No. 09-0481

In the Supreme Court of Texas

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Petitioners,

v.

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC.,
Respondents.

On Petition for Review from the
Third Court of Appeals at Austin

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	This is a suit for declaratory and injunctive relief in which Plaintiffs assert that Texas Business and Commerce Code Chapter 102, Subchapter B violates the U.S. and Texas Constitutions. 1.CR.2.[1]
Trial Court:	The Honorable Scott H. Jenkins, Presiding Judge for the 345th Judicial District, Travis County.
Trial Court Disposition:	The court held the challenged provision unconstitutional under the First Amendment of the U.S. Constitution, granted declaratory and injunctive relief, 2.CR.384; App. A, and issued findings of fact and conclusions of law, SCR.57, 89; App. C, D. The court also awarded attorneys' fees. 2.CR.421; App. B.
Parties in Court of Appeals:	Appellants—Susan Combs, Comptroller of Public Accounts of the State of Texas; Greg Abbott, Attorney General of the State of Texas. Appellees—Texas Entertainment Association, Inc.; Karpod, Inc.
Court of Appeals:	Third Court of Appeals at Austin, Texas.
Court of Appeals Disposition:	The court of appeals affirmed the trial court by a 2-1 vote. *Combs v. Tex. Entm't Ass'n*, 287 S.W.3d 852 (Tex. App.—Austin 2009, pet. filed); App. E. But the two justices who voted to affirm could not agree on a common rationale. Justice Henson issued the principal opinion below, while Chief Justice Jones concurred in a separate opinion. Justice Puryear dissented.

1. Clerk's record cites will be designated __.CR.__, with the first number indicating the volume, and the second indicating the page number. Reporter's record cites will similarly be designated __.RR.__. Cites to the supplemental clerk's record will be designated SCR.__.

The fee was originally enacted as Chapter 47 of the Texas Business and Commerce Code. The Legislature subsequently moved the provisions to Chapter 102.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal from a final judgment because the justices on the court of appeals disagree on a question of law that is material to the decision, TEX. GOV'T CODE § 22.001(a)(1), the case involves the validity of a statute, *id.* § 22.001(a)(3), and state revenue, *id.* § 22.001(a)(4), and the court of appeals committed an error of great importance to the jurisprudence of the State, *id.* § 22.001(a)(6).

ISSUE PRESENTED

In 2007, the Legislature enacted a $5 per patron fee on any sexually oriented business that allows the consumption of alcohol on its premises while offering live nude entertainment. Notably, any business can avoid the fee simply by either prohibiting alcohol or by offering erotic entertainment without full live nudity.

Is the Texas fee permissible under the First Amendment, given that the U.S. Supreme Court has repeatedly upheld laws categorically barring adult businesses from serving alcohol, as well as bans on public nudity—whereas Texas law merely imposes a per patron fee on businesses that combine alcohol consumption with live nude entertainment?

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PETITIONERS' BRIEF ON THE MERITS

Alcohol and live nude dancing are a combustible combination. It is well documented that adult businesses that combine alcohol with live nudity cause an increased incidence of rape, sexual assault, and other crimes—as the U.S. Supreme Court has repeatedly concluded, and the district court found below. The Founding Fathers could not have imagined that the First Amendment would be used to prevent policymakers from taking steps to combat rape and sexual assault—such as forbidding or discouraging live nude dancing establishments from allowing alcohol onto their premises, by imposing a fine or fee on such activities.

The regulation of adult entertainment is a unique and distinct area of First Amendment law. The U.S. Supreme Court has repeatedly held that live nude dancing receives only minimal protection under the First Amendment—and that when it comes to regulating such

activities, courts should favor state and local experimentation and defer to the considered judgment of policymakers—in stark contrast to other areas of First Amendment law.

In fact, the U.S. Supreme Court has repeatedly endorsed restrictions far more severe than the Texas fee—restrictions that it almost certainly would have struck down if applied to core political speech. States may categorically ban adult businesses from permitting the *consumption of alcohol* on their premises. States may also ban adult businesses from offering erotic entertainment in the form of *full live nudity*, by requiring their dancers to wear minimal clothing. In addition, States may *regulate more modestly*—short of a categorical ban—by imposing more limited regulations, such as zoning laws, consistent with the Court's repeated endorsement of state and local experimentation in the regulation of adult businesses.

The lesson from these rulings is simple. States may force adult businesses to choose between two options: either forbid the consumption of alcohol on your premises, or forbid full nudity by your dancers (States may even require both).

A fortiori, the Texas fee must likewise be constitutional. If States may force adult businesses to choose between two options, then surely adding a third option—and thus allowing *even more speech*—is even better. If States may ban alcohol and public nudity outright—and may enforce that ban with a fine—there is no practical, principled, or logical reason to treat the Texas fee any differently.

As both common sense and the record of this case confirm, when government imposes a fee on an activity, people will engage in less of that activity, by identifying and pursuing

substitutes. Customers deterred by the Texas fee may patronize adult businesses that do not allow alcohol—or consume alcohol while viewing erotic dancing without full live nudity.

It was entirely reasonable for policymakers to conclude that this substitution effect would help combat rape and sexual assault. After all, from the perspective of the adult business, the message is simple: Remove the alcohol—and avoid the fee.

The court of appeals thus contradicted nearly four decades of U.S. Supreme Court precedent when it struck down the Texas fee by a 2-1 vote. Tellingly, the two justices who did so could not agree on their reasoning. The principal opinion found the fee inherently flawed—a conclusion squarely rejected by a majority of the court below. The concurring opinion instead struck down the fee on a narrower ground—concluding that legislators failed to clearly state that they actually intended to combat rape. But that is, if anything, an even weaker basis for striking the fee. The legislators' intentions were amply clear. But more fundamentally, the First Amendment is about protecting speech—not requiring paperwork. Either the fee is valid, or it is not. What matters is the objective governmental purpose of the fee. Justice Puryear's dissent was right: If a ban is constitutional, then so must be the fee.

This case is not remotely about freedom of speech. It is about alcohol—and about preventing rape by discouraging adult businesses from combining alcohol with live nudity.

The judgment below is not just wrong—it is unprecedented. It contradicts nearly 40 years of U.S. Supreme Court precedent and First Amendment jurisprudence. The Court should grant the petition for review, reverse the judgment below, and uphold the Texas fee.

STATEMENT OF FACTS

In 2007, an overwhelming majority of legislators enacted a $5 per patron fee on adult businesses that combine alcohol consumption and live nude entertainment. TEX. BUS. & COM. CODE §§ 102.051-.056; App.F. Plaintiffs contend that the fee violates their freedom of speech under the First Amendment to the U.S. Constitution. 1.CR.6-7.

Texas law directs the Comptroller of Public Accounts to collect a $5 per patron fee from "sexually oriented businesses," TEX. BUS. & COM. CODE § 102.052(a), defined as any nightclub, bar, restaurant, or similar commercial enterprise that

> (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and
>
> (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 102.051(2).

The fee thus applies only to "sexually oriented businesses" that permit alcohol consumption while offering "live," "nude" entertainment. Texas law defines "nude" to mean "entirely unclothed" or "clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." *Id.* § 102.051(1).

The fee combats rape in two distinct ways. Most importantly, it discourages a combination of adult activities—alcohol consumption and live nude entertainment—that has been closely and repeatedly linked to rape, sexual assault, and other crimes in numerous past

U.S. Supreme Court decisions. The district court below likewise found such a link, noting that "Defendants presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund." SCR.62. In addition, proceeds from any business that continues to combine alcohol with live nudity shall be substantially spent on programs to combat sexual assault and provide services to rape victims. SCR.60-61. A remaining portion of the proceeds is also earmarked for indigent health care. SCR.60.

Plaintiffs, a "sexually oriented business" (Karpod, Inc.), and an association of such businesses (Texas Entertainment Association, Inc.), filed suit against the Comptroller and the Attorney General to challenge the validity of the fee. 1.CR.2. They claimed that the fee violates the First Amendment as well as various State constitutional provisions, 1.CR.4-8, and sought to enjoin enforcement of the statute accordingly. 1.CR.9-10.

The trial court declared that the provision violated the First Amendment, permanently enjoined its enforcement, 2.CR.384-86, and awarded attorneys' fees under the UDJA, 2.CR.421-22. The State timely appealed. 2.CR.403; SCR.24.

Plaintiffs sought to bar collection of the fee pending appeal. SCR.3. But both this Court and the courts below denied the request. SCR.22.

In a sharply divided opinion, the court of appeals affirmed. *Combs v. Tex. Entm't Ass'n*, 287 S.W.3d 852, 866 (Tex. App.—Austin 2009, pet. filed). But the two justices who voted to affirm could not agree on a common rationale for doing so. The principal opinion

of Justice Henson struck down the fee as inherently unconstitutional. *Id.* at 864. The concurring opinion of Chief Justice Jones disagreed, indicating that the fee could be valid, if the Legislature clearly identified the purpose of the fee. *Id.* at 866-70. But he concluded that the legislative history was inadequate in this regard. *Id.* at 870.

Justice Puryear dissented. *Id.* at 870-76. He rejected the First Amendment claim in its entirety and held that the fee was validly designed to combat sexual assault. *Id.* at 876.[2]

STANDARD OF REVIEW

The constitutionality of a state statute is a question of law that the Court reviews *de novo*. *See, e.g., Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001).

SUMMARY OF ARGUMENT

Over the past four decades, in case after case, the U.S. Supreme Court has upheld numerous laws regulating adult businesses—restrictions it almost certainly would have struck down if applied to political or artistic expression. The reason is simple: When it comes to the First Amendment, adult entertainment raises fundamentally different and unique concerns warranting government regulation—concerns not remotely presented by political or artistic expression. The Court has repeatedly observed that a wide variety of crimes and social ills

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2. As noted, Plaintiffs also challenged the fee under Article VII, § 3 and Article VIII, § 1 of the Texas Constitution, but neither the trial court nor the court of appeals addressed those claims. 2.CR.386; *Combs*, 287 S.W.3d at 856 n.2 & 864. Accordingly, the State does not present those issues for this Court's review. As for the viability of Plaintiffs' claims under the Tax Code and the UDJA, the State no longer seeks review of those issues. Under *Heinrich v. City of El Paso*, 284 S.W.3d 366, 372 (Tex. 2009), the UDJA is a proper vehicle to obtain prospective injunctive relief on Plaintiffs' constitutional claims against state officials acting in their official capacity. Plaintiffs, however, cannot seek a tax refund via their UDJA claim; they must pursue their refund claims under the Chapter 112 of the Texas Tax Code; App. G.

have been closely associated with live nude dancing, including rape and sexual assault. Not surprisingly, then, the Court has also repeatedly held that live nudity is entitled to only minimal protection under the First Amendment—and that policymakers are therefore entitled to broad judicial deference and the opportunity to experiment in regulating such activities.

Based on these unique concerns, the Court has allowed state and local policymakers to ban adult businesses from allowing alcohol consumption on their premises. The Court has also affirmed bans on live nude dancing and allowed certain clothing requirements for dancers. In addition, the Court has upheld more modest regulations, including zoning laws, designed to combat the harms linked with adult businesses.

If a ban would be valid—and a fine could be imposed to enforce that ban—there is no practical, principled, or logical reason to treat the Texas fee any differently. Like the bans upheld by the U.S. Supreme Court, the purpose of the Texas fee is not to suppress speech, but to discourage businesses from combining alcohol and live nudity, and thereby reduce the incidence of rape and sexual assault that too frequently results from such activities. Customers deterred by either a fine or a fee may patronize adult businesses that do not allow alcohol, or consume alcohol while viewing erotic dancing without full live nudity.

At bottom, the Texas fee regulates alcohol, not speech. The message of Texas law is simple: Remove the alcohol, and avoid the fee. In light of established precedent upholding far more severe restrictions on adult businesses—and repeated admonitions that lower courts give policymakers room to experiment with new solutions—the Texas fee must be upheld.

The court of appeals nevertheless invalidated the Texas fee by a 2-1 vote. Tellingly, the two justices in the majority could not agree on a common rationale.

The principal opinion launched a categorical attack on any effort by a state or local government to regulate adult businesses that serve alcohol by imposing this kind of fee. In doing so, the opinion conspicuously failed to even mention—let alone distinguish—relevant U.S. Supreme Court precedent upholding categorical bans on adult businesses from serving alcohol. If the principal opinion is right, then nearly four decades of U.S. Supreme Court precedent must be wrong.

Not surprisingly, a *majority* of the court below *rejected* that analysis. The concurring opinion struck down the Texas fee on a more limited rationale—one that, if anything, is even less plausible than the principal opinion. The concurring opinion did not hold that States may never impose a fee on adult businesses that combine alcohol with live nude dancing. It simply complained that the bill sponsor failed to clearly state her intent to enact the fee in order to combat rape. But the record is amply clear. And more fundamentally, the First Amendment is about protecting speech, not requiring paperwork. The test is objective governmental interest—not actual or subjective legislative intent. That objective interest—combating rape and sexual assault—is abundantly clear on the face of the statute, and reinforced by the legislative record. And in any event, even Plaintiffs do not claim that legislators expressed any intent (let alone predominate intent) to suppress expression.

Accordingly, the Court should reverse the judgment below and uphold the Texas fee.

ARGUMENT

I. THE TEXAS FEE DOES NOT VIOLATE THE FIRST AMENDMENT—AS U.S. SUPREME COURT PRECEDENT CONFIRMS, STATES MAY STRICTLY REGULATE LIVE NUDE DANCING, ESPECIALLY WHEN COMBINED WITH THE CONSUMPTION OF ALCOHOL.

A. The Regulation of Adult Businesses Is a Unique Area of First Amendment Law—Live Nude Dancing Receives Only Minimal Constitutional Protection, and Has Been Closely Linked with Rape and Other Crimes.

Both Plaintiffs and the principal opinion below commit a fatal error when they rely on First Amendment case law outside of the adult business context in order to support their claims. After all, the regulation of adult businesses is a unique and distinct area of First Amendment law. In fact, the U.S. Supreme Court has upheld a variety of categorical bans and other severe restrictions in the adult business context—laws that would almost certainly be struck down if applied to political speech or other core First Amendment activities.

The Court has treated regulations of adult businesses differently from laws targeting traditional speech for at least two reasons. First, nude dancing is protected by the First Amendment—but only barely. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) ("the customary 'barroom' type of nude dancing . . . involve[s] only the barest minimum of protected expression"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality) ("nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment," and "only marginally so"); *id.* at 584 (Souter, J., concurring) ("'society's interest in protecting [erotic] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate'") (quoting *Young v. Am. Mini Theatres, Inc.*,

427 U.S. 50, 70 (1976) (plurality)); *Barnes*, 501 U.S. at 586 n.3 (Souter, J., concurring) ("the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality) ("nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection").

Second, the U.S. Supreme Court has repeatedly identified a link between live nude dancing (both with and without alcohol) and a variety of negative secondary effects—including rape, sexual assault, and a variety of other crimes and social ills:

- In *California v. LaRue*, 409 U.S. 109 (1972), the Court noted that, "in licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the [California Department of Alcoholic Beverage Control] had occurred." *Id.* at 111. "Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises." *Id.*

- In *City of Newport v. Iacobucci*, 479 U.S. 92 (1986), the Court acknowledged the city's determination that "nude dancing in establishments serving liquor was 'injurious to the citizens' of the city. It found the ordinance [banning nude dancing at such establishments] necessary to a range of purposes, including 'preventing blight and the deterioration of the City's neighborhoods' and 'decreasing the incidence of crime, disorderly conduct and juvenile delinquency.'" *Id.* at 96-97.

- And in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court upheld a ban on public nudity as applied to live nude dancing, with or without alcohol. In his controlling concurring opinion, Justice Souter credited the State's "assertion that . . . nude dancing . . . 'encourages prostitution, increases sexual assaults, and attracts other criminal activity.'" *Id.* at 582. He expressly acknowledged "the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations." *Id.* at 586.

Accordingly, the U.S. Supreme Court has treated the regulation of adult businesses very differently from other laws that infringe on political or artistic expression.

Plaintiffs and the principal opinion thus commit a fatal error when they ground their legal conclusions almost exclusively in U.S. Supreme Court case law having nothing to do with the regulation of adult businesses. Indeed, the Court has expressly warned that "we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *LaRue*, 409 U.S. at 118.

B. Courts Apply a Uniquely Deferential Standard of Review To Encourage Policymakers To Experiment in Regulating Adult Businesses.

All legislation is presumed constitutional. And if this were an ordinary First Amendment case, there would be little more to say than that. But an even stronger presumption of validity—and a particularly deferential standard of review—attaches to regulations of adult businesses.

For nearly four decades, the U.S. Supreme Court has repeatedly instructed that, when it comes to adult businesses, courts should defer to state and local governments and resolve close cases in favor of policy experimentation. In *Young*, a plurality of the Court observed that policymakers "must be allowed a reasonable opportunity to experiment with solutions"

to redress the negative effects of adult businesses. 427 U.S. at 71 (plurality). The Court has consistently reaffirmed that same observation in later rulings. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (same); *Pap's A.M.*, 529 U.S. at 301 (plurality) (same); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality) (same); *id.* at 451 (Kennedy, J., concurring) (same). *See also Combs*, 287 S.W.3d at 875 (Puryear, J., dissenting) (same); *id.* at 871 ("there may be more than one method for government to choose to address serious problems associated with sexually oriented businesses").

In sum, only the most compelling demonstration of invalidity can overcome the strong presumption of constitutionality and measure of deference that the U.S. Supreme Court has attached to state and local regulations of adult businesses. Accordingly, any and all doubt in this case must be construed in favor of upholding the Texas fee.

C. Over the Past Four Decades, the U.S. Supreme Court Has Repeatedly Endorsed Restrictions Far More Severe Than the Texas Fee.

Plaintiffs cannot overcome the strong presumption of constitutionality and deference to policymakers that attach to any regulation of adult businesses. In fact, the U.S. Supreme Court has upheld a variety of restrictions on adult businesses far more severe than the Texas fee—as demonstrated by nearly a dozen separate rulings issued over the past four decades.

1. States may categorically ban adult businesses from selling alcohol.

To begin with, the Court has consistently affirmed the authority of state and local policymakers to categorically ban adult businesses from permitting the consumption of

alcohol on their premises. The Court has done so in case after case—and in more recent years, by a unanimous vote:

- In *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld a California ban on alcohol in various adult entertainment establishments by a 6-3 vote. The Court observed that "California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* at 118. In upholding the ban, the Court deferred to policymakers' concerns that "[p]rostitution occurred in and around such licensed premises, and involved some of the female dancers," and that "[i]ndecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises." *Id.* at 111. Justices Douglas, Brennan, and Marshall dissented.

- In *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), the Court reaffirmed its previous ruling in *LaRue*, noting that "regulations prohibiting the sale of liquor by the drink on premises where there [a]re nude but not necessarily obscene performances [a]re facially constitutional." *Id.* at 515.

- In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court again reaffirmed *LaRue*, stating (in *dicta*) that "a State could . . . ban [nude] dancing as a part of its liquor license program." *Id.* at 932-33. (The case arose at the preliminary injunction stage and thus did not constitute a ruling on the merits.)

- In *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), the Court held that States may ban alcohol wherever erotic dancers may display "any portion" of their "genitals" or the female "breast below the top of the areola." *Id.* at 714 n.1. In doing so, the Court noted that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 717. And it acknowledged the Legislature's findings that "common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Id.* at 718 (quotations omitted).

- In *City of Newport v. Iacobucci*, 479 U.S. 92 (1986), the Court held that local governments have the same powers as States to ban "nude or nearly nude dancing in local establishments licensed to sell liquor." *Id.* at 92-93. The Court credited local concerns that "the ordinance was necessary to a range of purposes, including 'preventing blight and the deterioration of the City's

neighborhoods' and 'decreasing the incidence of crime, disorderly conduct and juvenile delinquency,'" and held that "the interest in maintaining order outweighs the interest in free expression by dancing nude." *Id.* at 96-97.

