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COURT OF APPEALS

STATE OF NEW YORK

FOR THE PEOPLE THEATRES OF N.Y., INC.,

Plaintiff,

JGJ MERCHANDISE CORP.,

NO. 59

Plaintiff-Respondent,

-against-

THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

TEN'S CABARET, INC., et al.,

Plaintiffs-Respondents,

-against-

THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

111 Dr. Martin Luther King Jr Blvd
White Plains, New York
April 27, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

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Karen Schiffmiller
Official Court Transcriber

1 JUDGE RIVERA: The last case on for today, the -
2 - - For the People Theatres v. City of New York, Ten's
3 Cabaret, Inc. v. City of New York.

4 MS. GUSTAFSON: Good afternoon, Your Honors.

5 JUDGE RIVERA: Good afternoon.

6 MS. GUSTAFSON: May it please the court, my name
7 is Ingrid Gustafson, appearing on behalf of the City. I
8 would like to reserve three minutes for rebuttal.

9 JUDGE RIVERA: You have it, thank you.

10 MS. GUSTAFSON: Thank you.

11 In addressing the very narrow question presented
12 by this court in 2005, both of the lower courts applied the
13 wrong legal framework. This court was clear when it
14 remanded in 2005, that it was not remanding for the typical
15 trial, where the courts below could make a judgment based
16 on the preponderance of the evidence, but instead was
17 remanding for a special proceeding to test whether the City
18 could come forward with evidence, renewing support for its
19 legislative judgment on predominant sexual focus.

20 JUDGE GARCIA: And where does intermediate
21 scrutiny fit into that analysis?

22 MS. GUSTAFSON: Int - - - as this court
23 recognized in 2005, intermediate scrutiny requires
24 additional scrutiny. However, it does not mean that
25 deferential concepts go out the window. And it - - - it -

1 - - what it requires, in the words of this court, is - - -
2 is more confidence between the means and - - - and that the
3 - - - of the City's regulations and the ends that it's
4 trying to serve. What - - - what the Ci - - - and it was
5 very clear about what the City needed to do. It needed to
6 come forward with evidence, fairly supporting its original
7 legislative judgment.

8 JUDGE GARCIA: So I guess my bottom-line question
9 is, did that standard have any role in this proceeding,
10 according to our '05 decision?

11 MS. GUSTAFSON: Absolutely. This court when - -
12 - when, at the end of its decision, when it was laying out
13 the precise standard, used the fairly supported language.
14 And that makes sense, because that is the ultimate question
15 always in this proceeding, whether it's step one or step
16 three, it doesn't change. It's always the same question.
17 Has the City fairly supported its legislative judgment?
18 And this court stated if the - - -

19 JUDGE STEIN: Is that a - - - is that a standard
20 of proof? Is that something that - - - is a recognized
21 standard of proof that - - - that we've ever used in any
22 case?

23 MS. GUSTAFSON: It's very specific to this area
24 of the law, Your Honor, yes. This - - -

25 JUDGE FAHEY: You think fairly supports is - - -

1 MS. GUSTAFSON: Fairly supports comes from Al - -
2 - Alameda Books, which this court said in 2005, governs the
3 scope of this proceeding.

4 JUDGE STEIN: But wa - - - but wasn't Alameda in
5 the context, and wasn't the earlier decision in the context
6 of a summary judgment proceeding? Doesn't - - - didn't it
7 have to do with shifting burdens in order to get to this
8 hearing?

9 MS. GUSTAFSON: Respectfully, no, Your Honor, and
10 this court clarified when it was remanded, it used that
11 exact same language, because the ultimate - - - the
12 ultimate amount of evidence, I mean, is - - - is the same.
13 It's still very little evidence. It - - - it - - - this is
14 a very particular area of - - - of the law, Your Honor.
15 And - - - and the courts have gone through quite - - -

16 JUDGE RIVERA: Yeah, but in 2005, the court did
17 make clear - - - although you're right about the very
18 little evidence - - - that the evidence was targeted or the
19 court anticipated the evidence would be targeted.

20 MS. GUSTAFSON: Yes.

21 JUDGE RIVERA: And - - - and the court said
22 there's a - - - "There's a triable question of fact as to
23 whether the 60/40 businesses are so transformed in
24 character that they no longer resemble the kinds of adult
25 uses found both in the 1994 DCP study and its studies in

1 court decisions around the country to create negative
2 secondary effects. In addressing this factual dispute, we
3 anticipate that the City will produce evidence relating to
4 the purportedly sham character of self-identified 60/40
5 book and video stores, theaters, and eating-and-drinking
6 establishments or other commercial establishments located
7 in the city."

8 And then goes on to say what you don't have to
9 put forward. But it - - - it is clarifying there that - -
10 - that the court anticipated, as it says, that the evidence
11 was going to be focused on a particular type of factual
12 dispute.

