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
Cause No. 03-08-00213-CV

RESPONDENTS' BRIEF ON THE MERITS

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ISSUES PRESENTED

Though at the outer edge, live nude entertainment still is expression protected under the United States Constitution's First Amendment. Texas Business & Commerce Code, Chapter 102, Subchapter B taxes this expression. Thus, it is unconstitutional.

1. The United States Supreme Court has repeatedly held content-based taxes must withstand strict scrutiny. The Comptroller[1] concedes this tax cannot withstand strict scrutiny. Thus both courts below correctly held the tax unconstitutional. That the Legislature limited this tax to venues permitting alcohol consumption does not change the fact that this is a content-based tax subject to strict scrutiny.

2. Even if intermediate scrutiny review applies, Subchapter B fails constitutional muster because it is not narrowly tailored and the financial restraint on protected speech is inherently suspect. Thus, even under this review, the judgment should be affirmed.

3. The court of appeals' judgment can be affirmed on grounds independent of the First Amendment. Subchapter B is an occupation tax because its primary purpose is to raise revenue generally by imposing a tax on businesses for the privilege of carrying on business. Under the Texas Constitution an occupation tax must be allocated, one-fourth, to the free public schools and be imposed equally. Because Subchapter B does neither, it violates the Texas Constitution.[2]

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[1] The Comptroller of Public Accounts and the Attorney General of the State of Texas are both Petitioners with aligned interests. As the court of appeals did, Respondents refer to them collectively as the "Comptroller."

[2] The Comptroller failed to mention this alternative ground for affirming the judgment in its Petition and in its Brief on the Merits, though TEA and Karpod preserved the argument in their response. As a result, the Comptroller has waived any argument on this point. The Comptroller has also failed to present argument on the issues of sovereign immunity, administrative remedies, and attorneys' fees, and has therefore waived those issues as well.

INTRODUCTION

To determine whether a statute is constitutional, courts may not look to the statute's effect and posit that as the statute's purpose. This is the flawed premise underlying Justice Puryear's dissent below. And this is the false premise of the Comptroller's argument.

The Comptroller argues in this Court that the purpose of the challenged statute is robust alcohol regulation. And it asks the Court to look at one of the statute's possible effects—perhaps reducing alcohol consumption. Yet constitutional analysis requires more. It requires courts to determine the statute's purpose from its text, history and application. Here, the statute's text, its legislative history, and the Comptroller's testimony and evidence below demonstrate the statute is a tax statute, and its purpose is to generate revenue by taxing protected speech. Under the statute, the tax is due, not when one consumes alcohol or when one visits an establishment where alcohol is served, but rather only when the establishment visited provides live nude dancing—indisputably protected speech. This is a first amendment tax case.

The constitutionality of a tax assessed on expressive speech has never been reviewed under any standard other than strict scrutiny. Using strict scrutiny, both the trial court and court of appeals concluded the tax statute was unconstitutional. In the trial court, the Comptroller conceded this tax statute cannot survive strict scrutiny review. And on appeal, the Comptroller's hope rests solely on this Court doing as Justice Puryear did below—concluding that because the statute may have an effect on alcohol sales, then its purpose is alcohol regulation and therefore constitutionally permissible.

Only by restricting the Court's purpose determination to a simple look at a narrow purported effect of the statute, is the Comptroller free to ignore the tax statute's text, its legislative history, the Comptroller's own evidentiary record, and the controlling case law. Even the Comptroller's pithy statement—"remove the alcohol, and avoid the fee"—is absurd, as the fiscal note for the statute projected a hoped-for additional tax revenue benefit to the State of $87 million each biennium.

The Comptroller's brief presents a simplistic shell game. To avoid established precedent that protected speech, political or not, cannot be taxed, the Comptroller calls the tax a "fee." The Controller then ignores established precedent that would declare this fee a constitutionally impermissible regulatory fee, by casting this fee as a robust alcohol regulation. The Comptroller goes so far as to proclaim all of the money raised by this tax could be burned in the town square and that would have no effect on the constitutionality of the tax.

For the Comptroller to be right, the statute's text, every piece of legislative history and the undisputed trial evidence must be wrong. More likely, the Comptroller has concluded it must make the argument it makes, not because the statute actually regulates alcohol, but because only cases dealing with government's power to regulate alcohol give the Comptroller a seemingly plausible argument.

This Court will determine the purpose of the statute. And when it unravels the convoluted skein of the Comptroller's argument, the Court will conclude the statute taxes protected expression, and therefore the statute must withstand strict scrutiny. Because the statute cannot, the court of appeals decision should be affirmed.

STATEMENT OF FACTS

In 2008, the State of Texas began taxing a small group of businesses based on the content of the speech that takes place at those businesses. Only certain sexually oriented businesses, those that provide "live nude entertainment" are required to pay a $5.00 tax for each entry of each customer.[3] The taxed sexually oriented businesses are uniquely defined by the statute as nightclubs, bars, restaurants, or similar commercial enterprises that:

> (A) provide for an audience of two or more individuals live nude entertainment or live nude performances; and
>
> (B) authorize 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.[4]

It is undisputed that the government officials responsible for collecting the tax will have to evaluate the content of the expression at the businesses potentially taxed to determine if the tax applies.[5] And if a business that provides live nude entertainment does not pay the tax, it will be shut down.[6]

The purpose of this new sexually oriented business tax is to raise revenue.[7] The tax does not regulate the time, place or manner of the taxed businesses' protected speech.[8]

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3 TEX. BUS. & COM. CODE § 102.052.

4 TEX. BUS. & COM. CODE § 102.051(2).

5 3 RR 55-6; 3 RR 66; SCR 61, FOF 29 (citations to the Reporter's Record will be to "RR __;" citations to the Clerk's Record will be to "CR __;" citations to the Supplemental Clerk's Record will be to "SCR __." Citations to the trial court's Findings of Fact will be to "SCR___, FOF___.")

6 3 RR 70-71; SCR 61, FOF 30-31.

7 SCR 61, FOF 35.

8 SCR 63, FOF 37.

And none of the revenues from the tax will be used to regulate the businesses that pay the tax.[9] The tax came about not from a concern over regulating sexually oriented businesses that serve alcohol, but because the Texas Association Against Sexual Assault (the "Association") was looking for a source of revenue to fund its programs. Victoria Camp, the Association's deputy director, prepared a six-year plan that was the impetus for the tax.[10] The plan outlined the funding needs of many different Texas programs that address different issues.[11] Sexually oriented businesses were tapped as a convenient source of revenue.[12] Notably, although the Association's plan alleged that there is a strong connection between ***alcohol consumption*** and sexual assault, the Association made no claim of a link between ***sexually oriented businesses*** and sexual assault, and chose not to pursue an alcohol tax because it did not want to face the lobbyists for that industry.[13] Instead, it sought to tax sexually oriented businesses that provide live nude entertainment. The Association simply wanted funding for various laudable programs in Texas.[14] As long as those programs are funded, the Association and the Comptroller admit it does not matter where the money comes from.[15]

House Bill 1751, which enacted the tax, was passed by the 80th Legislature without the benefit of any studies addressing the impact the tax would have on protected

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9 SCR 62, FOF 36.

10 2 RR 178.

11 2 RR 179; PX-21.

12 PX-6 at pp. 9, 13-14.

13 3 RR 16-18.

14 PX-6 at p. 9.

15 3 RR 10-13; 3 RR 29-30, 33-4.

speech or the need for the government to restrain protected speech to achieve any sort of governmental interest advanced by the tax.[16] In fact, no claim was ever made to the Legislature that there was a link between ***sexually oriented businesses*** and sexual violence in Texas.[17] Further, the legislative record expressly disavows any link between adult cabarets and sexual assault:

> CSHB 1751 would provide a dedicated source of revenue to support essential sexual abuse prevention and survivor support programs. . . .
>
> The bill would provide a dedicated source of $18 million to a range of programs to aid sexual assault survivors and reduce the incidence of sexual assault. . . .
>
> CSHB 1751 would claim no defined link between sexual assault and strip clubs. The bill simply would use a fee generated from inessential and entirely discretionary behavior to fund important services to victims of sexual assault.[18]

The representative that authored H.B. 1751 testified before the House Ways and Means Committee that no link was being claimed and that the tax was simply a means to a stream of revenue:

> Chairman: Just -- just to make sure for the Committee and for -- you're not alleging and there's no study out that links this sexual business to --
>
> Rep. Cohen: No. Absolutely not.
>
> Chairman: -- to sexual assault or anything like that at all?
>
> Rep. Cohen: Absolutely not.
>
> Chairman: This is simply a form of funding, is what you –

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16 2 RR 176; SCR 62-63, FOF 41, 43, 48.

17 SCR 62, FOF 41.

18 PX-4 (HOUSE RESEARCH ORG. BILL ANALYSIS, Tex. H.B. 1751, 80th Leg., R.S. (2007)).

Rep. Cohen: Exactly.

Chairman: A stream of funding?

Rep. Cohen: Absolutely.

Chairman: Okay. Okay. Thank you.[19]

The tax applies to approximately 169 Texas businesses operating adult cabarets.[20] The Comptroller estimates that in the 2008-2009 biennium it will collect $87 million from those businesses under the tax.[21] The statute allocates one-hundred percent of that revenue to two specific funds. The first $25 million of taxes raised will be deposited in a revenue fund to the credit of the Sexual Assault Program Fund, and funds in excess of the first $25 million (estimated at $62 million) will be deposited to the credit of the Texas

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19 PX-6 at pp. 13-14 (testimony of Representative Cohen on H.B. 1751 before House Ways & Means Committee, 80th Leg., R.S. (Mar. 14, 2007)). A quick review of the transcript demonstrates that this testimony was not during the "heat of questioning," as the Comptroller represents in its brief. Pet. Br. at 42. Nor is there any suggestion that, as the Comptroller suggests, Representative Cohen was deceiving the committee in order to avoid accusing Texans of rape—she is not shy about discussing sexual violence. *Id.* A video link to the testimony before the Committee is available at http://www.house.state.tx.us/committees/broadcasts.php?session=80&CommitteeCode=490. Select the 80th Legislature from the drop-down list, then select the date of March 14, 2007, and forward the video to 1:08:43. This video makes the Comptroller's version of events seem even less plausible.

20 SCR 61, FOF 26; PX-8 Response No. 4. The original version of H.B. 1751 taxed live nude entertainment at all sexually oriented businesses, as defined in section 243.002 of the Texas Local Government Code. SCR 60, FOF 19; PX-3. At the hearing before the Ways and Means Committee in March 2007, the ability to audit sexually oriented businesses was discussed. John Heleman, the chief revenue estimator for the Comptroller, testified before the committee that the Comptroller hoped to join forces with the TABC who already audited liquor activities at many of the taxed businesses. PX-6 at p. 40. The committee questioned the government's ability to audit businesses that do not sell alcohol. *Id.* Then, in May 2007, the bill was amended to define the taxed sexually oriented businesses as only those businesses that allow the consumption of alcohol. SCR 60, FOF 19; PX-3 (Adopted Floor Amendment No. 1 by Senate on May 22, 2007).

21 SCR 61, FOF 27; PX-8 Response No. 2.

Health Opportunity Pool to fund health insurance for low income Texans.[22] No evidence was presented purporting to link adult cabarets with uninsured, low income Texans.[23]

Respondent TEA is a not for profit trade association of adult cabarets in Texas.[24] TEA provides services to its membership, including without limitation, lobbying and providing legislative awareness about issues facing TEA's members.[25] All TEA members are affected by the tax.[26] Respondent Karpod operates an adult cabaret in Amarillo, Texas subject to the tax.

TEA and Karpod filed this lawsuit in December 2007, seeking to declare the tax unconstitutional and enjoin its enforcement.[27] After a three day bench trial, the Honorable Scott Jenkins found the tax unconstitutional because it violates the First Amendment.[28] The trial court's judgment was entered before the first tax payments became due. Judge Jenkins permanently enjoined the enforcement or collection of the tax. But the Comptroller chose to disregard the injunction and is collecting the tax while this case is on appeal. On June 5, 2009, the Third Court of Appeals upheld the trial court's judgment, holding that the tax violates the First Amendment.

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22 TEX. BUS. & COM. CODE §§ 102.054-55.

23 SCR 63, FOF 46.

24 SCR 59, FOF 10; PX-9.

25 SCR 59, FOF 11; 2 RR 92-93.

26 SCR 59, FOF 9-11; 2 RR 94.

27 1 CR 2-17.

28 2 CR 384-386.

SUMMARY OF ARGUMENT

Texas Business & Commerce Code, Chapter 102, Subchapter B is a tax statute. It is designed for one purpose only: to raise revenue. And it picked an easy target, unpopular speech. But the government may not generate revenue from the exercise of a constitutional right. Recognizing the statute cannot survive strict scrutiny review based on its text, its legislative history, or the factual record, the Comptroller engages in a shell game to avoid confronting controlling precedent. Precedent requiring this tax to be reviewed under the strict scrutiny standard is ignored because the Comptroller calls the tax a "fee." Precedent requiring a "fee" to be revenue neutral is dismissed because the Comptroller insists the fee is a robust alcohol regulation.

