

No. S24A0772

In the
Supreme Court of Georgia

Georgia Association of Club Executives, Inc.,
Appellant,
v.

Department of Revenue Commissioner Frank O'Connell, Individually,
Appellee.

On Appeal from the Superior Court of Fulton County
Superior Court Case No. 2022CV362896

BRIEF OF APPELLEE

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INTRODUCTION

The State can tax businesses—including businesses that engage in expressive activity. And this case, which involves adult entertainment establishments and nude dancing, activity at the absolute periphery of First Amendment protection, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), is no different. With the Safe Harbor Act, Georgia imposed a 1% tax (the “Assessment”) on erotic massage parlors, lingerie modeling studios, and strip clubs. Those entities cannot avoid the burden of taxation simply because they engage in supposedly expressive activity.

Decades of legal authority make clear that the State is free to impose significant restrictions on adult businesses, including outright bans on the combination of nude dancing and alcohol. The Georgia Association of Club Executives, Inc., a group of strip clubs, provides no reason to retreat from those basic holdings here, where the Assessment is a far *less* intrusive state action than direct regulation or prohibition. The Association argues that this case is distinguishable from decades of precedent because it involves a tax, and taxes are just ... different. That’s true: taxes warrant *less* constitutional scrutiny than invasive regulations, not *more*, and the *de minimis* tax here is plainly valid.

Taxes enjoy a strong presumption of constitutionality that “can be overcome only by the most explicit demonstration that a [tax’s] classification is a hostile and oppressive discrimination against particular persons and classes.” *Leathers v. Medlock*, 499 U.S. 439,

451–52 (1991) (quotation omitted). That means that industry-specific taxes—even those that discriminate between speakers—do not implicate the First Amendment at all, except in rare circumstances, such as taxes that single out the press or taxes that discriminate on the basis of ideas. The Assessment does neither of these things. It has nothing to do with the press and imposes a tax on an entire industry, most of which (e.g., massage parlors) involves no protected expression at all. To the extent the Act mentions nude dancing, it does so to identify one of the types of *business* covered. The Assessment is not directed at, nor does it pose any danger of suppressing, any ideas expressed through nude dancing (whatever those supposedly are). Nude dancing isn't taxed. *Strip clubs* are taxed. And businesses can avoid the Assessment altogether by not serving alcohol. Taxes like these are subject only to rational basis review, *see Déjà Vu Show Girls v. Nev. Dep't of Tax'n.*, 130 Nev. 719, 732 (2014) (considering similar tax), and the Assessment is plainly rationally related to a legitimate government purpose.

But even if the Assessment were viewed as an actual *regulation*—i.e., something that limits, steers, or otherwise controls behavior—it would still pose no constitutional problem. It would best be viewed as a content-neutral regulation of conduct that incidentally burdens some protected expression. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). These kinds of regulations are subject to intermediate scrutiny. So, for that matter, are content-based regulations meant to reduce the

well-known secondary social effects of adult businesses. *Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 192 (2018). Either type of regulation is constitutional so long as it (1) furthers an important government interest (2) that is unrelated to the suppression of speech, and (3) its incidental restriction of protected speech is no greater than is necessary to further the important government interest. *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 255–56 (1982). Whether viewed as simply raising funds to help victims of child sexual exploitation or regulating adult businesses to mitigate the prostitution (including underage prostitution) they attract, the Assessment easily passes this test. Both of these goals are compelling state interests, there is no evidence whatsoever that the legislature passed the Act to suppress any sort of speech, and the Assessment is narrowly tailored to impose at most a *de minimis*, incidental burden on protected expression.

This Court should affirm.

STATEMENT

A. Statutory Background

In 2015, the General Assembly passed the Safe Harbor/Rachel’s Law Act, which as relevant here, established the “Safe Harbor for Sexually Exploited Children Fund,” 2015 Ga. Laws 675, 680, § 3-1, which is funded directly by a new annual “state operation assessment” (the “Assessment”) on “adult entertainment establishments,” *id.* at 683.

The statute defines an “adult entertainment establishment” as “any place of business or commercial establishment where alcoholic beverages of any kind are sold, possessed, or consumed” and any of the following three categories of adult entertainment occurs:

(A) The entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation;

(B) The patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments; or

(C) The patron directly or indirectly is charged a fee to engage in personal contact by employees, devices, or equipment, or by personnel provided by the establishment.

O.C.G.A. § 15-21-201(1); *see also id.* § 15-21-201(7) (defining “substantially nude”). Colloquially, these categories generally describe strip clubs, lingerie modeling, and massage parlors, respectively. The Act pairs them with a list of examples: “Such term shall include, but shall not be limited to, bathhouses, lingerie modeling studios, and related or similar activities.” *Id.* § 15-21-201(1).

Under the Act, each covered business must pay annually “a state operation assessment equal to the greater of 1 percent of the previous calendar year’s gross revenue or \$5,000.00.” *Id.* § 15-21-209(a). This money is disbursed for sex-trafficking prevention and awareness efforts and for “providing care, rehabilitative services, residential housing,

health services, and social services ... to sexually exploited children.”
Id. § 15-21-202(c).