13 MS. GUSTAFSON: The central question, yes, was
14 predominant sexual focus, and that is what all the evidence
15 is going to. Now there are facts, of course, in these
16 proceedings. The background facts about the nature of the
17 establishments are - - - ended up essentially being
18 undisputed. And yes, this court did use the term "factual
19 dispute" and "question of fact". But I - - - I would
20 submit that's not surprising when we're talking about - - -
21 those are the normal terms you'd use when talking about
22 summary judgment.

23 But we have to remember whose factual findings
24 we're disputing here. We're disputing the factual findings
25 with the findings of a democratically-elected body. The

1 legislature's judgment on predominant sexual focus. And
2 this court went on to clarify that this was not a
3 preponderance of the evidence, a - - - a standard where new
4 judgment could be made by the trial courts. Instead the -
5 - - it - - -

6 JUDGE GARCIA: I see this a little bit
7 differently, perhaps. It - - - it seems to me you've had -
8 - - we all know the long history of - - - of these cases.
9 When it came up here the last time on the new changes that
10 had been made, this court said, you don't have to go back
11 and prove the secondary effects and prove - - - I think
12 what we were trying to get at, what the Unconstitutional
13 thing would be that the City would be doing is, say, we
14 have the 60/40 rule, but now we're going to make this rule,
15 if you have one pornographic book in your store, it's still
16 predominantly, you know, pornographic, sexually oriented,
17 whatever the term is, and clearly that would be content
18 based, because that cannot have the same secondary effects.

19 So it seems like we were sending this back to
20 say, do these entities still resemble, or still have the
21 same kind of primary focus, that the entities were that you
22 were allowed to legislate in this way against and zone and
23 - - - and do whatever you were going to do? So it seems to
24 me, that was what we wanted to be determined in this
25 hearing.

1 MS. GUSTAFSON: Well, there are two points, Your
2 Honor. First, I - - - I read it differently. I mean, I
3 don't believe that the court opined that just even one peep
4 booth wouldn't - - - wouldn't be enough. It was remanding
5 for a closer look, concrete evidence on the nature of these
6 establishments. And that is exactly what the City adduced
7 - - -

8 JUDGE FAHEY: I didn't think we were doing that.
9 I - - - I thought the court was sending it back for '05 - -
10 - in the '05, to meet the third prong of the Alameda test.
11 That - - - that's the way I read that decision.

12 MS. GUSTAFSON: That's correct. Renewing support
13 for the legislative judgment.

14 JUDGE FAHEY: Right.

15 MS. GUSTAFSON: It wanted - - - it wanted - - -

16 JUDGE FAHEY: It directly focused on - - - so let
17 me just stop you for a second. Let's assume that's true
18 for a second, in argument. If - - - if that's what it was
19 remanded for, then the court had already made its
20 Constitutional determination as to the application of
21 intermediate scrutiny and that's the standard of review
22 that we're not dealing with today. Is - - - do you agree
23 with that?

24 MS. GUSTAFSON: The - - - the thing Constitu - -
25 - here's what I would say to that, Your Honor. First, yes,

1 the court determined what framework applied and what the
2 Constitutional standard was. But this - - -

3 JUDGE FAHEY: The law of this case is that
4 Constitutionally, then intermediate scrutiny has been
5 applied and now the question is, well, it's not a standard
6 of review question, but rather a burden of proof question.
7 Did the City meet that burden of proof as to the third
8 prong of the Alameda test on remittal?

9 MS. GUSTAFSON: That - - - that is the question,
10 Your Honor, but this court did not uphold the
11 Constitutionality of the amendments in 2005. If it had,
12 then the courts would not have - - - the lower courts would
13 not have been able to strike them down on - - - on remand.

14 The ultimate - - - the ultimate question is still
15 Constitutional. And yes, it is a burden of proof question,
16 but it is always tied into what is the City's burden under
17 the First Amendment, under the New York State Constitution.
18 What - - - what evidence must it have to satisfy
19 intermediate scrutiny? That is always the ultimate
20 question.

21 And the evidence the City adduced here was very
22 different than what was in the original legislative record.
23 The City adduced extensive evidence about ten different
24 bars and clubs, and fourteen - - -

25 JUDGE RIVERA: Be - - - because it was about the

1 evidence, about the internal - - - right, the internal - -
2 -

3 MS. GUSTAFSON: Yes.

4 JUDGE RIVERA: - - - materials, the setup - - -

5 MS. GUSTAFSON: All - - -

6 JUDGE RIVERA: - - - that - - - that's what you
7 say is different?

8 MS. GUSTAFSON: No, the de - - - the detail. The
9 original legis - - - the original legislative record had -
10 - - it was anecdotal, it had examples, it had reports, it
11 had conclusions by City's offic - - - City officials, but
12 it didn't have this level of evidence. And what this
13 evidence showed - - - in the First Department - - -

14 JUDGE RIVERA: Are you saying that first report,
15 did they actually go into the clubs that they went into for
16 purposes of this remand? Had they gone physically into
17 those clubs?

18 MS. GUSTAFSON: They went in - - - I - - - I'm -
19 - - I think I might be misunderstanding your question. In
20 post-remand, did the City go into the clubs?