The Comptroller's labyrinthine argument not only ignores the definition of "fee," but directly contradicts the statute's text, legislative history, and the trial court record. The Comptroller dismisses case law concerning regulatory fees, contending the Legislature actually intended to discourage nude dancing establishments from serving alcohol—despite the statute's text, its history and the evidence establishing an entirely different purpose. Ultimately, the Comptroller urges this Court to review the statute under a standard primarily reserved for zoning regulations—the ability of Legislature to regulate secondary effects. But even under this intermediate scrutiny, the statute fails. The Legislature may regulate the time, place, and manner of certain protected speech through narrowly tailored regulations in order to control negative secondary effects. But this power to regulate requires the Legislature to, at least, narrowly tailor the statute.

Because the legislature had no intent to regulate the taxed businesses, the Comptroller, at trial, offered no evidence concerning such regulation. That was not surprising, given that the Comptroller admitted before trial that the tax did not regulate the businesses. What is surprising is the State's bold willingness to urge this Court to divine a legislative intent to target secondary effects, not only unseen in the statute's text, but expressly disavowed by the legislature.

Further, the unavoidable crux of the Comptroller's argument is that secondary effects allegedly caused by speech may be regulated through a direct tax on that speech. No court has ever held that the Legislature may, under its power to regulate, impose a tax on protected speech. All the Supreme Court cases considering a content-based tax on speech have overturned the tax. Faced with that controlling precedent, the Comptroller struggles mightily to squeeze this statute into the zoning regulation cases. But that is an effort two current Supreme Court justices—Justices Scalia and Kennedy—have specifically warned against. Each has written that the government may not impose a tax on speech, marginal or not, in order to control secondary effects. The Comptroller hopes this Court will conclude these Justices did not mean what they said.

Texas Business & Commerce Code, Chapter 102, Subchapter B is a tax statute. It is designed to generate revenue, and it taxes protected speech. Thus it is subject to strict scrutiny review, and it cannot survive that scrutiny. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. The tax violates the First Amendment because states may not impose a content-based tax on speech and profit from the exercise of a constitutional right.

Despite the Comptroller's contention that its argument is supported by "40 years of precedent," it fails to cite a single case in which a court has upheld a differential, content-based tax on speech. In contrast, the Supreme Court has long held that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution."[29] The Comptroller attempts to dodge this well-settled rule by arguing that the tax should be analyzed similarly to content-neutral statutes with an incidental effect on speech, or ordinances that target secondary effects or regulate alcohol. But the tax is neither content neutral, nor a zoning or alcohol regulation, and must thus be analyzed under strict scrutiny.

A. The tax is subject to strict scrutiny.

The Supreme Court has always analyzed taxes on speech under a strict scrutiny analysis, explaining that "the government may not exercise its taxing power to . . . discriminate on the basis of the content of taxpayer speech" or "target a small group of speakers" without a compelling justification.[30] The tax in this case both imposes a differential tax on protected speech based on its content, and taxes a small group of speakers. As a result, this court should apply a strict scrutiny analysis. The Comptroller

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29 *Murdock v. Commonwealth of Penn.*, 319 U.S. 105, 113 (1943); *see also id.* at 114 n.8 ("The constitutional difference between . . . a regulatory measure and a tax on the exercise of a federal right has long been recognized.").

30 *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

has conceded that the tax cannot survive strict scrutiny; as a result, the judgment of the court of appeals should be affirmed.

1. The tax is a tax on speech.

First, although the Comptroller persists in calling the tax a "fee," it is important to note that it is by definition a tax. "A tax is a burden or charge imposed by the legislative power of the state upon persons or property to raise money for public purposes."[31] Black's Law Dictionary defines a tax as "a charge . . . imposed by the government on persons, entities, or property to yield public revenue."[32] The tax was designed to yield public revenue; thus, it is a tax, not a fee.[33] Courts have consistently held that states may not impose a tax on protected speech, whether marginal or not.[34] Because it penalizes a small group of speakers on the basis of the content of protected speech, the tax is presumptively unconstitutional and subject to strict scrutiny.[35]

2. The tax is content based.

A content-based statute distinguishes favored from disfavored speech on the basis of the speech's content. "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by

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31 *Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 623 (Tex. 1975).

32 BLACK'S LAW DICTIONARY (2d ed. 2001).

33 The trial court in this case specifically found that the tax was a content-based tax, not a fee—a finding that the Comptroller never challenged. SCR 62, FOF 36, 37. *See also* PX-4, PX 6 at pp.13-14.

34 *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

35 *Id.*

content then it is content based."[36] A content-based tax "singles out income derived from expressive activity for a burden the [Comptroller] places on no other income, and it is directed only at works with a specified content."[37] By contrast, the Supreme Court has held that general public nudity ordinances are content neutral, because they do "not target nudity that contains an erotic message; rather, [they] ban . . . all public nudity, regardless of whether that nudity is accompanied by expressive activity."[38] In other words, the public nudity ordinances discussed in *Barnes* and *Pap's A.M.* regulated conduct (i.e., nudity) without reference to expressive content—thus they were considered content neutral and were reviewed under intermediate scrutiny.[39]

Here, the tax applies not to entertainment in general, or even just nudity, but targets "live nude entertainment" and its related erotic message for suppression. A specialist in the Tax Policy Division of the State Comptroller's office testified that he would have to evaluate the content of the expression and make judgment calls on whether the tax would apply to a particular club.[40] In short, in order to determine whether the tax applies in this case, the enforcement authorities must necessarily examine the content of

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36 *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) Justice Kennedy's concurrence represents the fifth vote for the plurality opinion, and thus forms the narrowest ground upon which it rests. *Marks v. United States*, 430 U.S. 188 (1977).

37 *Simon & Schuster*, 502 U.S. at 116.

38 *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (plurality opinion).

39 *See id.*; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion); *see also Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1397 (11th Cir. 2003) (In *Barnes* and *Erie*, "a content-neutral law of general application was upheld because it was justified without reference to nude dancing.").

40 3 RR 55-56.

the message that is conveyed.[41] Thus, the tax is content based and must be subject to strict scrutiny.[42]

3. The tax targets a small group of speakers.

In addition, a tax on protected speech is suspect and subject to strict scrutiny if it targets a small group of speakers.[43] When a tax targets a small number of speakers it risks affecting a limited range of views.[44] And here, the tax targets only a small group of sexually oriented businesses engaged in constitutionally protected speech to bear the full burden of the tax. The selective taxation of a small group of speakers poses a particular danger of abuse:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the state imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.[45]

Each biennium, the tax is expected to generate ***$87 million*** from ***169 businesses***.[46] The trial court properly found that the tax targets a small group of speakers.[47] The Comptroller does not dispute, or even address this reason for applying strict scrutiny.

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41 *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

42 *See Alameda Books*, 535 U.S. at 448-50 (Kennedy, J., concurring).

43 *Leathers*, 499 U.S. at 447; *Arkansas Writers'*, 481 U.S. at 229.

44 *Leathers*, 499 U.S. at 448.

45 *Arkansas Writers'*, 481 U.S. at 228 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1984)).

46 PX-8 at pp. 2-3.

47 SCR 63, FOF 50.

Because the tax targets a small group of speakers, it is subject to strict scrutiny, and thus the appeals court's judgment should be affirmed.

B. The Comptroller may not use a secondary effects analysis to escape strict scrutiny.

The Comptroller appears to argue—albeit confusedly—that the tax is content neutral because it was intended to regulate secondary effects.[48] There is a line of cases that treat certain regulations—normally zoning regulations—as content neutral when the regulations' purpose is not to suppress speech but to suppress certain secondary effects by regulating the time, place, and manner of the speech's presentation.[49] These regulatory statutes are content based to the extent that they describe the regulated conduct by its content. Nonetheless, courts will treat a zoning regulation as if it were content neutral if "it was enacted for a valid purpose other than suppressing the expression due to a disagreement with the message conveyed or a concern over the message's direct effect on those who are exposed to it."[50]

There are at least five reasons why a secondary effects analysis does not apply in this case: (1) the Legislature enacted a tax, not a zoning regulation, and taxes on speech, unlike zoning regulations, create an inference of speech suppression; (2) the Supreme Court has never used a secondary effects analysis to review a tax on speech, even when the Legislature produces evidence of laudable intent; (3) the effects the Comptroller cites

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48 Notably, the effects the Comptroller cites are actually primary effects—the effects of the speech on those who hear it—rather than secondary effects. *See* SCR 62, FOF 38.

49 *See, e.g., Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986).

50 *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1278 (11th Cir. 2001).

are primary, not secondary effects; (4) there is no evidence in this case that the Legislature's intent in enacting the tax was to regulate secondary effects; and (5) discouraging protected speech by making it more expensive is not a valid secondary effects justification. All the evidence in the record indicates that the Legislature intended to do exactly what it did: enact a content-based, revenue-generating tax on speech.

1. Unlike zoning ordinances, content-based taxes create an inference of unconstitutionality and subvert the Legislature's purpose to raising revenue. Thus, it is impermissible to use a content-based tax to reduce secondary effects.

The Comptroller repeats over and over that if the government has the power to ban nude dancing based on its secondary effects, it must also have the power to tax. But the Comptroller glosses over the fact that governments may not simply ban nude dancing under the Constitution, without more.[51] And the Comptroller fails to note that while courts have used a secondary effects analysis to justify zoning regulations, no court has ever similarly justified a differential, content-based tax. Indeed, Justice Kennedy has specifically noted "***[a] city may not . . . impose a content-based fee or tax. This is true even if the government purports to justify the fee by reference to secondary effects.*** Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, ***this is not a permissible strategy***. . . ."[52] Contrary to the Comptroller's argument, no where did Justice Kennedy suggest that any type of tax would pass

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51 *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (striking down zoning ordinance banning nude dancing).

52 *Alameda Books*, 535 U.S at 445 (Kennedy, J., concurring) (emphasis added).

muster.[53] And even more notably, ***Justice Kennedy looked directly to the tax and regulatory fee cases*** that the Comptroller summarily dismisses as "traditional First Amendment activity" cases, which according to the Comptroller, therefore do not apply to erotic speech.[54]

But taxes on speech raise an inference of unconstitutional speech suppression, and are therefore reviewed under strict scrutiny.[55] The Comptroller assumes throughout its brief that this Court should review the tax using intermediate scrutiny—the same level of analysis the Supreme Court has used to review zoning ordinances impinging on speech.[56] But zoning ordinances, unlike taxes, are a traditional use of the government's police power for the purpose of regulating property uses that are detrimental to the public.[57] For that reason, zoning ordinances create a presumption that they are aimed at the negative externalities of speech, rather than the speech itself.[58] Justice Kennedy has explained that zoning regulations undergo a lower level of scrutiny because their traditional usage means that such regulations "***have a prima facie legitimate purpose***: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular

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53 Pet. Br. at 29-30.

54 *Alameda Books*, 535 U.S. at 445-49 (Kennedy, J., concurring) (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Simon & Schuster, Inc.*, 501 U.S. at 126-127; *Arkansas Writers'*, 481 U.S. at 230.)

55 *See, e.g., Simon & Schuster, Inc.*, 502 U.S. at 115-16 (1991) (content-based financial regulations "raise the specter that the government may effectively drive certain ideas from the marketplace.").

56 *See, e.g.*, Pet. Br. at 23-24.

57 *See Dupuy v. City of Waco*, 396 S.W.2d 103, 107 n.3 (Tex. 1965).

58 *See Alameda Books*, 535 U.S at 449 (Kennedy, J., concurring).

newspapers."[59] A tax such as the one at issue here, on the other hand, is more like a tax on unpopular newspapers than a restriction on slaughterhouses, and therefore raises the inference of unconstitutionality. Unlike zoning ordinances, taxes on speech have always been reviewed using a strict scrutiny analysis.[60]

Furthermore, zoning regulations, which regulate the time, place, and manner of speech, have a direct nexus to the government's purported purpose—eliminating secondary effects. But a tax on protected speech does not further the purpose—controlling rape and sexual assault—that the Comptroller has advanced on appeal as a justification for the statute. Ignoring for the moment that the Legislature asserted no such reason for passing this statute, a tax on speech is an unrelated condition which converts the government's purpose—protecting the public health—to something else, namely, profiting from the exercise of a constitutional right while the alleged negative effects continue. In *Nollan v. California Coastal Comm'n*, Justice Scalia explained this reasoning with a hypothetical:

> The evident constitutional propriety [of the regulation] disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the 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

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[59] *Id.* at 449; *see also Barnes*, 501 U.S. at 567-70 (plurality opinion) (examining history of anti-nudity statutes and finding a substantial governmental purpose unrelated to the suppression of speech.).