The Assessment became effective on January 1, 2017, 2015 Ga. Laws 675, 688, § 6-1(b), and was due for the first time on April 30, 2018, Ga. Comp. R. & Regs. 560-2-20-.01(8).

B. Proceedings Below

The Georgia Association of Club Executives is an association of fourteen strip clubs that are all “adult entertainment establishments” as defined by O.C.G.A. § 15-21-201. R1-61.

The Association first challenged the tax in November 2017, seeking declaratory and injunctive relief. *See Riley v. Ga. Ass’n of Club Execs.*, 313 Ga. 364, 364 & n.3 (2022). It claimed the Assessment violated the First Amendment and that portions of the Act were unconstitutionally vague or overbroad. *Id.* at 364. The superior court granted partial summary judgment to both parties, generally ruling for the State but also holding that the subsection of the Act dealing with lingerie modeling was overbroad because it could conceivably apply to “trunk shows” for lingerie. *Ga. Ass’n of Club Execs. v. Riley*, No. 2017CV297874, (Fulton Supt. Ct. Apr. 2, 2020). On appeal, this Court vacated that order and declared the case moot without reaching the merits because the only defendant, State Revenue Commissioner Lynnette T. Riley, was sued in her individual capacity but was no longer the Commissioner. *Riley*, 313 Ga. at 367–68.

The Association then filed identical lawsuits against the State and current Revenue Commissioner Frank O’Connell, R1-60; R10-3359, seeking a declaratory judgment that the tax is an unconstitutional restriction on free speech that is also unconstitutionally overbroad, along with injunctive relief, R1-74–75. The superior court resolved both cases in one summary judgment order because the two actions “are identical in all material respects.” R10-3359–60.

The superior court granted summary judgment for the State. R10-3160. It concluded that the Assessment is content neutral because it “addresses conduct—the commercial operation of adult entertainment establishments that serve alcohol—and any burden on protected expression is incidental.” R10-3118. Moreover, even assuming the Assessment is content based, it is nevertheless aimed at “the well-known link between sexually oriented businesses and various antisocial secondary effects, including prostitution and other crimes.” R10-3127. Applying this Court’s *Paramount Pictures* test, see 250 Ga. at 255–56, the superior court concluded that the Assessment served a legitimate government purpose, was not intended to repress protected speech, and was narrowly tailored. R10-3129–30. The court relied on *Maxim Cabaret*, in which this Court upheld ordinances that prohibited alcohol sales at strip clubs. 304 Ga. at 194. Because “it is beyond dispute that the State of Georgia could prohibit the combination of nude dancing and alcohol altogether,” the superior court determined the Association

“cannot seriously argue that while the State could do that, it cannot assess a small tax on that combination.” R10-3131.

The Association appealed, and both cases (this one, against the Commissioner, and Case No. S24A0726, against the State) are now before the Court.

STANDARD OF REVIEW

This Court reviews rulings on the constitutionality of a statute *de novo*. *Rhodes v. State*, 283 Ga. 361, 362 (2008).

SUMMARY OF ARGUMENT

The trial court correctly rejected the Association’s claims that the Assessment violates the First Amendment.

First, the Assessment does not implicate the First Amendment at all. “Differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents a danger of suppressing, particular ideas.” *Leathers*, 499 U.S. at 453. The U.S. Supreme Court has identified three categories of taxes that might pose such a concern: those that (1) single out the press, (2) target only a “small group of speakers,” typically within the press itself, or (3) discriminate based on the content of taxpayer speech. *Id.* at 447. The Assessment falls into none of these categories.

The Assessment does not target the press and applies to an entire industry, not a small group of speakers. Nor does it target speech because of the topic discussed or message expressed. It refers to nude

dancing not to single out any message, but to describe one of the three categories of businesses covered by the act: strip clubs. Indeed, the legislature went out of its way to *avoid* taxing nude dancing alone by limiting the Assessment to “commercial establishment[s] where alcoholic beverages ... are sold, possessed, or consumed,” O.C.G.A. § 15-21-201(1), thus leaving anyone free to engage in or view nude dancing without any tax burden.

Second, even if the Assessment implicates the First Amendment, it would still pass constitutional muster. If the Act “regulates” anything, it is best understood as a content-neutral regulation of conduct that imposes incidental burdens on protected expression. *O’Brien*, 391 U.S. at 376. Such laws are subject only to intermediate scrutiny, meaning they are permissible if (1) they further an important government interest (2) that is unrelated to speech, and (3) their incidental restriction of protected speech is no greater than necessary to further the important government interest. *Paramount Pictures*, 250 Ga. at 255–56.

The Act, which classifies based solely on unprotected conduct, is not content-based. *See Bushco v. Utah State Tax Comm’n*, 225 P.3d 153, 160–61 (Utah 2009) (explaining that a tax “that classifies based on unprotected conduct by definition does not classify based on protected expression and therefore is not content based”). To the contrary, its purpose is the same as almost all taxes: to raise revenue. And the Assessment is narrowly tailored because it does not regulate nude

dancing in any way and imposes only a *de minimis* tax burden on the very industry that creates the negative externalities the revenue is designed to alleviate. The Association's contrary argument that a tax is narrowly tailored only if funded from general revenues ignores that a tax focused on the industry most clearly associated with prostitution (including underage prostitution) is inherently less burdensome than a generalized tax that "would no doubt inflict burdens on a greater variety of protected expression than the [Assessment] at issue here." *Id.* at 168.