21 JUDGE RIVERA: Yeah.

22 MS. GUSTAFSON: Is that the question?

23 JUDGE RIVERA: Yes, well, I know you did, because
24 that's your evidence. My question is originally for the
25 first report or the 1994 report or whatever it was, had

1 they gone into these clubs?

2 MS. GUSTAFSON: That - - - that has been a matter
3 of some dispute. I mean, in the sense that was there - - -

4 JUDGE RIVERA: Is that a no?

5 MS. GUSTAFSON: - - - a clear - - - well, they -
6 - - they knew what was going - - - they knew there were
7 topless dancers in clubs - - -

8 JUDGE RIVERA: Is that a no? But is that a no?

9 MS. GUSTAFSON: I don't precisely know, I mean,
10 what exactly was done then, but they knew what was going on
11 inside of - - - of the establishments. So the idea they
12 literally never entered them - - - I mean, was there a
13 clear analysis of the nature of the enti - - - you know, in
14 the way that we have now on this record, no. But what we
15 have now is ample evidence of predominant sexual focus.
16 And the First Department actually upheld that there was
17 evidence in the record supporting predominant sexual focus.
18 It then went on, though, to find that outweighed, which was
19 the - - -

20 JUDGE FAHEY: But I need to - - - this is a
21 complicated area to write in, and I need to be clear on
22 what your position is. Are you saying that the - - - the
23 question is, it's not the standard of view that the City
24 applied to the - - - to the City showing that zoning was
25 justified by a government interest in regulating this

1 particular activity. You're saying that the 2005 case, I -
2 - - the way I read it, it seems to say that's intermediate
3 scrutiny; that's the law of the case. That's what applies
4 here.

5 MS. GUSTAFSON: Yes.

6 JUDGE FAHEY: So then the second question is,
7 it's not a standard of review question. It's not - - -
8 under your argument - - - not an intermediate scrutiny
9 question, but rather what's the burden of proof for the
10 City and have that met that burden of proof? So if - - -

11 MS. GUSTAFSON: They are - - -

12 JUDGE FAHEY: What does "fairly supports" mean,
13 in other words?

14 MS. GUSTAFSON: They're intertwined because we're
15 still - - - I - - - I think there's unfortunately no way to
16 get out of the fact that we're under the same intermediate
17 scrutiny framework. We're just at step three of that
18 framework. But yes - - -

19 JUDGE FAHEY: Okay.

20 MS. GUSTAFSON: It is a frame - - - the - - - the
21 courts below - - - it is a legal framework question,
22 though, and a standard of review question, though, because
23 of the lower courts did apply the wrong one, and stripped
24 all deference from the analysis. Again, the First
25 Department said in its opinion with respect to both the - -

1 - the bars and clubs and the book and video stores, there
2 is ev - - - we - - - we - - - there is evidence supporting
3 a legislative judgment of predominant sexual focus, but
4 then went - - - went on to find it outweighed.

5 If I may return - - -

6 JUDGE RIVERA: So is that their mistake - - -
7 your light has - - - has gone off, so if you could answer
8 this on reply. Is that their mistake that they went that
9 extra step and did some other some kind of factual finding;
10 imposed a burden that - - - that the Court of Appeals did
11 not impose in 2005?

12 MS. GUSTAFSON: If - - - if I may briefly?

13 JUDGE RIVERA: Well, that's a yes or no, but you
14 can answer it - - -

15 MS. GUSTAFSON: Yes, yes, that's the - - -

16 JUDGE RIVERA: - - - further on reply.

17 MS. GUSTAFSON: - - - the primary - - -

18 JUDGE RIVERA: Okay. Come back to it - - - come
19 back to it on your rebuttal. Thank you.

20 MS. DUBNO: Good afternoon, Your Honor. Erica
21 Dubno from Fahringer & Dubno for the respondent bookstores.
22 At the outset, this case shouldn't be here anyway. This
23 is, as a matter of fact, a factual dispute. It was
24 remanded for a factual determination.

25 JUDGE WILSON: But - - - but the result of the

1 factual determination is either that the regulations are
2 Constitutional or they're not Constitutional, right?

3 MS. DUBNO: That's correct, Your Honor, but the
4 act - - -

5 JUDGE WILSON: So this is a Constitutional
6 question that's up before the court, no?

7 MS. DUBNO: You - - - you can't manufacture a
8 Constitutional question by saying a fact will turn it - - -
9 the - - - the determination will turn on that. The reality
10 is, the Court of Appeals in 2005 already determined that
11 everything had been determined that needed to be done,
12 except for - - - as Judge Garcia pointed out - - - are the
13 establishments, the 60/40 establishments that exist today,
14 substantially similar to the ones that were studied back in
15 '94?

16 JUDGE WILSON: We can't tell you whether the - -
17 - the statute is Constitutional or not Constitutional until
18 that last issue is resolved, right?