[60] *See, e.g., Simon & Schuster, Inc.*, 502 U.S. at 116.

> the ban. ***Therefore, even though, in 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.***[61]

The Comptroller struggles to explain this quote away by stating that the Court "did not even consider the possibility that the '$100 tax contribution' might deter the harmful conduct in the first place. . . "[62] To the contrary, certainly the Court realized that a $100 contribution would deter the speech. But the Court determined that the purpose of deterring harmful effects was changed to the purpose of raising revenue when the monetary charge was added, and the harmful effects were allowed to continue. Thus, even though requiring a $100 contribution was, in name, a lesser restriction on speech, it could not stand. Accordingly, the Ninth Circuit has explained, in contrast to the Comptroller's argument,[63] "[w]hat makes the tax on shouting fire in a crowded theater unconstitutional . . . is that, as a matter of logical necessity, it changes the purpose justifying the underlying ban on shouting fire—no longer for public safety but now for raising revenue."[64] Similarly, here, the tax's purpose is only to raise revenue; it was not passed to regulate secondary effects.[65]

Remarkably, the Comptroller now argues that a ban on conduct, enforced with a fine, is the same as a tax.[66] This new argument fails for the same reasons described

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61 483 U.S. 825, 837 (1987) (emphasis added).

62 Pet. Br. at 34.

63 *Id.* ("Presumably . . . 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.").

64 *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 913 (9th Cir. 2009).

65 *See, e.g.*, PX-4 at p. 3; PX-6 at pp. 13-14; SCR 61, FOF 34-35.

66 Pet. Br. at 33-35.

above—enforcing a ban on speech with a fine does not change the purpose of the ordinance from regulating public health to raising revenue. It is one thing to punish prohibited speech if it occurs. It is quite another to permit it to occur so long as one has paid the appropriate fee. Furthermore, no Legislature bans conduct in order to raise revenue. Legislatures do, however, enact taxes to raise revenue. If the Legislature wishes to control the secondary effects of speech, it may use its police power and do so, assuming it fulfills Constitutional requirements. But it may not, under the guise of controlling secondary effects, place a content-based tax on a small number of speakers, thereby profiting from the exercise of a constitutional right. In that case, "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[67] This tax cannot be saved under a secondary effects analysis.

2. The Supreme Court has not analyzed content-based taxes under a secondary effects analysis, even when the tax has a laudable purpose and the speech is reprehensible.

The *Simon & Schuster* case demonstrates that courts will always apply strict scrutiny to a statute that financially burdens speech, even a statute with the laudable purpose of controlling the speech's undesirable secondary effects. In *Simon & Schuster*, the New York legislature passed a law requiring that an accused or convicted criminal's income from works describing his crime be placed in an escrow account and be made available for victims.[68] The statute's purpose—to ensure that criminals do not profit from their crimes, and that victims are compensated—was praiseworthy. Nonetheless, the

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67 *Nollan*, 483 U.S. at 837.

68 *Simon & Schuster, Inc.*, 502 U.S. at 108.

Court examined the tax under strict scrutiny, stating that such a statute "is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," explaining that "[i]n the context of financial regulation, it bears repeating . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas from the marketplace."[69] The Court analyzed the statute under strict scrutiny and ultimately overturned it, even though the statute was intended to prevent criminals from profiting from the descriptions of their own crimes and thus to regulate the effects of some rather disgusting speech.[70]

The Comptroller summarily disposes of *Simon & Schuster*—in addition to all the other Supreme Court tax cases—in a footnote, claiming that those cases are distinguishable because they involve "traditional First Amendment expression."[71] But the Supreme Court has not used that phrase to distinguish different types of protected speech. Further, the erotic expression at issue here is surely due no less protection than the speech graphically recounting the life and crimes of Henry Hill, a gangster, in *Simon & Schuster*. As a result, this tax is properly analyzed under strict scrutiny, a test that the Comptroller concedes it cannot meet. Thus, the statute is unconstitutional.

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69 *Id.* at 115-16.

70 *Id.* at 123.

71 Pet. Br. at 31.

3. The Comptroller has cited only primary, not secondary effects as the purpose of the tax.

Governments may regulate the time, place, and manner of speech in order to reduce secondary effects, but it may not achieve that by suppressing primary effects—i.e., the effect of the speech on listeners. In his concurring opinion in *Alameda*, Justice Kennedy explained that speech can have "primary effects" that change minds or prompt action, or "secondary effects," not related to speech's impact on an audience.[72] And the Supreme Court has made it amply clear that "[l]istener's reactions to speech are not the type of 'secondary effects'. . . referred to in *Renton*."[73] In short, "[t]he emotive impact of speech on its audience is not a 'secondary effect.'"[74] And the Supreme Court has held several times that "where the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional."[75]

Yet at trial, the Comptroller offered proof that the tax's purpose was an attempt to reduce primary effects. The Comptroller's expert conceded that no studies link live nude dancing to sexual aggression, but testified that one could infer that exposure to arousing material could lead to sexual aggressiveness.[76] Thus, the Comptroller's alleged justification for this tax is that the protected speech (nude dancing) causes undesirable thoughts and actions. By "proving" a primary effects justification, the Comptroller wholly failed to prove that the statute was intended to address secondary effects.

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72 *Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring).

73 *R.A.V. v. St. Paul*, 505 U.S. 377, 394 (1992) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

74 *Id.*

75 *Barnes*, 501 U.S. at 577 (Scalia, J., concurring).

Accordingly, the tax is not entitled to intermediate scrutiny—it is subject to strict scrutiny review.

4. The Comptroller has not shown that the tax was intended to regulate secondary effects.

The Supreme Court has held that in order to escape strict scrutiny under the First Amendment under the secondary effects doctrine, the government must show that "the purpose in enacting the legislation is unrelated to the suppression of expression."[77] The Comptroller seems to argue that this Court should conduct a type of rational basis review to determine if the Legislature intended to regulate secondary effects, rather than profit off the suppression of speech—that is, under the Comptroller's logic, "if there is any reasonably conceivable state of facts that could provide a rational basis"[78] for the tax, the intermediate scrutiny standard applies.[79] This argument is inherently circular, and has no support in the case law. And in this case, the Comptroller can point to no evidence that the statute was aimed at secondary effects. Instead, the statute, both on its face and in its legislative history, demonstrates that the Legislature intended to enact a revenue-generating tax.

The Comptroller argues that the tax is, on its face, aimed at secondary effects. But even a rudimentary review of the statute's text and history shows this contention is

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76 4 RR 86-7.

77 *Pap's A.M.*, 529 U.S. at 289 (plurality opinion).

78 *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (setting out standard for rational basis review under the Equal Protection Clause).

79 *See, e.g.*, Pet. Br. at 24-5 (Tax's "objective purpose is to suppress rape and sexual assault").

false.[80] The tax says nothing about the regulation of secondary effects connected with alcohol and live nude entertainment; instead, it merely imposes a tax.[81] And the Comptroller cites to no part of the statute that suggests the regulatory intention of which the Comptroller attempts so hard to convince the Court.[82] Thus, on its face, the tax is just that—a revenue-raising tax on speech.

Indeed, the stated purpose of the tax was to provide a source of revenue to support sexual abuse prevention and survivor support programs, not to target secondary effects caused by adult cabarets.[83] There was ***no mention*** of the regulation of secondary effects in the legislative record. The legislative history contains no studies or reports on which the Legislature could have relied when it enacted H.B. 1751.[84] Indeed, the bill's sponsor ***expressly disclaimed*** any link between sexual assault and strip clubs.[85] In light of the express legislative disclaimer of any link between the statute and secondary effects, the Comptroller cannot claim that the statute was aimed at secondary effects. Moreover,

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80 *See, e.g., Barnes*, 501 U.S. at 568 (plurality opinion) (referring to statute's "text and history" to discern it was not intended to suppress speech but instead was concerned with morality).

81 TEX. BUS. & COM. CODE § 102.052.

82 Indeed, on its face, the tax does not seem concerned at all with targeting secondary affects. For example, the tax does not apply to live nude performances combined with alcohol when there is only one audience member. TEX. BUS. & COM. CODE § 102.051(2). Surely, if the Legislature intended to target the secondary effects of alcohol and live nude dancing, there would be no reason to exempt performances for one person. Instead, the Legislature chose to tax the businesses that generate the most revenue.

83 PX-4; PX-6 at pp. 13-14; SCR 61, FOF 34.

84 SCR 62-3, FOF 41, 43, 48.

85 PX-4; PX-6 at pp. 13-14. The Comptroller suggests that this statement was made "in the heat of questioning," and to "avoid the indelicate act of accusing fellow Texans of directly causing rape." Pet. Br. at 41-42. This is pure sophistry. A brief review of the transcript will reveal that Rep. Cohen was not in the midst of any heated questioning when she made the disclaimer (she did not undergo any "heated" interrogations), and that she was not shy about discussing sexual violence in the slightest. *See, e.g.*, PX-6 at pp. 1-6, 13-14.

evidence of a purpose to regulate secondary effects must appear in the legislative record to provide a valid foundation for the statute.[86]

Furthermore, there is ***no evidence*** in the record suggesting that the Legislature intended for this tax to regulate secondary effects.[87] The Comptroller is reduced to arguing that a statement that "[s]exually oriented businesses employ women and funds generated there should be spent to address sexually oriented crimes that largely affect women"[88] was "implicitly suggesting a link."[89] But that is not the required connection. That statement makes no suggestion that the businesses cause sexual violence—it just makes the rather obvious point that such businesses employ women. The Comptroller also rather desperately asserts that a link was implied because one witness was both a sexual assault survivor and a former nude dancer.[90] The witness herself implied no such link, and there is no suggestion that anyone else did, either.[91] If this Court does not hold the State to its constitutional limits, there is no other protection.

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86 *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171-72 (2d Cir. 2007); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County Florida*, 337 F.3d 1251, 1267 (11th Cir. 2003); *see also SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 (8th Cir. 2003); *D.H.L. Associates v. O'Gorman*, 199 F.3d 50, 57-58 (1st Cir. 1999).

87 The Comptroller attaches to its brief a letter from the bill's sponsor, post-enactment, and contends that the letter suggests that the bill was passed to regulate secondary effects. Pet. Br. at Tab H. This letter was not part of the trial record. Moreover, a post-enactment statement from the bill's sponsor, when there is absolutely no evidence to support any such legislative intent, and when the sponsor herself explicitly denied such a link in testimony, is simply not credible. Notably, after Representative Cohen sent this letter ostensibly claiming a link, the legislature failed to pass her new bill.

88 *See, e.g.*, PX-6 at 13-14.

89 Pet. Br. at 42.

90 Pet. Br. at 43.

91 PX-6 at 10.

Furthermore, the Comptroller may not rely on post-enactment evidence of the Legislature's purpose in enacting the tax.[92] Although courts have held that a governmental entity can supplement a legislative record to show that the challenged regulation furthers the end of controlling secondary effects, "trial testimony and 'supplemental' materials cannot sustain regulations where there is *no* evidence in the pre-enactment legislative record."[93] In this case, neither the text of the statute, nor the legislative history show any legislative purpose to target secondary effects.[94]

The Comptroller relies on a passage from Justice Souter's concurrence in *Barnes* that it claims shows the Comptroller may rely on post-enactment evidence of the Legislature's purpose.[95] First, the concurrence in Barnes refers to evidence the Legislature relies on to show that the regulation actually furthers its intended purpose of controlling secondary effects (i.e., the third prong of the intermediate scrutiny test)—***not*** to the evidence of the Legislature's original purpose in enacting the bill. Moreover, the Comptroller fails to disclose that Justice Souter repudiated himself on this very point in *City of Erie v. Pap's A.M.*:

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92 *White River Amusement Pub, Inc.*, 481 F.3d at 171-72; *Peek-A-Boo Lounge of Bradenton, Inc.*, 337 F.3d at 1267; *see also 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 492 (6th Cir. 2008) (government must have "the actual purpose of suppressing 'secondary effects' when it enacted the ordinance.").

93 *11126 Baltimore Blvd. v. Prince George's County Maryland*, 886 F.2d 1415, 1425 (4th Cir. 1989).

94 The Comptroller misstates Judge Jones's conclusion regarding post-enactment evidence—he does not agree that such evidence is permissible to prove legislative purpose. *See Combs v. Tex. Entm't Assoc*, 287 S.W.3d 852, 869 (Tex. App.—Austin 2009, pet. filed) (Jones, J., concurring). TEA and Karpod agree with Judge Jones' concurring opinion on this point, although they disagree with his judgment concerning the level of scrutiny to be given a differential, content-based tax.

95 *Barnes*, 501 U.S. at 582-83 (Souter, J., concurring).