Alternatively, even if the Assessment were viewed as facially content-based, it would still be subject to intermediate scrutiny under the secondary-effects doctrine. This doctrine treats such laws as content-neutral because they are meant to control the non-communicative secondary social effects connected with sexually oriented businesses, independent of any message that the entertainment might communicate. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976). Courts applying this doctrine have repeatedly held that governments may impose severe restrictions, including complete bans on the combination of nude dancing and alcohol. *See, e.g., Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 886 (11th Cir. 2007); *Trop, Inc. v. City of Brookhaven*, 296 Ga. 85, 87–88 (2014).

Whether under *O'Brien* or the secondary-effects cases, the Assessment easily passes muster. The legislature relied on a wide

variety of studies establishing that child sex trafficking occurs in the same areas as prostitution, generally, and that there is a strong spatial correlation between prostitution activities and adult businesses. It also heard testimony from women and groups confirming that they or the victims they serve were trafficked in or near such establishments. That is more than enough to support a connection between live adult entertainment and child sexual exploitation, and to confirm that the State's interest is unrelated to the suppression of speech.

Third, the Association's arguments for strict scrutiny are misguided. Both this Court and the U.S. Supreme Court have flatly rejected the notion that a regulation that draws any facial distinctions between messages is subject to strict scrutiny. *Maxim Cabaret*, 304 Ga. at 191–92; *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 64 (2022). Nor is there anything special about taxes that would make them more constitutionally suspect than regulations. The opposite is true: taxes, including targeted taxes, are subject only to rational-basis review unless they implicate the core constitutional concerns discussed above (press censorship, viewpoint discrimination). Accepting the Association's contrary argument would lead to the bizarre result that complete *bans* of strip clubs are somehow more permissible than *taxes* on the same establishments. In any event, the Assessment is so narrowly tailored that it would likely survive even strict scrutiny.

Fourth, the Assessment is not constitutionally overbroad. Read naturally, the statute—which plainly applies to specific types of adult businesses—would not apply to plays, movies, or concerts in mainstream venues, as the Association contends. But even if some hypothetical application might raise constitutional concerns, the Association has not come close to showing that those problematic applications would “swamp” the statute’s legitimate applications. *See United States v. Hansen*, 599 U.S. 762, 774 (2023).

ARGUMENT

I. The Assessment does not implicate the First Amendment at all.

The trial court ruled against the Association on the ground that the tax satisfies this Court’s intermediate-scrutiny standard for content-neutral regulations that incidentally impact protected speech. R10-3128–29 (citing *Paramount Pictures*, 250 Ga. at 255–56). That was correct: the tax serves the State’s compelling (and undisputed) interest in combatting child sex trafficking, and “easily passes narrow tailoring.” R10-3129; *see infra* 28–31.

But the trial court needn’t have gone that far to uphold the tax. *See Williams v. State*, 307 Ga. 778, 784 (2020) (explaining that the Court will “affirm the judgment of a lower court so long as it is right for any reason”). Intermediate scrutiny typically applies to regulations that either impact expressive conduct, *O’Brien*, 391 U.S. at 377, or combat the secondary effects of an “industry that engages in expressive

activity.” *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231, 1238 (11th Cir. 2022). The Assessment, by contrast, regulates nothing. It is a minimal (1%) tax on an entire industry, only *part* of which (strip clubs) features *some* expression falling on the *margins* of First Amendment protection.

The General Assembly has broad discretion to “formulat[e] sound tax policies.” *Leathers*, 499 U.S. at 451. Because the power to tax inherently includes the power to discriminate in taxation, the legislature has “especially broad latitude in creating classifications and distinctions in tax statutes.” *Id.* (quoting *Regan v. Tax’n with Representation of Wash.*, 461 U.S. 540, 547 (1983)). In fact, the presumption of constitutionality for duly enacted taxation schemes is so strong that “differential taxation of speakers, *even members of the press*, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas.” *Id.* at 453 (emphasis added).

The upshot is that taxes are constitutionally suspect only if they fall into certain narrow categories that demonstrate an intent to suppress particular ideas. *See id.* at 447. The U.S. Supreme Court has identified three narrow (and overlapping) categories of taxes that fit this description. The first are taxes that single out the press, because “a tax limited to the press raises concerns about censorship of critical information and opinion.” *Id.* at 447. Second, a tax is constitutionally suspect if it targets only a “small group of speakers,” typically within

the press itself. *Id.* These sorts of taxes pose censorship risks because they will likely affect “only a limited range of views” and thus “distort the market for ideas.” *Id.* at 448. Third, a tax raises constitutional concerns if it discriminates based on the content of taxpayer speech. *Id.* at 447.