- And in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), all nine justices agreed that States may ban adult businesses from selling alcohol. Writing for the majority, Justice Stevens noted the general proposition that "greater powers include lesser ones." *Id.* at 511. The majority also reaffirmed the holding in *LaRue* that "the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in premises licensed to serve alcoholic beverages." *Id.* at 515. It noted that "the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *Id.* Likewise, in her concurring opinion, Justice O'Connor reaffirmed *LaRue* and later rulings upholding "the regulation of nude or nearly nude dancing in establishments licensed to serve alcohol." *Id.* at 533.

44 Liquormart is not the only instance in which the Court has unanimously upheld the authority of States to ban alcohol in adult establishments. In *Barnes*, where the Court upheld a ban on live nudity in adult establishments by a 5-4 vote, even the dissenters all agreed that States can ban adult businesses from serving alcohol. *See* 501 U.S. at 594 (White, J., dissenting) (suggesting that public nudity law upheld by majority would be constitutional if limited to establishments serving alcohol).

2. States may ban public nudity—including nude dancing specifically.

If the cases concerning alcohol sales were the only relevant rulings from the U.S. Supreme Court, they would be more than enough to support the Texas fee. But there is more. Separate and apart from their powers to regulate the sale of alcohol, States may also

categorically ban adult businesses from offering erotic entertainment in the form of full live nudity, by requiring dancers to wear minimal clothing while engaging in such activities.

In *Barnes*, the Court upheld a ban on live nudity by a 5-4 vote. The plurality observed that any expressive conduct involves both "'speech' and 'nonspeech' elements," and that government may regulate in order to serve an interest unrelated to the expressive elements of the activity. 501 U.S. at 567. It noted that a ban on nudity does not preclude all erotic expression, but only live nude entertainment: "Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Id.* at 571. Justice Scalia concurred; he would have ruled even more broadly for the government because the law "was not subject to First Amendment scrutiny at all." *Id.* at 572.

Justice Souter likewise concurred, in an opinion recognized as the controlling opinion in *Barnes*. *See, e.g., J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998). He observed that "society's interest in protecting [erotic] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." 501 U.S. at 584 (quotations omitted). He voted to uphold the ban, reasoning that, "[b]ecause the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, . . . the interest is unrelated to the suppression of free expression." *Id.* at 586.

Nine years later, in *Pap's A.M.*, the Court again upheld a ban on live nudity—this time by a 6-3 vote, reflecting a change in the composition of the Court. Justice O'Connor wrote a plurality opinion joined by the Chief Justice and Justices Kennedy and Breyer. That opinion is controlling in *Pap's A.M.*, because Justices Scalia and Thomas concurred in a separate opinion that ruled even more categorically for the government. The plurality observed that "nude dancing . . . falls only within the outer ambit of the First Amendment's protection." 529 U.S. at 289. It upheld the ban on the ground that, "[i]n trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood," *id.* at 293, while "leav[ing] ample capacity to convey the dancer's erotic message" through other means, such as dancing with minimal clothing, *id.* at 301.

* * *

The principal opinion below attempted to distinguish *Barnes* and *Pap's A.M.* on the ground that the Court upheld only a general ban on public nudity, as applied to live nude dancing—rather than a specific ban on live nude dancing. 287 S.W.3d at 859, 861.

But that is a distinction without a difference. The law "as applied" in those cases is functionally identical to a law specifically targeting nude dancing. The governmental interest is the same in both contexts. And so is the Court's controlling rationale: The law is valid because its purpose is to suppress negative secondary effects, not speech.

There is no reason to believe that *Barnes* and *Pap's A.M.* would have come out any differently had the cases instead involved a specific ban on live nude dancing. Quite the contrary, in fact: In *Pap's A.M.*, the dissenters were careful to point out that the drafters of the ban on nudity intended to target *only* live nude adult entertainment—not public nudity generally. One city council member even observed that "[w]e're not talking about nudity. We're not talking about the theater or art . . . . We're talking about what is indecent and immoral. . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." 529 U.S. at 329 (Stevens, J., dissenting). In upholding the ban, the Court responded specifically to the dissent, noting that "[e]ven if the city thought that nude dancing . . . constituted a particularly problematic instance of public nudity, *the regulation is still properly evaluated as a content-neutral restriction* because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing." *Id.* at 296 (plurality) (emphasis added).

Likewise, in *Barnes*, Justice Souter's controlling opinion explained that, "[b]ecause the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, . . . the interest is unrelated to the suppression of free expression." 501 U.S. at 586. Moreover, in his dissenting opinion, Justice White specifically distinguished between banning public nudity in public parks, beaches, and other public places, versus adult establishments—and noted that the case involved only a First Amendment claim about the latter, and not the former. *See id.* at 591. The Court rejected the claim nevertheless.

Not surprisingly, then, other courts have likewise rejected attempts to distinguish *Barnes* and *Pap's A.M.* in this manner. In *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998), the Eighth Circuit observed that "Justice Souter's formulation in *Barnes* was not predicated on the general nature of the Indiana statute. He found that the general prohibition on nudity was constitutionally sound as it applied to the specific venue of adult entertainment establishments." *Id.* at 904. And in *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003), the Eleventh Circuit upheld an ordinance that "prohibits nudity only in adult entertainment establishments" and "not . . . anywhere else in Cocoa Beach." *Id.* at 1306.

* * *

Whereas the principal opinion tried to distinguish *Barnes* and *Pap's A.M.* on the ground that those laws were broader than Texas law, Plaintiffs tried to claim that those laws were *narrower* than Texas law.

Specifically, Plaintiffs point out that *Barnes* and *Pap's A.M.* upheld nudity bans that employed a narrower definition of nudity than the broader definition in Texas law. In *Barnes* and *Pap's A.M.*, dancers could avoid being considered "nude" by wearing nothing more than "'pasties' and 'G-strings.'" *Barnes*, 501 U.S. at 563 (plurality). *See also Pap's A.M.*, 529 U.S. at 284 (same). Here, by contrast, dancers must don a few additional square inches of clothing to avoid the Texas fee. *See* TEX. BUS. & COM. CODE § 102.051(1) (defining "nude" to mean either "entirely unclothed" or "clothed in a manner that leaves uncovered or visible

through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks").

Plaintiffs contend, then, that a few square inches of clothing are constitutionally dispositive. But not even the principal opinion accepted this argument. And the law (not to mention common sense) is to the contrary. The Founding Fathers could not have imagined that compliance with the First Amendment would turn on such tenuous considerations.

If anything, the broader definition of nudity at issue here may make Texas law *easier*, not harder, to defend. In *Pap's A.M.*, the dissent suggested that only a broader definition of nudity would achieve the government's interests. *See* 529 U.S. at 323 (Stevens, J., dissenting) ("To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects [such as crime and disease] requires nothing short of a titanic surrender to the implausible."). In response, the plurality acknowledged that, "[t]o be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects" (namely, crime and other social ills)—and that it "may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed." *Id.* at 301 (plurality). *See also id.* at 310 (Scalia, J., concurring) (same). The plurality nevertheless upheld the narrower definition, reasoning that state and local governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 301 (quotations omitted).

If States are permitted to experiment with a narrower (and potentially *less* effective) definition of nudity, then surely they may attempt a slightly broader (and thus potentially *more* effective) definition, as Texas has done here. Indeed, both the U.S. Supreme Court and other courts have upheld broader definitions of nudity indistinguishable from Texas law:

- In *Bellanca*, the Court observed that "*any form of nudity* coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718 (quotations omitted, emphasis added). Accordingly, the Court upheld a ban on alcohol where dancers expose "any portion" of their "genitals" or the female "breast below the top of the areola"—just as under Texas law. *Id.* at 714 n.1.

- In *44 Liquormart*, Justice O'Connor reaffirmed in her concurring opinion that States may prohibit "nude *or nearly nude* dancing in establishments licensed to serve alcohol," citing *Bellanca*. 517 U.S. at 533 (emphasis added).

- In *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), the Seventh Circuit specifically rejected the argument that state and local governments may not impose clothing requirements "over and above the pasties and G-strings requirement," *id.* at 726—upholding a ban on alcohol where dancers expose their "buttocks" or the female "breast below a horizontal line across the top of the areola at its highest point," *id.* at 708.

- And in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), the Eleventh Circuit upheld not only a general "requirement that dancers wear G-strings and pasties in all adult theaters," but also "the additional requirement of clothing somewhat more modest within 500 feet of establishments that serve alcohol." *Id.* at 886.

3. States may also regulate more modestly, short of a categorical ban.

Finally, the Court has held that States may regulate more modestly—short of a categorical ban—by imposing more limited regulations on adult businesses, such as zoning laws, consistent with its repeated endorsements of state and local experimentation. *See Young*, 427 U.S. 50 (upholding zoning ordinance that forbids adult establishments from

locating near other adult establishments or near residential areas); *Renton*, 475 U.S. 41 (upholding zoning ordinance that forbids adult establishments from locating near residential and other family and community areas); *Alameda Books*, 535 U.S. 425 (upholding zoning ordinance that forbids the establishment of more than one line of adult entertainment business in the same building or structure). *Cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 n.15 (1981) (invalidating a zoning ordinance restricting "all live entertainment, not just live nude dancing").

D. The Texas Fee Is Plainly Constitutional.

1. Because the U.S. Supreme Court has upheld even more stringent restrictions on adult businesses, the Texas fee is *a fortiori* valid.

The Texas fee must be constitutional in light of nearly 40 years of U.S. Supreme Court precedent upholding even stricter regulations of adult businesses. As Justice Puryear explained in his dissent:

> [A] state may, in an effort to combat secondary effects associated with sexually oriented businesses, entirely prohibit the consumption of alcohol within sexually oriented businesses. If a state may completely prohibit the consumption of alcohol within sexually oriented businesses, it seems logical to assume that a state may also impose less exacting alcohol restrictions on sexually oriented businesses provided that the restriction is also designed to combat negative secondary effects. . . . There can be little doubt that a fee is less restrictive than an absolute ban, and [that] the statute was designed to address potential negative secondary effects arising from the pairing of erotic entertainment and alcohol consumption . . . . Consequently, I fail to see how the majority can conclude that the statute at issue violates the First Amendment.

287 S.W.3d at 871-72 (citations omitted).

Justice Puryear is entirely correct. The U.S. Supreme Court has repeatedly endorsed restrictions far more severe than the Texas fee—including categorical bans on the sale of alcohol at adult establishments and categorical bans on live nude dancing.

If States may force adult businesses to choose between two options—either forbid alcohol or forbid full nudity—then surely States may offer a third option (and allow *even more speech*): pay a $5 per patron fee, and offer both alcohol and live nude dancing. If States can ban either (or even both) of these activities altogether, then surely they may merely discourage them, and encourage substitutes that result in less rape, less sexual assault, and less of other criminal activities and social ills. If two options are not unconstitutionally burdensome, then three options is even less troubling—allows even more speech—and is thus even easier to uphold. If a ban (and fine) would be valid, so must be a fee.

The record of this case confirms what common sense would presume: Under the Texas fee, there will be less nude dancing with alcohol, because people will identify and pursue substitutes. 2.RR.88-89, 106-07, 117-19, 120-21, 137, 148, 150-51. Customers who are deterred by the Texas fee may instead patronize adult establishments that do not serve alcohol. Or they can choose to consume alcohol at establishments that offer erotic expression short of full live nudity, free of the Texas fee. *See Combs*, 287 S.W.3d at 870 (Puryear, J., dissenting) (noting that the fee does not apply to "establishments that provide erotic entertainment but do not allow for the consumption of alcohol or that allow alcohol

consumption but do not allow their erotic entertainers to perform fully nude"); *id.* at 873 ("a business may avoid . . . the fee . . . by not allowing its customers to consume alcohol").

It was reasonable for policymakers to determine that this substitution effect would help reduce the incidence of rape and sexual assault. The Texas fee is thus well within the range of reasonable experimentation repeatedly endorsed by the U.S. Supreme Court.

2. The Texas fee satisfies established First Amendment doctrine.

In light of the more severe restrictions that the Court has already upheld, it is not surprising that the Texas fee likewise satisfies scrutiny under established doctrine.

The U.S. Supreme Court has reviewed governmental restrictions on adult businesses under two nominally different, but functionally identical, tests: *United States v. O'Brien*, which governs all governmental restrictions on expressive conduct, including bans on nudity, 391 U.S. 367, 377 (1968), and *Renton*, which the Court has applied to time, place, and manner regulations of adult business, such as zoning laws, 475 U.S. at 47-54; *see also Alameda Books*, 535 U.S. at 440-41 (plurality); *id.* at 449-50 (Kennedy, J., concurring). Both the U.S. Supreme Court and other courts have recognized that these tests are essentially interchangeable. *See, e.g., Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Ben's Bar*, 316 F.3d at 714; *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 365-66 (5th Cir. 2002). *See also Combs*, 287 S.W.3d at 867-68 & n.1 (Jones, C.J., concurring).

At bottom, both tests examine whether the regulation governing adult businesses: (1) was enacted pursuant to a legitimate governmental power; (2) does not completely

prohibit adult entertainment; (3) is aimed not at the expression itself but at the negative secondary effects caused by the businesses; and (4) is designed to serve a substantial governmental interest, is narrowly tailored, and leaves open reasonable alternative avenues. *See Ben's Bar*, 316 F.3d at 722; *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 311 (5th Cir. 2007); *Combs*, 287 S.W.3d at 874 (Puryear, J., dissenting).

Plaintiffs do not dispute that the Texas fee was enacted pursuant to a legitimate government power (prong one). Nor do they contest that the provision does not completely prohibit all forms of adult entertainment (prong two). Plaintiffs instead argue that the Texas fee fails the final two prongs of the analysis. But the Texas fee easily satisfies these remaining conditions. The Texas fee is content neutral, not content based, because its objective purpose is to suppress the negative secondary effects of nude dancing and alcohol—most notably, rape and sexual assault—and not to suppress speech. Moreover, there is ample evidence confirming that the fee will in fact help to reduce the incidence of rape and sexual assault. Accordingly, the fee satisfies established First Amendment doctrine.

a. The Texas fee is content neutral because its objective purpose is to suppress rape and sexual assault—not speech.

Plaintiffs contend that the Texas fee is *not* aimed at the secondary effects of nudity and alcohol, but rather is a "content based restriction on speech." 1.CR.7. To support that claim, Plaintiffs point to a single statement made by the bill's sponsor on the House floor. As detailed below, however, *see infra*, at 36-44, the analysis turns on an objective analysis

of governmental interest—and not a search for the subjective intent of the political branches (much less individual legislators).

The plain text of the statute demonstrates that the Legislature's predominant concern in passing the Texas fee was the secondary effects of combining nude dancing and alcohol, and not the content of the expression. It does not limit the types of dance that may be performed, the amount of clothing that may be worn, or where any of the expression may take place. *See Combs*, 287 S.W.3d at 870 (Puryear, J., dissenting) ("the statute does not address the expressive nature of the entertainment at issue"); *id.* at 874 (same). It simply imposes a $5 per patron fee on businesses that offer both live nude entertainment and alcohol—a combination that, as is well documented and previously detailed, results in rape, sexual assault, and other crimes and social ills. *See id.* at 874-75.

b. The Texas fee does indeed serve the substantial government interest in combating rape and sexual assault, while leaving ample alternate avenues for erotic expression.

A State's interest in curbing the secondary effects of adult businesses, such as rape and sexual assault, "is plainly a substantial one." *Barnes*, 501 U.S. at 583 (Souter, J., concurring). Plaintiffs do not contest the validity of that interest. 2.RR.24-25; 5.RR.203 (acknowledging the importance of combating rape and sexual assault).

Nor do they contest that the fee actually serves the Legislature's purpose in combating the negative effects of nudity and alcohol. Their own witnesses testified that the fee would lead to decreased patronage at their establishments—meaning that patrons would choose

entertainment that either involved slightly more clothing or no alcohol. 2.RR.88-89, 106-07, 117-19, 120-21, 137, 148, 150-51. *See also Combs*, 287 S.W.3d at 875-76 (Puryear, J., dissenting). Plaintiffs complain that the evidence in the record showing that the fee combats rape and sexual assault is post-enactment, rather than pre-enactment, evidence. But even the concurring opinion below rejected this complaint, as detailed below. *See infra*, at 44-45.

Moreover, as noted, the fee plainly does not impede any avenues of communication. *See Combs*, 287 S.W.3d at 876 (Puryear, J., dissenting).

In short, the Texas fee easily passes constitutional muster under intermediate scrutiny.

E. If the Principal Opinion Below Is Correct—and the Texas Fee Is Inherently Unconstitutional—Then Four Decades of U.S. Supreme Court Precedent Must Be Wrong.

Because the U.S. Supreme Court has repeatedly upheld far more severe restrictions, it is not surprising that both Plaintiffs and the principal opinion have difficulty identifying a plausible reason to invalidate the Texas fee. Indeed, each of the rebuttal arguments put forth by Plaintiffs and the principal opinion suffers from a predictable problem: They ignore four decades of U.S. Supreme Court precedent. No wonder, then, that the analysis of the principal opinion was rejected by a *majority* of the court of appeals below.

1. Contrary to the principal opinion, U.S. Supreme Court precedent confirms that the Texas fee is not content based—because its objective purpose is to suppress rape, not speech.

The principal opinion claimed that the Texas fee is unconstitutional because it applies only to adult entertainment and is therefore "content based" and not content neutral.

According to the opinion below, any law is "content-based when the regulating party must examine the speech to determine if the restriction applies." 287 S.W.3d at 858. *See also id.* at 860 (noting trial testimony that "the Comptroller's office would be required to examine the content of the expressive conduct" to determine whether the fee applies).

It is hard to take this argument seriously, however, given that *every* restriction on adult businesses upheld by the U.S. Supreme Court over the past four decades applied—by definition—only to adult entertainment, and that regulators were necessarily required to "examine the speech to determine if the restriction applies." *Id.*

The principal opinion fundamentally misunderstands the distinction between content neutral and content based regulations. As the U.S. Supreme Court has repeatedly explained, a law is content based or content neutral *not* because of what it does, but because of the government interest it serves. The analysis turns on whether the interest is to suppress erotic expression, or to suppress negative secondary effects that may result from such expression. As the Court noted in *Renton*, "[t]o be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, . . . the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community. . . . In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" 475 U.S. at 47-48. *See also Pap's A.M.*, 529 U.S. at 296 (plurality) (same).

The Court has even adopted the same approach outside the adult business context. As the Court explained in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)—the "preeminent case on content-neutral regulation," *Palmer v. Waxahachie Indep. Sch. Dist.*, 2009 WL2461889, at *10 (5th Cir. Aug. 13, 2009)—"[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is . . . [t]he government's purpose." *Id.* "[P]urpose is the *controlling consideration.* A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* (emphasis added). "Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Id.* (quotations omitted).

Accordingly, a majority of the court below was right to *reject* the principal opinion, and instead conclude that a statute is content neutral so long as the purpose it serves is not related to suppressing speech. *See* 287 S.W.3d at 867-68 & n.1 (Jones, C.J., concurring) (same); *id.* at 873 (Puryear, J., dissenting) (same).

The principal opinion attempts to avoid *Renton*, *Ward*, and other similar cases by suggesting that taxes are somehow constitutionally unique—distinct from zoning laws and other regulations. The opinion supposes that taxes are subject to a wholly different concept of content neutrality—one that for some reason does not permit government to combat negative secondary effects such as rape and sexual assault. *See* 287 S.W.3d at 858 ("Unlike the restrictions at issue in *Alameda Books*, *Renton*, and *Young*, the SOB tax is not a zoning

restriction, but a tax on businesses that offer live, nude entertainment in the presence of alcohol."); *id.* at 860-61 (same).

