of the business, does not cause negative secondary effects, see *For The People Theatres of NY, 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), *ipso facto* rendering the 2001 Amendments unconstitutional for Federal constitutional purposes under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Furthermore, the City did not establish “how speech will fare” if the 2001 Amendments are enforced, as required under Justice Kennedy’s controlling decision in *City of Los Angeles v.*

Alameda Books, Inc., supra, 535 U.S. at 440 (Kennedy, *J.*, concurring in the Judgment).

The challenged provisions also: (1) “substantially burden[] more speech than necessary” and are therefore unconstitutional under the First Amendment in light of *Free Speech Coalition v. Paxton*, No. 23-1122 (June 27, 2025), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997); (2) unconstitutionally permit a “sensitive use veto” in conflict with *Young v. Simi Valley*, 216 F.3d 807 (9th Cir. 2000); and (3) fail to provide adequate procedural safeguards for businesses featuring protected expression and thereby conflict with the standards of *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

In addition to violating First Amendment rights - - in and of itself causing irreparable injury as a matter of law, see, *Elrod v Burns*, 427 U.S. 347 (1976); *Mahmoud v. Taylor*, 606 U.S. ----, 145 S.Ct. 2332 (2025) (violation of First Amendment rights “unquestionably constitutes irreparable injury”) - - enforcement of the challenged zoning will require Applicants to close or materially change the nature of their businesses, or face nuisance abatement (or criminal) penalties for violation of the ordinance, and will jeopardize the livelihood of hundreds of performers and employees.

For all of these reasons, “the record as a whole” shows that the challenged provisions “constitute a forbidden intrusion on the field of free expression” and therefore should have been declared unconstitutional under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), and Applicants satisfy every element of even

the most rigorous test for an injunction pending certiorari, including a reasonable probability that certiorari will be granted. See Note, *The Role of Certiorari in Emergency Relief*, 137 Harv. L. Rev. 1951 (2024).

Statement of the Case

A. Factual Background

1. The Affirmed Factual Findings of No Adverse Secondary Effects In The New York State Court Litigation

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 (2nd Cir. 1975)], and 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 also been consistently recognized that businesses featuring nude performance, and particularly concentrations of such businesses, are sometimes 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 otherwise regulating the location of such businesses in order to minimize negative secondary effects 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*; *City of*

Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). *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 1995, following extensive study and consideration, New York City adopted amendments (the "1995 Amendments") to its Amended Zoning Resolution ("AZR"), for the purpose of minimizing the negative secondary effects associated with "adult establishments," which were newly defined under the AZR. The 1995 Amendments eliminated the loud and garish signage promoting adult establishments, prohibited adult establishments in residential districts, and broke up concentrations of adult establishments in Times Square and along other commercial corridors by imposing 500' "buffer zones" between adult establishments and other such establishments, as well as between adult establishments and schools, churches and other "sensitive receptors."

As amended in 1995, the AZR 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 upheld as facially constitutional in *Buzzetti v. City of New York*, 140 F.3d 134 (2nd Cir.), *cert. den.*, 525 U.S. 816 (1998), *Stringfellow's of New York, Ltd. v. City of New York*, 91 N.Y.2d 382 (1998), and *Hickerson v. City*

of New York, 146 F.3d 99 (2nd Cir. 1998), *cert. den.*, 525 U.S. 1067 (1999). In *Hickerson*, *supra*, a consortium of more than plaintiffs, *inter alia*, challenged the “substantial portion” standard as unconstitutionally “void for vagueness.” In response, the City Department of Buildings (“DOB”) interpreted “substantial portion” as forty percent or more of customer accessible floor space devoted to “adult” activities or materials as otherwise defined in the AZR. This interpretation, embodied in an Operational Policy and Procedure Notice, was based on the statement in the 1995 New York City Planning Commission Report that the City’s pre-enactment studies, underlying the 1995 Amendments, only studied businesses devoting more than forty percent of the customer accessible floor space to such activities or materials.

In other words, the secondary effects, if any, of businesses devoting less than forty percent of their customer accessible floor space to such activities or materials (known as “60/40” businesses) were not (and have never been) studied.