The Court has consistently rejected challenges to taxes that fall outside of these narrow categories. In particular, it has upheld taxes that discriminated among speakers so long as those taxes did not discriminate among *messages*. For instance, in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550–51 (1983), the Court rejected a First Amendment challenge to a statute that allowed tax deductions for contributions to veterans’ organizations, even if they engaged in lobbying, but disallowed them for all other contributions to nonprofit groups that engaged in lobbying. And in *Leathers*, the Court considered a challenge to a state law that exempted some media outlets (newspapers and magazines) but not others (cable television providers) from the sales tax. The Court reiterated that “a differential burden on speakers is insufficient by itself to raise First Amendment concerns,” and explained that the tax at issue implicated none of the First Amendment’s core concerns: singling out the press, targeting a narrow group to bear the burden of the tax, or discriminating based on content. 499 U.S. at 447–49, 452. Because the tax did not “present[] the danger of suppressing[] particular ideas,” the Court held that it did not violate the First Amendment. *Id.* at 453.

The Court has rejected taxes that *target* the press. In *Grosjean v. American Press Company*, 297 U.S. 233 (1936), the Court held unconstitutional a Louisiana tax that singled out large newspapers for a tax on advertising receipts. The Court reasoned that the tax was particularly suspicious because it was not measured by the volume of advertisements, but instead by circulation, thus showing a “plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.” *Id.* at 251; *see also Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 591 (1983); *Ark. Writers’ Project, Inc. v. Ragland (A.W.P.)*, 481 U.S. 221, 229 & n.4 (1987). These rulings make perfect sense. After all, the First Amendment was enacted against a backdrop of “persistent effort” by the British government to suppress criticisms of the government. *Grosjean*, 297 U.S. at 245. Any such censorship, whether direct or indirect, thus goes “to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.” *Id.* at 243.

The Assessment, by contrast, does not fall into the narrow categories of taxes that warrant heightened First Amendment scrutiny. No one argues that it targets the press or otherwise implicates traditional First Amendment concerns such as political speech. Far from it: the Assessment mostly applies to businesses involving no protected expression at all—massage parlors and lingerie-modeling studios. The only expressive conduct it even tangentially reaches—

nude dancing at strip clubs—“falls only within the outer ambit of the First Amendment’s protection.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000); *cf. id.* at 310 (Scalia, J., concurring in judgment) (asking “what (if anything) nude dancing communicates”); *Maxim Cabaret*, 304 Ga. at 195–98 (Peterson, J, concurring) (questioning whether the Georgia Constitution’s speech clause protects nude dancing). In short, the Assessment simply does not implicate the sorts of core First Amendment concerns that animated rulings like *Grosjean* and *Arkansas Writers’ Project*.

Nor does the Assessment target a small handful of speakers in a way likely to censor certain viewpoints. The Supreme Court appears to have considered this point only in cases involving the press. *See, e.g., A.W.P.*, 481 U.S. at 229; *Clear Channel Outdoor, Inc. v. Dir., Dep’t of Fin. of Baltimore City*, 472 Md. 444, 467 (2021) (citing *Grosjean*, *Minneapolis Star*, *A.W.P.*, and *Leathers* for the principle that “[a] tax that targets a small group of speakers *among the press* is suspect”) (emphasis added)). But even assuming that this category extends beyond the press, the Assessment would not implicate it because it applies broadly to the entire live-adult-entertainment industry. In that way, it resembles the tax the Supreme Court upheld in *Leathers*, which applied “uniformly to the approximately 100 cable systems then operating in the State,” 499 U.S. at 448, and not the one in *Arkansas Writers’ Project*, which “f[ell] on a limited group of [three] publishers,” 481 U.S. at 229 n.4. The Assessment, in other words, “hardly

resembles a ‘penalty for a few.’” *Leathers*, 499 U.S. at 448 (citing *Minneapolis Star*, 460 U.S., at 592, and *A.W.P.*, 481 U.S. at 229 & n.4). It poses no risk of “distort[ing] the market for ideas.” *Id.*

Finally, the Assessment does not fall in the third category of taxes that “discriminate[] on the basis of the content of taxpayer speech.” *Id.* at 447. The Association’ constitutional challenge is premised on the notion that the statute facially targets protected speech because it mentions “nude or substantially nude persons dancing.” Br. at 12; O.C.G.A. § 15-21-201(1)(A). But a law is content-based only if it “targets speech based on its communicative content—that is, if it applies to particular speech because of the topic discussed or the idea or message expressed.” *City of Austin*, 596 U.S. at 69 (quotation omitted). And the statute here does nothing of the sort. It refers to nude dancing not to single out any particular message, but rather just to describe one of the categories of *businesses* covered by the tax—strip clubs.

The Act’s text and structure make this clear. Each of the subparts of the definition of “adult entertainment establishment” describes an identifiable type of establishment in the industry. Lingerie-modeling studios “charge[] [patrons] a fee” or “require[] [them] to make a purchase” in order to view “persons exhibiting or modeling lingerie or similar undergarments.” O.C.G.A. § 15-21-201(1)(B). Erotic massage parlors charge patrons a “fee to engage in personal contact by employees, devices, or equipment, or by personnel provided by the establishment.” *Id.* § 15-21-201(1)(C). And while the strip-club

definition refers to nude dancing “with or without music,” its applicability does not turn only on the presence of nude dance; establishments also fall within the definition if they feature “nude or substantially nude persons ... engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation.” *Id.* § 15-21-201(1)(A). And on top of that, they have to serve alcohol. *Id.* § 15-21-201(1).