But neither common sense nor U.S. Supreme Court precedent supports such a distinction. Indeed, even the concurring opinion below expressly addressed and rejected this argument, stating that, "[t]o the extent that Justice Henson's opinion suggests that secondary-effects analysis is or should be confined strictly to cases involving zoning regulations, I do not adopt that view. . . . I see no reason to analyze and decide cases in which protected speech is regulated through imposition of a tax any differently from cases in which it is regulated by a zoning restriction or other means." 287 S.W.3d at 867.

The principal opinion claims that Justice Kennedy's concurring opinion in *Alameda Books* supports a distinction between taxes and other laws. *See* 287 S.W.3d at 859 (quoting *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring) (noting that government may not impose "a content-based fee or tax")). But as a careful reading of his opinion confirms, Justice Kennedy was only concerned about a tax that discourages people from viewing erotic expression altogether. Such a tax would indeed raise constitutional issues. He expressed no concerns, however, about a fee designed merely to encourage people to pursue valid substitutes—*e.g.*, to view adult entertainment without alcohol, or without full live nudity. *See id.* at 445 (law is valid if purpose is "to reduce secondary effects and not to reduce speech"); *id.* at 450-51 (same). Nothing in his opinion indicated any intent to depart from established precedent supporting such a fee—including decisions joined by Justice Kennedy

himself. *See, e.g.*, *Pap's A.M.*, 529 U.S. 277 (plurality joined by Justice Kennedy, upholding ban on live nudity); *44 Liquormart*, 517 U.S. at 515-16 (majority joined by Justice Kennedy, upholding ban on alcohol in adult businesses); *Barnes*, 501 U.S. 560 (plurality joined by Justice Kennedy, upholding ban on live nudity).

Similarly flawed is the suggestion below that the Texas fee is somehow content based and unconstitutional just because it may require regulators to distinguish between artistic expression that happens to involve nudity from non-artistic and purely erotic nude dancing. *See, e.g.*, 287 S.W.3d at 860. In fact, the Supreme Court has repeatedly refused to invalidate regulations of adult businesses based on hypothetical concerns about artistic activities not factually presented by the parties in the case.[3]

Finally, Plaintiffs complained below that the Texas fee did not target the "secondary effects" of alcohol and nude dancing, but instead regulated the "primary effects" of speech because it was responding to the potential reaction of viewers. But again, the same could be said for all of the various restrictions previously upheld by the U.S. Supreme Court. *See, e.g.*, *Barnes*, 501 U.S. at 585-86 (Souter, J., concurring) (rejecting such arguments).

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3. *Compare LaRue*, 409 U.S. at 114 ("[t]he state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink"), *with id.* at 121 (Douglas, J., dissenting) (expressing concern that "a licensee might produce . . . a play—Shakespearean perhaps or one in a more modern setting—in which, for example, 'fondling' in the sense of the rules appears"); *id.* at 127 (Marshall, J., dissenting) (complaining that "[t]he regulations . . . treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film,'" and "ban not only obviously pornographic photographs, but also great sculpture from antiquity"). *See also Barnes*, 501 U.S. at 585 n.2 (plurality) (upholding ban on nudity even though it would not be constitutional as applied to "a production of 'Hair' or "Equus'").

2. The tax cases invoked by the principal opinion involve core First Amendment activities—not adult business activities that can be banned (as well as discouraged).

The principal opinion relies heavily on a series of First Amendment tax cases—each involving traditional First Amendment expression, and not one involving adult businesses—to support its conclusion. 287 S.W.3d at 859-61.[4] It even attempts to claim rhetorical high ground by reminding readers that "the power to tax involves the power to destroy." *Id.* at 859 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)).

But these cases are irrelevant because the Texas fee does not involve traditional First Amendment expression. The difference is critical, because live nude dancing, accompanied by alcohol, is a unique category of expression that government can *ban*. It would make little sense for a court to hold that government cannot merely tax what it can ban outright.

The principal opinion thus fails under its own logic: "the power to destroy" surely includes "the power to tax." *Id.* at 859.

3. Although the principal opinion oddly suggests otherwise, there is no practical, logical, or legal difference between a ban enforced by a fine and the Texas fee.

Oddly, the principal opinion seems to contest the common sense proposition that the "power to destroy" includes the "power to tax." To support this surprising conclusion, the opinion relies heavily on a single paragraph from *Nollan v. California Coastal Commission*,

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4. *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Leathers v. Medlock*, 499 U.S. 439 (1991); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

483 U.S. 825 (1986). 287 S.W.3d at 861-62. But *Nollan* is not an adult business case. Indeed, it is not even a First Amendment case. Rather, it involves the Takings Clause of the Fifth Amendment—and simply invokes a First Amendment hypothetical in *dicta*, as an analogy. Tellingly, not even Plaintiffs have relied on (or indeed, even cited) *Nollan* below—and a majority of the court below rejected the argument—for good reason: The reasoning of the principal opinion is difficult to square with common sense, not to mention established precedent governing adult businesses, or even *Nollan* itself.

The principal opinion appears to employ the following logic: If Texas could have banned adult businesses from serving alcohol outright, that only proves that the State had no good reason to regulate more modestly by merely discouraging such activities with a fee. In sum, the principal opinion asks: If a hatchet is available, why use a scalpel?

But the choice of policy instruments and enforcement mechanisms is a question for policymakers, not courts. The U.S. Supreme Court has repeatedly observed that, as a constitutional matter, "greater powers include lesser ones." *44 Liquormart*, 517 U.S. at 511. Moreover, within the specific context of adult entertainment, the Court has emphatically encouraged state and local policymakers to experiment with different levels of regulation. *See supra*, at 11-12. And the Court has put this principle into practice in a variety of ways:

- Consider zoning laws. If the principal opinion were correct, modest zoning ordinances concerning adult businesses would likewise be unconstitutional. After all, if government can ban an adult business from serving alcohol, why merely zone such businesses out of certain areas? Yet the U.S. Supreme Court has repeatedly upheld zoning laws on adult businesses. *See supra*, at 20-21.

- Consider also bans on public nudity. If the principal opinion were correct, the narrow definition of nudity upheld in *Pap's A.M.* would likewise be invalid. After all, if erotic nude dancing causes harm, why require just pasties and G-strings—why not just require more clothing? Yet the Court has upheld narrower definitions of nudity—explicitly reasoning that state and local policymakers "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 301 (quotations omitted). *Compare Pap's A.M.*, 529 U.S. at 323 (Stevens, J., dissenting) ("To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects [such as crime and disease] requires nothing short of a titanic surrender to the implausible."), *with id.* at 301 (plurality) (upholding narrower definition even though "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects," and it "may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed"); *see also supra*, at 18-20.

Lest we lose the forest for the trees, consider this: Imagine that the Legislature had simply enacted a categorical ban, forbidding nude dancing establishments from serving alcohol. And imagine the Legislature chose to penalize violations of the ban with a fine of up to $500 per patron. All of this would plainly be valid under numerous U.S. Supreme Court rulings since *LaRue*.

Yet if a fine of up to $500 per patron would be valid, there is no reason, in law or logic, to treat a $5 per patron assessment any differently. A prosecutor could adopt an internal policy of enforcing all violations of the alcohol ban at $5 per patron. And if that is so, there is no reason why the Legislature could not codify such an enforcement policy as a matter of law. Certainly Plaintiffs have never complained that the problem with Texas law is that a $5 fee is too small to be effective or have any deterrent value. To the contrary, their very complaint is that the Texas fee will indeed be an effective deterrent.

The effectiveness of the Texas fee is precisely what distinguishes *Nollan* from this case. To be clear, *Nollan* nowhere says that the greater power *never* includes the lesser power. It merely says that the greater does not include the lesser *only* when the "same" "justification" or "purpose" is not served by the lesser option. 483 U.S. at 836, 837. So long as the lesser power does effectively "serve[] the same end," it is permissible. *Id.* at 836.

Consider the example in *Nollan*: The Court presumed a "lack of nexus" between the interest served by "forb[idding] shouting fire in a crowded theater" and a lesser regulation "grant[ing] dispensations to those willing to contribute $100 to the state treasury." *Id.* at 837. The Court did not even consider the possibility that the "$100 tax contribution" might deter the harmful conduct in the first place—presumably because, if one wants to injure others by causing a stampede in a theater, a $100 flat fee is not going to pose a real deterrent. *Id. See also Combs*, 287 S.W.3d at 872 n.3 (Puryear, J., dissenting) ("In effect, [*Nollan*] reasoned that the imposition of the [$100 flat] fee would not further the state's interest in encouraging public safety."). Accordingly, the Court determined that, "if the [lesser] condition substituted for the [greater] prohibition utterly fails to further the end advanced as the justification for the prohibition," then the lesser option is not permissible. *Nollan*, 483 U.S. at 837.

That logic does not apply here. As discussed, the record is undisputed that the Texas per patron fee is effective, and will indeed drive some market participants out of business, 2.RR.88-89, 106-07, 117-19, 120-21, 137, 148, 150-51, because consumers will identify and pursue substitutes, such as nude dancing establishments that either prohibit alcohol on their

premises or refrain from offering live full nudity. Nor is it disputed that this substitution effect, much like an outright ban, will indeed serve the "same" interests in reducing the incidence of rape and sexual assault. *Nollan*, 483 U.S. at 836. *See* SCR.62 ("Defendants presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects addressed by the sexual asault program fund."). So the greater power here *does* include the lesser. As *Nollan* itself observes: "If a prohibition designed to accomplish [a valid] purpose would be a legitimate exercise of the police power . . . , it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." 483 U.S. at 836-37.

Not surprisingly, then, a majority of the court below rejected the logic of the principal opinion. *See* 287 S.W.3d at 867 (Jones, C.J., concurring) ("I see no reason to analyze and decide cases in which protected speech is regulated through imposition of a tax any differently from cases in which it is regulated by a zoning restriction or other means."); *id.* at 872 n.3 (Puryear, J., dissenting) ("unlike [*Nollan*] . . . the fee in this case is designed to further the same interest that a total ban on erotic entertainment and alcohol consumption would accomplish: minimizing potential negative secondary effects").

In sum, the notion that Texas could have banned adult businesses outright from combining alcohol with nude dancing—but may not take steps to simply discourage their operations—is, to put it bluntly, absurd. If a fine is valid, then of course a fee is, too.[5]

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5. For similar reasons, the principal opinion errs when it alternatively suggests, in a footnote, that the Texas fee is not narrowly tailored because a portion of the proceeds of the fee is earmarked for indigent

F. The Alternative Rationale Adopted by the Concurring Opinion—That the Fee May or May Not Be Constitutional, Depending on the Subjective Intention of Legislators—Is Also Meritless Under Established Precedent.

Whereas the principal opinion held that *any* fee on adult businesses that allow alcohol is inherently unconstitutional, the concurring opinion was more equivocal. According to the concurring opinion, a fee will sometimes be constitutional, sometimes not—depending on the subjective intent of the legislators who enacted it. By this logic, the concurring opinion would have upheld the *identical* fee, had the Legislature simply stated more clearly its intention to combat rape and sexual assault. *See* 287 S.W.3d at 870 ("the record in this case does not contain evidence . . . that the legislature's predominate purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing"). In other words, the Legislature could cure the fee in the next session, by adopting legislative findings or otherwise stating more clearly in the record its subjective intentions.

The rationale of the concurring opinion is, if anything, even less plausible than the principal opinion. The First Amendment is concerned with protecting speech—not requiring paperwork. Either the fee is valid, or it is not. The provision operates the same, no matter what any individual legislator might have said during a committee hearing. Nothing in the First Amendment requires the Legislature to undertake the redundant exercise of reenacting

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health care. 287 S.W.3d at 864 n.12. This misunderstands the entirety of the analysis. As noted, the fee achieves precisely the same beneficial deterrent effect on rape and sexual assault that a categorical ban, enforced by a fine, would serve. This deterrent value exists, of course, regardless of how the proceeds are spent—whether they are spent on sexual assault programs exclusively, deposited into general revenue, or burned in the public square. (By analogy, a police department may choose to spend the money generated by speeding tickets in order to fund programs to combat speeding, or to support other government functions having nothing to do with speeding. Speeding tickets deter speeding, regardless of how the funds are spent.)

the fee with a different legislative record, based on nothing more than a single judge's concerns about the clarity of legislators' intentions.

1. The constitutionality of a regulation of adult businesses turns on objective governmental interest—not subjective legislative intent.

Under established precedent, the test is objective governmental interest—not the subjective intention of legislators. As Justice Souter explained in his controlling opinion in *Barnes*, "[o]ur appropriate focus is *not* an empirical enquiry into the *actual intent* of the enacting legislature, but rather the existence or not of a *current governmental interest* in the service of which the challenged application of the statute may be constitutional." 501 U.S. at 582 (emphasis added). As previously noted, the Texas fee advances the valid, objective government interest in reducing rape and sexual assault. No further inquiry into subjective intentions is necessary to uphold the fee.

The U.S. Supreme Court has never struck down an otherwise valid regulation of adult businesses based on legislative intent. To the contrary, it is a "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383.

The rationale behind this principle is simple: "Inquires into congressional motives or purposes are a hazardous matter"—especially "when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *Id.* at 383-84. After all, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others

to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void [a statute] essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id.* at 384.

The Court has repeatedly invoked these principles and upheld various regulations of adult businesses without regard to legislative intent. *See, e.g.*, *Renton*, 475 U.S. at 47-48 (quoting *O'Brien*); *Barnes*, 501 U.S. at 582-83 (Souter, J., concurring) (same); *Pap's A.M.*, 529 U.S. at 292 (citing *O'Brien*). *See also LaRue*, 409 U.S. at 126 n.3 (Marshall, J., dissenting) ("a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute").

In fact, in *Renton* the Court upheld a zoning law even though the dissent found actual evidence of legislative animus against erotic expression. The dissent noted that "many of the stated reasons for the ordinance were *no more than expressions of dislike for the subject matter*." 475 U.S. at 59 (quotations omitted, emphasis added). For example, the city council concluded that allowing adult businesses to locate in regular commercial districts would "give[] an impression of legitimacy to, and cause[] a loss of sensitivity to the adverse effect of pornography" and "a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Id.* at 59 n.3.

Despite this evidence of legislative animus, the majority in *Renton* upheld the ordinance, invoking "the familiar principle of constitutional law that this Court will not strike

down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 48 (quoting *O'Brien*, 391 U.S. at 383). The "predominate intent" of the law was the prevention of negative secondary effects—and not "the suppression of free expression"—and that was "more than adequate" to uphold the ordinance. *See id.* (quotations omitted).

The Court did the same in *Pap's A.M.* There, as in *Renton*, the dissent identified statements by lawmakers reflecting animus towards adult entertainment. In one statement, a city council member observed: "We're not talking about nudity. We're not talking about the theater or art . . . . We're talking about what is indecent and immoral. . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." 529 U.S. at 329. The Court upheld the ban on live nude dancing in any event: "As we have said before, . . . this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Id.* at 292 (plurality) (citing *O'Brien* and *Renton*).

The concurring opinion rejects all of this, however, insisting that actual legislative intent is indeed relevant to determining the constitutionality of a regulation of adult businesses. *See* 287 S.W.3d at 869 (Jones, C.J., concurring). To support this conclusion, the concurring opinion relies exclusively on a handful of lower court opinions.

But the opinion does not even address (let alone distinguish) the holdings of *O'Brien*, *Renton*, and *Pap's A.M.*, discussed above. It does attempt to distinguish Justice Souter's concurring opinion in *Barnes*. But as the opinion below admits, 287 S.W.3d at 869, Justice Souter expressly stated that "the appropriate focus is *not* an empirical enquiry into the *actual*

intent of the enacting legislature, but rather the existence or not of a *current governmental interest* in the service of which the challenged application of the statute may be constitutional," 501 U.S. at 582 (emphasis added). Nor does the opinion below acknowledge that lower courts are actually divided on this issue. *See, e.g.*, *Abilene Retail v. Bd. of Commn'rs of Dickinson County*, 492 F.3d 1164, 1172-73 (10th Cir. 2007); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 557 n.7 (5th Cir. 2006).

At most, construing U.S. Supreme Court precedent in the light most charitable to the concurring opinion, only the strongest evidence of legislative animus—namely, a "predominate intent" to "suppress[] free expression"—could justify invalidating an otherwise valid regulation of adult businesses. *Renton*, 475 U.S. at 48. *See also Alameda Books*, 535 U.S. at 440-41 (plurality) (rejecting effort by dissenters to "depart from the *Renton* framework," and upholding regulation because "the predominate concerns motivating the ordinance were with the secondary effects of adult speech, and not with the content of adult speech") (quotations and alterations omitted).

If *Renton* and *Alameda Books* are correct, then the Texas fee must be constitutional. The concurring opinion has not identified *any* evidence even remotely suggesting animus toward speech—let alone a "predominate intent" to suppress speech. *Renton*, 475 U.S. at 48. The inability to locate any such evidence is unsurprising: Texas law allows any adult business to engage in any form of speech it desires—it must simply do so without alcohol (or pay a modest $5 per patron fee if it wants to keep alcohol). It is hard to imagine how such

a modest law (compared to the bans upheld in *Barnes* and *Pap's A.M.*) could be motivated by animus.

2. The legislative record is devoid of any indication (let alone predominate evidence) of animus towards speech in any event.

The sole evidence of legislative intent identified by the concurring opinion is a statement by the bill sponsor allegedly denying a link between the businesses subject to the House bill (as originally introduced) and the incidence of rape and sexual assault. But that statement does not constitute evidence—let alone predominate evidence—of legislative animus towards speech. And the concurring opinion badly misreads the record in any event.

To begin with, the objective governmental interest served by the Texas fee—combating rape and sexual assault—is apparent on the face of the statute. *See, e.g.*, *Renton*, 475 U.S. at 48 (determining government interest by examining the law "by its terms"); *Alameda Books*, 535 U.S. at 441 (Kennedy, J., concurring) (determining the governmental purpose of a statute "is something that can be determined on the face of it"). As Justice Puryear noted, the statute on its face "seems concerned with the regulation of alcohol or the regulation of the pairing of alcohol and erotic entertainment rather than the suppression of any specific erotic expression." 287 S.W.3d at 873 (Puryear, J. dissenting).

The concurring opinion focused not on the text of the statute, but on the legislative history—specifically, a single statement by Representative Cohen during a House hearing, allegedly denying a link between the businesses that would pay the fee and sexual assault. 1.CR.113. (The concurring opinion also mentions a House bill analysis, 287 S.W.3d at 868,

but that document took no position one way or another on this issue.) The Cohen statement was made during the heat of questioning, presumably to avoid the indelicate act of accusing fellow Texans of directly causing rape. 1.CR.113.

Moreover, the Cohen statement was about a *different bill*. As originally introduced, the bill applied to *all* nude dancing establishments throughout Texas—without regard to the presence of alcohol. It was not until the bill reached the Senate that it was amended—limited to adult businesses allowing alcohol. This distinction is critical, given longstanding concerns that combining alcohol with nude dancing increases the incidence of rape. *See, e.g.*, *LaRue*, 409 U.S. at 111. (Plaintiffs respond by pointing out that the only reason for the Senate amendment, documented in the legislative history, was administrative convenience. But nothing in these statements affirmatively deny an additional interest in reducing rape and sexual assault. Notably, the concurring opinion does not discuss any of this.)

Other statements by Representative Cohen confirm that she was indeed concerned about rape and sexual assault. During her prepared closing remarks at that same hearing, she said that "sexually oriented businesses employ women and funds generated there should be spent to address sexually oriented crimes that largely affect women," implicitly suggesting a link. 1.CR.125. She also opened the following session of the Legislature by circulating a letter to her colleagues expressly reiterating the link between nude dancing, alcohol, and sexual assault, as the prime motivation for enacting the Texas fee. App. H.