Based on this OPPN, the City’s attorneys stipulated on the record in *Hickerson* to (what became known as) the “60/40” rule, and the “void for vagueness” challenge to the 1995 Amendments was accordingly withdrawn.

Since taking effect in 1998, the 1995 Amendments have been wildly successful in achieving the City’s goals as exterior signage of businesses featuring adult entertainment or materials has been “toned down” City-wide and the number of adult establishments City-wide has been dramatically reduced from 177 in 1995 (all “100%” locations) to 136 in 2000 (of which 35 were “100%” locations and 101 were “60/40”), and by 2022 to 42 (of which 10 were “100%” locations and 32 were “60/40”).

During this same period, the number of adult establishments in Manhattan (the central business district) was reduced from 107 in 1995 (all “100%”) to 69 in 2000 (of which 24 were “100%” locations and 45 were “60/40”), and by 2022 to 23 (of which 4 were “100%” locations and 19 were “60/40”).

The City began to enforce the 1995 Amendments when the facial constitutional challenges to the enactment concluded, however, despite the “substantial portion” statutory definition, the 60/40 regulatory rule, and the *Hickerson* Stipulation (and despite universal compliance with the new restrictions on exterior signage), it took the position that the 60/40 business model was a “sham” and that 60/40 businesses were subject to the zoning restrictions imposed by the 1995 Amendments. The New York Court of Appeals disagreed, rejecting the City’s outlandish misinterpretation and holding that compliance with the “spatial” 60/40 rule was full compliance with the zoning ordinance as written. *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).

Following the New York Court of Appeals’ rejection of the City’s plainly bad faith “sham compliance” arguments in *Dezer* and *Les Hommes*, *supra* - - and notwithstanding the substantial reduction in the number and the success in breaking up the concentrations of 100% and 60/40 locations since the enactment of the 1995 Amendments, as well as the elimination of “loud” and “garish” signage - - the City did an abrupt “about-face” on its 1995 position and adopted the “2001 Amendments” on October 31, 2001.

The 2001 Amendments eliminated the 60/40 Rule for eating and drinking

establishments, and significantly modified it for bookstores. For eating and drinking establishments, anything more than 0% allocated to regularly featured adult entertainment made the business an “adult establishment” subject to the locational restrictions first 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 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 located 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 alleged adverse secondary effects, governmental interest, or legitimate zoning concerns. Unlike the 1995 Amendments, which were supported by a 1994 study by the New York Department of City Planning, the 2001 Amendments were not supported by any new study of any kind. The City did not study 60/40 businesses in 1994 (60/40 businesses did not exist at that time) and did not study 60/40 businesses in 2001. There is no evidence in the record that the City has studied 60/40 businesses since that time, either. Nor was there any claim or evidence that the 60/40 business form exists or has been regulated in any other jurisdiction; thus there was no experience base for the City to draw upon.

Among other things, in adopting the 2001 Amendments, 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. Despite having multiple 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. Most importantly, the City did not investigate or consider what effect the amendments would have on the public’s access to the protected expression then-available in existing adult establishments.

In other words, in 2001 there was no evidence from which the City could have modified the conclusion it had made in 1995 that businesses that did not devote a “substantial portion” of their establishment to adult uses could not be shown to be associated with (let alone the cause of) negative secondary effects in their neighborhoods, especially taking into account the subdued signage following the enforcement of the 1995 Amendments. (Not only was there no such evidence in 2001—there also is no such evidence *now*, two dozen years later.)

Worse still, while the City now justifies the 2001 Amendments by reference to the supposed need to ameliorate negative secondary effects, the record evidence (and the lived experience of the two decades during which the 2001 Amendments were enjoined) shows that there was no such need (as further discussed below), especially

when taking into account the undisputed facts that the number of adult establishments has plummeted since both 1995 and the City itself has drastically changed.

The 2001 Amendments were challenged soon after their adoption in both state and federal court. The federal cases 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 NY, 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). Remarkably, during the course of that litigation, after a full trial, including site visits, the trial judge made specific findings of fact, that the 60/40 businesses featuring “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, therefore, 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.