> What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition. . . By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied. . . . Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes, supra*. ***I should have demanded the evidence then, too***, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "Ignorance, sir, ignorance."[96]

The other cases cited by the Comptroller[97] also do not support the proposition that a barren legislative record can be supplemented by trial evidence of an alleged intent to control secondary effects.[98] And *Alameda Books* and *Pap's A.M.'s* application of *Renton* shows that pre-enactment evidence is required.[99]

Here, there is no evidence in the text of the statute or the legislative record to demonstrate any intent by the Legislature to target secondary effects. Further, the trial court specifically found that the tax "was imposed by the Legislature to raise revenue . . . ."[100] In *Renton*, the Supreme Court held that a finding by the district court that a Legislature's "predominant intent" was to control secondary effects was enough to show that the statute should be analyzed under intermediate scrutiny.[101] Under similar

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96 *Pap's A.M.*, 529 U.S. at 316 (Souter, J., dissenting) (emphasis added).

97 Pet. Br. 37-41.

98 *See, e.g., G.M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631, 635 (7th Cir. 2003) (Town offered evidence that board relied on studies, cases and police reports before enacting ordinance); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 557 & 557 n.6 (5th Cir. 2006) (stated purpose of statute was to regulate secondary effects of sexually oriented businesses); *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 175-76 (5th Cir. 2003) (Extensive findings of secondary effects were in the preamble of the ordinance).

99 *White River Amusement Pub, Inc.*, 481 F.3d at 171-2.

100 SCR 61, FOF 35.

101 *Renton*, 475 U.S. at 48.

reasoning, the inverse should be true here: the trial court's finding that the Legislature's sole intent was to raise revenue is enough to subject the tax to strict scrutiny.

5. Discouraging protected speech by making it more expensive is not a valid secondary effects justification.

At trial the Comptroller argued that the projects that are funded by the tax show that the tax addresses secondary effects. On appeal the Comptroller argues that the plain language of the statute demonstrates an intent to reduce the combination of alcohol and nude dancing because the effect of taxing that protected speech where alcohol is consumed will make it more expensive and therefore discourage it.[102] This type of backward reasoning has been rejected by the Supreme Court: "[if] the *effect* of the statute [is taken] and posited . . . as the State's interest . . . this sort of circular defense can sidestep judicial review of almost any statute because it makes all statutes look narrowly tailored."[103]

Moreover, if, as the Comptroller argues, the Legislature's intent was to suppress protected speech, then no secondary effects justification is allowed. The Comptroller's argument ignores the very reasoning behind the "secondary effects/content neutral" fiction for sexually oriented businesses that came from *Renton* and *Alameda Books*.[104] Before a court can even determine that a regulation is subject to intermediate scrutiny, it must determine that it is not intended to ban expression.[105] A regulation will not be

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102 *See, e.g.*, Pet. Br. at 22.

103 *Simon & Schuster*, 502 U.S. at 120 (emphasis in original).

104 *729, Inc.*, 515 F.3d at 490-91.

105 *Alameda Books*, 535 U.S. at 434 (plurality opinion).

analyzed under intermediate scrutiny unless the government "had the actual purpose of suppressing 'secondary effects' when it enacted the ordinance."[106] And suppressing secondary effects by reducing speech is not permissible:

> A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. . . . The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech.[107]

The Comptroller has specifically argued that the purpose of the tax is to reduce nude dancing and thus suppress speech.[108] But this is not a constitutional method of reducing targeted negative effects.[109] As a result, the Comptroller has admitted that intermediate scrutiny does not apply to this statute. As the Comptroller has conceded the statute cannot survive strict scrutiny

C. The Comptroller cannot disguise the tax on speech by linking it with alcohol.

The Comptroller bases much of its argument on the idea that a greater power to ban alcohol must include a lesser power to tax protected speech related to alcohol. But first, the Comptroller again misstates the law—it may not simply ban alcohol when it is connected with protected speech. [110] And second, this is not an alcohol regulation, or

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106 *729, Inc.*, 515 F.3d at 491.

107 *Alameda Books*, 535 U.S. at 449-50 (Kennedy, J., concurring).

108 Pet. Br. at 22.

109 *Alameda Books*, 535 U.S. at 449-50 (Kennedy, J., concurring).

110 *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996); *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 305-308 (5th Cir. 2007); *Ben's Bar v. Vill. of Somerset*, 316 F.3d 702, 712 (7th Cir. 2003); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir. 1998).

even a tax on alcohol, but a tax on the purveyors of speech.[111] The Comptroller cannot dodge the constitutional analysis for content-based taxes merely by linking the tax to alcohol.

1. The Legislature's power over the regulation of alcohol does not give it the power to suppress speech.

The Comptroller relies on the United States Supreme Court's opinion in *California v. LaRue,*[112] and cases that followed it—*New York Liquor Authority v. Bellanca,*[113] and *City of Newport v. Iacobucci,*[114] to support its argument that alcohol may simply be banned when connected with live nude entertainment. But the Comptroller fails to advise this Court that *LaRue* and its progeny were abrogated by the Supreme Court's opinion in *44 Liquormart.*[115] The Fifth Circuit, among others, has recognized that *44 Liquormart* abrogated *LaRue.*[116] Following *44 Liquormart*, there is no doubt governments seeking to regulate (rather than tax) the combination of alcohol and protected speech must satisfy an intermediate scrutiny analysis.[117] That is, governments cannot simply proclaim that any regulation less than a complete ban on alcohol must, as a matter of course, be allowed because of states' broad Twenty-First Amendment rights—the reasoning in *Bellanca* and *Iacobucci.* Further, *44 Liquormart* also makes clear that just because the government is

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111 *Illusions-Dallas*, 482 F.3d at 307 (statute preventing sexually oriented businesses from obtaining or renewing permits to serve alcohol in dry counties regulates the clubs, not the clubs' patrons).

112 409 U.S. 109 (1972).

113 452 U.S. 714 (1981).

114 479 U.S. 92 (1986).

115 *44 Liquormart*, 517 U.S. at 515-16.

116 *Illusions-Dallas*, 482 F.3d at 305-07.

under no obligation to provide a benefit (*i.e.*, a liquor license), does not mean the conferral of that benefit can be conditioned on the surrender of a constitutional right.[118]

Finally, the Supreme Court expressly rejected the Comptroller's "greater includes the lesser" argument: "'the greater-includes-the lesser' argument should be rejected . . . [as] inconsistent with both logic and well-settled doctrine."[119] The Supreme Court held that although the State had the power to regulate and ban *commercial activity*—the sale of liquor—that did not permit the conclusion that it could, without more, ban *commercial speech* about the liquor.[120] "The text of the First Amendment makes clear that attempts to regulate speech are more dangerous than attempts to regulate conduct."[121] Thus, the fact that the State may regulate alcohol does not mean that it may suppress protected speech. Like erotic speech, commercial speech does not receive the same protection as core political speech does under the First Amendment.[122] Yet the Constitution did not permit Rhode Island to regulate commercial speech based on its connection with alcohol.[123]

The government does not have unfettered power, as the Comptroller's *a fortiori* argument suggests, to prohibit protected speech just because alcohol consumption is involved. If the Legislature chooses to police alcohol at sexually oriented businesses, it must satisfy an intermediate scrutiny analysis. In this case, the Legislature did not choose

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117 *Id.* at 308 n.5; *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007); *Ben's Bar*, 316 F.3d at 712 (7th Cir. 2003); *Sammy's of Mobile, Ltd*, 140 F.3d 993, 996 (11th Cir. 1998).

118 *44 Liquormart*, 517 U.S. at 513.

119 *Id.* at 511.

120 *Id.*

121 *Id.* at 512.

122 *Id.*

to regulate alcohol, but instead taxed protected speech, and this tax is thereby subject to strict scrutiny.

2. The tax neither regulates nor was intended to regulate alcohol.

The Comptroller hopes the Court will overlook that the tax was not intended to, and in fact does not, regulate alcohol.[124] Rather, the Comptroller has done what *Simon & Schuster* has forbidden: the Comptroller has taken a potential effect of the statute—reducing alcohol consumption at sexually oriented businesses—and posited this effect as the statute's purpose.[125] The text and history of the statute, again, shows that the Legislature had no such purpose. It is perhaps not all that significant that the tax is located in the section of the Commercial Code that governs sexually oriented businesses, not the section that governs alcohol.[126] But it is significant that the Legislature previously delegated regulatory power over sexually oriented businesses to Texas local governments.[127] Indeed, the City of Amarillo regulates Karpod.[128] Moreover, the statute's legislative history demonstrates that the Legislature linked the tax to businesses where alcohol was consumed for efficiency purposes, because TABC was already in charge of auditing such businesses.[129] Finally, unlike the alcohol regulation upheld in *Illusions—Dallas*, this regulation is not "part of a 'web' of alcohol regulations." The

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123 *Id.* at 516.

124 *See Illusions-Dallas*, 482 F.3d at 307.

125 *Simon & Schuster, Inc.*, 502 U.S. at 120.

126 TEX. BUS. & COM. CODE § 102.051 *et seq.*

127 TEX. LOC. GOV'T CODE § 243.001.

128 2 RR 123-4.

129 *See* PX-6 at 40-42.

statute's purpose in this case is not to protect the welfare and safety of the public, but to profit from the exercise of a constitutional right.[130]

Indeed, if the Legislature's true goal was to remove alcohol from adult cabarets, as the Comptroller argues on appeal, one would expect to see at least a trace of that intent in the legislative history. But no such trace exists. One would expect to see a fiscal note detailing the enormous impact on the state's revenue if the Legislature's predominant intent was to get rid of alcohol at adult cabarets and thereby cut off the accompanying tax revenue on alcoholic beverage sales. But no legislator expressed any interest in cutting off this revenue stream. In fact, a member of the House Ways and Means Committee expressed concern when the Comptroller's office estimated there might be some revenue lost by local governments as a result of the tax, based on the assumption that patrons of sexually oriented businesses who paid the $5 tax would likely buy one less drink.[131] If a forecasted loss of $800,000 to local governments to gain $53 million in revenue for the state alarmed the committee,[132] surely they would have wanted to know that they were actually passing legislation intended to create a ***net loss*** to general revenue of over ***$20 million per year*** should adult cabarets choose to stop serving alcohol.[133] For the

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130 *Illusions-Dallas*, 482 F.3d at 309.

131 PX-6 at pp. 43-44.

132 PX-3, fiscal note in Bill File.

133 The State of Texas taxes alcohol sales at 14%. Monthly alcohol sales reports for restaurants and bars are submitted to the Comptroller and are available as a matter of public record. At trial, the monthly sales reports from one adult cabaret were offered in evidence. PX-19. Another cabaret owner testified that while he could not recall the amount of revenue from all clubs, there was a compilation of the Comptroller's public records available that showed these amounts. 2 RR 99-101. That compilation of alcohol sales for adult clubs, available at www.texasbarreport.com to members, is attached as Appendix A. These numbers are available to the Comptroller through its

Comptroller's argument to be right – "Remove the alcohol, and avoid the fee" – the Legislature must have intended to cause this net loss to general revenue, and it clearly did not even consider such a loss. And certainly, the proponents of H.B. 1751 were not interested in adult cabarets avoiding the fee, as the stated purpose of the bill was to provide them a stream of funding.[134] The legislative record demonstrates that the Comptroller has made up this imaginary legislative intent out of thin air.

In sum, H.B. 1751 was not intended to regulate alcohol, or reduce its consumption. The declared purpose of the bill was to generate revenue.[135] And the tax does not regulate the patrons of the clubs.[136] It is a tax on the purveyors of speech themselves.[137] As Justice Scalia's hypothetical in *Nollan* suggests, if the Legislature wished to ban alcohol, it could probably do so, providing the regulation complied with the First Amendment. But the Legislature was not interested in regulating alcohol here; rather, it was interested in profiting from the protected speech at sexually oriented businesses. By using the combination of protected speech and alcohol to generate revenue, the Legislature, in a very real sense, approves the combination—and profits from it—rather than disapproving the combination and regulating, banning or policing it.

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own records. The list identifies $84,351,433 in alcohol sales revenue from adult businesses for the first seven months of 2009. That translates to approximately $144,602,460 in annual alcohol sales that, in turn, result in tax revenue for Texas of approximately $20,244,344.

134 *See, e.g.*, PX-6 at p. 14.

135 2 RR 178-79; 3 RR 16-18; PX-6 at pp. 9, 13-14; PX-4.

136 3 RR 43; SCR 61-62, FOF 35-37.

137 *See Illusions-Dallas*, 482 F.3d at 307.

II. If this Court determines the tax is a fee, the case law on regulatory fees applies—and excessive regulatory fees on protected speech are unconstitutional.