The statute demonstrates that the General Assembly went out of its way to *avoid* targeting any protected expression for taxation. The Assessment applies not to nude dancing per se, but to the combination of nude dancing with “business[es] or commercial establishment[s] where alcoholic beverages ... are sold, possessed, or consumed.” *Id.* That means anyone remains free to engage in or view nude dancing in a non-commercial setting without being subject to the tax. And even commercial establishments featuring nude dancing will not be subject to the tax as long as they do not serve or allow alcohol on the premises. The Assessment, in other words, is not “directed at” any expressive conduct, and does not “present[] the danger of suppressing” any club’s “particular ideas.” *Leathers*, 499 U.S. at 453. *See Maxim Cabaret*, 304 Ga. at 193–94 (“Serving alcohol is not itself protected expression, and the [ordinance] leaves Maxim’s employees free to express themselves as they wish through dance or otherwise.” (quotation omitted)).

The Nevada Supreme Court employed this same reasoning in *Déjà Vu Showgirls v. Nevada Department of Taxation*, 130 Nev. 719 (2014),

a challenge to the State’s 10% excise tax on profits from live entertainment establishments. That court rejected arguments that the entertainment-tax violated the First Amendment because, among other things, it discriminated amongst speakers by favoring family- versus adult-oriented messages in live entertainment. *Id.* at 729. Not so, said the court; the tax “does not regulate live entertainment” but rather “imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring at live-entertainment facilities.” *Id.* at 728. So “[b]ecause [the tax] does not discriminate on the basis of the content of taxpayer speech, target a small group of speakers, or otherwise threaten to suppress ideas of viewpoints,” the court held that the tax was subject only to rational basis review, which it easily satisfied. *Id.* at 732. *See also Clear Channel Outdoor, Inc.*, 472 Md. at 468, 478 (tax on billboards promoting off-premises goods or services subject to rational basis under *Leathers*); *Am. Multi-Cinema, Inc. v. City of Warrenville*, 321 Ill. App. 3d 349, 356, 359 (2001) (applying rational basis, explaining that “AMC is subject to the amusement tax because AMC is a business engaged in amusements, not because AMC is a first amendment actor”).

Because the Assessment does not implicate the First Amendment, it is subject only to rational-basis review, which it easily satisfies. *See Taylor v. Devereux Foundation*, 316 Ga. 44, 83–84 (2023); *Regan*, 461 U.S. at 547 (same). Targeted taxes are commonplace, and serve a variety of legitimate purposes, including raising revenue to offset a

particular industry’s negative societal impacts—or just raising revenue, period. So just as Georgia may reasonably tax hotels to fund stadium construction, O.C.G.A. § 48-13-51(a)(5), or tax rental cars to promote “industry, trade, commerce, and tourism,” *id.* § 48-13-90, it was plainly rational for the General Assembly to tax this industry to raise revenue for any number of legitimate ends, especially combatting the deleterious effects of that industry.

II. Even if the Assessment implicates the First Amendment, it satisfies intermediate scrutiny under both the incidental-impact and secondary-effects doctrines.

The Assessment is simply a tax to raise revenue and does not regulate anything. But even if it somehow *did* amount to a regulation impacting speech, it would be subject to no more than intermediate scrutiny under either the incidental-burden or secondary-effects doctrines. The trial court correctly held that the Assessment satisfies that standard.

“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *O’Brien*, 391 U.S. at 376. A content-neutral law that imposes incidental burdens on protected expression is subject only to so-called intermediate scrutiny. *Id.*; *Wise Enters. v. Unified Gov’t of Athens-Clarke Cnty.*, 217 F.3d 1360, 1363 (11th Cir. 2000) (discussing *O’Brien*).

Even when a law facially targets protected expression, the level of scrutiny depends on the law’s scope and context. As relevant here, “[t]his Court and the U.S. Supreme Court have held repeatedly that ordinances designed to combat the negative effects of sexually oriented businesses on the surrounding community are to be evaluated as ‘content-neutral’ regulations, which are subject to intermediate scrutiny.” *Maxim Cabaret*, 304 Ga. at 191–92; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–50 (1986) (describing secondary-effects doctrine).

This Court applies a combined intermediate-scrutiny test announced in *Paramount Pictures* in both the incidental-burden and secondary-effects contexts. Regulations are permissible if (1) they “further[] an important government interest” (2) “that is unrelated to the suppression of speech,” and (3) their “incidental restriction of protected speech is no greater than is necessary to further the important governmental interest.” *Maxim Cabaret*, 304 Ga. at 192 (citing *Paramount Pictures*, 250 Ga. at 255–56). The Assessment, which imposes substantially less burden than those repeatedly upheld by this Court and the U.S. Supreme Court, easily passes this test.