19 MS. DUBNO: I - - - I beg to differ, and I - - -
20 I think that it's not, but - - -

21 JUDGE WILSON: Isn't the claim a Constitutional
22 claim?

23 MS. DUBNO: There - - - there's no question that
24 - - -

25 JUDGE WILSON: We're not here about the First

1 Amendment?

2 MS. DUBNO: We're certainly here about the First
3 Amendment, which is why I think - - -

4 JUDGE WILSON: We are? Okay.

5 MS. DUBNO: But at this point, it's important to
6 note that we're dealing with a burden of proof here, and
7 that we had a trial judge who went to the establishments.
8 He visited them. I was there. He personally inspected
9 them. We had a judge who heard witness testimony - - -

10 JUDGE WILSON: Constitutional questions can never
11 turn on issues of fact?

12 MS. DUBNO: I - - - I think that this court
13 doesn't have fact-finding power, and certainly they're
14 trying to transform this into a Constitutional issue, when
15 the real issue on remand is - - -

16 JUDGE STEIN: But we do have - - - but we do
17 have, at the very least, the power to determine whether the
18 correct standard of review and burden of proof and
19 application of, you know, whatever the analysis is. One of
20 the things that everybody seems to disagree about are these
21 four factors that the - - - the court referred to, and how
22 - - - how you take them into account. At the very least,
23 aren't those issues that are appropriate for us to look at?

24 MS. DUBNO: This case came up as an appeal as a
25 right, not a leave application. The basis was that it was

1 either a Constitutional question or it was a dissent by two
2 justices on an issue of law. If you look at the actual
3 dissent, it wasn't on an issue of law.

4 JUDGE RIVERA: Okay.

5 MS. DUBNO: They reviewed the facts.

6 JUDGE STEIN: But - - - but - - -

7 JUDGE RIVERA: So let's say we disagree with you,
8 now let's get to - - - to the merits of the - - -

9 MS. DUBNO: Absolutely. Getting to the merits,
10 Your Honor. Certainly, the burden of proof in this case
11 was absolutely met. There was no concern about whether or
12 not the four factors that the judge considered. The
13 Appellate Division didn't dictate that these were the only
14 factors that could be considered, but they gave some kind
15 of guidance. We needed some kind of benchmark, because
16 unfortunately, the remand from the court - - -

17 JUDGE FAHEY: They - - - they had - - - they had
18 four factors, and the dissent basically said that the very
19 little evidence standard referred to Alameda was met. So -
20 - - so we have a fairly supports language that's being
21 used, and then we have a very little evidence standard
22 that's being used. I'm having a hard time reconciling
23 those two concepts in - - - for the same case and the same
24 burden of proof. Do you see what my problem is?

25 MS. DUBNO: Certainly. I welcome that, Your

1 Honor. I mean, I think we all realize that we're here on a
2 stage three Alameda analysis, and that because the
3 Constitution and First Amendment free expression is
4 involved, we are dealing with heightened scrutiny there.

5 Relating to the amount of evidence, the quantum
6 of evidence that needed to be produced, we take the
7 position that it should be a preponderance of the evidence.
8 That fairly presents, certainly is one aspect of it, but
9 we're above rational basis at this point. Rational basis
10 was step one of Alameda, we met that. In fact, now we're
11 on stage three here, and their burden was higher and they
12 simply didn't meet it. These were factual determinations
13 that were made - - -

14 JUDGE FAHEY: But the phrases - - - the phrases
15 that we're stuck with here in the law of this case is - - -
16 is "fairly supports" and "very little evidence." Which
17 phrase would you apply to the standard of the third prong
18 of the Alameda test? Are you saying it's a very little
19 evidence question that the City has to meet? Or "fairly
20 supports" - - - the evidence has to fairly support the
21 proposition?

22 MS. DUBNO: I - - - I don't totally understand
23 the distinction between the two. I think there's an
24 ambiguity there. I understand what you're - - -

25 JUDGE FAHEY: I - - - I think there's an

1 ambiguity there too. That's one of the difficulties I have
2 with the case, because I - - - I'm saying to myself, well,
3 how much do they have to show to meet their burden?

4 MS. DUBNO: More than they did.

5 JUDGE FAHEY: Well, that's - - - that's a good
6 argument, but - - - but - - -

7 JUDGE RIVERA: Is - - - is part of the tension
8 amount versus quality, and aren't we left with quality as
9 being what this boils down to? Is the evidence good enough
10 at the end of the day?

11 MS. DUBNO: Certainly the evidence was disputed.
12 We - - - it's not true at all what the City's maintaining
13 that it was undisputed - - - undisputed - - - all the time.
14 We had a five-day trial on this. There were witnesses that
15 testified. They presented videos where they zoomed in on
16 certain things, saying this was adult material. But they
17 didn't videotape anything else in the store.

18 JUDGE FAHEY: Let - - - let's stick with the
19 burden, okay, because the details of it, we get lost in
20 those weeds. It's a waste of time. For now, if - - - if
21 the standard is very little evidence, they win, don't they?

22 MS. DUBNO: I - - - I still don't believe that
23 they meet the very little evidence, certainly if there's -
24 - -

25 JUDGE FAHEY: It's not much. Very little isn't

1 much, you know.