The Comptroller argues throughout its brief that the tax is really a "regulation of adult businesses"[138] although the Comptroller admitted at trial that the tax did not regulate adult businesses.[139] But even if this Court determines the tax is regulatory, it fails constitutional muster under the law regarding regulatory fees. The Supreme Court has held it is unconstitutional to impose a tax or exact a fee for the privilege of exercising First Amendment rights.[140] A fee as a condition of exercising First Amendment rights is a prior restraint on speech, and as such faces a "heavy presumption" of invalidity.[141] The government may, however, exact a narrowly tailored fee on First Amendment activities "as a regulatory measure to defray the costs of policing the activities in question."[142] It remains curious that the Comptroller argues the tax is a fee and yet offers the Court no explanation as to why these cases would not apply.

When a fee is imposed on First Amendment activities, "only revenue-neutral fees may be imposed so that the government is not charging for the privilege of exercising a constitutional right."[143] Thus, in *Fly Fish, Inc. v. City of Cocoa Beach*, the Eleventh

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138 *See, e.g.*, Pet Br. at 11-12, 37.

139 PX-9 at p.5.

140 *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992); *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 108 & 112-114(1943); *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941); *Fernandes v. Limmer*, 663 F.2d 619, 632-33 (5th Cir. 1981).

141 *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

142 *Murdock*, 319 U.S. at 114; *see also Cox*, 312 U.S. at 577; *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 710 (5th Cir. 1994).

143 *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1314 (11th Cir. 2003) (citing *Murdock*, 319 U.S. at 113-14; *Cox*, 312 U.S. at 577).

Circuit struck down a $1,250 licensing fee for sexually oriented businesses because the city had not shown that the charge was "reasonably related to the costs of administering the licensing program."[144] And in *729, Inc. v. Kenton County Fiscal Court*, the Sixth Circuit remanded to the district court because the County had not shown that its revenues from a $3,000 licensing fee would not exceed the costs of administering the licensing regime for sexually oriented businesses.[145]

In this case, the Comptroller's expert has admitted that the tax does not "regulate" anything.[146] Thus, there are no administrative costs to defray, making the tax a purely revenue-raising endeavor.[147] Indeed, the Comptroller has essentially abandoned any real argument that the statute serves a regulatory purpose by spending money on sexual violence programs, instead stating that the money raised could be burned in the town square and the statute would still pass Constitutional muster.[148] Because the statute is not revenue neutral, it is unconstitutional under established precedent.

The Comptroller urges that this tax is somehow distinguishable from all the case law dealing with taxes on speech (the Comptroller does not even mention regulatory fees) because this is a tax on erotic speech.[149] But in *729, Inc.*, and *Fly Fish*, two federal circuit courts ***applied the regulatory fee cases dealing with core political speech to fees on erotic speech***, and held that the costs the government seeks to pass on to licensees

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144 *Id.* at 1315.

145 *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 504-05 (6th Cir. 2008).

146 3 RR 43.

147 *See* PX-4; PX 6 at pp.13-14; SCR 62, FOF 36, 37.

148 Pet. Br. at 35-36 at n.5.

must be narrowly tailored to serve a significant governmental interest.[150] Indeed, in *729, Inc.*, the Sixth Circuit set out a three-part test to determine the constitutionality of such a fee:

> (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 county's interests; and (3) whether the county's cost estimates for those narrowly tailored measures are reasonable.[151]

This statute fails the Sixth Circuit's test. First, the tax at issue is no modest fee. The Comptroller projects that it will raise $87 million[152] from 169 clubs.[153] That means each club will pay on average $514,792.90 for the 2008-2009 biennium.[154] Karpod's anticipated tax liability is more than three times its average annual profits.[155] Terry Brown, Karpod's owner, and John Faltynski, who owns an adult cabaret that was not a party to the lawsuit, testified that the tax will put them out of business.[156] And the Comptroller acknowledged at trial that small clubs will be driven out of business.[157] No fee approaching anywhere near the magnitude of the revenue to be collected by the tax on a per club basis ($250,000 per year) has ever been upheld. Indeed, the Comptroller

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149 *Id.* at 31.

150 *729, Inc.*, 485 F.3d 501-03 (citing *Forsyth County*, 505 U.S. at 130-34; *Murdock*, 319 U.S. at 114; *Cox*, 312 U.S. at 576-77); *Fly Fish, Inc.*, 337 F.3d at 1314 (citing *Murdock*, 319 U.S. at 113-14; *Cox*, 312 U.S. at 577).

151 *729, Inc.*, 485 F.3d *at* 501.

152 PX-3 and PX-8, Response No. 1.

153 PX-8, Response No. 4.

154 That amounts to an annual average of about $257,000 per club. And that amount will increase in later years. *See* PX-8, Response No. 1.

155 *See* PX-18, $12,500 per month anticipated tax liability, PX-17 summary of net profits.

156 2 RR 137; 2 RR 151.

argues that one purpose of the fee is to dissuade people from engaging in the protected speech by making it more expensive.[158] Of course, Supreme Court precedent makes clear such a purpose is impermissible. The Comptroller thus essentially confesses that the tax fails the first element of the regulatory fee test.

In addition, the $5.00 per customer fee is not narrowly tailored to defray administrative costs.[159] It is undisputed that the tax imposes no regulations on the businesses taxed.[160] And it is undisputed there will be no administrative cost to the state for the tax.[161] Accordingly, the tax is not a narrowly tailored regulatory fee.

Finally, the amounts the Comptroller estimates it will collect are not reasonably connected to the supposed secondary effects being addressed. The undisputed evidence shows that of the $87 million to be collected, $18 million will be appropriated from the Sexual Assault Fund,[162] $7 million will sit idle in that Fund,[163] and $62 million will provide insurance for low income Texans.[164] Even if the $18 million could be considered administrative costs of regulation, the Comptroller did not show that these cost estimates are reasonable. And the Comptroller failed to explain how leaving $7 million in the

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157 5 RR 188.

158 *See, e.g.*, Pet. Br. at 25.

159 *See 729, Inc.*, 515 F.3d at 502; *Fly Fish*, 337 F.3d at 1315.

160 SCR 61-62, FOF 32, 36, 37; 3 RR 43.

161 *See* PX-8, Response No. 3; SCR 61-62, FOF 28, 36.

162 3 RR 77; SCR 60, FOF 21.

163 3 RR 78; SCR 60, FOF 22.

164 2 RR 161.

government's coffers or spending $62 million on insurance premiums for the poor are reasonably related to any secondary effects alleged to be associated with adult cabarets.[165]

The tax in this case should be examined under strict scrutiny as a content-based tax. But if it is not, it should be reviewed under the case law addressing regulatory fees, because it is a financial burden, not a time, place or manner regulation. And because it is an excessive regulatory fee, it fails constitutional muster.

III. Even if this Court applies intermediate scrutiny, the statute still fails because it is not narrowly tailored.

If this Court agrees with the Comptroller that in this case, a differential, content-based tax should for the first time be reviewed under an intermediate scrutiny standard, the statute still fails. When a regulation burdens expression, but is either content neutral or aimed at secondary effects, courts apply an intermediate scrutiny analysis.[166] Under that test, a regulation is constitutional only if (1) "it is within the constitutional power of the Government"; (2) it "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) the restriction is narrowly tailored to restrict First Amendment freedoms no more than is necessary.[167] Even if the Court determines that a strict scrutiny analysis is inappropriate for content-based taxes, the tax still fails intermediate scrutiny for at least two reasons: (1) the Comptroller's argument demonstrates that intermediate scrutiny does not apply; and (2) the tax is not narrowly tailored.

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165 SCR 63, FOF 45, 46.

166 *See Barnes*, 501 U.S. at 567; *Renton*, 475 U.S. at 50.

167 *Barnes*, 501 U.S. at 567 (citing *United States v. O'Brien*, 291 U.S. 367 (1968));

Even if this Court improperly posits the effect of the statute as the state's interest and analyzes the tax as though it were a content-neutral time, place and manner regulation, the Comptroller fails to advance a regulation that is narrowly tailored to achieve a substantial government interest. Even under the liberal evidentiary burden applied to a secondary effects analysis, the government is required to provide some evidence that the alleged secondary effects problem exists, and that the tax is narrowly tailored to combat that problem.[168]

For a regulation to be narrowly tailored, the scope of the regulation must be proportional to the interest served.[169] In this case, the scope of the tax is not in proportion to the purported interest. The majority of tax revenue from the tax will be used to combat a problem (uninsured Texans) that is not created by adult cabarets. There is no evidence that low income uninsured Texans are a secondary effect of adult cabarets.[170] Adult cabarets do not cause low income Texans to be uninsured.[171] For that reason alone, the tax is not narrowly tailored. There is also no evidence that the burden of the tax ($87 million from 169 clubs) is proportional to the taxed businesses' contribution to the alleged secondary effects.

Furthermore, this revenue-generating tax cannot be narrowly tailored, because it does not "promote . . . a substantial government interest that would be achieved less

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168 *Illusions-Dallas*, 482 F.3d at 312-15.

169 *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

170 SCR 62, FOF 46.

171 *Id.*

effectively absent the regulation."[172] The Comptroller's witnesses and Torrie Camp testified unequivocally that it does not matter where the money comes from as long as the sexual assault programs are funded.[173] Thus, the state has not shown that an interest in funding sexual assault programs requires a burden on speech.

Programs for victims of sexual assault and programs to help low income people obtain health insurance can be funded without any burden on protected speech. More to the point, the Comptroller's interest in helping victims of sexual assault would not be achieved less effectively by funding the Sexual Assault Fund from general revenue[174] instead of taxing protected speech. Accordingly, the tax fails intermediate scrutiny because it is not narrowly tailored.

IV. The tax violates the Texas Constitution.

After finding the tax unconstitutional because it violates the First Amendment, the court of appeals chose not to address TEA and Karpod's arguments under the Texas Constitution. TEA and Karpod preserved this argument, however, and although the Comptroller does not address this alternative ground in its briefing, the judgment can be affirmed because the Tax violates the Texas Constitution. As discussed below, the tax is an occupation tax, and it is unconstitutional because it violates the one-fourth rule for occupation taxes and is not an equal and uniform occupation tax.

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172 *1995 Venture I, Inc. v. Orange County, Tex.*, 947 F. Supp. 271, 279 (E.D. Tex. 1996); *see also Daytona Grand, Inc. v. City of Daytona Beach, Florida*, 490 F.3d 860, 885 (11th Cir. 2007) (same).

173 3 RR 10-13; 3 RR 29-30, 33-4.

174 PX-7.

A. This statute was enacted for the sole purpose of raising revenue. It is not regulatory. Therefore, it is a tax.

The statute creates an occupation tax. An occupation tax is defined generally as "a form of excise tax imposed upon a person for the privilege of carrying on a business, trade, or occupation."[175] It is well settled in Texas that a government charge is an occupation tax, and not a regulatory fee, if its primary purpose is to raise revenue.[176]

The stated purpose of House Bill 1751 was to provide a dedicated source of revenue for the Sexual Assault Program Fund.[177] The author of H.B. 1751 testified that the charge was simply a means to get to a stream of funding.[178] The Comptroller has never disputed the trial court's findings of fact that the tax is not regulatory.[179] The fact that the tax is not regulatory is further evidenced by a lack of any regulatory authority conferred by the statute and the lack of any attempt to actually regulate. Texas courts look "to the actual conferral of regulatory authority in determining whether a charge imposed is intended primarily for the raising of revenue."[180] The programs funded by the tax have no regulatory authority over the businesses taxed. Nor are there any regulatory measures in the tax. "Regulatory authority is the authority to determine whether, when,

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175 *Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 624 (Tex. 1975); *see also* 35 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 13.15 (2d ed. 2002) ("An occupation tax is, as the name implies, a tax on a profession, business, vocation, trade or other means of livelihood.").

176 *Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937), quoted in *H. Rouw Co. v. Texas Citrus Comm'n*, 247 S.W.2d 231, 234 (Tex. 1952); *see also Conlen Grain*, 519 S.W.2d at 624; Op. Tex. Att'y Gen. No. JC-001 (1999).

177 PX-4; SCR 61, FOF 34.

178 PX-6 at pp. 13-14.

179 SCR 61-2, FOF 32, 35, 36, 37.

180 Op. Tex. Att'y Gen. No. JM-963 (1988) (citations omitted).

or how a person or entity conducts business and [] regulatory expenses are distinct from expenses for the services, infrastructure, or improvements a governmental entity provides to the general public."[181] There are no regulations in the tax about what the taxed businesses can or cannot do, where they can do it, or when they can do it.[182] They simply have to pay a fee that the government intends to spend for public purposes. This is the very definition of a tax: "A tax is a burden or charge imposed by the legislative power of the state upon persons or property to raise money for public purposes."[183]

Assuming for the sake of argument that there is a link between gentlemen's clubs and sexual abuse (even though the legislative history of the tax expressly disclaims any link), funding programs to attempt to ameliorate effects of the sexual exploitation industry, does not *regulate* the taxed businesses. The statute does nothing besides raise revenue from the taxed businesses and then apportion that money for public purposes. Funding for victims without any provisions for regulating the taxpayer is not a regulatory purpose, it is merely finding a revenue source to accomplish a social need.