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] While the merits of that conclusion 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 fully and finally determined that the regulated businesses do not cause negative secondary effects (and the municipality presents no proof to the contrary in federal court).

To knowledge of Applicants' counsel, no federal court has ever upheld a municipal zoning scheme against a First Amendment challenge after such a "no negative secondary effects" finding by the State Courts.

2. The Lack of Any Justification For The 2001 Amendments

After the 2001 Amendments were upheld as constitutional under the New York State Constitution in 2017, these actions resumed—and the 2001 Amendments were promptly preliminarily enjoined by District Judge William H. Pauley in 2019. Judge Pauley concluded 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). He also recognized (408 F.Supp. at 470) that

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).

After the 1995 Amendments went into effect in 1998, and the number of adult

establishments quickly fell from 177 to 136 in 2000 (35 were “100%” establishments, and 101 were 60/40 establishments). This litigation continued after Judge Pauley’s preliminary injunction order, and by 2022 the number had fallen all the way to 42 adult establishments in the entire City (ten “100%” establishments and 32 60/40 establishments).

Manhattan saw a drastic drop in the number of adult establishments. From 107 adult establishments in 1993, that number had fallen to 69 by the year 2000 (of which 24 were “100%” and 45 were 60/40 establishments). In 2022, there were just 23 adult establishments in Manhattan—less than a quarter of the number extant when the 1995 Amendments were adopted. Four of those were 100% establishments. Nineteen were 60/40 establishments that must relocate if the 2001 Amendments are upheld.

Judge Pauley was also referring to drastic change in New York City overall, and especially (though not only) in Times Square, which had a reputation as the “red light district” of New York as early as the 1920s. A majority of the City’s adult establishments were located in or around Times Square (and Chelsea) by 1993.

But while many (including Judge Pauley) remember the crime-ridden city of the 1970s, the record evidence shows that both violent crime and property crime had steadily fallen since that time, through the time the 1995 Amendments were adopted, and up until the 2001 Amendments were adopted. Indeed, the undisputed expert declaration of Professor Lance Freeman established 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 (though not surprisingly, they trail behind the crime data somewhat). Meanwhile, undisputed surveys by Focus Probe, a professional marketing research group, showed a direct correlation between neighborhood quality and the replacement of “garish” signage with the “subdued” signage adopted by 60/40 businesses in the late 1990s, as established by the testimony of DOB’s signage expert.

The net result is that the record overwhelmingly demonstrated that crime has never been lower, and income and property values have never been higher—and none of these conditions have anything to do with the 2001 Amendments, which have never been enforced.

To put it differently, if the purpose of the 1995 Amendments was to ameliorate the secondary effects caused by large numbers and concentrations of 100% adult establishments, they were indisputably working—the number of 100% establishments plummeted from 177 in 1993 to 10 in 2022, and over the same time period the secondary effects disappeared, even while the number of 60/40 establishments has see-sawed from 0 in 1993 to a high of 101, to just 32 in 2022. And by the time of the trial, crime was down and property values up. Simply put, the 1995 Amendments were—and are—achieving their stated purpose. Conversely, the 2001 Amendments do not have a purpose.

3. The public's access to expression will be severely diminished.

At the time the preliminary injunction was issued, the City estimated that there were about 2800 sites available to which 60/40 establishments might lawfully relocate. Thereafter, when pressed on the issue during the proceedings below, the City revised its estimate downward to 1703 available sites.

After the plaintiffs identified flaws in the City's methodology, the City dramatically again revised its number downward. It agreed that, because adult establishments are themselves sensitive receptors that preclude another adult establishment within 500 feet, not all those sites can be simultaneously occupied. Thus, the City contends that 204 sites city-wide and 5 sites in Manhattan can be simultaneously occupied. (However, of the 5 sites in Manhattan, two are within 500' of other "available" sites, disqualifying them.)

While 204 sites may at first blush seem to be a substantial number, it is not. It represents a vanishingly small portion of the 857,298 lots in New York. 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 *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) ("Alameda"), requires.