The concurring opinion did not mention the letter, but indicated that courts may not look at post-ratification evidence to establish the governmental interest served by the legislation. 287 S.W.3d at 869. But the U.S. Supreme Court has already rejected that contention. In *Barnes*, Justice Souter's controlling opinion specifically noted that the valid governmental interest served by the ban on nude dancing "has not been articulated by Indiana's Legislature or by its courts." 501 U.S. at 582. He nevertheless concluded that courts "may legitimately consider" post-ratification statements—indeed, even statements made by litigators during the course of litigation—as evidence of government interest. *See id.* (quoting the State's briefing before the U.S. Supreme Court).

Surely if courts may rely on post-ratification statements made by attorneys during the course of the litigation to establish a valid governmental interest, then *a fortiori* courts may also look to statements by the actual legislator who wrote the bill.

Other statements in the legislative record also suggest that the bill was plainly designed to combat rape and sexual assault. One witness opposed the measure precisely because it "does create the impression that somehow sexually oriented businesses are linked to sexual violence." 1.CR.120. Another witness, who supported the bill, specifically identified herself as both "a sexual assault survivor and . . . a former dancer of the adult entertainment industry." 1.CR.118.

To be sure, the record could have been clearer about legislative intent. But the U.S. Supreme Court has never indicated that a regulation of adult business may be

unconstitutional based on insufficiently clear evidence of legislative intent. Under established precedent, the fee is valid, because there is no evidence whatsoever—let alone predominate evidence—of any legislative animus towards speech.

3. The concurring opinion correctly rejected Plaintiffs' objection to using post-enactment (rather than just pre-enactment) evidence to confirm that the Texas fee will indeed help combat rape.

Notably, the concurring opinion expressly *rejects* Plaintiffs' only other complaint about the legislative record. Plaintiffs argue that the record is deficient because it lacks sufficient pre-enactment evidence establishing that the Texas fee will indeed reduce the incidence of rape and sexual assault. But as the concurring opinion notes, courts may look to post-enactment evidence to confirm the efficacy of a regulation.

The record is undisputed that the Texas fee will indeed reduce demand for alcohol and live nude dancing. 2.RR.88-89, 106-07, 117-19, 120-21, 137, 148, 150-51. It is likewise undisputed that, by reducing demand for alcohol and live nude dancing, the Texas fee will in turn reduce the incidence of rape and sexual assault. (Plaintiffs did attempt to discredit one trial expert who testified on this issue. But they have not disputed the underlying conclusion—they challenge neither the district court finding, SCR.62, nor the repeated observations of the U.S. Supreme Court on this point.)

So Plaintiffs are apparently complaining only about the timing—and not the quality—of the evidence. They object on the ground that most of this evidence was not

formally presented to the Legislature during deliberations on the bill—and therefore that it constitutes post-enactment, rather than pre-enactment, evidence.

But even the concurring opinion below rejected this argument—stating that "post-enactment evidence may be considered" in determining "a link between the challenged regulation and the asserted interest in combating secondary effects." 287 S.W.3d at 869. Likewise, the U.S. Supreme Court has held that courts may rely *exclusively* on post-enactment evidence to confirm that a regulation of adult business does indeed serve a valid governmental interest. In *Barnes*, for example, Justice Souter's controlling opinion upheld the ban on live nude dancing, based solely on post-enactment evidence that the regulation would combat secondary effects—even though "this justification has not been articulated by Indiana's Legislature." 501 U.S. at 582-86 (Souter, J., concurring).

* * *

The judgment below demands this Court's review. If the judgment stands, the efforts of Texas policymakers to reduce the incidence of rape and sexual assault, by discouraging adult businesses from combining alcohol with nude dancing, will be dramatically frustrated.

Nothing in the First Amendment compels this result. To the contrary, respect for the Constitution and for the limited authority of the judicial branch compels reversal.

PRAYER

For the reasons stated, the Court should grant the petition for review, reverse the judgment of the court of appeals, and uphold the Texas fee.

Respectfully submitted,

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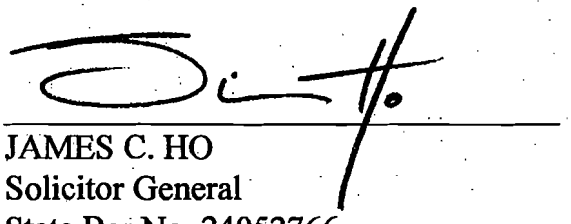

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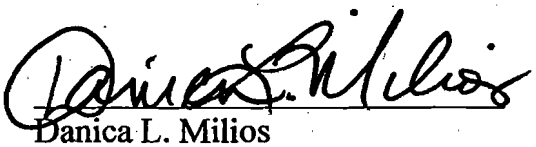

Danica L. Milios

APPENDIX

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Tab A

CAUSE NO. D-1-GN-07-004179

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC.	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
vs.	§	TRAVIS COUNTY, TEXAS
SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendants.	§	345TH JUDICIAL DISTRICT

Filed In The District Court of Travis County, Texas
on 3-28-08 2:35 P.M.
at
Amalia Rodriguez-Mendoza, Clerk

JUDGMENT

From March 3, 2008 to March 6, 2008, the Court heard the trial of this cause. After considering the pleadings, the evidence, the arguments of counsel, and the applicable legal authorities, the Court decides as follows:

The Court DENIES Plaintiffs' motions to exclude the opinions of Defendants' experts, Dr. Bell and Dr. George.

The Court holds that Subchapter B of Chapter 47 of the Texas Business and Commerce Code, while furthering laudable goals, violates the First Amendment to the United States Constitution and is therefore invalid.

This subchapter probably must be reviewed as a content-based tax, using strict scrutiny, either because it is "aimed" at what are arguably the primary effects of protected speech, i.e., the effect on the audience of watching nude erotic dancing, or because its "aim," as determined by the use of the bulk of the funds raised by the tax for the Texas health opportunity pool, is to address lack of adequate health insurance, a statewide problem, by singling out business activity

involving expression that, while politically unpopular, is nevertheless protected by the First Amendment. Subchapter B does not pass muster under this standard because Defendants failed to—and conceded that they cannot—meet their burden to show that it is necessary to serve a compelling state interest and narrowly tailored for that purpose.

Even if the subchapter were analyzed as a content-neutral measure aimed at the secondary effects of protected speech, using intermediate scrutiny, it must be held unconstitutional.

If reliance by the Legislature on some pre-enactment evidence of links between the secondary effects addressed by the programs funded by the subchapter's tax and the business activity subject to the tax is a constitutional requirement (as is suggested, but not expressly held, by Supreme Court caselaw), Subchapter B must be held unconstitutional because no evidence indicating that any legislators actually considered any evidence of such links was presented at trial. Tori Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

If pre-enactment evidence is not required, the subchapter must still be held unconstitutional because Defendants, while presenting persuasive trial evidence supporting a link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund, presented no evidence supporting a link between the business activity subject to the tax and the alleged secondary effects addressed by the Texas health opportunity pool. There is no evidence that combining alcohol with nude erotic dancing causes dancers to be uninsured, that any dancer is in fact uninsured, or that any uninsured dancer could qualify for assistance from the fund.

Subchapter B also fails to pass muster under intermediate scrutiny because it is not narrowly tailored. First, only one of the two alleged secondary effects was ever shown to be possibly connected to the combination of nude erotic dancing and the consumption of alcohol. Second, no evidence was presented to show that the amount of the tax is related in any way to the degree to which the taxed business activity contributes to the alleged secondary effects or to the financial cost of that contribution.

For the foregoing reasons, the Court DECLARES that sections 47.051–.056 of the Texas Business and Commerce Code are unconstitutional and invalid. It is therefore unnecessary to reach Plaintiffs' state constitutional claims.

The Court ORDERS that Defendants are PERMANENTLY ENJOINED from assessing or collecting the tax imposed by sections 47.051–.056.

The Court ORDERS, pursuant to section 37.009 of the Texas Civil Practice and Remedies Code and 42 U.S.C. § 1988, that Plaintiffs recover from Defendants their reasonable and necessary attorneys' fees in an amount to be determined by the Court after receiving letters from Plaintiffs and Defendants on this issue. The letters must contain no more than three pages and be filed by April 4, 2008.

SIGNED this 28 th day of March, 2008.

SCOTT H. JENKINS
JUDGE PRESIDING

Tab B

CAUSE NO. D-1-GN-07-004179

TEXAS ENTERTAINMENT ASSOCIATION, INC. and KARPOD, INC.	§	IN THE DISTRICT COURT OF
Plaintiffs	§	
V.	§	TRAVIS COUNTY, TEXAS
SUSAN COMBS, COMPTROLLER OF THE STATE OF TEXAS and GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	
Defendants	§	345th JUDICIAL DISTRICT

ORDER

Having considered the evidence and Plaintiffs' request for attorneys' fees under section 37.009 of the Texas Civil Practice & Remedies Code, the Court finds that Plaintiffs are entitled to attorneys' fees and that the attorneys' fees awarded below are reasonable and necessary, and an award of these fees is equitable and just.

IT IS THEREFORE ORDERED that Plaintiffs, Texas Entertainment Association, Inc. and Karpod, Inc. shall have and recover from Defendants Susan Combs, Comptroller of Public Accounts of the State of Texas and Greg Abbott, Attorney General of the State of Texas, the following amounts for attorneys' fees: $320,020.42 for trial fees; $78,750.00 if Defendants appeal to the Third Court of Appeals and Plaintiffs prevail; $42,000.00 for a petition for review to the Texas Supreme Court if Plaintiffs prevail; $31,500.00 for briefing the merits to the Texas Supreme Court if Plaintiffs prevail; and $105,000.00 for prevailing in an appeal to the United States Supreme Court.

IT IS FURTHER ORDERED that in addition to the fees awarded above, Plaintiffs shall have and recover from Defendants Susan Combs, Comptroller of Public Accounts of the State of

Texas and Greg Abbott, Attorney General of the State of Texas attorneys' fees in the amount of $26,250.00 for briefing the state constitutional claims not reached by this Court as a cross-point in the Third Court of Appeals contingent on the Third Court's addressing and sustaining the cross-point; and an award of $10,500.00 for briefing the state constitutional claims as a cross-point in the Texas Supreme Court, contingent on the Texas Supreme Court's addressing and sustaining that cross-point.

IT IS FURTHER ORDERED that all costs of court spent or incurred are adjudged against Defendants Susan Combs, Comptroller of Public Accounts of the State of Texas and Greg Abbott, Attorney General of the State of Texas.

IT IS FURTHER ORDERED that the award in this Order shall accrue interest at the rate of 6% per annum from the date of this Order until it is fully satisfied.

IT IS FURTHER ORDERED that Defendants Susan Combs, Comptroller of Public Accounts of the State of Texas and Greg Abbott, Attorney General of the State of Texas take nothing on their counterclaims against Plaintiffs, Texas Entertainment Association, Inc. and Karpod, Inc.

IT IS FURTHER ORDERED that this Order and the Court's March 28, 2008 Judgment fully and finally dispose of all parties and claims before this Court and are final and appealable.

SIGNED this 11th day of April, 2008.

The Honorable Scott H. Jenkins

APPROVED AS TO FORM

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Tab C

CAUSE NO. D-1-GN-07-004179

TEXAS ENTERTAINMENT ASSOCIATION, INC. and KARPOD, INC.	§	IN THE DISTRICT COURT OF
Plaintiffs	§	
V.	§	TRAVIS COUNTY, TEXAS
SUSAN COMBS, COMPTROLLER OF THE STATE OF TEXAS and GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS	§	
Defendants	§	345th JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From March 3, 2008 to March 6, 2008, the Court heard the trial of this cause. Orders disposing of the case were signed by the Court on March 28, 2008, and April 11, 2008. The Defendants requested Findings of Fact and Conclusions of Law on April 15, 2008. After considering the pleadings, evidence, testimony, and arguments of counsel, the Court, in response to Defendants' request, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The 80th Legislature enacted Subchapter B of Chapter 47 of the Texas Business and Commerce Code under House Bill 1751.

2. House Bill 1751 also amended Section 420.008(b) of the Texas Government Code to provide that fees from Subchapter B, Chapter 47, Business and Commerce Code will be applied to the Sexual Assault Program Fund. Further, HB 1751 amended section 420.008(c) of the Texas Government Code to identify the types of programs that may be funded by the Sexual Assault Program Fund.

3. The new Sexually Oriented Business Tax ("SOB Tax") imposed by Subchapter B, Chapter 47, Business and Commerce Code, requires some, but not all, sexually oriented businesses to pay a fee equal to $5.00 for each customer for each entry into its business if the business is a "sexually oriented business" as defined by the statute.

4. The SOB Tax statutorily defines a "sexually oriented business" as a nightclub, bar, restaurant, or similar commercial enterprise that:

> (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and
>
> (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

TEX. BUS. & COM. CODE § 47.051(2).

5. The statutory definition of a "sexually oriented business" in the SOB Tax is different than the definition of a sexually oriented business in Subchapter A of Chapter 47, which incorporates the definition of sexually oriented business from section 243.002 of the Texas Local Government Code.

6. The SOB Tax does not define "live nude entertainment" or "live nude performance," but it does define "nude":

> (1) "Nude" means:
>
> (A) entirely unclothed; or
>
> (B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

TEX. BUS. & COM. CODE § 47.051(1).

7. The SOB Tax went into effect on January 1, 2008.

8. The SOB Tax required businesses to keep daily records of the number of customers beginning January 1, 2008, and to remit quarterly payments beginning in April 2008.

9. TEA is a trade association that promotes the adult cabaret industry in Texas.

10. TEA is a non-profit Texas corporation incorporated on June 2, 1993, with its principal place of business at 3303 Sage, Houston, Texas 77056. The members of TEA will be affected by the SOB Tax.

11. TEA provides services to its membership, including but not limited to information regarding the adult entertainment industry, periodic membership meetings to discuss common issues faced by TEA's members, and lobbying and legislative awareness regarding issues facing TEA's members at the state and federal level.

12. Karpod operates a "topless gentlemen's club" in Amarillo, Texas called "Players."

13. Players provides topless dancing entertainment in a commercial enterprise for an audience of two or more individuals and authorizes on-premises consumption of alcohol.

14. Players has operated for approximately seven (7) years.

15. The Comptroller of the State of Texas is responsible for assessing and collecting the SOB Tax.

16. TEA and Karpod filed this lawsuit challenging the constitutionality of the SOB Tax.

17. The Plaintiffs filed with the Attorney General a statement of the grounds on which they seek an injunction more than five (5) days before filing this lawsuit.

18. No taxes were due from the Plaintiffs under the SOB Tax statute when they filed the lawsuit.

19. The original version of HB 1751 applied to all "sexually oriented businesses," as defined in section 243.002 of the Texas Local Government Code, that provide live nude entertainment, including modeling studios and adult video arcades, among others. HB 1751 was later amended to include only certain sexually oriented businesses.

20. Under the SOB Tax, the first $25 million collected in a biennium will be deposited in a general revenue fund to the credit of the Sexual Assault Program Fund, and funds in excess of the first $25 million will be deposited to the credit of the Texas health opportunity pool established under Subchapter N, Chapter 531, Government Code.

21. Of the $25 million designated for the Sexual Assault Program Fund, only $18,075,000 is appropriated in the 2008-2009 fiscal biennium.

22. The remaining $6,925,000 remains unappropriated, and only the Legislature can determine how much, if any, of that remaining money will be appropriated in the future.

23. The Comptroller's draft proposed rules for the SOB Tax require a business that holds occasional events with live nude entertainment to pay the fees for those events.

24. The Comptroller has not promulgated rules for the SOB Tax and stopped the rule-making process because of this lawsuit.

25. The Comptroller's November 15, 2007 revenue estimate used to certify the General Appropriations Act for 2008-09 shows that available revenue supports current General Revenue spending for the 2008-09 biennium, yielding an expected $2 billion General Revenue-related ending balance on August 31, 2009.

26. The Comptroller estimates that there are 169 businesses in Texas that will be responsible to pay the SOB Tax.

27. The Comptroller estimates that it will collect $87,277,000 from the SOB Tax in the 2008-2009 biennium.

28. The Comptroller estimates there will be no significant administrative costs to the Comptroller's office to administer the SOB Tax.

29. To enforce the SOB Tax, the Comptroller will have to make judgment calls to determine which businesses must pay the tax based on the content of their expression.

30. The Comptroller intends to enforce this statute in the same manner that it enforces the collection of other delinquent taxes pursuant to Title 2 of the Texas Tax Code.

31. Enforcement of the statute would ultimately conclude in closing down a business that did not pay the delinquent tax.

32. The Comptroller does not regulate the businesses subject to the tax and is not aware of any regulation imposed by the statute.

33. The Comptroller does not have discretion to divert funds from the Sexual Assault Program Fund to some other fund.

34. The stated purpose of the SOB Tax was to provide a dedicated source of revenue to support sexual abuse prevention and survivor support programs.

35. The fee imposed by the SOB Tax was imposed by the Legislature to raise revenues, not for the purpose of defraying regulatory costs for regulating the businesses that must pay the fee.

36. The Comptroller does not regulate the businesses that must pay the tax, and no revenues from the tax will be used to regulate the businesses that must pay the tax.

37. The SOB Tax does not regulate the time, place, or manner of activities associated with the sexually oriented businesses that must pay the tax.

38. The evidence offered by Defendants to support an alleged secondary effects justification arguably described primary effects of erotic speech.

39. The author of HB 1751, State Representative Ellen Cohen, testified before the House Ways & Means Committee that she claimed no link between sexual assault and the businesses responsible for the fees to be paid.

40. The House Research Organization's Bill Analysis claimed no link between sexual assault and the businesses responsible for the fees to be paid.

41. There is no evidence that the Legislature actually considered or saw any studies claiming a link between sexual assault and the sexually oriented businesses that are responsible for the SOB Tax.

42. Victoria Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

43. There is no evidence that studies about sexually oriented businesses were created, consulted, or reviewed by the Legislature prior to enacting HB 1751.

44. Defendants presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund.

45. One of the aims of the tax is to address the lack of adequate health insurance for low-income Texans, a statewide problem.

46. There was no evidence that combining alcohol with nude erotic dancing causes dancers to be uninsured, that any dancer is, in fact, uninsured, or that any uninsured dancer could qualify for assistance from the Texas health opportunity pool.

47. There is no evidence that any funds deposited in the Texas health opportunity pool would benefit employees or entertainers of the SOBs subject to the tax.

48. There is no evidence that studies about the chosen fee amount of $5.00 per entry (or the impact this fee will have on the affected businesses) were created, consulted, or reviewed by the Legislature prior to enacting HB 1751.

49. There is no evidence that the amount of the fee relates to any impact that sexually oriented businesses have on sexual violence or lack of health care.

50. The SOB Tax targets a small group of speakers.

51. TEA and Karpod hired Winstead PC and Gray & Becker to represent them in this suit against Susan Combs, Comptroller of the State of Texas, and Greg Abbott, Attorney General of the State of Texas.

52. The attorneys' fees amounts testified to at trial were reasonable and necessary and it is equitable and just to award attorneys' fees to Plaintiffs in the following amounts: $320,020.42 for trial fees; $78,750.00 if Defendants appeal to the Third Court of Appeals and Plaintiffs prevail; $42,000.00 for a petition for review to the Texas Supreme Court if Plaintiffs prevail; $31,500.00 for briefing the merits to the Texas Supreme Court if Plaintiffs prevail; and $105,000.00 for prevailing in an appeal to the United States Supreme Court.