Further, there is no connection between sexually oriented businesses and uninsured, low-income Texans.[184] In the unlikely event that the Sexual Assault Fund is found to be a regulation of sexually oriented businesses, the fact that the majority of

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181 Op. Tex. Att'y Gen. No. JC-001 (1999).

182 The state has already delegated this type of regulatory authority to cities and counties. TEX. LOC. GOV'T CODE §§ 243.001-243.011. Notably, the state recognized in that statute that regulatory fees charged could not exceed the cost of processing applications and investigating applicants. TEX. LOC. GOV'T CODE § 243.009.

183 *Conlen Grain*, 519 S.W.2d at 623.

184 SCR 63, FOF 46.

funds from the tax raises revenue for public health care for the poor, an undeniably public purpose unrelated to sexually oriented businesses, renders the tax an occupation tax.[185]

There is no dispute that the tax does not benefit the businesses that must pay the tax.[186] Rather, the sexually oriented businesses are being taxed to raise revenue for the benefit of the general public. The United States Supreme Court has recognized that a fee is an assessment on a voluntary act in return for a benefit bestowed on the applicant paying the fee, not for the benefit of other members of society.[187]

The appropriated funds raised by the tax go to programs similar to the programs in *Rouw* and *Conlen Grain* that raised revenue for research and promotional purposes – public purposes that rendered the assessments occupation taxes.[188] The Sexual Assault Fund will provide monetary grants to programs and schools for research and education, for awareness campaigns, training, to support grants from the Governor's office for human trafficking prosecution projects, for pilot projects to monitor sex offenders on parole and provide treatment to incarcerated sex offenders.[189] And the funds given to the Health Opportunity Fund will be used to pay health insurance premiums for low income

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185 *See City of Dallas v. Lowenberg*, 187 S.W.3d 777, 780 (Tex. App.—Eastland 2006, pet. filed) (as a matter of law, fire registration fee for commercial buildings that essentially raised revenue to pay for all of city's fire prevention services was an illegal occupation tax); *City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d 322, 328-30 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (fees imposed exceeded cost of granting license and exercising proper police regulation and constituted an occupation tax).

186 PX-8, Response No. 16; 2 RR 163-4; FOF 47.

187 *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-41 (1974).

188 *See Tex. Boll Weevil Eradication Found., Inc. v. Lewellyn*, 952 S.W.2d 454, 462-3 (Tex. 1997) (discussing *Rouw* and *Conlen Grain*).

189 TEX. GOV'T CODE § 420.008(c).

Texans.[190] These are the exact types of general public purpose matters that this Court has held are not regulatory and constitute an occupation tax.[191]

Looking at the plain language of the tax statute and its legislative history, this Court should find as a matter of law that the statute's primary purpose is to raise revenue; therefore, the fee imposed is a tax as a matter of law.[192]

B. The tax is an occupation tax.

The tax is imposed only on admissions to sexually oriented businesses, not any other type of business, and sexually oriented businesses must pay the tax in order to conduct business in Texas. In short, the tax is a form of excise tax imposed upon sexually oriented businesses for the privilege of carrying on their businesses: an occupation tax.

The Comptroller argues this tax is not a tax on the privilege to do business because sexually oriented businesses can avoid the tax by not allowing alcohol or by not allowing live "nude" entertainment. The statute defines the businesses to be taxed—those that allow alcohol and "nude" entertainment. It is difficult to insist that this tax is not an occupation tax because one need only leave the occupation to avoid the tax. The fact that an occupation tax can be avoided by pursuing a different type of business does not change the nature of the tax.

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190 TEX. BUS. & COM. CODE § 102.055; TEX. GOV'T CODE § 531.507.

191 *H. Rouw Co.*, 247 S.W.2d at 234; *Conlen Grain*, 519 S.W.2d at 623.

192 *H. Rouw Co.*, 247 S.W.2d at 234.

Furthermore, Texas courts have repeatedly held that charges for admissions to certain businesses, as in this case, constitute occupation taxes.[193] The key factor for determining whether a tax is an occupation tax is whether the tax is imposed on a particular type of business in exchange for the privilege of operating in the state.[194] The tax fits squarely within this definition. Thus, the constitutional requirements for occupation taxes apply.

C. The tax is unconstitutional because it does not allocate one-fourth of its revenue to public schools.

This tax violates the Texas Constitution because it does not set aside one-fourth of its revenue for the public free schools.[195] The Texas Tax Code contains many examples of occupation taxes that, as the Texas Constitution requires, expressly allocate a quarter of their revenue to the public free schools.[196] This tax, on the other hand, makes no such provision.

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193 *See, e.g., Calvert v. McLemore*, 358 S.W.2d 551, 552 (Tex. 1962) (tax on admissions to motion pictures, operas, plays and other such entertainments constituted an occupation tax); *State v. Rope*, 419 S.W.2d 890, 897 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.) (admission fee to dance hall was intended to raise revenue and constituted occupation tax); *Dancetown, U.S.A., Inc. v. State*, 439 S.W.2d 333, 334 (Tex. 1969) (tax on admission to dance halls was an occupation tax); *see also* Op. Tex. Att'y Gen. No. JC-001 (1999) (city tax on admission fee to racetracks constituted an occupation tax as a matter of law because city had no regulatory authority over racetrack).

194 *Conlen Grain*, 519 S.W.2d at 620.

195 TEX. CONST. Art. VII, § 3; *see also Conlen Grain*, 519 S.W.2d at 627 n.3 (McGee, J., dissenting) (noting that one challenge to an occupation tax would be that the tax fails to set aside one-fourth of its revenue for the public free schools); Op. Tex. Att'y Gen. No. V-1027 (1950) (one-fourth of occupation tax must be set aside for the benefit of the public free schools).

196 *See, e.g.,* TEX. TAX CODE §§ 182.122 (occupation tax on public utility) ("Revenues collected under this chapter are allocated: (1) one-fourth to the foundation school fund; and (2) three-fourths to the general revenue fund"), 152.122 (taxes on sale, rental and use of motor vehicles), 162.504 (diesel fuel tax), 162.503 (gasoline tax), 162.505 (liquefied gas tax),181.202 (occupation tax on cement production), 191.122 (occupation tax on oil well services), 191.145 (occupation tax on attorneys), 201.404 (occupation tax on gas production), 201.353 (occupation tax on oil

Because the tax does not allocate one-fourth of the revenue raised to the benefit of the public free schools, the entire statute is invalid. The Tax expressly provides how every penny to be collected must be allocated by the Comptroller. And courts cannot add provisions to make a statute constitutional; "it is for the Legislature, not the courts, to remedy defects or supply deficiencies in the laws . . . ."[197] Furthermore, the tax's allocation provisions are "so connected with the remainder of the act in meaning and purpose that it cannot be presumed that the Legislature would have passed the remainder of the act without" them.[198] The legislative history of H.B. 1751 conclusively demonstrates that the statute was passed expressly to provide revenue for certain causes.[199] Because the explicit purpose of the statute was to raise money for these causes, it is not clear the Legislature would have passed the tax if the revenues did not go to the programs specified. Thus, because the Legislature failed to allocate one-fourth of the tax's revenue to the public free schools, and because the courts cannot rewrite the statute to include a provision that the Legislature did not contemplate, the entire statute is unconstitutional.

D. The tax is unconstitutional because it is not an equal and uniform occupation tax.

The Tax also violates the Texas Constitution because it is not equal and uniform. The Constitution provides that "occupation taxes shall be equal and uniform upon the

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production), 203.152 (occupation tax on sulphur production); TEX. INS. CODE § 227.001 (occupation tax on insurance companies).

197 *Board of Insurance Comm'rs. of Texas v. Guardian Life Ins. Co. of Texas*, 180 S.W.2d 906 (Tex. 1944).

198 *Burns v. Dilley County Line Indep. Sch. Dist.*, 295 S.W. 1091, 1095 (Tex. 1927).

same class of subjects within the limits of the authority levying the tax."[200] The Legislature cannot make an arbitrary, unreasonable, or unreal classification between subjects for purposes of taxation.[201] A classification violates the Constitution when it "has no reasonable basis in the nature of the business classified, and . . . the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature."[202] For example, in *Calvert v. McLemore*, the Texas Supreme Court held that a statute violated the equal and uniform requirement when it taxed admissions to motion pictures houses, operas, plays "and like amusements held at places other than at a fixed and regularly established motion picture theater."[203] The court held that the tax created an arbitrary classification because there was no reasonable distinction between a person who exhibited a motion picture in an established theater and one who showed the same picture in a temporary location.[204]

Similarly, in this case, the tax creates an arbitrary classification because it operates differently on businesses that provide the same entertainment to the same clientele. The statute taxes live nude entertainment and performances for "an audience of two or more individuals" in "a nightclub, bar, restaurant, or similar commercial enterprise." But businesses such as lingerie modeling studios, nude modeling studios, or adult arcades that provide live nude entertainment for an audience of one in a commercial setting are

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199 PX-4.

200 TEX. CONST. Art. VIII § 2.

201 *Texas Co. v. Stephens*, 103 S.W. 481, 485 (Tex. 1907).

202 *Id.*

203 358 S.W.2d 551, 553 (Tex. 1962).

exempted from the tax. The undisputed evidence shows that these businesses provide the same type of entertainment and serve the same customers as the sexually oriented businesses subject to the tax.[205]

In *Bullock v. Texas Skating Association*, the court upheld a tax that operated differently on ballrooms and skating rinks because the type of entertainment and the type of clientele served by the two businesses were clearly distinguishable.[206] Here, however, there is no reasonable distinction between the live nude entertainment provided at a nightclub that falls under the statute and that provided at, for example, a lingerie modeling studio, nude modeling studio, or in an adult arcade theater.[207] Nor is there a difference between the clientele served by such businesses. The statute only applies to *certain* sexually oriented businesses.[208] There is no justification for the separate treatment afforded those sexually oriented businesses, and the statute's classification is unreasonable and arbitrary. Thus, the tax is not equal and uniform and is therefore unconstitutional.

The judgment of the courts below should be affirmed because the tax violates the First Amendment. But even if this Court disagrees on that point, the tax violates the Texas Constitution.

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204 *Id.*

205 2 RR 149-50.

206 583 S.W.2d 888, 893-94 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

207 *See Calvert*, 358 S.W.2d at 553.

208 The original version of H.B. 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. But the tax was later amended to include only *certain* sexually oriented businesses.

PRAYER

TEA and Karpod pray that the Comptroller's Petition for Review be denied and the judgment of the court of appeals affirmed.

Respectfully submitted,

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Pursuant to the Texas Rules of Appellate Procedure, the undersigned hereby certifies that on the 15th day of October, 2009, a true and correct copy of this Respondents' Brief on the Merits is being served via certified mail, return receipt requested, on:

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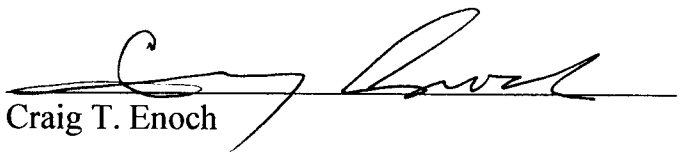