The best evidence that these locations would not preserve the public's access to the speech is simply that none of the 60/40 establishments in New York are located at any of those addresses now. Thus, all 32 60/40 businesses would have to relocate if the 2001 Amendments went into effect. If those locations (all of which are legally

available) were sites where the public would demand and support adult establishments, the market would have provided for those establishments at some point in the last two and a half decades. It has not.

The undisputed evidence below, including expert declarations, established that one reason is that the demand for adult entertainment is primarily in Manhattan, and the clientele for adult entertainment (particularly adult eating and drinking establishments) is largely young professionals and business executives with disposable incomes (who are disproportionately represented in Manhattan) and tourists; New York City in general (and Manhattan in particular) is a “travel/tourism mecca” rivaled only by London. Some 83% of all hotel rooms in New York City are in Manhattan. And the undisputed declarations of the adult establishments operators themselves explained that this is one reason that most of alternative sites on the City’s list aren’t actually viable alternatives.

Moving adult establishments from Manhattan primarily to the other boroughs would effectively eliminate them. One expert modeled trips of hypothetical tourists attempting to visit adult establishments in the other boroughs. He concluded that the combination of travel infrastructure and schedules meant that the trip would take drastically longer than it would today and be drastically more expensive—to the point that the overwhelming majority of people simply would not make the trip at all.

There are nineteen 60/40 establishments in Manhattan as of the most recent record evidence. If the 2001 Amendments go into effect, there would be only three. The public’s access to this protected expression would not be “substantially

undiminished”; to the contrary it would, in fact, be decimated.

4. The Unique Mandatory Termination Requirements Imposed On Adult Establishments

In addition to the definitional changes that affect permissible locations, two other aspects of the City’s zoning scheme are challenged in this case. First, adult businesses are subject to unique (and stringent) mandatory termination requirements. Second, the 2001 Amendment’s mandatory termination requirements provided that 60/40 establishments operating in locations that would be impermissible under the 2001 Amendments would be required to shut down or relocate within one year of the date they became non-conforming. That descriptor applies to all the Applicants (or their predecessors in interest), all of which would have been forced to close at their current locations if not for consensual stays, preliminary injunctions or the current stay pending appeal.

Mandatory termination for non-conforming uses is the exception rather than the rule under the City’s ZR—only a few types of non-conforming uses are subject to mandatory termination at all. Adult use is one of them. Most non-conforming uses must terminate only if they have been discontinued for two years (or have expanded or increased in intensity). For example, non-conforming non-“adult” bars are not subject to mandatory termination.

Under the 2001 Amendments, an adult establishment must also terminate if any land within 500 feet of it is rezoned such that adult establishments are prohibited from being within 500 feet. This includes all residential and certain commercial and manufacturing districts. Adult uses are the only uses which are subject to

mandatory termination based on the rezoning of land that the use does not even occupy. Every other use which becomes non-conforming on the basis of other land being rezoned may continue its use indefinitely (subject to termination only through discontinuance or an increase in use intensity).

Adult establishments are uniquely subject to a sensitive-use “veto.” When an adult establishment of any kind seeks a building permit, it is required to submit with its application an area diagram that shows all other uses within a 500 foot radius, to permit the DOB to determine whether the establishment will be in a permitted location. Non-adult uses are not required to submit an area diagram with their building permit applications. While since March 23, 2022, DOB’s Legal Counsel no longer routinely reviews permit applications that propose 60/40 Establishments, neither are those applications exempt from that review, and there is no published time limit for the review of the application, nor for issuance of a building permit.

This is of particular concern to adult establishments because the vesting priority for building permits is the date of issuance, not the date of application. This means that when an application is submitted for an adult use, anyone can see it (applications are public records), then apply for a permit for a sensitive use (e.g., a church, school, etc.), obtain their permit before the adult-use application review is completed (due to faster application-to-issuance time frames for non-adult uses), and effectively “veto” the adult establishment’s application.¹

¹ The record establishes that this is not a speculative risk. One of the plaintiff’s architects—without rebuttal by the City—submitted a declaration describing in detail how, after submitting an “no work” adult use application and area diagram in

B. Relevant Procedural History

The 2001 Amendments were enacted October 1, 2001, effective October 1, 2002.