2 MS. DUBNO: If there's a debate between the two,
3 certainly "fairly presents", which is what was in the
4 remand, certainly would be above very little evidence.

5 JUDGE FAHEY: But by analogy, let's - - - let's
6 say you're relying then on "fairly supports". It - - -
7 it's stronger for your case. What would you compare it to
8 in New York jurisprudence as a standard of proof? You just
9 made reference to a preponderance of the evidence. Is that
10 what you're saying they have to meet here?

11 MS. DUBNO: Certainly, and there is authority
12 that at the stage three of Alameda, it's a preponderance of
13 the evidence. The rational basis, which is stage one - - -

14 JUDGE FAHEY: I saw one, I think, Seventh Circuit
15 case. That was the only case I saw that it actually said
16 that.

17 MS. DUBNO: That's correct, Your Honor. This is
18 an entirely new beast for everybody. It's not something
19 that's been litigated throughout the country, but the
20 Alameda standard is higher. It's free speech. It's
21 heightened scrutiny - - -

22 JUDGE RIVERA: Okay, but why is not under - - -
23 under Alameda and what we said in 2005, that you could have
24 a small amount of evidence, not a lot, but the - - - the
25 quality is what resonates and that it then fairly supports.

1 I'm not sure I'm understanding the equation that you're - -
2 - you're arguing for here.

3 MS. DUBNO: Well - - -

4 JUDGE RIVERA: Just a little bit of evidence is
5 never going to be enough? Isn't it about the quality of
6 that evidence?

7 MS. DUBNO: Cer - - -

8 JUDGE RIVERA: And I - - - I don't know that you
9 can say this is a little bit of evidence. But it - - -
10 let's even assume you're right about the quantity. Isn't
11 it still about the quality?

12 MS. DUBNO: Certainly, either if it's quality or
13 quantity, in this situation, what was presented was
14 insufficient as found by the trial judge, and the majority
15 in the Appellate Division. They have fact-finding powers
16 and they all reviewed the evidence - - -

17 JUDGE FAHEY: Yeah.

18 MS. DUBNO: - - - and found - - -

19 JUDGE FAHEY: But they - - - narrowing it down
20 then, we have the Appellate Division saying there are these
21 four factors and only one of those four factors supports
22 the City's position. The City says that factor, even if
23 you took that by itself, the booths, would be enough. Is -
24 - - is that - - - is that really what we're deciding here?

25 This court, today, what you're asking us to

1 decide. Are we narrowing it down to that? The issue of
2 whether or not the Appellate Division majority's
3 application of equally weighing those four factors,
4 signage, display - - - I think where they're both located,
5 and the - - - the question of the booths, as opposed to the
6 dissent which was saying the booths alone would be enough
7 to meet the very little evidence standard.

8 MS. DUBNO: Yeah, certainly, I mean, we - - - we
9 never advocated the - - - the four-prong test that was
10 promulgated - - -

11 JUDGE FAHEY: You're stuck with it now.

12 MS. DUBNO: - - - by the Appellate Division, but
13 which we're stuck with now, but even to point that out, at
14 this point, certainly, the Appellate Division and the trial
15 court weighed the issues. They made the determinations. I
16 don't think that there's anything unreasonable abo - - -
17 about it. The determination, those factors derived from
18 the DCP report that was promulgated in 1994, which was the
19 basis for the law in the first place, so it was a rational
20 thing. Whether or not, you know, having a few booths,
21 they've already said having a booth wouldn't be sufficient,
22 you know.

23 But the question is, are you going to
24 automatically say that an establishment that has one booth,
25 ten booths, twenty booths, whatever the number is,

1 automatically constitutes an adult establishment, then why
2 was this whole sixteen-year purpose, you know - - - they
3 could have just put that in the law in the first place. It
4 wasn't done, and the reason it wasn't done is because that
5 doesn't constitute an adult establishment. No study was
6 done - - -

7 JUDGE RIVERA: Is there - - - is there any
8 establishment that - - - that the only proof is the booths?

9 MS. DUBNO: I'm sorry?

10 JUDGE RIVERA: Any establishment in which it's
11 only about booths?

12 MS. DUBNO: I mean, I - - - I would say that of
13 the stores that were selected by this City at the trial,
14 nine out of ten of them did have booths.

15 JUDGE RIVERA: No, I understand. But only
16 booths? They had nothing else?

17 MS. DUBNO: No, I mean - - -

18 JUDGE RIVERA: It sounds like you're arguing if
19 there's only a couple of booths, then it - - - they're not
20 covered, and that's not the intent, and that's not what the
21 1994 report was referring to.

22 MS. DUBNO: Right, I mean, this - - - this - - -
23 the stores have other aspects to them. They have a variety
24 of merchandise there - - -

25 JUDGE RIVERA: Okay, thank you. Your light is

1 off. Thank you, counsel.