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NO. 09-0481

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
Cause No. 03-08-00213-CV

APPENDIX TO
RESPONDENTS' BRIEF ON THE MERITS

A. Chart showing revenue from alcohol sales at adult businesses – 1/1/09 – 7/31/09

TRADE TOP__ADULT SALES

#	NAME	ADDRESS	CITY	RANK	PCTCHG	MAY09	JUN09	JUL09	TRADE	YTD CHG	YTD	AREA
1	BABY DOLLS TOPLESS SALOON	10250 SHADY TRL	DALLAS	5	-0.43%	$536,368	$491,741	$555,445	ADT	-3.17%	$3,670,454	DALLAS/FT WORTH
2	TREASURES	5647 WESTHEIMER RD	HOUSTON	7	-5.21%	$504,916	$461,763	$464,766	ADT	0.68%	$3,545,155	HOUSTON
3	ST JAMES RESTAURANT & CABA	555 RANKIN RD	HOUSTON	14	2.00%	$345,941	$356,040	$376,393	ADT	3.20%	$2,590,588	HOUSTON
4	LODGE	10530 SPANGLER RD	DALLAS	19	-6.60%	$360,794	$365,587	$353,578	ADT	-9.60%	$2,592,460	DALLAS/FT WORTH
5	BABY DOLLS FT WORTH	3601 HIGHWAY 157	FORT WORTH	36	18.24%	$300,102	$269,947	$298,182	ADT	15.59%	$1,925,477	DALLAS/FT WORTH
6	DALLAS GENTLEMEN'S CLUB	2117 W NORTHWEST HWY	DALLAS	38	-7.47%	$317,112	$304,567	$290,721	ADT	-17.58%	$2,288,637	DALLAS/FT WORTH
7	PERFECT 10 MENS CLUB	16511 BRATTON LN	AUSTIN	39	2.90%	$272,641	$243,518	$285,101	ADT	-0.16%	$1,836,794	AUSTIN
8	TMC BEVERAGES OF HOUSTON INC	3303 SAGE RD STE 100	HOUSTON	43	-25.91%	$295,967	$228,926	$277,796	ADT	-18.81%	$1,940,301	HOUSTON
9	SUGARS	2731 LOOP 410 NORTHWEST	SAN ANTONIO	65	-7.02%	$265,296	$238,797	$249,672	ADT	-4.79%	$1,868,262	SAN ANTONIO
10	RITZ CABARET	10520 GULF FWY	HOUSTON	81	-0.58%	$230,785	$203,653	$237,528	ADT	-2.85%	$1,632,133	HOUSTON
11	PALAZIO	501 E BEN WHITE BLVD	AUSTIN	83	15.86%	$228,591	$216,903	$235,852	ADT	7.13%	$1,588,189	AUSTIN
12	CENTERFOLDS	6166 RICHMOND AVE	HOUSTON	109	3.37%	$231,323	$202,534	$212,140	ADT	11.93%	$1,578,331	HOUSTON
13	PALACE MEN'S CLUB	2482 NE LOOP 410	SAN ANTONIO	118	-4.86%	$214,201	$198,283	$206,231	ADT	0.45%	$1,555,696	SAN ANTONIO
14	SPEARMINT RHINO GENTLEMEN'S CL	10965 COMPOSITE DR	DALLAS	128	-21.51%	$211,127	$181,198	$201,288	ADT	-24.67%	$1,383,310	DALLAS/FT WORTH
15	CABARET ROYALE/LA BOUTIQUE	10723 COMPOSITE DR	DALLAS	133	23.70%	$192,059	$184,904	$199,194	ADT	21.54%	$1,358,466	DALLAS/FT WORTH
16	YELLOW ROSE	6528 N LAMAR BLVD	AUSTIN	135	-5.33%	$166,987	$186,539	$198,267	ADT	-17.66%	$1,251,469	AUSTIN
17	PERFECT 10 MENS CLUB	111 NW LOOP 410	SAN ANTONIO	147	3.90%	$175,412	$171,613	$191,022	ADT	-9.37%	$1,245,663	SAN ANTONIO
18	SILVER CITY	7501 N STEMMONS FWY	DALLAS	149	-4.96%	$210,557	$180,245	$190,835	ADT	-15.25%	$1,427,306	DALLAS/FT WORTH
19	SUGAR'S	404 E HIGHLAND MALL BLVD	AUSTIN	189	8.05%	$175,833	$174,960	$170,746	ADT	-1.32%	$1,255,614	AUSTIN
20	GOLD CUP	12747 NORTHWEST FWY	HOUSTON	196	15.78%	$157,224	$156,109	$169,515	ADT	-4.91%	$1,087,181	HOUSTON
21	SAN ANTONIO MENS CLUB	8244 INTERCHANGE PKWY	SAN ANTONIO	197	-6.59%	$174,509	$150,191	$169,276	ADT	-12.71%	$1,214,697	SAN ANTONIO
22	TMC BEVERAGES OF DALLAS INC	2340 W NORTHWEST HWY	DALLAS	202	1.18%	$181,256	$158,108	$167,712	ADT	-6.48%	$1,241,713	DALLAS/FT WORTH
23	NEW ORLEANS NIGHTS RESTAURANT	7101 CALMONT AVE	FORT WORTH	210	-11.39%	$181,628	$161,939	$164,660	ADT	-18.22%	$1,224,000	DALLAS/FT WORTH
24	SPLENDOR	7440 W GREENS RD	HOUSTON	211	7.47%	$148,834	$154,436	$164,469	ADT	8.36%	$1,136,638	HOUSTON
25	HEARTBREAKERS-THE CLUB	3200 GULF FWY	DICKINSON	220	-6.01%	$180,660	$156,805	$160,734	ADT	6.15%	$1,287,266	COASTAL
26	D B COOPER'S	22565 I-45 NORTH	SPRING	240	19.38%	$133,073	$135,258	$155,266	ADT	11.76%	$978,366	HOUSTON
27	COLORADO BAR AND GRILL	6710 SOUTHWEST	HOUSTON	261	-14.53%	$173,120	$150,883	$150,917	ADT	-16.03%	$1,141,393	HOUSTON

		FWY										
28	ALL STARS	9440 IH 10 W	SAN ANTONIO	278	-12.63%	$171,753	$143,835	$146,031	ADT	-5.59%	$1,078,242	SAN ANTONIO
29	EXPOSE'	3615 S CONGRESS AVE	AUSTIN	294	2.89%	$143,800	$151,662	$140,752	ADT	1.29%	$953,454	AUSTIN
30	JOY OF AUSTIN	3105 S I H 35	ROUND ROCK	299	5.01%	$137,322	$132,917	$139,124	ADT	5.90%	$892,706	AUSTIN
31	MICHAEL'S INTERNATIONAL	6440 SOUTHWEST FWY	HOUSTON	303	92.86%	$123,772	$132,683	$138,574	ADT	68.40%	$809,769	HOUSTON
32	PALACE	5850 EVERHART ROAD	CORPUS CHRISTI	354	-21.57%	$134,130	$114,603	$128,783	ADT	-4.84%	$938,919	COASTAL
33	MILLION DOLLAR SALOON	6826 GREENVILLE AVE	DALLAS	372	-23.95%	$152,174	$139,506	$126,142	ADT	-8.56%	$1,067,879	DALLAS/FT WORTH
34	STILETTOS	1050 N SUGAR RD	PHARR	384	-14.12%	$130,540	$103,485	$124,190	ADT	-7.19%	$893,435	SOUTH TEXAS
35	XOTICAS-RIO GRANDE VALLEY LP	4502 N CAGE BLVD	PHARR	429	-6.66%	$120,282	$106,216	$116,716	ADT	-6.89%	$856,503	SOUTH TEXAS
36	FORT WORTH GENTLEMANS CLUB	3315 NORTH FWY	FORT WORTH	431	47.24%	$111,758	$105,190	$116,312	ADT	61.86%	$835,142	DALLAS/FT WORTH
37	LANDING STRIP	745 BASTROP HWY	AUSTIN	436	-19.64%	$107,203	$110,927	$115,974	ADT	-11.25%	$774,800	AUSTIN
38	XOTICAS	9205 SAN DARIO AVE	LAREDO	515	8.80%	$87,886	$104,881	$107,582	ADT	2.82%	$689,341	SOUTH TEXAS
39	CLUB ONYX	10557 WIREWAY DR	DALLAS	528		$110,846	$91,056	$106,457	ADT		$781,127	DALLAS/FT WORTH
40	CASSIDY'S POLO CLUB	6019 W 45TH AVE	AMARILLO	596	9.20%	$101,579	$91,182	$100,659	ADT	20.58%	$702,421	WEST TEXAS
41	CLUB CHEETAH	6425 S PADRE ISLAND DR	CORPUS CHRISTI	599	-11.86%	$99,524	$100,027	$100,356	ADT	-2.82%	$732,148	COASTAL
42	BABES	4211 SUNGATE	SAN ANTONIO	604	-15.93%	$101,264	$91,884	$100,054	ADT	-6.14%	$717,894	SAN ANTONIO
43	ALLSTARS CABARET	6340 WESTHEIMER RD	HOUSTON	623	65.22%	$107,038	$91,942	$98,515	ADT	95.25%	$832,694	HOUSTON
44	CENTERFOLDS	5418 BREWSTER ST	SAN ANTONIO	649	39.16%	$81,276	$86,445	$96,854	ADT	1.98%	$547,376	SAN ANTONIO
45	TIFFANY'S CABARET OF SAN ANTON	8736 WURZBACH RD	SAN ANTONIO	660	1.61%	$98,489	$90,129	$96,486	ADT	-6.49%	$675,076	SAN ANTONIO
46	TEXAS CABARET	1300 NE LOOP 820	FORT WORTH	670	-12.66%	$88,790	$85,864	$95,741	ADT	-23.21%	$578,469	DALLAS/FT WORTH
47	CABARET	410 N SAM HOUSTON PKWY E	HOUSTON	719	-15.74%	$88,689	$93,054	$92,902	ADT	-14.93%	$669,447	HOUSTON
48	RED PARROT	14401 GATEWAY BLVD W	EL PASO	725	14.72%	$83,539	$86,331	$92,554	ADT	11.60%	$619,519	WEST TEXAS
49	BABE'S CABARET	5614 HILLCROFT ST	HOUSTON	729	-21.91%	$81,366	$84,426	$92,412	ADT	-13.49%	$603,350	HOUSTON
50	DOLL HOUSE PRIVATE CLUB INC	602 W ELMS RD	KILLEEN	766	45.99%	$80,946	$92,066	$89,514	ADT	-5.72%	$539,447	CENTRAL TEXAS
51	R B L TEX-MEX LOUNGE INC	2017 W OWASSA RD	EDINBURG	799	-25.29%	$79,846	$75,770	$87,759	ADT	-17.08%	$604,192	SOUTH TEXAS
52	FLASH DANCER	520 N WATSON RD	ARLINGTON	877	-20.97%	$81,146	$80,062	$83,182	ADT	-8.73%	$663,730	DALLAS/FT WORTH
53	JUNGLE	4541 CANYON DR	AMARILLO	885	-3.89%	$82,004	$72,731	$82,911	ADT	-3.39%	$609,973	WEST TEXAS
54	HOUSTON DOLLS CABARET	313 RANKIN RD STE H	HOUSTON	923	7.81%	$78,500	$75,817	$81,204	ADT	11.12%	$561,214	HOUSTON
55	SHOWTIME	1298 W MANSFIELD HWY	KENNEDALE	984	-1.42%	$77,406	$73,637	$77,935	ADT	10.87%	$602,133	DALLAS/FT WORTH