SDNY Case No. 02-cv-4431, originally captioned *MLB Enterprises Corp. d/b/a Lace, et al. v. City of New York, et al.* was filed June 12, 2002. SDNY Case no. 02-cv-4432, originally captioned *59 Murray Corp. d/b/a New York Dolls, et al. v. City of New York, et al.*, was likewise filed June 12, 2002. SDNY Case No. 02-cv-8333, captioned *Club at 60th Street, Inc. et al. v. City of New York*, was filed October 18, 2002. (SDNY Cases Nos. 02-cv-4431, 4432 and 8333 are sometimes hereafter referred to collectively as the “Club Cases”.) SDNY Case No. 18-3732, captioned *336 LLC d/b/a The Erotica, et al. v. City of New York*, was filed April 27, 2018 (the “Book/Vido Store Case”).

The Club Cases were assigned to U.S. District Judge Alan Schwartz and the plaintiffs in the Club Cases moved for a preliminary injunction against enforcement of the 2001 Amendments, however, while those motions were pending, but before they could be decided, the New York Supreme Court, in parallel litigation, enjoined declared the 2001 Amendments unconstitutional and enjoined enforcement. *Ten’s*

2014, it took the City 5-1/2 months to approve the application, including a fallacious objection raised by the City, and then a false complaint by a competitor, that there was a house of worship with 500’ of the location, resulting in delays and wrongful revocation of the permit once issued. In comparison, the house of worship received its “no work” permit in 3 days. (Not incidentally, the purported house of worship abandoned its application and never obtained a permanent certificate of occupancy after the unsuccessful effort to stop the involved club from opening.) This unconstitutional sensitive use veto creates a tremendous chilling effect on owners and operators of adult establishments. As one owner/operator explained below, “For this reason, unless and until the City changes its rules governing vesting priority, I would never again seek to establish an adult establishment in New York City on a site which had not previously been approved for adult use.”

Cabaret, Inc. v. City of New York, 1 Misc.3d 399 (Sup. Ct. N.Y. Co. 2003). Judge Schwartz accordingly held the Federal Court litigation in abeyance.

Ultimately, after extensive litigation in the State Court, including a trial and several rounds of appeals, (a) the trial court found the 2001 Amendments unconstitutional, *inter alia*, based on express findings that the 60/40 “adult” business form did not cause negative secondary effects, and (b) the Appellate Division, First Department, affirmed those findings, but (c) the New York Court of Appeals - - without disturbing the factual findings - - nonetheless concluded that the 2001 Amendments were constitutional for purposes of the New York Free Expression Clause, N.Y. Const., Art. I, § 8. *For The People Theatres of NY, 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). The Federal constitutional question was not raised in that litigation and not before the New York Court of Appeals.

After the New York State litigation was concluded, the Club Cases were reactivated, the Book/Video Store Case was filed, and U.S. District Judge William Pauley III issued a preliminary injunction against enforcement of the 2001 Amendments, concluding (as quoted, *supra*) that

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).

725 Eatery Corp. v. City of New York, 408 F.Supp.3d 424, 470 (S.D.N.Y. 2019).

Ultimately, motions for summary judgment and a motion in limine were denied, and the case was tried to U.S. District Judge Lewis Liman on the basis of the extensive motion declarations, documents exchanged during discovery, and detailed stipulations of fact, followed by two days of oral argument. The District Court then rendered its Opinion, upholding the constitutionality of the 2001 Amendment and dismissing the Club and Book/Video Store Cases. *689 Eatery Corp, etc., et al. v. City of New York, et al.*, n.o.r., 6977060 (S.D.N.Y., Oct. 23, 2023) (denying motion in limine), and 716 F.Supp.3d 88 (S.D.N.Y. 2024) (dismissing claims).

The City then 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 Court of Appeals affirmed in a Summary Order. *557 Entertainment Inc. et al. v. City of New York, et al., n.o.r.*, 2025 WL 1873473 (2nd Cir., July 8, 2025) (1a).