53. In addition to the fees listed above, it is equitable and just to award attorneys' fees to Plaintiffs in the following amounts: $26,250.00 for briefing the state constitutional claims not reached by this court as a cross-point in the Third Court of Appeals, contingent on the Third Court's addressing and sustaining the cross-point, and $10,500.00 for briefing the state constitutional claims as a cross-point in the Texas Supreme Court, contingent on the Texas Supreme Court's addressing and sustaining that cross-point.

54. To the extent any of the foregoing are more properly deemed conclusions of law, they are hereby adopted as such.

Conclusions of Law

55. This Court has jurisdiction over this proceeding, and venue is proper in this Court.

56. As Defendants concede, erotic nude/topless dancing is protected expression under the First Amendment of the United States Constitution and the Texas Constitution.

57. If the government must examine the content of the message to determine if the tax applies, the tax is content-based.

58. The SOB Tax is a content-based tax.

59. The effect of protected speech on the listener (or viewer) is a primary effect, not a secondary effect.

60. Financial regulations on speech are inherently suspect.

61. Absent a compelling justification, the government may not exercise its taxing power to (1) single out the press, (2) target a small group of speakers, or (3) discriminate on the basis of the content of taxpayer speech.

62. If the SOB Tax targets the primary effects of protected speech, then it must be evaluated under strict scrutiny.

63. Speech cannot be banned, taxed, or otherwise penalized because of its primary effects unless the State satisfies its heavy burden to prove a connection between the speaker and those primary effects; a compelling state interest in banning, taxing, or otherwise penalizing the speech; and that the mechanism used is narrowly tailored to achieve the State's interest.

64. Defendants failed to—and conceded that they cannot—meet their burden under strict scrutiny to show that the SOB Tax is necessary to serve a compelling state interest and narrowly tailored for that purpose.

65. The SOB Tax violates the First Amendment and is invalid and unconstitutional.

66. A content-based tax on First Amendment activity cannot be justified by "secondary effects."

67. Intermediate scrutiny is only applicable to content-neutral time, place, and manner regulations.

68. Even if the SOB Tax could be considered a content-neutral measure under a secondary effects analysis, it fails intermediate scrutiny.

69. The government can only assess a regulatory fee on businesses engaged in protected speech if the fee is calculated to meet the expense incident to the administration of the regulatory act and to the maintenance of public order in the matter licensed.

70. The SOB Tax is not a regulatory measure.

71. Only revenue-neutral fees can be imposed so that the government is not charging for the privilege of exercising a constitutional right.

72. In evaluating the constitutionality of a fee a court looks at (1) whether the fee's total amount will deter the exercise of First Amendment rights, (2) whether the measures associated with the fee's amount are narrowly tailored means of advancing the State's interests, and (3) whether the State's cost estimates for those narrowly tailored measures are reasonable.

73. If reliance by the Legislature on some pre-enactment evidence of links between secondary effects and protected speech is a constitutional requirement (as is suggested, but not expressly held, by Supreme Court case law), the SOB Tax must be held unconstitutional because no evidence indicating that the Legislature actually considered any evidence of such links was presented at trial.

74. If pre-enactment evidence is not required, the SOB Tax must still be held unconstitutional because Defendants presented no evidence supporting a link between the protected expression subject to the tax and the alleged secondary effects addressed by the Texas health opportunity pool.

75. The SOB Tax also fails to pass muster under intermediate scrutiny because it is not narrowly tailored. It is not narrowly tailored because only one of the two alleged secondary effects was ever shown to be possibly connected to the combination of nude erotic dancing and the consumption of alcohol, and because no evidence was presented to show that the amount of the tax is related in any way to the degree to which the taxed business activity contributes to the alleged secondary effects or to the financial cost of that contribution.

76. Defendants presented no evidence supporting a link between the business activity subject to the tax and the alleged secondary effects addressed by the Texas health opportunity pool.

77. Sections 47.051-.056 of the Texas Business & Commerce Code are unconstitutional and invalid because they violate the First Amendment of the United States Constitution.

78. Requiring Karpod to either pay the SOB Tax or post a bond as a condition precedent to proceeding with this lawsuit would result in an unreasonable restraint on its right of access to the courts.

79. The individual members of TEA would have standing to challenge the SOB Tax in their own right.

80. The constitutional interests that TEA seeks to protect are germane to its organizational purpose.

81. Neither the claims asserted by TEA nor the relief requested requires the participation of individual members of TEA.

82. Chapter 112 of the Texas Tax Code did not prohibit Plaintiffs from seeking relief before any taxes were due.

83. Portions of Section 112.108 of the Texas Tax Code purporting to prohibit declaratory relief and attorneys' fees are unconstitutional in violation of Article 1, Section 13, Texas Constitution.

84. The portions of the SOB Tax that fund the Texas health opportunity pool are not severable from the remainder of the SOB Tax provisions.

85. Because the Court finds the SOB Tax unconstitutional under the First Amendment, it is unnecessary for the Court to reach Plaintiff's state constitutional claims.

86. To the extent any of the foregoing are more properly deemed findings of fact, they are hereby adopted as such.

SIGNED this 7th day of May, 2008.

SCOTT H. JENKINS
JUDGE PRESIDING

Tab D

CAUSE NO. D-1-GN-07-004179

TEXAS ENTERTAINMENT ASSOCIATION, INC. and KARPOD, INC. Plaintiffs	§	IN THE DISTRICT COURT OF
V.	§	TRAVIS COUNTY, TEXAS
SUSAN COMBS, COMPTROLLER OF THE STATE OF TEXAS and GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS Defendants	§	345th JUDICIAL DISTRICT

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

From March 3, 2008 to March 6, 2008, the Court heard the trial of this cause. Orders disposing of the case were signed by the Court on March 28, 2008, and April 11, 2008. The Defendants requested Findings of Fact and Conclusions of Law on April 15, 2008. After considering the pleadings, evidence, testimony, and arguments of counsel, the Court, in response to Defendants' request made Findings of Fact and Conclusions of Law on May 7, 2008. Defendants requested Additional and Amended Findings of Fact and Conclusions of Law on May 13, 2008, and Plaintiffs requested Additional Findings of Fact and Conclusions of Law on May 16, 2008, within 10 days of the Court's Findings of Fact and Conclusions of Law. After considering the parties' requests, the Court makes the following Additional Findings of Fact and Conclusions of Law:

Additional Findings of Fact

1. Karpod filed an oath of inability to pay the SOB Tax.

Additional Conclusions of Law

1. After notice and a hearing, the Court found that prepayment of the SOB Tax

would be an unreasonable restraint on access to the courts in this case.

2. Because requiring prepayment of the SOB Tax or a bond would result in an unreasonable restraint on Karpod's right of access to the courts, the Court may issue a permanent injunction other than as provided by Subchapter C of Chapter 112 of the Texas Tax Code, which the Court does by permanently enjoining the enforcement, assessment or collection of the tax in order to protect Karpod's access to the courts and to protect Plaintiffs' First Amendment rights under the circumstances.

3. Defendants seek to enforce, assess, and collect an unconstitutional tax that violates the First Amendment of the United States Constitution.

4. The loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury, and therefore Karpod will suffer irreparable injury if a permanent injunction is not granted.

5. No other adequate remedy at law is available to Karpod if a permanent injunction is not granted.

6. A governmental defendant's evidence on secondary effects in a First Amendment case is not subject to the standards established in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (adopting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993)).

7. A governmental defendant in a secondary effects case may rely on any evidence that is reasonably believed to be relevant to demonstrating a connection between the secondary effects of speech and a substantial, independent government interest.

8. William George, Ph.D. (Dr. George) is qualified to testify on a possible link between alcohol and sexual-assault related behaviors, the effects of alcohol on sexual risk-taking

behaviors, and the effects of alcohol on sexual perception.

9. Dr. George's testimony is relevant.

10. Dr. George's testimony is based on a reliable foundation.

11. Holly Bell, Ph.D. (Dr. Bell) is qualified to testify on sex workers, topless dancing, and sexual assault.

12. Dr. Bell's testimony is relevant.

13. Dr. Bell's testimony is based on a reliable foundation.

14. To the extent that any of the foregoing are more properly deemed findings of fact, they are hereby adopted as such.

SIGNED on this 10th day of June, 2008.

Honorable Scott H. Jenkins

Tab E

H

Court of Appeals of Texas,
Austin.
Susan COMBS, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas, Appellants
v.
TEXAS ENTERTAINMENT ASSOCIATION, INC. and Karpod, Inc., Appellees.
No. 03-08-00213-CV.

June 5, 2009.

Background: Sexually oriented business and an association representing the interests of sexually oriented businesses brought action for declaratory and injunctive relief, challenging constitutionality of tax imposed on businesses that offer live, nude entertainment in the presence of alcohol. The 345th Judicial District Court, Travis County, Scott H. Jenkins, J., found tax unconstitutional under the First Amendment and enjoined the Comptroller of Public Accounts from collecting or assessing the tax. Comptroller and Attorney General appealed.

Holdings: The Court of Appeals, Diane M. Henson, J., held that:
(1) tax was based on the content of expressive conduct, and thus was subject to strict scrutiny;
(2) association was not precluded on the basis of sovereign immunity from bringing declaratory action challenging constitutionality of tax; and
(3) request for declaratory judgment was not a redundant remedy, even though tax code permitted taxpayers to seek a return of taxes paid under protest and an injunction prohibiting the assessment or collection of a tax.

Affirmed.

J. Woodfin Jones, C.J., concurred and filed opinion.

David Puryear, J., dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 ⇐1559

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1559 k. Offensive, Vulgar, Abusive, or Insulting Speech. Most Cited Cases
The fact that constitutionally protected speech may be offensive to some does not justify its suppression; in fact, it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General.

Most Cited Cases

Constitutional Law 92 ⚿1518

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases
Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚿1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny; Compelling Interest. Most Cited Cases
In order to withstand strict scrutiny, a statute must be narrowly tailored to promote a compelling government interest. (Per Diane M. Henson, J., with one justice concurring in judgment.)

[4] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1514

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases
A content-neutral restriction on speech withstands intermediate scrutiny if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1513

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1513 k. Governmental Disagreement with Message Conveyed. Most Cited Cases

Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based, for purposes of analysis under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral; the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
Rules are generally considered content-based, for purposes of analysis under the First Amendment, when the regulating party must examine the speech to determine if the restriction applies. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿2201

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2201 k. Nude Dancing in General. Most Cited Cases
While nude dancing falls only within the outer ambit of the First Amendment's protection, it is nevertheless protected as expressive conduct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
A tax based on the content of speech does not become more constitutional under the First Amendment because it is a small tax. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
A tax is constitutionally suspect under the First Amendment if it targets a small group of speakers; the fear is censorship of particular ideas or viewpoints. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
A tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is particularly repugnant to First Amendment principles. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
Differential taxation based on content is subject to strict scrutiny under the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
A taxing statute is content-based, for purposes of analysis under the First Amendment, if it singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expres-

sion, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
Where taxing authorities must necessarily examine the content of the message that is conveyed, such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⇐2239

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases
Tax imposed on businesses offering live, nude entertainment in the presence of alcohol was based on the content of expressive conduct, and thus was subject to strict scrutiny under the First Amendment, even though tax was directed at reducing the secondary effects of sexually oriented businesses, and a sexually oriented business owner could avoid the tax by choosing not to allow the consumption of alcohol on the premises; thus, in light of concession by Comptroller of Public Accounts and the Attorney General that tax could not survive strict scrutiny, tax was unconstitutional under the First Amendment. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1; V.T.C.A., Bus. & C. §§ 47.051-47.056.

[17] Constitutional Law 92 ⇐2213

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
The intermediate scrutiny applied to zoning regulations aimed at decreasing secondary effects of sexually oriented businesses does not apply to differential taxation statutes, and thus an intent to reduce secondary effects does not preclude the proper application of strict scrutiny to a content-based tax on expressive conduct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 ⇐1613

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(C) Trade or Business
92k1613 k. Intoxicating Liquors. Most Cited Cases

Intoxicating Liquors 223 ⇐5.1

223 Intoxicating Liquors
223I Power to Control Traffic
223k5 States
223k5.1 k. In General. Most Cited Cases
A state's regulatory power over the sale and use of alcoholic beverages under the Twenty-first Amendment cannot be used to shield the suppression of speech from First Amendment scrutiny. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amends. 1, 21.

[19] Constitutional Law 92 ⇐1572

92 Constitutional Law
92XVIII Freedom of Speech, Expres-

sion, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
The power to ban speech pursuant to a government's police power does not presuppose the power to impose a tax disincentive on such speech. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 92 ⇐1058

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1058 k. Denial of Benefits as Constitutional Violation. Most Cited Cases
Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely, including those that demand the surrender of a constitutional right. (Per Diane M. Henson, J., with one justice concurring in judgment.)

[21] Constitutional Law 92 ⇐2239

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2236 Intoxicating Liquors
92k2239 k. Nudity in General. Most Cited Cases

Intoxicating Liquors 223 ⇐16

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k16 k. Taxation. Most Cited Cases
Even if considered content neutral for First Amendment purposes, tax imposed on businesses that offer live, nude entertainment in the presence of alcohol could not survive intermediate scrutiny because it was not narrowly tailored to further a substantial governmental interest; majority of proceeds resulting from the tax were allocated to purposes bearing no relation to the negative secondary effects the State claimed it was seeking to correct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1; V.T.C.A., Bus. & C. §§ 47.051-47.056.

[22] Constitutional Law 92 ⇐1505

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1505 k. Narrow Tailoring. Most Cited Cases
In determining whether a restriction on speech is narrowly tailored, for purposes of intermediate scrutiny under the First Amendment, the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct. (Per Diane M. Henson, J., with one justice concurring in judgment.) U.S.C.A. Const.Amend. 1.

[23] Declaratory Judgment 118A ⇐44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases
While the tax code does provide a remedy for taxpayers seeking to challenge the legality of a tax, such a challenge may also be brought in a suit for declaratory relief un-

der the Texas Uniform Declaratory Judgments Act (UDJA). V.T.C.A., Tax Code §§ 112.052, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[24] States 360 ⇐191.9(2)

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(2) k. Declaratory Judgment. Most Cited Cases
Declaratory-judgment actions against state officials challenging the constitutionality of a statute do not implicate the sovereign-immunity doctrine because they are not considered suits against the State. V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[25] Costs 102 ⇐194.40

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.40 k. Declaratory Judgment. Most Cited Cases

Declaratory Judgment 118A ⇐44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases
Sexually oriented business's request for declaratory judgment regarding constitutionality of tax imposed on businesses that offer live, nude entertainment in the presence of alcohol was not a redundant remedy, and thus award of attorney fees to business under Uniform Declaratory Judgments Act (UDJA) was not improper, even though tax code permitted taxpayers to seek a return of taxes paid under protest and an injunction prohibiting the assessment or collection of a tax; at the time of trial, business had not paid the tax under protest or filed a written protest, because the first tax payments were not yet due, and at the time the UDJA claim was filed, business had a constitutional right to a declaratory judgment regarding its tax liability. V.T.C.A., Tax Code §§ 112.052, 112.053, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

[26] Declaratory Judgment 118A ⇐44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases
If a party requests a declaration under the Uniform Declaratory Judgments Act (UDJA) that goes beyond its request under the tax code for a return of taxes paid under protest and an injunction prohibiting the assessment or collection of the tax, the UDJA claim is not considered a redundant remedy. V.T.C.A., Tax Code §§ 112.052, 112.101; V.T.C.A., Civil Practice & Remedies Code § 37.001 et seq.

Held UnconstitutionalV.T.C.A., Bus. & C. §§ 47.051, 47.052, 47.053, 47.054, 47.055, 47.0551, 47.056. ***856** James C. Ho (argued), Danica L. Milios, James C. Todd, Christine Monzingo, for Susan Combs, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas.

Craig T. Enoch (argued), G. Stewart Whitehead, Peter A. Nolan, Elliot Clark, Randall D. Chapman, Douglas M. Becker, Antoinette D. "Toni" Hunter, L. Monique Gonzalez, for Texas Entertainment Associ-

ation, Inc. and Karpod, Inc.

Before Chief Justice JONES, Justices PURYEAR and HENSON.

OPINION

DIANE M. HENSON, Justice.

The Comptroller of Public Accounts and the Attorney General of the State of Texas [FN1] appeal the trial court's judgment in a suit for declaratory and injunctive relief brought by Texas Entertainment Association, Inc. ("TEA"), and Karpod, Inc. The trial court's judgment declared subchapter B of chapter 47 of the business and commerce code unconstitutional and permanently enjoined the Comptroller from assessing or collecting the tax imposed by that subchapter. [FN2] *See* Tex. Bus. & Com.Code Ann. §§ 47.051-.056 (West Supp.2008). Because we hold that subchapter B violates the First Amendment to the United States Constitution, we affirm the trial court's judgment. [FN3] *See* U.S. Const. amend. I.

FN1. Because the appellants' interests are aligned, we will refer to them collectively as "the Comptroller."

FN2. For purposes related to TEA and Karpod's state constitutional claims, the parties dispute whether the assessment at issue in this case is properly considered a tax or a fee. We will adopt the language of the trial court's order, which refers to the assessment as a tax. However, because we need not reach the state constitutional claims in this appeal, we express no opinion on whether the assessment imposed by subchapter B is properly considered a tax or a fee.

FN3. After oral argument was heard in this case, both sides requested leave to file post-submission briefs. Those motions are hereby granted.

BACKGROUND

In 2007, the Texas Legislature enacted chapter 47, subchapter B, of the business and commerce code, which imposes a tax "on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business." Tex. Bus. & Com.Code Ann. § 47.052(a). The statute further defines a sexually oriented business ("SOB") as:

> a nightclub, bar, restaurant, or similar commercial enterprise that:
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> (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and
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> ***857** (B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 47.051(2). As a result, the tax applies only to businesses that permit alcohol consumption in the presence of live, nude entertainment. "Nude" is defined as "entirely unclothed" or "unclothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." *Id.* § 47.051(1). A business subject to the tax is not required to impose the tax on its cus-

tomers, but may use its discretion in determining how it will derive the money required to pay the tax. *Id.* § 47.052(c). The legislature allocated the first $25 million in revenue received from the SOB tax to the State's sexual assault program fund and the remaining revenue to the Texas health opportunity pool to fund health insurance for low-income Texans. *Id.* §§ 47.054-.055. The SOB tax went into effect on January 1, 2008.[FN4]

> FN4. During the 2007 session, the legislature also repealed chapter 47 of the business and commerce code, effective April 1, 2009, as part of a nonsubstantive statutory revision program. *See* Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.47(a)(1), 2007 Tex. Gen. Laws 1905, 2082. Subchapter B of chapter 47 was enacted without reference to this repeal.

In response to the enactment of subchapter B, Karpod, a sexually oriented business, and TEA, an association representing the interests of sexually oriented businesses in Texas, filed suit for declaratory and injunctive relief against the Comptroller, asserting that the tax violated the state and federal constitutions. After a bench trial, the trial court issued a declaratory judgment that the statute violated the First Amendment to the United States Constitution, permanently enjoined the Comptroller from collecting or assessing the tax, and awarded attorneys' fees in favor of TEA and Karpod.[FN5] This appeal followed.

> FN5. In light of its finding that the statute is unconstitutional under the First Amendment, the trial court declined to reach TEA and Karpod's state constitutional claims.

DISCUSSION

On appeal, the Comptroller argues (1) that the SOB tax does not violate the First Amendment, (2) that the SOB tax does not violate the Texas Constitution, (3) that sovereign immunity bars suit by TEA, and (4) that the trial court erred in awarding attorneys' fees.

The First Amendment

[1] We note at the outset that "the fact that protected speech may be offensive to some does not justify its suppression." *Carey v. Population Servs. Int'l,* 431 U.S. 678, 701, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). In fact, "it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 87, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (Stewart, J., dissenting).