A. The Assessment is valid under the *O’Brien* incidental-burden doctrine.

1. If the Assessment is a regulation at all, it falls most naturally into the *O’Brien* category of facially neutral conduct regulations that incidentally burden expression. To recap, the Safe Harbor Act does not

regulate speech at all. Instead, it taxes a commercial enterprise: “adult entertainment establishment[s],” O.C.G.A. § 15-21-201, two of the three categories of which do not involve any expressive activity. *See id.* at (1)(B) (“modeling lingerie”); *id.* at (1)(C) (“personal contact by employees”). And subpart A, which covers strip clubs, still has only an incidental impact on protected expression. Nude dancing is protected by the First Amendment, but only barely. *See, e.g., Doran*, 422 U.S. at 932 (“the customary ‘barroom’ type of nude dancing ... involve[s] only the barest minimum of protected expression”). And this particular tax is triggered only when a commercial enterprise both offers nude dancing *and* serves or allows the consumption of alcohol. O.C.G.A. § 15-21-201(1)(A). In other words, the tax does not target nude dancing specifically (much less whatever “messages” might be expressed through nude dancing in your average strip club), but only a particular business model that combines alcohol service and nude dancing for a charge. *See Combs v. Tex. Ent. Ass’n*, 347 S.W.3d 277, 286–88 (Tex. 2011) (mandatory \$5- per-customer fee on strip clubs was not content-based even though it “single[d] out nude dancing” because “the fee d[id] not apply to nude dancing where alcohol is not consumed”). The tax, in short, addresses conduct—the commercial operation of adult entertainment establishments that serve alcohol—and any burden on protected expression is incidental.

2. The Assessment satisfies the *Paramount Pictures* test. The Association do not dispute that the State has an important—indeed

“compelling”—interest in combatting the sexual exploitation of children, or that the Safe Harbor Act furthers that purpose by funding services to victims. *See* Br. at 27 (noting that this interest is “substantial, and indeed compelling”); *see also, e.g., New York v. Ferber*, 458 U.S. 747, 757 (1982). Nor is there any suggestion, on the face of the Act, the legislative history, or otherwise, that the Assessment is related to the suppression of speech. The express purpose of the Assessment is to raise money for the Safe Harbor for Sexually Exploited Children Fund, which provides services to sexually exploited children, funds trafficking prevention and awareness efforts, and covers the operating expenses of the Safe Harbor Commission, which administers the fund. O.C.G.A. §§ 15-21-202 *et seq.* The Assessment, in other words, has the same purpose as the vast majority of taxes—generating income for government programs and operations. The Association agrees on this point. Br. at 27 (noting that “[t]he State’s interest is ... raising revenue to combat a particular social problem”).

Finally, the Assessment is tailored such that the incidental “restriction” of protected speech is no greater than necessary to further the State’s interest. It applies to an entire industry, most of which involves no protected speech. And its burden on nude dancing is virtually nil: it does not prohibit nude dancing, regulate the content of nude dancing, or even restrict or dictate the time, place, or manner of nude dancing. That indisputably “leaves [the Association’s members’] employees free to express themselves as they wish through dance or

otherwise.” *Maxim Cabaret*, 304 Ga. at 193–94 (quoting *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 525 (2015)). The only recognizable “burden” is the tax, which is not large or punitive, and is attached only to a commercial enterprise where patrons drink alcohol. See O.C.G.A. § 15-21-201(1). Put differently, the expressive conduct itself is not taxed because the tax can be completely avoided by eliminating the consumption of alcohol or the operation for profit. *Id.*; see *Pap’s A.M.*, 529 U.S. at 301 (*de minimis* impacts on speech are permissible).

If that is a burden on protected expression at all, it is *de minimis*, as multiple courts addressing similar (yet significantly higher) taxes have held. See *Bushco*, 225 P.3d at 168; *Combs*, 347 S.W.3d at 287–88. And that minimal burden is tied directly to the State’s interest in combatting the sexual exploitation of children. The tax is thus sufficiently tailored to the State’s interests here.

3. The Association argues that the Assessment is not narrowly tailored because “funding the [programs] out of general revenues would be equally effective.” Br. at 27. That is wrong as a matter of both law and common sense. First, it underscores that the Assessment does not implicate the First Amendment at all. Blackletter law holds both that targeted taxes pose no inherent First Amendment problem, *see supra* at 11–19, and that even a complete ban on nude dancing will survive intermediate scrutiny, *Maxim Cabaret*, 304 Ga. at 194. Why, then, would a minimal, industry-wide tax that imposes no “restrictions” on

expression at all, *see id.* at 192, pose *more* of narrow-tailoring problem? The Association has no real answer to this apart from repeating their mantra that “taxes are different.” *See, e.g.,* Br. at 28. Taxes *are* different, but not in the way the Association argues—they warrant *less* First Amendment scrutiny, not more. Any other conclusion would flip the reasoning of *Leathers* and both the incidental-burden and secondary-effects doctrines on their heads.

But even setting aside the mismatch between the Association’s First Amendment theories and their application to taxes, their general-fund argument fails as a matter of common sense. Funding a new initiative requires either an increase in revenue or a reallocation of funds away from some other government purpose. So if the General Assembly wanted to allocate money to the Safe Harbor Fund, its options were to (a) shift the funding from other programs, which would likely impact others’ expression and would at the very least negatively impact the recipients of that funding, (b) impose a new, generalized tax on everyone, which “would no doubt inflict burdens on a greater variety of protected expression than the [Assessment] at issue here,” *Bushco*, 225 P.3d at 168, or (c) impose a targeted tax on the industry most closely associated with prostitution and sex trafficking. The legislature opted for choice (c), and it calibrated the tax so as to render *de minimis* any impact on protected expression—again, the tax is small and businesses can avoid it altogether merely by not also offering alcohol. “[T]he requirement of narrow tailoring is satisfied so long as the

regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quotation omitted). The legislature’s choice of a targeted tax here squarely fits that description, and the Association’ arguments to the contrary fail.