A petition to reargue was denied without opinion August 21, 2025 (11a), and a motion to stay issuance of the Mandate was likewise denied without opinion. October 1, 2025. (12a) The Mandate was then issued. (13a)

As of the date of this motion, to the best of counsel's knowledge, information and belief, the 2001 Amendment have not as yet been enforced against anyone.

Argument

Point I

Applicants Have A Strong Likelihood Of Success On The Merits Of Their Questions Meriting Review

Applicants’ proposed petition for certiorari will present a number of substantial constitutional questions meriting review on certiorari.

These include whether the substantial governmental interest required to justify an ordinance that impacts free expression under a municipality’s police power must exist when it is enforced, or merely when it is enacted, where there have been significant changed circumstances and the facts that justified the original ordinance no longer exist. While this important question of federal law has not been settled by the Supreme Court, the Second Circuit’s decision stands in apparent conflict with *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938), where this Court long-ago 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.”

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 fully and finally determined, as a matter of fact, not to create negative secondary effects [see *For The People Theatres of NY, 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)]. To the best of counsel's knowledge, information and belief, since the seminal decision in *Renton*, neither the Supreme 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 has been such a finding. Accordingly, the case at bar is truly unprecedented in modern First Amendment jurisprudence and flies in the face of all relevant Supreme Court and lower court precedent.

This case also presents substantial constitutional questions relating to (1) the application of the Kennedy Test ("how speech will fare") to the facts at bar [*see Alameda Books*, 535 U.S. at 440 (Kennedy, J., controlling concurrence)]; (2) whether the challenged zoning provisions "substantially burden more speech than necessary" [*see Free Speech Coalition v. Paxton*, No. 23-1122 (June 27, 2025), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997)]; (3) whether the permitting provisions of the City's Zoning Resolution conflict with the standards of *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), and *Young v. Simi Valley*, 216 F.3d 807 (9th Cir. 2000); and (4) whether "the record as a whole" shows that the challenged provisions "constitute a forbidden intrusion on the field of free expression" [*see Bose Corp. v. Consumers Union of U.S., Inc.*, *supra.*].

All of these questions and issues merit discretionary Supreme Court review on certiorari, *see* U. S. Supreme Court Rule 10(a) and Rule 10(c), and as to each of them Applicants' have a strong likelihood of success.

Point II

Enforcement Will Cause Irreparable Harm

Violation of Applicants' constitutional rights constitutes irreparable harm as a matter of law [see *Mahmoud v. Taylor*, 606 U.S. ----, 145 S.Ct. 2332 (2025) (violation of First Amendment rights “unquestionably constitutes irreparable injury”)]. To the same effect, see *Elrod v Burns*, 427 U.S. 347 (1976).

Moreover, the threat of enforcement of the 2001 Amendments will be inherently disruptive to the Applicants (who employ large numbers of entertainers and other staff, and are the source of significant sales and income tax revenue for the City and State). This would require them to choose between violation of the amended zoning resolution, or substantial reconfiguration of their business models, or closing and endeavoring to relocate at great (and, in some cases, potentially prohibitive, expense), as well as uncertainty if any suitable alternative locations can be found.

Point III

The Balance Of The Equities Favors Applicants

On the other hand, there are no equities favoring enforcement of the 2001 Amendments at this time. Specifically:

A. The 2001 Amendments have not been enforced during the twenty-four years since their enactment, and significantly changed circumstances exist which no longer justify the restriction on expression; and

B. The 1995 Amendments, imposing a dispersal plan on the then-existing adult establishments (as defined), permitting the 60/40 businesses to remain

in situ, and putting restrictions on outdoor signage, was successful in reducing the number of adult establishments and addressing their negative secondary effects. As a consequence, the factual predicate for the 1995 Amendments, alleged to justify the 2001 Amendments, no longer exists [*see 725 Eatery Corp. v. City of New York*, 408 F.Supp.3d 424 (S.D.N.Y. 2019) (Pauley, D.J.) (granting preliminary injunction)], and there will consequently be no prejudice to the City by enjoining enforcement pending certiorari.