56	GOLD CLUB	4680 FANNETT RD	BEAUMONT	997	-12.99%	$81,504	$72,337	$77,048	ADT	7.31%	$618,710	GOLDEN TRIANGLE
57	LIPSTICK GENTLEMEN'S SPORTS BA	3625 HIGHWAY 146	BACLIFF	1023	39.31%	$74,559	$68,595	$76,035	ADT	15.41%	$481,906	COASTAL
58	CABARET OF C C A MEN'S CLU	5401 LEOPARD ST	CORPUS CHRISTI	1137	-17.02%	$71,046	$63,321	$71,176	ADT	-15.10%	$492,494	COASTAL
59	TEQUILA SUNRISE	11701 GATEWAY BLVD W	EL PASO	1141	29.52%	$67,035	$65,258	$71,062	ADT	6.46%	$456,598	WEST TEXAS
60	PEEP-N-TOM'S	2925 E ABRAM ST	ARLINGTON	1201	-8.26%	$73,205	$71,170	$69,287	ADT	-12.82%	$513,350	DALLAS/FT WORTH
61	BOTTOM'S UP	5945-55 WILLIAMS	CORPUS CHRISTI	1249	36.83%	$63,335	$66,889	$67,375	ADT	30.58%	$422,411	COASTAL
62	DREAMSTREET	5835 MLK PARKWAY	BEAUMONT	1339	-4.32%	$61,156	$55,902	$64,319	ADT	-11.63%	$460,567	GOLDEN TRIANGLE
63	STILETTO S	1480 HWY 77/83 NORTH	BROWNSVILLE	1534	-24.34%	$50,729	$50,743	$59,353	ADT	-24.16%	$418,594	COASTAL
64	WILD ZEBRA THE GENTLEMEN'S PAR	2525 NE LOOP 410 STE 110	SAN ANTONIO	1585	-22.64%	$64,489	$56,231	$58,247	ADT	-14.35%	$462,988	SAN ANTONIO
65	CLUB ONYX HOUSTON	3113 BERING DR	HOUSTON	1596	-10.04%	$67,386	$59,192	$58,031	ADT	-6.97%	$472,679	HOUSTON
66	ILLUSIONS	7405 CAMP BOWIE W	FORT WORTH	1682	-5.57%	$58,679	$51,568	$56,021	ADT	-0.29%	$405,297	DALLAS/FT WORTH
67	MAXIMUS	3136 SEYMOUR HWY	WICHITA FALLS	1725	-19.80%	$53,653	$63,284	$55,436	ADT	-0.86%	$399,011	CENTRAL TEXAS
68	LIPSTICK	10859 HARRY HINES BLVD	DALLAS	1727		$48,670	$42,108	$55,374	ADT		$380,780	DALLAS/FT WORTH
69	WALL STREET	3300 S FORT HOOD ST BLDG 1-C	KILLEEN	1751	25.02%	$64,631	$49,434	$54,873	ADT	-15.77%	$385,322	CENTRAL TEXAS
70	STILETTO'S CABARET	3929 HIGHWAY 157 S	FORT WORTH	1801	78.55%	$60,563	$49,692	$53,836	ADT	48.67%	$367,007	DALLAS/FT WORTH
71	PLAYMATES	9605 SOUTHWEST FWY	HOUSTON	1891	-6.25%	$49,598	$44,838	$51,927	ADT	1.01%	$342,502	HOUSTON
72	T & A CABARET	8701 SOUTH FWY	FORT WORTH	1943	-22.76%	$48,339	$44,014	$51,103	ADT	-14.89%	$385,158	DALLAS/FT WORTH
73	FARE ARLINGTON	2711 MAJESTY DR	ARLINGTON	1980	-15.74%	$41,246	$45,300	$50,551	ADT	-16.16%	$328,475	DALLAS/FT WORTH
74	LABARE II	2102 W NORTHWEST HWY	DALLAS	2269	0.38%	$44,996	$40,220	$45,166	ADT	0.33%	$278,833	DALLAS/FT WORTH
75	MAIN STAGE	5000 MARK IV PKWY	FORT WORTH	2271	-38.38%	$60,510	$42,242	$45,159	ADT	-25.06%	$419,063	DALLAS/FT WORTH
76	SUGARS	15301 GULF FWY	HOUSTON	2282	-12.40%	$29,516	$29,824	$45,000	ADT	-47.14%	$257,292	HOUSTON
77	GLAMOUR GIRLS CABARET	14428 HEMPSTEAD RD	HOUSTON	2379	6.67%	$42,591	$45,735	$43,803	ADT	-3.11%	$309,503	HOUSTON
78	KING LOUNGE INC	1602 MARKET CENTER BLVD	DALLAS	2407	-30.78%	$47,072	$43,449	$43,352	ADT	-20.41%	$348,825	DALLAS/FT WORTH
79	HARLEM NITES CABARET	9317 SOUTH FWY	FORT WORTH	2515	-20.83%	$40,619	$35,616	$42,093	ADT	32.77%	$373,560	DALLAS/FT WORTH
80	LEGS CABARET	8307 GULF FWY	HOUSTON	2542	7.79%	$44,679	$40,810	$41,769	ADT	6.62%	$297,668	HOUSTON
81	SHOWTIME	1821 LA SALLE	WACO	2648	25.48%	$43,657	$41,233	$40,460	ADT	73.45%	$304,125	CENTRAL TEXAS
82	FOXXY'S CABARET	11112 S POST OAK ROAD	HOUSTON	2710	4.85%	$41,052	$37,322	$39,570	ADT	14.53%	$297,131	HOUSTON
83	TROPHY CLUB GENTLEMEN'S RE	1050 W RANKIN RD STE 280	HOUSTON	2806	-24.80%	$49,405	$46,076	$38,352	ADT	-25.01%	$330,513	HOUSTON
84	MOMENTS	9003 NORTH FWY	HOUSTON	2928	4.02%	$35,111	$33,310	$36,884	ADT	6.08%	$244,431	HOUSTON
85	TEXAS SHOWGIRLS	411 N SCOTT AVE	WICHITA FALLS	2952	56.74%	$36,128	$34,188	$36,670	ADT	130.92%	$223,615	CENTRAL TEXAS
86	TWO MINNIES	641 RUBY AVE	WACO	2960	-1.40%	$30,154	$30,591	$36,560	ADT	-6.10%	$240,717	CENTRAL

												TEXAS
87	MAXIMUS	1901 N BEN WILSON ST	VICTORIA	3016	-8.28%	$35,070	$33,139	$35,978	ADT	4.30%	$269,843	COASTAL
88	MOULIN ROUGE	8930 WINKLER DR	HOUSTON	3270	17.29%	$32,497	$26,732	$33,340	ADT	14.17%	$208,447	HOUSTON
89	ZEBRA SHOWBAR	7700 S DESERT BLVD	VINTON	3303	30.26%	$32,206	$35,531	$33,005	ADT	-9.36%	$223,710	WEST TEXAS
90	ALOHA GENTLEMANS CLUB	5413 S STAPLES ST	CORPUS CHRISTI	3526	-22.47%	$23,722	$23,823	$31,306	ADT	-29.76%	$192,253	COASTAL
91	MOMENTS	5133 SPENCER HWY	PASADENA	3534	1.44%	$35,746	$34,807	$31,173	ADT	63.07%	$274,219	HOUSTON
92	HI-10 CABARET	11927 EAST FWY	HOUSTON	3620	-32.32%	$33,010	$30,008	$30,274	ADT	-12.67%	$243,201	HOUSTON
93	LA CHATTE	13335 DULUTH ST	HOUSTON	3748		$26,485	$30,349	$29,320	ADT	102.06%	$246,284	HOUSTON
94	CLUB ONYZ	4102 NACO PRN BLVD	SAN ANTONIO	4092	65.00%	$23,985	$26,551	$27,000	ADT	20.69%	$113,927	SAN ANTONIO
95	PARTY PLACE CABARET	4842 LEOPARD ST	CORPUS CHRISTI	4156	-18.17%	$32,079	$29,915	$26,578	ADT	4.87%	$235,681	COASTAL
96	MAXIMUS	4417 CRAWFORD DR	ABILENE	4245		$7,926	$25,859	$25,923	ADT		$73,987	WEST TEXAS
97	PLAYERS	2121 E INTERSTATE 40	AMARILLO	4266	-17.27%	$27,982	$25,828	$25,786	ADT	-13.46%	$196,619	WEST TEXAS
98	PLAYMATES GENTLEMAN'S CLUB	8110 SPRINGDALE RD	AUSTIN	4336	-57.69%	$31,095	$25,636	$25,234	ADT	-41.24%	$209,050	AUSTIN
99	MEMORIES CABARET	10314 HEMPSTEAD RD	HOUSTON	4413	-14.98%	$24,568	$25,311	$24,690	ADT	-3.78%	$173,060	HOUSTON
100	WHISPERS	15038 W EXPRESSWAY 83	HARLINGEN	4540	-6.48%	$22,245	$19,663	$23,958	ADT	14.57%	$161,824	COASTAL
101	TONGA	5900 COLLEGE	BEAUMONT	4548	-13.37%	$22,637	$19,764	$23,910	ADT	-11.63%	$187,700	GOLDEN TRIANGLE
102	CRAZY HORSE SALOON	1400 1/2 N SCOTT AVE	WICHITA FALLS	4743	-22.16%	$23,355	$22,445	$22,786	ADT	356.85%	$189,829	CENTRAL TEXAS
103	REFLECTIONS	1507 N WATSON RD	ARLINGTON	4803	27.13%	$20,537	$17,322	$22,386	ADT	369.37%	$150,996	DALLAS/FT WORTH
104	PLAYMATE'S	311 N GREAT SOUTHWEST PKY	ARLINGTON	4814	-9.18%	$22,226	$18,953	$22,339	ADT	2.24%	$151,901	DALLAS/FT WORTH
105	GINIA'S	1534 S STAPLES ST	CORPUS CHRISTI	4906	28.26%	$16,113	$21,247	$21,705	ADT	-18.21%	$122,402	COASTAL
106	CHEETAHS	3437 W INTERSTATE 40	AMARILLO	5176	6.44%	$21,658	$17,161	$20,188	ADT	-3.10%	$134,353	WEST TEXAS
107	MIRAGE CLUB	310 VALLEY HI DR STE 103	SAN ANTONIO	5447		$13,903	$15,940	$18,815	ADT		$103,467	SAN ANTONIO
108	PLEASURES	1907-11 S STAPLES	CORPUS CHRISTI	5489	-11.37%	$19,118	$17,896	$18,573	ADT	-2.86%	$143,038	COASTAL
109	WEST SIDE SHOWLOUNGE	533 EXECUTIVE CENTER BLVD	EL PASO	5564	-23.09%	$22,340	$19,427	$18,107	ADT	-12.03%	$145,897	WEST TEXAS
110	PLEASURE CABARET	11150 NORTHWEST FWY	HOUSTON	5571	-59.01%	$23,634	$21,278	$18,061	ADT	-37.35%	$212,545	HOUSTON
111	LIPS	510 N STANTON ST	EL PASO	5736		$0	$0	$17,156	ADT		$17,156	WEST TEXAS
112	ELEGANCE CABARET	2412 E BELKNAP ST	FORT WORTH	5787	6.34%	$20,054	$21,585	$16,905	ADT	6.40%	$164,839	DALLAS/FT WORTH
113	MIRAGE CABARET	3416 W 34TH ST	HOUSTON	5796	17.88%	$13,660	$13,717	$16,859	ADT	-12.15%	$101,623	HOUSTON
114	SHOWGIRL	4617 HIGHWAY 377 S	FORT WORTH	5901	-16.69%	$15,387	$16,866	$16,439	ADT	-7.64%	$112,777	DALLAS/FT WORTH
115	O	3701 N I H 35	AUSTIN	5930	-44.72%	$23,875	$16,205	$16,311	ADT	-50.54%	$130,298	AUSTIN
116	FANTASY RANCH	701 106TH ST	ARLINGTON	6302	-42.55%	$20,633	$12,489	$14,540	ADT	-38.22%	$155,410	DALLAS/FT WORTH
117	CHICS CABARET	10255 EAST FWY	HOUSTON	6392	-31.03%	$14,193	$13,246	$14,111	ADT	-12.67%	$108,617	HOUSTON

118	RAINBOW LOUNGE	4970 W MILITARY DR	SAN ANTONIO	6404	-22.68%	$12,252	$12,352	$14,052	ADT	-17.94%	$98,397	SAN ANTONIO
119	BABY O'	2711 STOREY LN	DALLAS	6639		$16,322	$12,674	$12,999	ADT		$41,995	DALLAS/FT WORTH
120	ICE CREAM CASTLES	7309 FULTON ST	HOUSTON	7060	-20.79%	$12,735	$10,190	$10,994	ADT	9.32%	$95,325	HOUSTON
121	BABES	7901 E INTERSTATE 40	AMARILLO	7264	-21.12%	$8,630	$9,056	$10,169	ADT	-21.44%	$71,271	WEST TEXAS
122	ILLUSIONS	4100 MAPLE AVE	DALLAS	7508	-17.09%	$8,690	$7,997	$9,274	ADT	-20.02%	$67,932	DALLAS/FT WORTH
123	LONGHORN SALOON	INTER N/E CORNER HWY 107 AND	EDINBURG	7967	-47.33%	$3,754	$1,372	$7,686	ADT	-59.21%	$33,458	SOUTH TEXAS
124	HOT SPOT GENTLEMAN CLUB	5608 N SHEPHERD DR	HOUSTON	8166	900.00%	$2,150	$1,000	$7,000	ADT	38.78%	$17,170	HOUSTON
125	GIRLS NEXT DOOR	2714 N PIEDRAS ST	EL PASO	8192		$4,692	$9,478	$6,943	ADT		$41,123	WEST TEXAS
126	DIAMOND CLUB CABARET	3136 RICHMOND AVE	HOUSTON	8653	-53.79%	$5,862	$4,968	$5,466	ADT	-39.47%	$45,544	HOUSTON
127	K C MENS CLUB ENNIS, TEXAS	850 S INTERSTATE HIGHWAY 45	ENNIS	9005	50.18%	$8,280	$1,911	$4,582	ADT	-35.85%	$30,672	CENTRAL TEXAS
128	STILETTOS INC	10625 VETERANS MEMORIAL DR S	HOUSTON	9031	-50.17%	$6,645	$7,856	$4,498	ADT	-1.96%	$45,301	HOUSTON
129	LA ESQUINA LOUNGE	1/2 MI E FROM 493 S/S ON MON	LA BLANCA	9078	57.97%	$5,016	$2,727	$4,398	ADT	19.02%	$25,686	SOUTH TEXAS
130	SILHOUETTE	8128 HWY 80 W	FORT WORTH	9551	-91.44%	$22,930	$17,358	$3,227	ADT	-49.71%	$150,273	DALLAS/FT WORTH
131	MOONLIGHT CLUB	105 E AVENUE D	KILLEEN	9800	-51.48%	$2,538	$2,889	$2,783	ADT	-49.43%	$21,916	CENTRAL TEXAS
132	CLUB SINSATIONS	14448 HEMPSTEAD RD	HOUSTON	10356		$4,131	$2,030	$1,804	ADT		$8,643	HOUSTON
133	SANDY'S LOUNGE	4736 TELEPHONE RD	HOUSTON	10876	-13.50%	$1,012	$777	$1,032	ADT	-22.83%	$6,690	HOUSTON