B. The Act also satisfies intermediate scrutiny under the secondary-effects doctrine.

Similarly, even if the Assessment somehow amounted to a *content-based* regulation of protective expression (it does not, for the reasons discussed above), it would still pass constitutional muster under the secondary-effects doctrine.

1. In light of both nude dancing’s minimal protection under the First Amendment, and the well-known link between sexually oriented businesses and various antisocial secondary effects, including prostitution and other crimes, *Maxim Cabaret*, 304 Ga. at 188, even a facially content-based speech regulation is treated as content-neutral if it is meant to address these secondary effects, *City of Renton*, 475 U.S. at 49. The logic of this “settled position,” *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002), is that such laws are meant to control non-communicative secondary effects connected with sexually oriented businesses, independent of any message that the entertainment at issue might communicate, *see Young*, 427 U.S. at 71 n.34. So secondary-effects regulation “is completely consistent with [the] definition of content-neutral speech regulations as those that are

justified without reference to the content of the regulated speech.”

Renton, 475 U.S. at 50 (quotation omitted).

The secondary-effects doctrine is especially well developed when it comes to the government’s authority to regulate adult entertainment establishments that also serve alcohol. *See N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (“Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior.”) (quotation omitted). The U.S. Supreme Court and this Court have repeatedly held that governments may go so far as to completely *ban* the combination of nude dancing and alcohol. *See California v. La Rue*, 409 U.S. 109, 118 (1972); *Daytona Grand*, 490 F.3d at 886; *Trop*, 296 Ga. at 88; *Maxim Cabaret*, 304 Ga. at 195. These prohibitions are constitutionally permissible because they have “minimal incidental effects on free expression” and clearly serve the State’s interest in combating “disorderly conduct, prostitution, public solicitation, public indecency, fighting, battery, assaults, drug use, and drug trafficking” associated with adult entertainment establishments. *Maxim Cabaret*, 304 Ga. at 188, 193. For that matter, governments can also ban public nudity outright. *See, e.g., Barnes v. Glen Theatre*, 501 U.S. 560, 567 (1991) (lead op.); *see also id.* at 572 (Scalia, J., concurring) (contending that the nudity ban was “not subject to First Amendment scrutiny at all”).

The Association argues that the addition of alcohol is “irrelevant” to the analysis in this case, Br. at 23, but that makes no sense. If you

can *ban* these types of businesses, surely the addition of alcohol is highly relevant. The Association ignores that the addition of alcohol focuses the type of establishment: a business enterprise that combines alcohol and nudity (i.e., strip clubs, etc.) while leaving anyone free to engage in the underlying expression (nude dancing) free of taxation or regulation in virtually every other setting. That’s why all the precedent is against the Association, and they barely even try to explain otherwise. Moreover, no one is relying on the Twenty-First Amendment as a justification for the tax, *see* Br. at 25–26, nor is that amendment a basis for the huge corpus of incidental-burden or secondary-effects caselaw. The U.S. Supreme Court once mentioned that amendment as an additional factor supporting the validity of state regulations of businesses, *La Rue*, 409 U.S. at 114–16, but later clarified that “the States’ inherent police powers provide ample authority” to regulate adult businesses independent of the Twenty-First Amendment, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 515 (1996).

Finally, the Association argues that the secondary-effects doctrine ratchets down the scrutiny level only when applied “*in a regulatory context.*” Br. at 18. That is correct, but it does not cut in the Association’s favor. Secondary-effects cases *are* largely focused on content-based regulations of adult businesses. These regulations—which can limit where and when adult businesses can operate or prohibit them altogether—are far more intrusive than the Assessment

here, which, as discussed above, “regulates” nothing. The Association’s focus on regulation only reaffirms the point that the Act does not implicate the First Amendment at all. *See supra* Part I. But even if the Act *were* somehow deemed a content-based *regulation* of adult businesses, it would still pass constitutional muster under that doctrine.

2. The Assessment easily satisfies review under the secondary-effects doctrine. This Court uses the *Paramount Pictures* test in both the incidental-burden and secondary-effects contexts. *See Maxim Cabaret*, 304 Ga. at 192. The only difference for a secondary-effects analysis would be the nature of the evidentiary assessment. If the Assessment is viewed as a tool to reduce child sex trafficking associated with the establishments subject to the Assessment, the focus would shift to ensuring that the legislature was actually motivated by that (undisputedly substantial) interest in passing the Act, rather than the content of the speech itself. The record shows that the General Assembly was squarely motivated by the former.

The legislature relied on a wide variety of studies connecting adult business with both child sexual exploitation specifically and sex trafficking generally. Among many examples, one study showed (1) a “strong spatial correlation” between arrests for child prostitution and adult prostitution in Atlanta, (2) that truants and runaways are often found near adult-entertainment establishments, and (3) that “there is a spatial association between prostitution-related activities and legal

adult sex venues.” R6-1178–84, 1217–24. These proximity factors are all the more important because the General Assembly reviewed studies from other cities showing that most men who buy sex do so indoors, and nearly half of those men buy sex at strip clubs. R1-286; *see City of Renton*, 475 U.S. at 51–52 (“First Amendment does not require a city ... to conduct new studies or produce evidence independent of that already generated by other cities” when ordinance is narrowly tailored to establishments with “unwanted secondary effects.”).