Conclusion

Applicants' motion should be granted and Respondents enjoined from enforcing the 2001 Amendments, as against Applicants, pending Applicants' petition for a writ of certiorari and, if granted, pending the Court's review of the Judgment appealed from.

Dated: October 22, 2025

Respectfully submitted,

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APPENDIX

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24-621 (L)

59 Murray Enters. v. City of New York

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of July, two thousand and twenty-five.

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

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.

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

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.**

For Plaintiffs-Appellants:

EDWARD S. RUDOFISKY, Zane and Rudofsky,
Melville, New York; ERICA T. DUBNO,
Fahringer & Dubno, New York, New York;
G. RANDALL GARROU (Jerome Mooney, *on
the brief*), Weston, Garrou & Mooney, Los
Angeles, California; Jeffrey M. Nye,
Stagnaro, Saba & Patterson, Cincinnati,
Ohio.

For Defendants-Appellees:

ELINA DRUKER (Richard Dearing, Ingrid R.
Gustafson, *on the brief*), for Muriel Goode-
Trufant, Acting Corporation Counsel of the
City of New York, New York, New York.

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

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.

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 existing 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, ongoing 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 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

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).

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.

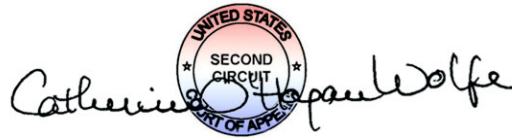
While framed as a substantive due process challenge, the bookstore plaintiffs are again repeating the claim that the 2001 amendments violate the First Amendment. But “where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff’s 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:

Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in black, flanked by two small stars on either side.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of August, two thousand twenty-five.

557 Entertainment Inc., DCD Exclusive Video
Inc., Video Lovers Inc., et al.,

Plaintiff - Appellants,

v.

City of New York, Hon. Eric Adams, et al.,

Defendants - Appellees.

ORDER

Docket Nos: 24-621 (Lead)
24-623 (Con)
24-636 (Con)
24-640 (Con)

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.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

A circular official seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal features the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with stars on either side of the center text.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of October, two thousand twenty-five.

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

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., d/b/a Wonderland, 689 Eatery, Corp., DBA Satin Dolls, 725 Eatery, Corp., Substituting for MLB Enterprises, Corp., DBA Platinum Dolls,

Plaintiff - 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,

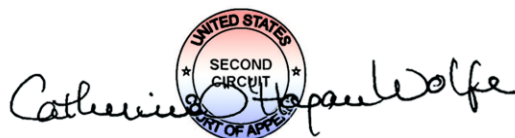
Defendants - Appellees.

Appellants move to stay the Court's mandate.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal of the United States Court of Appeals for the Second Circuit. The seal features the words "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around its perimeter, with two stars on either side of the word "CIRCUIT".

MANDATE

24-621 (L)

59 Murray Enters. v. City of New York

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of July, two thousand and twenty-five.

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

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.

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

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.**

For Plaintiffs-Appellants:

EDWARD S. RUDOFISKY, Zane and Rudofsky,
Melville, New York; ERICA T. DUBNO,
Fahringer & Dubno, New York, New York;
G. RANDALL GARROU (Jerome Mooney, *on
the brief*), Weston, Garrou & Mooney, Los
Angeles, California; Jeffrey M. Nye,
Stagnaro, Saba & Patterson, Cincinnati,
Ohio.

For Defendants-Appellees:

ELINA DRUKER (Richard Dearing, Ingrid R.
Gustafson, *on the brief*), for Muriel Goode-
Trufant, Acting Corporation Counsel of the
City of New York, New York, New York.

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

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.

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 existing 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, ongoing 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 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

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).

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.

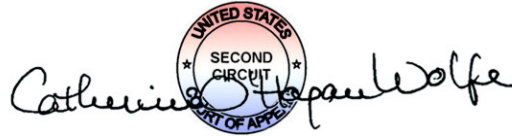
While framed as a substantive due process challenge, the bookstore plaintiffs are again repeating the claim that the 2001 amendments violate the First Amendment. But “where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff’s 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:

Catherine O'Hagan Wolfe, Clerk of Court

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".