2 MS. DUBNO: Thank you very much, Your Honor.

3 MR. RUDOFISKY: Good afternoon, may it please the
4 court, Edward S. Rudofsky for the cabarets. Just to be
5 clear, we had a separate trial. So it was not just a five-
6 day trial, it was two complete trials, very extensive.

7 The fundamental flaws in the City's case were
8 twofold. Number one, it's failure to prove the degree of
9 transformation between the establishments studied in 1994,
10 the so-called "hundred percent" establishments, and the
11 establishments sought to be regulated in 2001, the so-
12 called 60/40 establishments. And sec - - - separately,
13 it's failure to prove "how speech would fair" under the
14 2001 amendment, since they're committed to take effect.

15 And Your Honor, I think the answer is, the City
16 never perceived that it had this burden, even after the
17 Appellate Division rule, and it introduced no evidence.
18 The evidence the City introduced were the testimony by
19 inspectors as to the interior of the clubs.

20 JUDGE STEIN: But I thought that's what the - - -
21 what this court said in 2005, show us that they - - - that
22 it was a sham; that they really weren't transformed and
23 that the - - - that the pre - - - predominant focus of - -
24 - of these facilities were not - - - was not sexually - - -

25 MR. RUDOFISKY: Yes, but it - - -

1 JUDGE STEIN: - - - sexual.

2 MR. RUDOFISKY: But the - - - in this field, if
3 you go back to Renton and look at everything through the
4 lens of the case law, it ultimately - - - although we're
5 not challenging the 1998 ruling, it's ultimately about
6 secondary effects. It's about signage; it's about crime;
7 it's about property values. It's not about - - -

8 JUDGE RIVERA: Now, I think in 2005, this court
9 made clear, you're not revisiting the second effects.

10 MR. RUDOFISKY: Yes, agreed.

11 JUDGE RIVERA: This is not what we're doing.

12 MR. RUDOFISKY: But the investigation, the
13 testimony that the City adduced, did not address any of the
14 elements that were studied in 1994. Why is that
15 significant? Because what was - - - what was 2005 about?
16 The City did not want to do another study, and said, we
17 want to rely - - - to Constitutionally justify the
18 regulation in 2001 - - - we want to rely on the 1994 study,
19 which was not about the interior of the clubs. It was
20 about secondary effects.

21 JUDGE RIVERA: What - - - was there not testimony
22 about the interior of the clubs?

23 MR. RUDOFISKY: In 19 - - -

24 JUDGE RIVERA: No, no, no, at this trial in the
25 remand.

1 MR. RUDOFISKY: Yes, of course, there was. That
2 was - - -

3 JUDGE RIVERA: Okay, so I'm not sure - - -

4 MR. RUDOFISKY: That was - - -

5 JUDGE RIVERA: - - - I'm understanding your
6 argument then.

7 MR. RUDOFISKY: It's a - - -

8 JUDGE RIVERA: If they've not - - - we - - - in
9 2005, the court - - - excuse me. In 2005, the court
10 remanded, so that they could indeed meet this third prong,
11 and said - - - and anticipate that they are going to
12 present evidence - - -

13 MR. RUDOFISKY: But - - -

14 JUDGE RIVERA: - - - and they did about the
15 interior; did they not?

16 MR. RUDOFISKY: But - - - yes, but the court in
17 2005 said - - - used the words "so transformed", which has
18 becomes - - - becomes pivotal. The Court of Appeals says -
19 - -

20 JUDGE RIVERA: Which is what the evidence has to
21 show but - - -

22 MR. RUDOFISKY: - - - show us how they were
23 transformed or not transformed from 1994. The problem is
24 you're comparing 1994 exterior - - -

25 JUDGE FAHEY: You're - - - you're saying there

1 should be a new study, but I don't - - - I don't think
2 that's the issue.

3 MR. RUDOFISKY: No, I'm not. I'm not saying - - -

4 JUDGE FAHEY: Well, what are you saying then?

5 MR. RUDOFISKY: The Court of - - - your - - - your
6 predecessors clearly said there didn't have to be a new
7 study. The City had a choice. It could either have a
8 study or not, or it could come forward with evidence that
9 would fairly support the proposition that the 2000 - - -
10 the 60/40s were - - - were the - - - the functional
11 equivalent for pur - - - for this regulatory purpose of the
12 19 - - - the clubs that were studied in 1994.

13 JUDGE WILSON: And you're saying they - - - they
14 couldn't do that - - -

15 MR. RUDOFISKY: So you have - - - you have a 1994
16 - - -

17 JUDGE WILSON: You're saying they couldn't that,
18 because there was no study in '94?

19 MR. RUDOFISKY: No, they could have done it, but
20 they chose not to.

21 JUDGE WILSON: What - - - what is the evidence
22 that - - - what is - - -

23 MR. RUDOFISKY: They didn't do it. They - - -

24 JUDGE WILSON: What is the evidence you would
25 have liked them to put in to meet their burden?

1 MR. RUDOFISKY: The - - - the - - - we put in
2 evidence and they could have put in evidence. We had a
3 sign - - - we had a sign study done. We had a - - - a
4 crime study done. We had a property value - - -