[2][3][4] In conducting our First Amendment analysis, we must first determine whether the SOB tax is subject to strict or intermediate scrutiny. Content-based restrictions on speech are presumptively invalid and subject to strict scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion). In order to withstand strict scrutiny, a statute must be narrowly tailored***858** to promote a compelling government interest. *See, e.g., United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). The Comptroller concedes that the SOB tax cannot survive a strict scrutiny analysis, arguing instead that the tax is content-neutral and therefore subject to intermediate scrutiny. A content-neutral restriction on speech

withstands intermediate scrutiny "if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

[5][6] "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based," while "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The principal inquiry in determining content neutrality "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Rules are generally considered content-based when the regulating party must examine the speech to determine if the restriction applies. *See, e.g., Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 383, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984).

[7] While nude dancing "falls only within the outer ambit of the First Amendment's protection," it is nevertheless protected as expressive conduct. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). In arguing that the SOB tax is subject to intermediate scrutiny, the Comptroller points to cases in which the U.S. Supreme Court has applied intermediate scrutiny to zoning restrictions aimed at the secondary effects of businesses offering adult entertainment. *See Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728 (plurality opinion) (zoning ordinance prohibiting more than one "adult entertainment business" in single building); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (zoning ordinance restricting location of adult movie theaters); *Young,* 427 U.S. at 71-72, 96 S.Ct. 2440 (plurality opinion) (same).

[8] Unlike the restrictions at issue in *Alameda Books, Renton,* and *Young,* the SOB tax is not a zoning restriction, but a tax on businesses that offer live, nude entertainment in the presence of alcohol.[FN6] The U.S. Supreme Court has suggested that zoning restrictions directed to secondary effects of speech are inherently different from other types of restrictions on speech. *See Alameda Books,* 535 U.S. at 449, 122 S.Ct. 1728 (plurality opinion) ***859** (Kennedy, J., concurring)[FN7] ("[Z]oning regulations do not automatically raise the specter of impermissible content discrimination ... because they have a prima facie legitimate purpose: to limit the negative externalities of land use.... [T]hese sorts of ordinances are more like a zoning restriction on slaughterhouses and *less like a tax on unpopular newspapers.*") (emphasis added); *Young,* 427 U.S. at 62, 73 n. 35, 96 S.Ct. 2440 (plurality opinion) (stating that the zoning ordinance's restrictions are so minimal that "the market for this commodity is essentially unrestrained" and that "[t]he situation would be quite different if

the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech"). Because zoning ordinances are distinguishable from other restrictions on speech, we do not find the First Amendment analyses applied in zoning cases to be particularly relevant to the present case. *See Alameda Books,* 535 U.S. at 445, 122 S.Ct. 1728 (plurality opinion) (Kennedy, J., concurring) (stating that city could regulate secondary effects of adult entertainment businesses with zoning ordinance, but could not suppress the speech itself by, "for example, imposing a content-based fee or tax").

> FN6. While the Comptroller characterizes the SOB tax as a "modest fee" of five dollars per customer, "the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 136, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).
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> FN7. Because Justice Kennedy concurred in the judgment of the Court on the narrowest grounds, his concurrence represents the Court's holding in *Alameda Books. See Marks v. United States,* 430 U.S. 188, 194, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks and citation omitted).

Furthermore, while the Supreme Court has held that bans on public nudity should be reviewed with intermediate scrutiny as content-neutral restrictions, the public-nudity bans at issue in those cases did not single out a specific class of First Amendment speakers, as the SOB tax does. *See Pap's A.M.,* 529 U.S. at 290, 120 S.Ct. 1382 (plurality opinion) ("By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity."); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 571, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion) ("Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board.... Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.").

[9][10][11] Having found the cases involving zoning restrictions and total nudity bans inapplicable to the present case, we now turn to the body of law addressing differential taxation of First Amendment speakers. The SOB tax targets a small group of taxpayers engaged in expression protected by the First Amendment, even if only marginally so. *See Barnes,* 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion). A tax imposed on a small group of First Amendment speakers, particularly a group conveying a message that the taxing body might consider undesirable, carries a greater risk of suppressing speech than a zoning ordinance because "the power to tax involves the power to destroy." *McCulloch v. Maryland,* 4 Wheat. 316, 17 U.S. 316, 431, 4 L.Ed. 579 (1819). As the Supreme Court stated in *Leathers v. Medlock:*

> [D]ifferential taxation of First Amendment speakers is constitutionally suspect when

> it threatens to suppress the expression of particular ideas or viewpoints.... A tax is also suspect if it ***860** targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991) (citations omitted). "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

[12][13][14][15] A selective taxation scheme in which an entity's tax status depends entirely on the content of its speech is "particularly repugnant to First Amendment principles." *Arkansas Writers' Project,* 481 U.S. at 229, 107 S.Ct. 1722. As a result, differential taxation based on content is subject to strict scrutiny. *Id.* at 231. A taxing statute is content-based if it "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). Where taxing authorities must necessarily examine the content of the message that is conveyed, "[s]uch official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible" with the First Amendment. *Arkansas Writers' Project,* 481 U.S. at 230, 107 S.Ct. 1722.

[16] Testimony at trial revealed that in order to determine whether the SOB tax should be assessed against a particular taxpayer, representatives from the Comptroller's office would be required to examine the content of the expressive conduct. For example, Steven White, a program specialist in the Comptroller's tax policy division, testified that if a play involving nudity was held at a bar or other establishment that serves alcohol, the owner of the establishment would not be subject to the SOB tax because "the main ingredient of the performance is not necessarily that of live nude entertainment." White also testified that a comedy show involving nudity at a venue where alcohol is sold would not trigger the SOB tax, because "the essence of that performance is not necessarily one of live nude entertainment." White further explained that a bar hosting a "wet t-shirt contest" or a bar at which bartenders periodically perform dance routines and become nude as defined by the statute would be subject to the tax. Similarly, Emma Fuentes, an auditor in the Comptroller's office testified, "Using my own judgment, I would look at the taxpayer we're auditing. If it's like a theater that puts on plays and concerts I would think that maybe this fee was not appropriate for them ... [b]ecause the whole essence of the transaction to me would be for somebody to go see a play and not so much a sexually oriented business." These examples reveal that the SOB tax is not imposed in all incidents where live nude entertainment occurs in the presence of alcohol, but only in those situations in which the taxing authority-the Comptroller-determines, after examining the content of the expression, that it represents the "essence" of live nude entertainment. This type of differential taxation based on content is precisely the type of restriction warranting strict scrutiny in *Arkansas Writers' Project, Minneapolis Star,* and *Simon &*

Schuster.

[17] The bulk of the testimony at trial focused on the Comptroller's argument that the SOB tax is aimed at reducing the secondary effects of sexually oriented businesses.***861** However, a tax on speech is not necessarily content-neutral simply because it is aimed at secondary effects. *See Forsyth County,* 505 U.S. at 134, 112 S.Ct. 2395. While intermediate scrutiny is applied to zoning regulations aimed at decreasing secondary effects, zoning regulations are distinguishable from differential taxation statutes, as previously discussed. *See Alameda Books,* 535 U.S. at 449, 122 S.Ct. 1728 (plurality opinion) (Kennedy, J., concurring) (stating that designation of zoning restrictions on adult entertainment businesses as "content-neutral" is legal fiction used because "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional"). In light of this distinction, evidence that the SOB tax is aimed at reducing secondary effects of sexually oriented businesses does not preclude the proper application of strict scrutiny in this case.

[18] The Comptroller also argues that the State has the power to categorically ban nude dancing or the sale of alcohol in the presence of nude dancing, and therefore the SOB tax must be constitutionally permissible because it is less restrictive than a total ban. First, the Supreme Court cases relied upon by the Comptroller for the proposition that the State may ban nude dancing altogether refer, as previously discussed, to content-neutral bans on nudity in general, rather than specific prohibitions on nude dancing. *See Pap's A.M.,* 529 U.S. at 290, 120 S.Ct. 1382 (plurality opinion); *Barnes,* 501 U.S. at 566, 571, 111 S.Ct. 2456 (plurality opinion). Second, with regard to the power to ban alcohol in the presence of nude dancing, the Supreme Court held in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." In other words, a state's regulatory power over the sale and use of alcoholic beverages under the Twenty-first Amendment cannot be used to shield the suppression of speech from constitutional scrutiny. *See id.*[FN8]

> FN8. We note that the Court's holding in *44 Liquormart* did not foreclose the possibility of a state using its inherent police power to place restrictions on the sale of alcohol in the presence of nude dancing. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). However, such use of a state's police power must satisfy First Amendment scrutiny. *See Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 80, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) (Powell, J., concurring) (stating that "no aspect of the police power enjoys immunity from searching constitutional scrutiny").

[19] Furthermore, we disagree with the Comptroller's *a fortiori* argument that if a government may, in the interest of public safety, ban alcohol in the presence of nude dancing, it may also impose a tax on establishments that provide alcohol in the presence of nude dancing. The reason this argument fails is best addressed by the following analogy posited by the U.S. Su-

preme Court:

> [T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in ***862** a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). As this hypothetical suggests, the power to ban speech pursuant to a government's police power does not presuppose the power to impose a financial disincentive on such speech. This reasoning is even more applicable in the present case because the act of shouting fire in a crowded theater, unlike nude dancing, is not subject to First Amendment protection at all. *See Schenck v. United States,* 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

[20] The Supreme Court has held that while a government has the power to regulate the use and sale of alcohol, it "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially his interest in freedom of speech." *44 Liquormart,* 517 U.S. at 513, 116 S.Ct. 1495 (internal quotation marks and citation omitted). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)). This is precisely what the State seeks to do in the present case. By conditioning the ability to sell alcohol on the forfeiture of a First Amendment right, the State attempts to produce a result-the imposition of a content-based tax on speech-which it could not command directly.[FN9]

> FN9. The fact that there is no constitutional right to provide alcohol in the presence of nude dancing is immaterial because "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely," including those that demand the surrender of a constitutional right. *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Furthermore, we disagree with the Comptroller's characterization of the SOB tax as an alcohol regulation, rather than a tax on speech. While it is true that a sexually oriented business owner may avoid the tax by choosing not to allow the consumption of alcohol on the premises, this aspect of the SOB tax is insufficient to transform a content-based tax into a content-neutral alcohol regulation. In reviewing the plain language, context, and legislative history of the relevant statutory provisions, we are

not convinced that "the statute's predominant purpose is with regulating the service of alcohol," as was the case in *Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299, 309 (5th Cir.2007), in which the Fifth Circuit applied intermediate scrutiny to a provision of the Texas Alcoholic Beverage Code prohibiting sexually oriented businesses from obtaining private club permits from the Texas Alcoholic Beverage Commission (TABC) to serve alcohol in dry counties. *See* Tex. Alco. Bev.Code Ann. § 32.03(k) (West 2007). In *Illusions,* the Fifth Circuit held that the statute at issue was "part of a 'web' of alcohol regulations," which are unrelated to the suppression of speech, and emphasized the statutory context of the prohibition within the alcoholic beverage code, where it appears alongside other provisions allowing TABC to regulate the sale of alcohol. 482 F.3d at 309; *see also id.* at 308 (concluding "that § 32.03(k) is ***863** subject to intermediate scrutiny because its predominant purpose, as exhibited by its plain text and its place within the Texas Alcoholic Beverage Code, is unrelated to the suppression of speech").

The SOB tax, on the other hand, is not part of a "web" of alcohol regulations imposed by the alcoholic beverage code, but appears in chapter 47 of the business and commerce code, which governs sexually oriented businesses. The SOB tax is remitted to the Comptroller, *see* Tex. Bus. & Com.Code Ann. § 47.053, and, unlike the statutory provision at issue in *Illusions,* does not involve the regulatory oversight of TABC.[FN10] The original version of the SOB tax proposed in the legislature and passed by the House of Representatives made no mention of alcohol at all. *See* Tex. H.B. 1751, 80th Leg., R.S. (2007) (as passed by House, May 9, 2007). The bill was later amended in the Senate to restrict the pool of taxpayers to those sexually oriented businesses that allowed alcohol on the premises. *See* S.J. of Tex., 80th Leg., R.S. 3043 (2007). As TEA and Karpod point out in their briefs, this change mirrored a similar amendment originally proposed in the House, *see* H.J. of Tex., 80th Leg., R.S. 3573 (2007), after a hearing before the House Ways and Means Committee, in which there was some discussion regarding the additional audit burden that the SOB tax would impose on the Comptroller's office, the convenience of "joining forces" with TABC for audit purposes, and the logistical difficulties in auditing sexually oriented businesses that are not regulated by TABC.[FN11] *See* Hearing on Tex. H.B. 1751 Before the House Comm. on Ways & Means, 80th Leg., R.S. 39-42 (March 14, 2007). Beyond this discussion regarding the efficiency and convenience of combining the audit resources of TABC and the Comptroller's office, the legislative history of subchapter B of chapter 47 of the business and commerce code includes no references to the regulation of alcohol.

FN10. TABC is authorized to "exercise all powers, duties, and functions conferred by" the alcoholic beverage code, and "shall inspect, supervise, and regulate every phase of the business of manufacturing, importing, exporting, transporting, storing, selling, advertising, labeling, and distributing alcoholic beverages, and the possession of alcoholic beverages for the purpose of sale or otherwise." Tex. Alco. Bev.Code Ann. § 5.31 (West 2007).

We note also that chapter 183 of the tax code, which imposes a tax on gross receipts derived from the

sale of "mixed beverages," includes a "conflict of rules" provision to govern conflicts between regulations issued by TABC and those issued by the Comptroller in the collection of the tax. *See* Tex. Tax Code Ann. § 183.052 (West 2008). No similar provision appears in the SOB tax statute, suggesting that the legislature did not contemplate the exercise of TABC's regulatory authority in connection with the SOB tax.

FN11. During the hearing, a representative from the Comptroller's office testified that the SOB tax would create "an additional audit burden" and stated that "these particular establishments are regulated by the TABC and they are subject to audit already by the TABC," so "[h]opefully we can join forces with the TABC." When asked, "Is the bill specifically tied to those entities that are selling liquor? If it is not, how are you going to [audit] the entities that don't sell liquor?" the Comptroller's representative answered, "Well, I believe we would be on our own on that case."

Reviewing the SOB tax provisions in their statutory context, we conclude that, unlike the provision at issue in *Illusions,* the predominant purpose of the SOB tax is not to regulate the service of alcohol. *See* 482 F.3d at 309, 310 n. 7 (concluding that statute has predominant purpose of regulating alcohol and is therefore content-neutral because "the text of the statute and its statutory context" suggest that it "is more in the nature of a typical alcohol regulation" and less in the nature of a law suppressing speech). Despite the limitation of ***864** the SOB tax burden to businesses that allow the consumption of alcohol, the SOB tax remains a content-based differential tax burden on protected speech, and is subject to strict scrutiny. *See, e.g., Arkansas Writers' Project,* 481 U.S. at 230, 107 S.Ct. 1722 (stating that such tax burdens are "entirely incompatible" with First Amendment).

[21][22] The Comptroller concedes that the SOB tax cannot withstand strict scrutiny. As the trial court stated in its judgment, "Defendants failed to-and conceded that they cannot-meet their burden to show that [the tax] is necessary to serve a compelling state interest and narrowly tailored for that purpose." In light of the Comptroller's concession and our determination that the SOB tax is a content-based tax subject to strict scrutiny, we hold that the SOB tax is unconstitutional under the First Amendment.[FN12] The Comptroller's first issue is overruled. Having found the SOB tax unconstitutional under the First Amendment, we need not reach the Comptroller's second issue regarding Karpod and TEA's state constitutional claims.

FN12. Even if we were to consider the SOB tax to be content-neutral, it would fail constitutional muster under the intermediate-scrutiny standard because it is not narrowly tailored to further a substantial governmental interest. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). In determining whether a restriction on speech is narrowly tailored, "the validity of the regulation depends

on the relation it bears to the overall problem the government seeks to correct." *Ward v. Rock Against Racism,* 491 U.S. 781, 801, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In the present case, the majority of the proceeds resulting from the SOB tax are allocated for a purpose that, while laudable, bears no relation to the overall problem that the State claims it is seeking to correct-the negative secondary effects of nude dancing when combined with alcohol. While the first $25 million in revenue per biennium is allocated to the sexual assault program fund, the remainder-and the vast majority-of the revenue is dedicated to providing health insurance to low-income individuals. *See* Tex. Bus. & Com.Code Ann. §§ 47.054-.055 (West Supp.2008). The Comptroller presented no evidence at trial of a link between a lack of health insurance and nude dancing where alcohol is consumed. Because the State has imposed a tax on protected speech and allocated only a fraction of the proceeds to combat secondary effects, there is "an inadequate nexus between the regulation and the interest sought to be served." *Clark,* 468 U.S. at 299 n. 8, 104 S.Ct. 3065; *see also Ward,* 491 U.S. at 799, 109 S.Ct. 2746 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.").

Sovereign Immunity

In its third issue on appeal, the Comptroller argues that TEA, as an organization that is not subject to the SOB tax, is barred from bringing suit on the basis of sovereign immunity. *See State v. Holland,* 221 S.W.3d 639, 643 (Tex.2007) ("Absent an express waiver of its sovereign immunity, the State is generally immune from suit."). The Comptroller asserts that TEA cannot take advantage of the waiver of sovereign immunity found in the tax-protest provisions of the tax code because these provisions apply only to taxpayers. *See* Tex. Tax Code Ann. §§ 112.052, .101 (West 2008); *see also Rylander v. Bandag Licensing Corp.,* 18 S.W.3d 296, 302 (Tex.App.-Austin 2000, pet. denied) ("The Tax Code provides a statutory remedy for taxpayers who contend a tax is unlawful or may not legally be demanded.").

[23][24] While the tax code does provide a remedy for taxpayers seeking to challenge the legality of a tax, such a challenge may also be brought in a suit for declaratory relief under the Texas Uniform Declaratory Judgments Act (UDJA), ***865** Tex. Civ. Prac. & Rem.Code Ann. §§ 37.001-.011 (West 2008), as TEA has done in the present case. *See Bandag Licensing,* 18 S.W.3d at 303. This Court has held that "[a] suit seeking a declaratory judgment that a state agent is acting pursuant to an unconstitutional law is not an action against the State barred by sovereign immunity." *Rylander v. Caldwell,* 23 S.W.3d 132, 136 (Tex.App.-Austin 2000, no pet.).[FN13] Declaratory-judgment actions against state officials challenging the constitutionality of a statute "do not implicate the sovereign-immunity doctrine" because they are not considered "suits against the State." *Texas Natural Res. Conservation Com'n v. IT-Davy,* 74 S.W.3d 849, 855 (Tex.2002). Because the present case falls within this category of cases for which the sovereign-immunity doctrine does not ap-

ply, we hold that TEA is not barred from bringing suit.[FN14] The Comptroller's third issue on appeal is overruled.

> FN13. The Comptroller argues that *Caldwell* contradicts the Texas Supreme Court's decision in *W.D. Haden Co. v. Dodgen,* 158 Tex. 74, 308 S.W.2d 838 (1958). However, in *Dodgen,* the court expressly distinguished between suits "to compel performance of or to enforce rights arising out of a contract with a state agency," which are considered suits against the State for purposes of sovereign immunity, and suits seeking a determination of a person's rights when state officials act outside their lawful authority, which are not considered suits against the State for sovereign-immunity purposes. 308 S.W.2d at 840. This Court's holding in *Caldwell* is consistent with this distinction.
>
> FN14. On appeal, the Comptroller does not contest TEA's associational standing to bring suit. *See Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (requirements for associational standing).

Attorneys' Fees

[25] In its fourth issue on appeal, the Comptroller argues that Karpod is not entitled to attorneys' fees under the UDJA because its UDJA claim is redundant to the legal remedy provided by the tax-protest provisions of the tax code. *See* Tex. Tax Code Ann. §§ 112.052, .101. The Comptroller contends that Karpod improperly brought its UDJA claim solely as a vehicle to obtain attorneys' fees. *See Texas State Bd. of Plumbing Exam'rs v. Associated Plumbing-Heating-Cooling Contractors of Tex., Inc.,* 31 S.W.3d 750, 753 (Tex.App.-Austin 2000, pet. dism'd by agr.) ("It is an abuse of discretion ... to award attorney's fees under the UDJA when the statute is relied upon solely as a vehicle to recover attorney's fees.").

[26] Chapter 112 of the tax code allows taxpayers to seek a return of taxes paid under protest, *see* Tex. Tax Code Ann. § 112.052, and an injunction prohibiting the assessment or collection of a tax, *see id.* § 112.101.[FN15] If a party requests a declaration under the UDJA that goes beyond its request pursuant to the tax code, the UDJA claim is not considered a redundant remedy. *See Strayhorn v. Raytheon E-Systems, Inc.,* 101 S.W.3d 558, 572 (Tex.App.-Austin 2003, pet. denied) (distinguishing between taxpayer that "requested a statutory interpretation that went beyond its request for a tax refund," for which UDJA claim would not be redundant, and taxpayer seeking declaration that denial of refund claim was unlawful, for which UDJA claim would be redundant). In addition, the issues to be determined in a tax-protest suit "are limited to those arising from the reasons expressed in the ***866** written protest as originally filed." Tex. Tax Code Ann. § 112.053(b) (West 2008). At the time of trial, Karpod had not paid the SOB tax under protest or filed a written protest as contemplated by section 112.053 because the first SOB tax payments were not yet due.[FN16] Therefore, when Karpod's UDJA claim was filed, the constitutionality of the SOB tax was not yet a "reason[ ] expressed in the written protest" that could be raised in a tax-protest suit.[FN17] *Id.* The Texas Supreme Court has held that taxpayers have a consti-

tutional right to obtain judicial review of tax liability by means of a prepayment declaratory action. *See R Commc'ns, Inc. v. Sharp,* 875 S.W.2d 314, 317-18 (Tex.1994) (holding tax code provision prohibiting declaratory actions and requiring taxpayers to seek relief through protest suit to be unconstitutional); *see also Bandag Licensing,* 18 S.W.3d at 305 (tax code provision prohibiting award of attorneys' fees in declaratory-judgment action is "an unconstitutional barrier to access to the courts"). At the time Karpod's UDJA claim was filed, it had a constitutional right to a declaratory judgment regarding its tax liability and such a declaration was not redundant to any remedy available under the tax code. As a result, the trial court did not abuse its discretion in awarding attorneys' fees under the UDJA. The Comptroller's fourth issue is overruled.

FN15. Chapter 112 also allows taxpayers to bring a refund suit, *see* Tex. Tax Code Ann. § 112.151 (West 2008), which is distinct from a tax-protest suit, *see id.* § 112.052 (West 2008). Karpod did not seek a refund under section 112.151.

FN16. The trial court's judgment declaring the tax unconstitutional was issued on March 28, 2008, and the order awarding attorneys' fees was issued April 11, 2008. Karpod did not pay the tax under protest or file its written protest letter until April 21, 2008, the date that the first SOB tax payments became due.

FN17. TEA, for that matter, had no access to a tax-protest suit at any time during this litigation because it is not a taxpayer for SOB tax purposes. As a result, TEA's claim under the UDJA is not a redundant remedy preventing an award of attorneys' fees.

CONCLUSION

We affirm the trial court's judgment declaring that subchapter B of chapter 47 of the business and commerce code is unconstitutional and permanently enjoining assessment and collection of the tax.

Concurring Opinion by Chief Justice JONES.
Dissenting Opinion by Justice PURYEAR.

CONCURRING OPINION

J. WOODFIN JONES, Chief Justice.
Although I agree that strict scrutiny is the appropriate standard to apply in this case and concur in the decision to affirm the trial court's judgment, I write separately to address the issue raised by the parties concerning the use and relevance of post-enactment evidence in determining the statute's predominant purpose.

Our First Amendment analysis proceeds in three parts. *See City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality op.) (citing *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46, 47-49, 51-54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). The first question, whether the challenged law imposes a complete ban or is instead a "time, place, and manner" regulation, *see id.,* is not in contention here, as the parties agree that the fee or tax at issue is the latter. The second question in the analysis is whether the restriction is content-neutral or content-based, *see id.;* the answer to this question determines what level of scrutiny should be applied, *see City of Erie v. Pap's A.M.,* 529 U.S. 277,

278, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.). A content-based***867** regulation is considered presumptively invalid and is subject to strict scrutiny. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 230-31, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). Government regulation of speech or other expressive activity is content-neutral and subject only to intermediate scrutiny if it is adopted not "because of disagreement with the message it conveys," but for reasons unrelated to the content of the speech. *Hill v. Colorado,* 530 U.S. 703, 720, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Even in cases when a regulation has an incidental effect on some speakers or messages but not others, however, it will be deemed content-neutral and reviewed under intermediate scrutiny if its predominant purpose was aimed at perceived harmful secondary effects of the speech, rather than at its content. *Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728; *City of Renton,* 475 U.S. at 48-49, 106 S.Ct. 925. After determining the level of scrutiny, the third part of the analysis involves applying the appropriate constitutional standard to decide whether the regulation is narrowly tailored to promote a compelling governmental interest (strict scrutiny), *see Arkansas Writers' Project,* 481 U.S. at 231, 107 S.Ct. 1722, or narrowly drawn to further a substantial governmental interest unrelated to the suppression of free speech (intermediate scrutiny), *see Turner Broad. Sys. v. Federal Commc'ns Comm'n,* 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

I agree with Justice Henson that, in the present case, the level-of-scrutiny inquiry (*i.e.,* "question two") can properly be decided by considering the plain text of the statute at issue and its statutory context. *See, e.g., Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299, 310 (5th Cir.2007) (holding that statute's predominant purpose could be determined by considering text and statutory context). In addition to those factors, I believe it is also appropriate at this stage of the inquiry to look beyond whether the statute is content-based or content-neutral on its face and consider evidence regarding whether the statute's predominant purpose was to regulate speech or to address secondary effects. *See City of Renton,* 475 U.S. at 48-49, 106 S.Ct. 925. To the extent that Justice Henson's opinion suggests that secondary-effects analysis is or should be confined strictly to cases involving zoning regulations, I do not adopt that view. Given that, in determining the content neutrality of any statute under the First Amendment, "[t]he government's purpose is the controlling consideration," *Ward,* 491 U.S. at 791, 109 S.Ct. 2746, it would be unwise to ignore evidence regarding whether the government's actual purpose was to combat negative secondary effects. Accordingly, I see no reason to analyze and decide cases in which protected speech is regulated through imposition of a tax any differently from cases in which it is regulated by a zoning restriction or other means.

As the Eleventh Circuit has observed, while the Supreme Court has stated that zoning ordinances and public-nudity ordinances should be reviewed under distinct standards, "the Court also has sometimes collapsed the two categories into a single, overarching category of regulatory action targeting the negative 'secondary effects'

of non-obscene adult entertainment and drawn conclusions about this single category." *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee City,* 337 F.3d 1251, 1255 (11th Cir.2003). "Additionally, the Court has occasionally borrowed specific doctrines***868** developed in one category of case to apply to the other." *Id.* at 1255-56 (citing *Alameda Books,* 535 U.S. at 434, 122 S.Ct. 1728 (plurality op.) (relying on Court's holding in *Pap's A.M.,* a case involving public-nudity ordinance, to explicate evidentiary showing necessary to sustain adult-entertainment zoning ordinance); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 583-84, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring) (relying on evidentiary standard described in *Renton,* a zoning case, to explicate evidentiary showing necessary to sustain public-nudity ordinance)).[FN1] Therefore, I would hold that the *Renton* test may be applied here and that question two of that test may be decided by considering evidence relevant to the issue of whether the legislature's predominant purpose in enacting the statute was to address secondary effects.

> FN1. *See also City of Erie v. Pap's A.M.,* 529 U.S. 277, 281-82, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality op.) (applying *Renton's* secondary-effects doctrine to justify non-zoning restrictions); *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citing *Renton* for proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others" in non-zoning context). The federal courts of appeals have followed suit. *See, e.g., Fantasy Ranch Inc. v. City of Arlington,* 459 F.3d 546, 556 (5th Cir.2006) (holding that city ordinance requiring sexually oriented businesses to enforce proximity provisions between nude dancers and patrons was content-neutral because "the ordinance's predominate concern is for secondary effects"); *Dream Palace v. County of Maricopa,* 384 F.3d 990, 1013 (9th Cir.2004) (equating second question of *Renton* test to determination of whether statute was designed to combat secondary effects of adult entertainment industry); *G.M. Enters., Inc. v. Town of St. Joseph,* 350 F.3d 631, 637 (7th Cir.2003) (focusing level-of-scrutiny inquiry solely on whether ordinances targeted secondary effects of sexually oriented businesses and opting not to decide whether ordinances were content-based or content-neutral).

In the present case, the trial court made several written fact findings relating to the absence of evidence that the statute's predominant purpose was to combat secondary effects of combining nude dancing and alcohol:

> The author of HB 1751, State Representative Ellen Cohen, testified before the House Ways & Means Committee that she claimed no link between sexual assault and the businesses responsible for the fees to be paid.
>
> The House Research Organization's Bill Analysis claimed no link between sexual assault and the business responsible for the fees to be paid.
>
> There is no evidence that the Legislature actually considered or saw any studies

claiming a link between sexual assault and the sexually oriented businesses that are responsible for the SOB Tax.

Victoria Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

There is no evidence that studies about sexually oriented businesses were created, consulted, or reviewed by the Legislature prior to enacting HB 1751.

The State does not challenge those findings in this appeal. The trial court also made the following conclusion of law:

If reliance by the Legislature on some pre-enactment evidence of links between secondary effects and protected speech is a constitutional requirement (as is suggested, not expressly held, by Supreme Court case law), the SOB Tax must be held unconstitutional because no evidence indicating that the Legislature***869** actually considered any evidence of such links was presented at trial.

The State argues that, in making the foregoing findings and conclusion, the trial court created a "false distinction" between pre- and post-enactment evidence, which led it to determine that the State's "evidence of a link between the combination of alcohol and nude dancing and sexual assault" was insufficient. Relying on Justice Souter's concurring opinion in *Barnes* and two Fifth Circuit decisions, *see Fantasy Ranch,* 459 F.3d at 560; *N.W. Enters. Inc. v. City of Houston,* 352 F.3d 162, 175 (5th Cir.2003), the State argues that the Supreme Court has never required the government to produce "pre-enactment evidence" of legislative purpose in order to meet its burden of showing that a statute is content-neutral. The State's reliance on these cases is inapposite.

While Justice Souter did urge that "the appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional," *see id.* at 582, 111 S.Ct. 2456, his comments were made in the context of a discussion of question three of the *Renton* analysis-whether the government satisfied the intermediate-scrutiny standard by producing sufficient evidence of a link between the challenged regulation and the asserted interest in combating secondary effects. Likewise, the statements in the cited Fifth Circuit cases regarding the use of post-enactment evidence were made in the context of question-three discussions.[FN2] But inquiring into whether a statute's *purpose* was to address secondary effects is wholly distinct from inquiring into whether the statute can be *justified* on the basis that it actually furthers an important or substantial governmental interest in combating negative secondary effects; the former determines the level of scrutiny to be applied, while the latter determines whether the statute passes constitutional muster under the applicable standard. Although I agree that post-enactment evidence may be considered in answering question three, and is often essential to that inquiry, it is far from clear that post-enactment evidence-even evidence directly relevant to purpose-may properly be considered in answering question two. *See, e.g., Illusions,* 482 F.3d at 310 n. 7 (declining to address question of whether district court erred in relying on state's post-enactment assertion of secondary-effects purpose as basis for applying

intermediate scrutiny, having decided that statute was content-neutral based on its plain text and statutory context); *White River Amusement Pub, Inc. v. Town of Hartford,* 481 F.3d 163, 171-72 (2d Cir.2007) (concluding that *Renton* permits consideration only of pre-enactment evidence at question-two stage); *Dream Palace,* 384 F.3d at 1013-14 (same); *Peek-A-Boo Lounge,* 337 F.3d at 1268 & n. 16 (same); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 862 (8th Cir.2003) (same); *D.H.L. Assocs., Inc. v. O'Gorman,* 199 F.3d 50, 57-58 (1st Cir.1999) (same); *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683, 690 (10th Cir.1998) (same).

> FN2. *See Fantasy Ranch,* 459 F.3d at 560-61 (discussing post-enactment evidence in determining whether ordinance furthered important or substantial government interest); *N.W. Enters. Inc. v. City of Houston,* 352 F.3d 162, 175 (5th Cir.2003) (holding same and noting that question-two stage is not appropriate point to require legislature "to show evidence of negative secondary effects and of the new regulations' efficacy" because "[d]isputes over the effectiveness of the proposed regulations are properly reserved for the final prong of the *Renton* analysis").

Irrespective of whether courts may properly consider post-enactment evidence ***870** of purpose in answering question two, however, all of the State's post-enactment evidence in this case was relevant to the issue of whether the statute can be justified (question three), not its purpose (question two). As the trial court explained in its detailed findings of fact, the record in this case does not contain evidence-either pre- or post-enactment-that the legislature's predominant purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing. Thus, the State's argument that the trial court created a false distinction between pre- and post-enactment evidence is unavailing, because no evidence was produced showing that the legislature's purpose was aimed at secondary effects.

In sum, I agree with Justice Henson that the text and context of the statute show that it is a content-based restriction. Therefore, in the absence of any evidence that the legislature's predominant purpose was to address secondary effects, the statute may not be deemed content-neutral and must be reviewed under strict scrutiny, *see City of Renton,* 475 U.S. at 48-49, 106 S.Ct. 925, which the State has conceded it cannot meet.

I join the "Sovereign Immunity" and "Attorneys' Fees" sections of Justice Henson's opinion.

DISSENTING OPINION

DAVID PURYEAR, Justice.

Because I believe that the statutory scheme at issue in this case should have been reviewed using intermediate scrutiny rather than strict scrutiny and because I believe that the statute does not violate the First Amendment, I respectfully dissent from the result reached by the majority.

As mentioned in Justice Henson's opinion, section 47.052 of the business and commerce code provides as follows: "A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business." Tex. Bus. & Com.Code Ann. § 47.052(a)

(West Supp.2008) (emphasis added). The code defines "sexually oriented business" as follows:

a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

Id. § 47.051(2) (West Supp.2008); *see also id.* § 47.051(1) (West Supp.2008) (defining "nude"). Accordingly, the code imposes a fee on businesses that provide nude erotic entertainment and permit the consumption of alcohol on the their premises. By requiring all the conditions to be satisfied before a fee may be imposed, the code necessarily exempts establishments that provide erotic entertainment but do not allow for the consumption of alcohol or that allow alcohol consumption but do not allow their erotic entertainers to perform fully nude. The code also requires that a large portion of the fee collected be given to the State's sexual assault program fund. *Id.* § 47.054 (West Supp.2008).

First Amendment

The statute in question, by its terms, does not specifically impose restrictions on the type of erotic entertainment performers may engage in or that patrons may observe. In other words, the statute does not address the expressive nature of the entertainment at issue. Instead, the statute affects the ability of businesses to combine***871** the entertainment and the consumption of alcohol. Although no specific limits on expression are imposed, the statute still has First Amendment implications because it affects the manner in which businesses may provide erotic expression. *See Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299, 307 (5th Cir.2007). In light of this, I would analyze the constitutionality of the statute by employing traditional First Amendment jurisprudence; however, I would note that while this type of regulation does have First Amendment implications, live erotic entertainment "falls only within the outer ambit of the *First Amendment's* protection." *City of Erie v. Pap's A. M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *see also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter J., concurring) (distinguishing between societal interest in protecting erotic expression and greater interest in protecting "untrammeled political debate"); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (explaining that nude dancing at bars "involves only the barest minimum of protected expression"); *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 707 (7th Cir.2003) (noting that nude dancing is only given diminished protection under First Amendment); *see also Fantasy Ranch Inc. v. City of Arlington,* 459 F.3d 546, 554 (5th Cir.2006) (explaining that although live erotic entertainment is protected by First Amendment, governments can regulate it).[FN1]

FN1. In her opinion, Justice Henson agrees that the type of expressive conduct at issue in this case only barely falls within the protections of the First Amendment. However, rather than concluding that the conduct's placement on the edge of pro-

tected speech subjects the behavior to less constitutional protection, she confusingly concludes that the type of expressive conduct at issue in this case warrants the highest judicial scrutiny, presumably higher than that afforded to behaviors more truly expressive in nature, to prevent unfair suppression.

Alcohol Prohibitions for Sexually Oriented Businesses

As a preliminary matter, I would note that a state may, in an effort to combat secondary effects associated with sexually oriented businesses, entirely prohibit the consumption of alcohol within sexually oriented businesses. *See Ben's Bar,* 316 F.3d at 706, 728 (7th Cir.2003) (upholding constitutionality of ordinance that prohibited consumption of alcohol within sexually oriented businesses); *see also 181 South Inc. v. Fischer,* 454 F.3d 228, 233-34 (3d Cir.2006) (concluding that regulation prohibiting erotic expression at locations licensed to sell alcohol did not violate First Amendment). If a state may completely prohibit the consumption of alcohol within sexually oriented businesses, it seems logical to assume that a state may also impose less exacting alcohol restrictions on sexually oriented businesses provided that the restriction is also designed to combat negative secondary effects. *Cf. Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382 (upholding city ordinance that imposed restriction that was less onerous than complete ban on erotic dancing and noting that there may be more than one method for government to choose to address serious problems associated with sexually oriented businesses).

The statute at issue in this case imposes a fee on establishments providing erotic entertainment and allowing their customers to consume alcohol. There can be little doubt that a fee is less restrictive than an absolute ban,[FN2] and as discussed ***872** more thoroughly later, the statute was designed to address potential negative secondary effects arising from the pairing of erotic entertainment and alcohol consumption by providing revenue for the State's sexual assault program fund. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 511, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (stating proposition that greater governmental powers include lessor ones); *cf. New York State Liquor Auth. v. Bellanca,* 452 U.S. 714, 717, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (explaining that state's ability to ban sale of alcohol entirely encompasses lesser power to ban sale of alcohol at certain locations).[FN3] I can find no compelling distinction between statutes designed to curb potential negative secondary effects by prohibiting, in their entirety, the pairing of alcohol consumption and erotic entertainment and statutes designed to curb unwanted secondary effects by imposing a fee on establishments allowing the two activities that would render the later unconstitutional but the former constitutional. Consequently, I fail to see how the majority can conclude that the statute at issue violates the First Amendment.

FN2. Regardless of the amount of the fee, the imposition of a fee for engaging in certain activities is less restrictive than banning the activity in its entirety because individuals have the option of engaging in the activity by paying the fee. Although businesses may challenge the amount of the fee as being excessive, those arguments are fundamentally different than challenging the State's authority to impose the fee at

all.