5 JUDGE RIVERA: But this court said you don't have
6 to do any studies.

7 MR. RUDOFISKY: Have to, doesn't mean you can't,
8 Judge. They had to come up with some methodology for - - -

9 JUDGE RIVERA: You - - - you seem to want to
10 impose the exact burden we said they don't have.

11 MR. RUDOFISKY: We did - - - we don't want to
12 impose any burden. The government is seeking to regulate
13 free expression. It's got to prove at the end of the day -
14 - -

15 JUDGE GARCIA: But counsel - - -

16 JUDGE STEIN: I - - -

17 JUDGE GARCIA: I - - - I'm sorry. I think your
18 argument here is they were - - - we said they could rely on
19 the old study. And then they had to show that these
20 characteristics of these businesses still retained the
21 characteristics of the businesses that the City sought to
22 address in that old - - - in the - - - in the original law.
23 But I think your next part, which I'm having trouble
24 following is, they had to use exactly the same criteria
25 used, outside versus inside, of those businesses that was

1 used in the '94 study, and I don't think that's what we
2 said in 2005.

3 MR. RUDOFISKY: I - - - I agree that the court did
4 not - - - the court did not tell them what they had to do.

5 JUDGE GARCIA: But we did tell them.

6 MR. RUDOFISKY: The court told them what they
7 didn't - - -

8 JUDGE GARCIA: We told them that they had to show
9 that the predominant ongoing focus was on sexually explicit
10 material, and it didn't say inside - - -

11 MR. RUDOFISKY: And I - - -

12 JUDGE GARCIA: - - - the bookstore or outside the
13 bookstore.

14 MR. RUDOFISKY: I am - - - I am merely suggesting
15 to Your Honors that when you read the 2005 opinion, and you
16 read the case law in this area, the question of - - - the
17 question of what focus are we talking about - - - where the
18 whole area is concerned with the effect of the business on
19 the community. It is not concerned with the - - - what
20 goes on inside the club.

21 JUDGE GARCIA: But what goes on inside certainly
22 has an effect - - -

23 MR. RUDOFISKY: But that - - -

24 JUDGE GARCIA: - - - because it goes to traffic -
25 - -

1 MR. RUDOFISKY: And that - - -

2 JUDGE GARCIA: - - - it goes to the presence of
3 the business in the neighborhood.

4 MR. RUDOFISKY: But I couldn't agree more, Judge.
5 The record is barren. They never connected those dots.

6 JUDGE GARCIA: No, but they connected - - - I
7 think the disconnect we're having is they connected those
8 dots originally, so all we said to take advantage of the
9 connection you originally made, is that you have to show
10 this predominance remains.

11 MR. RUDOFISKY: Okay, and - - - and I'm suggesting
12 - - -

13 JUDGE FAHEY: But your compliance, in essence,
14 was a sham, so we're back once again to the burden - - -

15 MR. RUDOFISKY: I'm suggesting that - - -

16 JUDGE FAHEY: Let me finish. We're back once
17 again to that burden of proof problem.

18 MR. RUDOFISKY: A hundred percent, Judge. And I'm
19 suggesting that they - - - a close reading of this record
20 and - - - and following the sequence of what went on, they
21 didn't do that. They proved something else.

22 But let me turn if I may - - -

23 JUDGE GARCIA: What did they prove?

24 JUDGE RIVERA: I'm sorry - - - what's - - - yes.
25 What's the something else they proved?

1 MR. RUDOFISKY: The so - - - the something else is
2 that the second part of the Constitutional test, as we've
3 addressed at some length in our brief, is how speech will
4 fare. In 1995, the City - - - excuse me, 1998 - - - the
5 City represented to this court with respect to the earlier
6 version of the statute, the 1995 statute, that the 60/40
7 form of doing business, the - - - the substantial
8 proportion component of the definition, would increase and
9 expand the availability of protected speech, and that
10 therefore the 19 - - - and we've - - - we've cited chapter
11 and verse in our brief.

12 The 1995 rule - - - rules were - - - were
13 Constitutional because the substantial proportion test was
14 written into the law and that would permit the less intense
15 use, under forty-percent use, in a dispersal plan, which
16 this was. It was a disperse - - - to zone it - - - to
17 disperse the concentrations of adult uses into - - - out
18 into the boroughs, that they adopted a dispersal plan and
19 they said that the less intense use would be available
20 throughout the City and that would satisfy the
21 Constitutional concerns.

22 They then turned around in 2001, and they took
23 forty percent down to zero for the clubs, eliminating that
24 expansion that they addressed in 1995, eliminating that
25 factor. They - - - with respect to the book stores, they

1 severely restricted without eliminating - - - severely
2 restricted - - -

3 JUDGE RIVERA: So I - - - I'm sorry. What - - -
4 what is it you say that they proved on the remand? I - - -

5 MR. RUDOFISKY: They didn't - - -

6 JUDGE RIVERA: I - - - I'm losing the thread.

7 MR. RUDOFISKY: They didn't address on the remand
8 how speech would fare, which is part of the test that
9 Justice Kennedy articulated in Alameda Books. The 2005
10 decision makes it very clear that Justice Kennedy's
11 decision is the - - - is the controlling decision.