FN3. Justice Henson tries to dismiss the State's "greater power includes the lesser power" by relying on a hypothetical described in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In that case, the Supreme Court noted that a state could prohibit people from shouting the word "fire" in crowded theaters without violating the First Amendment because the prohibition would fall within a state's power to protect the public safety. *Id.* at 837, 107 S.Ct. 3141. However, the Court also theorized that a state could not adopt the ban but also allow individuals to violate the ban if they chose to contribute $100 to the state treasury. *Id.* The Court noted that the second situation would amount to a lesser restriction than a total ban but also concluded that the addition to the ban would be unrelated to the purpose of protecting the public safety and would, in fact, alter the purpose of the ban. *Id.* In effect, the Court reasoned that the imposition of the fee was improper because imposing the fee would not further the state's interest in encouraging public safety. In other words, the Court determined that "the condition substituted for the prohibition [would] utterly fail[ ] to further the end advanced as the justification for the prohibition." *Id.*

The fee at issue in this case is unlike the one described above because the fee in this case is designed to further the same interest that a total ban on erotic entertainment and alcohol consumption would accomplish: minimizing potential negative secondary effects resulting from the consumption of alcohol and the viewing of erotic entertainment. Accordingly, the fee at issue in this case is actually more similar to the other hypothetical described in *Nollan,* in which the Court theorized that because a state could refuse to issue a building permit in order to protect public's interest in a beach, the State could also legitimately grant the permit but impose limitations designed to protect the public's interest in that property. *Id.* at 836-37, 107 S.Ct. 3141.

Intermediate Scrutiny Applies

Once it has been determined that a statute regulates activity protected by the First Amendment, courts must then determine what level of scrutiny to employ when reviewing the statute. As a preliminary matter, I would note that courts often apply intermediate scrutiny to governmental regulations of sexually oriented businesses. *See Fantasy Ranch,* 459 F.3d at 555 (5th Cir.2006) (listing various instances in which courts have applied intermediate scrutiny); *see also 729, Inc. v. Kenton County Fiscal Court,* 515 F.3d 485, 504 (6th Cir.2008) (explaining that regulations pertaining to sexually oriented businesses are reviewed under intermediate rather than strict scrutiny due to "the peculiar ***873** 'secondary effects' associated with adult businesses"). When determining whether to apply intermediate or strict scrutiny, courts look to the purpose of the regulation at issue. *Illusions,* 482 F.3d at 308. If the statute "is intended to suppress expressions contained in erotic dancing, then it is sub-

ject to strict scrutiny," but if the statute "has a purpose unrelated to the suppression of speech, then it is subject to intermediate scrutiny." *Id.*

Although the statute at issue in this case mentions "live nude entertainment" and "live nude performances," the statute imposes no direct limitation on the type of expression that may be exhibited through erotic entertainment. *Cf. id.* at 309 (explaining that fact that statute "references content" does not necessarily mean that statute is "intended to suppress speech, even without a legislative record to suggest a purpose unrelated to speech"). Moreover, it only imposes a fee if a sexually oriented business decides to pair erotic entertainment with the consumption of alcohol. In other words, a business may avoid any imposition of the fee described in the statute by not allowing its customers to consume alcohol. *See id.* (noting that fact that sexually oriented business could remove itself from reach of regulation by not allowing alcohol consumption weighs in favor of determination that regulation should be reviewed under intermediate scrutiny). Accordingly, the statute seems concerned with the regulation of alcohol or the regulation of the pairing of alcohol and erotic entertainment rather than the suppression of any specific erotic expression. *Cf. Ben's Bar,* 316 F.3d at 726 (explaining that regulation prohibiting consumption of alcohol within sexually oriented business was "not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct").

For these reasons, I believe that the statute has a purpose unrelated to the suppression of expression and is, therefore, subject to intermediate scrutiny. *Cf. Sammy's of Mobile Ltd. v. City of Mobile,* 140 F.3d 993, 996 (11th Cir.1998) (noting that ordinances prohibiting sale or consumption of alcohol at sexually oriented business are content-neutral and should be analyzed under intermediate scrutiny).

This conclusion is also supported by the fact that courts have reviewed regulations pertaining to sexually oriented businesses and imposing more significant restrictions under intermediate scrutiny. For example, courts have employed intermediate scrutiny when reviewing regulations limiting the locations in which sexually oriented businesses may operate. *See, e.g., City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 440, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion) (applying intermediate scrutiny to ordinance that prohibited more than one sexually oriented business per building and did not contain a provision exempting preexisting businesses); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (utilizing intermediate-scrutiny test when reviewing regulation limiting the locations in which adult movie theaters may operate).

In addition, courts have also employed intermediate scrutiny when reviewing limitations placed on actual erotic expression. *See, e.g., Fantasy Ranch,* 459 F.3d at 557 (applying intermediate scrutiny to ordinance imposing proximity limitations, which required performers to be six feet away from customers or to be separated from their customers by wall); *Hang-On, Inc. v. City of Arlington,* 65 F.3d 1248, 1254-55 (5th Cir.1995) (applying intermediate scrutiny when reviewing statute prohibiting contact between erotic entertainers***874** and customers). Furthermore, the Supreme

Court has applied intermediate scrutiny when reviewing the constitutionality of an ordinance prohibiting public nudity, which had the effect of requiring erotic entertainers to wear minimal attire. *Pap's A.M.,* 529 U.S. at 296-302, 120 S.Ct. 1382.

Finally, courts have employed intermediate scrutiny to review complete bans on the consumption of alcohol within sexually oriented businesses. *See Ben's Bar,* 316 F.3d at 722. Similarly, intermediate scrutiny has been applied to a statute that completely prohibited the issuance or renewal of alcohol permits for sexually oriented businesses located inside dry political subdivisions. *Illusions,* 482 F.3d at 303, 307, 310; *see* Tex. Alco. Bev.Code Ann. § 32.03(k) (West 2007); *see also* Tex. Elec.Code Ann. § 501.021 (West Supp.2008) (allowing voters to determine whether to allow sale of alcohol within political subdivision).

The statute at issue in this case does not require sexually oriented businesses to move from their current locations, imposes no direct limitation on the type of erotic expression entertainers may provide, and does not completely ban the consumption of alcohol within a sexually oriented business. Rather, the statute imposes a fee on a sexually oriented business only if it chooses to allow the consumption of alcohol on its premises. Nothing in the cases relied upon by either of the other two justices convinces me that a more exacting standard should be employed to review a statute that has a more modest impact on First Amendment expression than the regulations described above.

The Statute Survives Intermediate Scrutiny

Having determined that the statute in question in this case should be reviewed under intermediate scrutiny, I would then determine whether the statute may be upheld under that level of scrutiny. In the context at issue in this case, a regulation satisfies intermediate scrutiny if it was issued "pursuant to a legitimate governmental power"; "does not completely prohibit adult entertainment"; "is aimed not at the suppression of expression, but rather at combating negative secondary effects"; and "is designed to" further a "substantial governmental interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest." *Illusions,* 482 F.3d at 311.

There is no dispute that the legislature has the authority to regulate both alcohol consumption and sexually oriented businesses. *Cf. Ben's Bar,* 316 F.3d at 722 (explaining that regulation of alcohol consumption falls within state's police powers). In addition, as described earlier, the statute in question does not completely ban erotic entertainment. *Cf. California v. LaRue,* 409 U.S. 109, 118-19, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (upholding constitutionality of regulation that prohibited certain types of erotic expression in bars and noting that state did not ban the expression entirely, but merely prohibited it in establishments that allow for the consumption of alcohol). Consequently, the first two elements are met.

Regarding the third element, as described previously, nothing in the statute directly addresses any aspect of erotic expression; rather, the statute addresses the pairing of erotic expression with the consumption of alcohol. Moreover, rather than prohibiting any particular act of expression, the statute simply imposes a fee on establishments

that desire to allow the consumption of alcohol on their premises and that provide erotic entertainment.

Furthermore, the statute attempts to address some of the potentially negative secondary effects from the pairing of alcohol***875** and erotic expression by using a portion of the total fees collected to provide revenue for the State's sexual assault program fund. Additionally, the legislative history for the statute demonstrates that the purpose of the statute was to provide funding for programs alleviating the impact of secondary effects. *See* Senate Research Ctr., Bill Analysis, Tex. H.B. 1751, 80th Leg., R.S. (2007) (stating that fee will be used to fund "programs that relate to sexual assault prevention, intervention, and research"); House Research Org., Bill Analysis, Tex. H.B. 1751, 80th Leg., R.S. (2007) (listing various sexual assault programs that money raised by fee could be used for). Although the effect of the fee on potential secondary effects may be more attenuated than a complete ban on alcohol consumption within businesses providing erotic entertainment would be, a state must be given a reasonable opportunity to experiment with solutions to serious problems affecting its populace. *See Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382.

In light of the preceding, I would conclude that the statute is aimed at combating negative secondary effects and is not aimed at the suppression of expression. *Cf. Fantasy Ranch,* 459 F.3d at 557 (concluding that intermediate scrutiny was appropriate because the ordinance was "predominately targeted to the prevention of secondary effects, not to the suppression of symbolic expression"). For the reasons that follow, I would also conclude that the fourth element is satisfied.

To satisfy the "substantial interest" requirement of the final element, the State must present some evidence demonstrating a connection "between the combination of alcohol [consumption] and erotic dancing and negative secondary effects." *Illusions,* 482 F.3d at 312-13; *see Fantasy Ranch,* 459 F.3d at 561 (requiring only that regulation be supported by evidence that could reasonably be viewed as relevant to effects in question). However, the burden on the State is very light, *Illusions,* 482 F.3d at 312, and the State is not required to prove that its regulation is the only way to combat potential negative secondary effects, *see Alameda Books,* 535 U.S. at 437, 122 S.Ct. 1728.

The link between sexually oriented businesses and negative secondary effects has been discussed in various cases, *Pap's A.M.,* 529 U.S. at 300, 120 S.Ct. 1382 (noting that crime and other safety issues are caused by "presence of nude dancing establishments"), and courts have also identified a state's interest in combating these effects as a substantial interest, *see, e.g., Barnes,* 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring) (concluding that states have substantial interest in preventing negative secondary effects associated with sexually oriented businesses). In fact, the Supreme Court has reasoned that governments are not required to obtain new evidence regarding negative secondary effects when passing new regulations for sexually oriented businesses and may instead rely on evidence previously discovered, including evidence summarized in prior cases. *Pap's A.M.,* 529 U.S. at 296-97, 120 S.Ct. 1382. In addition, the legislature has specifically identified a link between sexually oriented businesses and negative secondary effects. In particular, the legislature has determined that it is ap-

propriate to impose regulations on sexually oriented businesses that are not imposed on other businesses because "sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to ... the growth of criminal activity." Tex. Loc. Gov't Code Ann. § 243.001(a) (West 2005).

Although the link between sexually oriented businesses and negative secondary ***876** effects has been previously established, evidence was also presented at trial suggesting a link between sexually oriented businesses and the types of behavior that the sexual assault fund is designed to combat. *See Barnes,* 501 U.S. at 582, 111 S.Ct. 2456 (Souter J., concurring) (explaining that when determining whether statute is constitutional, courts should focus on whether there is current governmental interest and not on whether interest was thoroughly articulated when regulation was issued); *Fantasy Ranch,* 459 F.3d at 560 (stating that governments may justify enactment of regulation with evidence presented at trial). In fact, the district court found that the State "presented persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund." Specifically, expert testimony was introduced stating that viewing erotic entertainment while consuming alcohol increases the likelihood that sexually assaultive behaviors might ensue. Moreover, various expert witnesses also stated that it was reasonable for legislators to conclude that there is a causal link between viewing erotic entertainment while consuming alcohol and sexually assaultive behavior.

For these reasons, I would conclude that the State has a substantial interest in combating negative secondary effects and that the statute at issue furthers that interest. *See Illusions,* 482 F.3d at 312 (explaining that courts must determine whether substantial interest exists and whether regulation facilitates that interest).

Regarding the restrictive component of the final element, as mentioned previously, the statute at issue imposes no affirmative ban on any expressive conduct. Instead, the statute imposes a fee on establishments providing erotic entertainment that also allow their patrons to consume alcohol. Nothing prohibits businesses from continuing to provide erotic entertainment and allow patrons to consume alcohol provided that the businesses pay the fee. Alternatively, businesses may continue to provide erotic entertainment without paying the fee if they stop allowing their customers to consume alcohol or if they require their performers to wear minimal clothing. *See Pap's A.M.,* 529 U.S. at 301, 120 S.Ct. 1382 (commenting that requiring performers to wear minimal clothing has *de minimus* impact on erotic expression).

Given that the statute does not directly target any type of expressive conduct, that the statute provides multiple avenues in which businesses may continue providing erotic entertainment, and that courts have upheld other regulations actually limiting the type of erotic expression that may be conveyed, *see id.* at 284, 301, 120 S.Ct. 1382 (upholding ordinance requiring dancers to wear minimal attire while engaged in erotic entertainment); *Hang On,* 65 F.3d at 1256-57 (stating that ordinance prohibiting contact between customers and erotic performer did not burden protected expression more than is essential to "interest in preventing prostitution, drug dealing, and assault"), I would conclude that the statute's

restriction on expressive conduct is no greater than is essential.

Having determined that all four prongs of intermediate scrutiny were satisfied, I would hold that section 47.052 of the business and commerce code does not violate the First Amendment of the federal constitution.[FN4]

> FN4. Because the district court concluded that the statute violated the First Amendment, it made no determination regarding the Association's other attacks on the statute. Having found that the statute does not violate the First Amendment, I would reverse the judgment of the district court and remand the case for consideration of the other issues raised in the case.

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Combs v. Texas Entertainment Ass'n, Inc.
287 S.W.3d 852

END OF DOCUMENT

Tab F

TEXAS BUSINESS AND COMMERCE CODE

§ 102.051. Definitions

In this subchapter:

(1) "Nude" means:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(2) "Sexually oriented business" means a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

§ 102.052. Fee Based on Admissions; Records

(a) A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business.

(b) A sexually oriented business shall record daily in the manner required by the comptroller the number of customers admitted to the business. The business shall maintain the records for the period required by the comptroller and make the records available for inspection and audit on request by the comptroller.

(c) This section does not require a sexually oriented business to impose a fee on a customer of the business. A business has discretion to determine the manner in which the business derives the money required to pay the fee imposed under this section.

§ 102.053. Remission of Fee; Submission of Reports

Each quarter, a sexually oriented business shall:

(1) remit the fee imposed by Section 47.052 to the comptroller in the manner prescribed by the comptroller; and

(2) file a report with the comptroller in the manner and containing the information required by the comptroller.

§ 102.054. Allocation of Certain Revenue for Sexual Assault Programs

The comptroller shall deposit the first $25 million received from the fee imposed under this subchapter in a state fiscal biennium to the credit of the sexual assault program fund.

§ 102.055. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium in the Texas health opportunity pool established under Subchapter N, Chapter 531, Government Code. Money deposited in the pool under this section may be used only to provide health benefits coverage premium payment assistance to low-income persons through a premium payment assistance program developed under that subchapter.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, becomes law and the Texas health opportunity pool is established under that Act. If that Act does not become law, or that Act becomes law but the pool is not established, this section has no effect, and the revenue is deposited as provided by Section 47.0551.

§ 102.056. Administration, Collection, and Enforcement

The provisions of Subtitle B, Title 2, Tax Code, apply to the administration, payment, collection, and enforcement of the fee imposed by this chapter.

Tab G

§ 112.051. Protest Payment Required

(a) If a person who is required to pay a tax or fee imposed by this title or collected by the comptroller under any law, including a local tax collected by the comptroller, contends that the tax or fee is unlawful or that the public official charged with the duty of collecting the tax or fee may not legally demand or collect the tax or fee, the person shall pay the amount claimed by the state, and if the person intends to bring suit under this subchapter, the person must submit with the payment a protest.

(b) The protest must be in writing and must state fully and in detail each reason for recovering the payment.

(c) The protest payment must be made within the period of time set out in Subdivision (3) of Subsection (c) of Section 111.104 of this code for the filing of refund claims.

§ 112.055. Class Actions

(a) In this section, a class action includes a suit brought under this subchapter by at least two persons who have paid taxes under protest as required by Section 112.051 of this code.

(b) In a class action, all taxpayers who are within the same class as the persons bringing the suit, who are represented in the class action, and who have paid taxes under protest as required by Section 112.051 of this code, are not required to file separate suits, but are entitled to and are governed by the decision rendered in the class action.

§ 112.101. Requirements Before Injunction

(a) An action for a restraining order or injunction that prohibits the assessment or collection of a tax or fee imposed by this title or collected by the comptroller under any law, including a local tax collected by the comptroller, or a statutory penalty assessed for the failure to pay the tax or fee may not be brought against the public official charged with the duty of collecting the tax or fee or a representative of the public official unless the applicant for the order or injunction has first:

(1) filed with the attorney general not later than the fifth day before the date the action is filed a statement of the grounds on which the order or injunction is sought; and

(2) either:

(A) paid to the public official who collects the tax or fee all taxes, fees, and penalties then due by the applicant to the state; or

(B) filed with the public official who collects the tax or fee a good and sufficient bond to guarantee the payment of the taxes, fees, and penalties in an amount equal to twice the amount of the taxes, fees, and penalties then due and that may reasonably be expected to become due during the period the order or injunction is in effect.

(b) The amount and terms of the bond and the sureties on the bond authorized by Subsection (a)(2)(B) must be approved by and acceptable to the judge of the court granting the order or injunction and the attorney general.

(c) The application for the restraining order or injunction must state under the oath of the applicant or the agent or attorney of the applicant that:

(1) the statement required by Subsection (a)(1) has been filed as provided by that subsection; and

(2) the payment of taxes, fees, and penalties has been made as provided by Subsection (a)(2)(A) or a bond has been approved and filed as provided by Subsection (a)(2)(B) and Subsection (b).

(d) The public official shall deliver a payment or bond required by Subsection (a)(2) to the comptroller. The comptroller shall deposit a payment made under Subsection (a)(2)(A) to the credit of each fund to which the tax, fee, or penalty is allocated by law. A payment made under Subsection (a)(2)(A) bears pro rata interest. The pro rata interest is the amount of interest that would be due if the amount had been placed into the suspense account of the comptroller.

§ 112.1011. Nature of Action for Injunction

(a) A court may not issue a restraining order or consider the issuance of an injunction that prohibits the assessment or collection of an amount described by Section 112.101(a) unless the applicant for the order or injunction demonstrates that:

(1) irreparable injury will result to the applicant if the order or injunction is not granted;

(2) no other adequate remedy is available to the applicant; and

(3) the applicant has a reasonable possibility of prevailing on the merits of the claim.

(b) If the court issues a temporary or permanent injunction, the court shall determine whether the amount the assessment or collection of which the applicant seeks to prohibit is due and owing to the state by the applicant.

Tab H

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ELLEN COHEN
STATE REPRESENTATIVE

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January 14, 2008

Dear Colleague,

As we look towards what will prove to be a challenging session, I would like to again ask for your support on an issue that unfortunately affects all of our districts: sexual violence.

Last session, working with a bipartisan team we were able to pass, with a wide majority, House Bill 1751, which created an Adult Entertainment Fee to help reduce the incidence of sexual violence throughout the state.

As you know, court action has delayed the expenditure of these funds. Nevertheless, in its ruling, the court found evidence persuasive in supporting a link between these sexually oriented businesses and the secondary effects addressed by the sexual assault program fund. So this session, working with members of both parties, I will introduce the modified legislation that addresses the court's concerns and gets the resources to those who need it most. It is my hope that we will enjoy the same overwhelming support for the reiteration of the bill that it received last session.

Once again, I am asking you to support this measure, and I will meet with new members to provide an in depth explanation of the bill. I am sure you will also be hearing from other people and organizations, including my friend and activist Mica Mosbacher and the Texas Association Against Sexual Assault who are passionate about the issue. We all believe that Texas can continue the fight against sexual violence by coming together around common ground.

Having worked in the field for two decades, I know deeply and profoundly how sexual violence affects so many of us and I thank each of you for your consideration. The 1.9 million women, children, and men across this state who are victims of sexual violence are not just statistics, they are friends, neighbors, and constituents. On behalf of all of them I thank you in advance for your support.

Sincerely,

Ellen Cohen

CC: Members of the House of Representatives
Members of the Senate

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