12 JUDGE RIVERA: Well, hasn't - - - to the extent
13 there's agreement with the plurality.

14 Okay, counselor, your light is off. Thank you so
15 much.

16 MR. RUDOFISKY: Thank you.

17 MS. GUSTAFSON: There are three major points I'd
18 like to hit. First I will return, Judge Rivera, to the
19 question that you asked me at the end of - - - of my
20 opening. I want to go back to also talk about the burden a
21 bit, and how very little evidence fits in with fairly
22 support, and then this issue of the interiors of the clubs
23 and the Kennedy decision, I will deal with at the end.

24 Yes, Your Honor, what the - - - the majority got
25 wrong was that it went too far. The majority found - - -

1 and it wasn't just based on single peep booths - - - the
2 majority found, based on the City's evidence, which showed
3 that the clubs have between seven and sixteen peep booths,
4 that - - - and very graphically showed they were promoting
5 adult entertainment. It showed that there was interior and
6 exterior signage, large signage, promoting those booths,
7 both inside and outside. It showed the layouts. In many
8 of the stores you had to walk through - - -

9 JUDGE STEIN: But ultimately the question for the
10 - - - for the trial court and then the Appellate Division
11 to determine is whether the City met its burden, whatever
12 that burden was, of showing that these establishments
13 maintained their preno - - - predominant focus on sexually
14 explicit activities, correct?

15 MS. GUSTAFSON: Yes.

16 JUDGE STEIN: Okay. So doesn't it boil down to
17 what is that burden? And - - - right?

18 MS. GUSTAFSON: The bur - - - the burden, it's
19 very - - - it's very little evidence. But as it's - - -
20 the evidence, nonetheless, must be - - - it has to have a
21 qual - - - a qualitative value, it has to relati - - - it
22 has to be relevant, it has to be credible - - -

23 JUDGE FAHEY: Your - - - your - - -

24 MS. GUSTAFSON: - - - and it has to fairly
25 support - - -

1 JUDGE FAHEY: Slow down. Both your parties are
2 placed in an impossible position, because the court really
3 here is confronted with two different phrases to
4 characterize the burden, right? One says, "fairly
5 supports" and the other one says, "very little evidence".
6 And that's - - - that's the territory we have to navigate.

7 MS. GUSTAFSON: I - - - my position, Your Honor,
8 is that the "fairly support" is a fuller - - - further
9 development of the "very little evidence". It's explaining
10 what type of evidence you have to have. I mean, it has to
11 be evidence that's relevant. It has to be credible. It
12 has to be of a sufficient quality that the court is
13 satisfied that the City acted reasonably. So I believe
14 there - - -

15 JUDGE STEIN: Well, but isn't that - - -

16 MS. GUSTAFSON: - - - is a connection.

17 JUDGE STEIN: Isn't - - - isn't it true, then,
18 that those courts found that it wasn't satisfied with that
19 proof.

20 MS. GUSTAFSON: They applied the wrong legal
21 framework, Your Honor. Both eliminated deference. They
22 answered - - - answered the wrong question. The Supreme
23 Court said that the deferential standard of - - -

24 JUDGE RIVERA: But - - - but your point, that as
25 a matter of law, you met the burden?

1 MR. BLANCH: Yes.

2 JUDGE RIVERA: A matter of law, and that whatever
3 factors the AD applied, whether they're appropriate or not,
4 is - - - is almost irrelevant - - -

5 MS. GUSTAFSON: Yes.

6 JUDGE RIVERA: - - - because there's - - - with
7 those factors, without those factors, as a matter of law,
8 you've met the burden.

9 MS. GUSTAFSON: That - - - that is exactly
10 correct, Your Honor. Because the background facts about
11 the nature of the establishment are not disputed, this
12 court can decide this as a matter of law, and it can do it
13 in two ways: One, just taking the first step of the
14 majority division's analysis and two, based on the
15 undisputed evidence in the record.

16 Now if I may turn to this issue of the
17 interiority of the clubs very briefly. As this court said,
18 there were - - - this court was clear in 2005, the City did
19 not have to come forward with additional evidence about a
20 secondary effect. Secondly, I think this is a bit of a red
21 herring. The City has been functioning throughout these
22 trials with some caveats, under the assumption that the
23 former establishments were a hundred percent, that is, that
24 they were entirely devoted to adult book or videos and
25 materials, or to topless dancing. And - - - and the test

1 that was set by this court was to show that the current
2 establishments, nonetheless, may maintain a predominately
3 sexual focus, fairly support that position, and the
4 evidence the City adduced was extensive. It was different
5 than what was before this court, and the City amply met
6 that burden.

7 JUDGE RIVERA: Thank you.

8 MS. GUSTAFSON: Thank you very much, Your Honor.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of For the People Theatres of N.Y., Inc. v. City of New York, et al., No. 59 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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