Also, the Georgia hotels and motels where prostitution generally takes place are often near strip clubs, where, yet another study explained, “on any weekend night you will find the same group of 10–15 prostitutes, many of whom are young.” R6-1274. And there is not necessarily a clear line between “prostitution” and “child prostitution,” because men buying sex may not even know the prostitutes are underage. *See* R6-1301–07. Moreover, the final report of the Joint Commercial Sexual Exploitation of Minor Study Commission concluded in 2008 that there is “frequent proximity between adult entertainment venues and prostitution activity. Not only does employment in such businesses frequently serve as a stepping stone to prostitution,” but also “these businesses often serve as the very location for such illicit transactions.” R4-855–56. In short: the studies considered by the General Assembly in passing the Act showed a geographic proximity between arrests typically associated with sex trafficking and the types

of crimes and activities among adults that might expose children to these activities and the people that would exploit them.

The General Assembly also heard live testimony from women and groups confirming that they or victims they serve were trafficked in or near adult entertainment establishments. Keisha Head, a victim of sex trafficking, testified that “all the girls that were trafficked with [her] started in strip clubs. It was a grooming place for victims.” R6-1752; *see also* R4-1332 (“There were a lot of children on the streets of Atlanta during that time ... [b]eing exploited on Metropolitan Avenue and through the strip clubs.”). Jennifer Swain of youthSpark, a nonprofit serving vulnerable children, testified that the daughter of her committee’s ambassador was initially trafficked out of an adult entertainment business in Atlanta. R4-1332. And Heather Stockdale of Georgia Cares, an organization serving child sex trafficking victims, discussed the case study of “Ashley,” who was brought in to dance at an adult entertainment establishment with a fake ID when she was only 16. R8-2607–08. More broadly, Stockdale said that in Georgia Cares’s experience, “it is in entertainment establishments that we have heard time and again, even as recruitment grounds, or grooming grounds, or meeting outside of these places[,] that youth can sometimes be first introduced to the life of trafficking.” R8-2609.

This evidence is more than enough to “provide assurance that the regulation was actually motivated by the asserted concerns over

secondary effects rather than by the content of the speech itself.”

Bushco, 225 P.3d at 165.

3. The Association argues that the evidence doesn’t show *enough* of a connection between their establishments and child sexual exploitation to satisfy intermediate scrutiny. Br. at 27. The Association misunderstands the evidentiary framework and misstates the evidence before the General Assembly.

A state “may rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.” *Alameda Books*, 535 U.S. at 438 (quotation omitted); *see also Oasis Goodtime Emporium I*, 297 Ga. at 524. The burden of proving such a connection is not high—indeed, “very little evidence is required.” *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring). Nor is the state required to “prove the efficacy” of the data it uses. *Parker v. Whitfield County*, 265 Ga. 829, 829–30 (1995); *see also World Famous Dudley’s Food & Spirits, Inc. v. City of College Park*, 265 Ga. 618, 620 (1995). In short, the government’s evidence must only “fairly support the [State’s] rationale for its ordinance.” *Alameda Books*, 535 U.S. at 438.

The Association nonetheless focuses heavily on purported flaws of individual studies in evidence, noting for example that some “do not analyze adult entertainment establishments at all,” that some do not specifically “discuss child sex trafficking,” and that “some rely on the mere rough spatial proximity between juvenile prostitution arrests and

‘adult sex venues.’” Br. at 30–31. Their objections sometimes veer into technical critiques. *See, e.g., id.* at 32 (arguing that maps in study “provide no credible quantitative data that would allow the reader to go beyond casual ‘eyeballing’”); *id.* at 32–33 (faulting study “lump[ing] different adult businesses together” rather than focusing on the “businesses described in the *specific* challenged” connections.). All of this misses the point.

While these criticisms might be relevant to weighing competing evidence in a civil trial, or to peer review of an academic paper, they mean next to nothing for a secondary-effects analysis. The State need not “prove the efficacy of the studies” the General Assembly relied upon or “prove that the negative secondary effects it reasonably fears ... have already been experienced locally.” *Oasis*, 297 Ga. at 524. Nor must the State “forge an ironclad connection between [adult businesses] and secondary effects or to produce studies examining precisely the same conditions at issue.” *Ass’n of Club Execs. of Dallas, Inc. v. City of Dallas*, 83 F.4th 958, 967 (5th Cir. 2023). In fact, the legislature was not required to consider any empirical evidence at all. *See Alameda Books*, 535 U.S. at 439; *cf. Ctr. For Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1167 (9th Cir. 2003) (upholding law where legislature relied solely on experiences of other communities). But the General Assembly *did* consider numerous studies, and they more than

“support[ed] a link” between the covered adult businesses and the targeted secondary effects. *Alameda Books*, 535 U.S. at 437.¹

Likewise, the Association’s own evidence falls well short of showing that the General Assembly could not “reasonably believe” its own evidence showed the requisite connection. *See Oasis Goodtime*, 297 Ga. at 524. The Association’s own study, for example, addresses only (1) whether individuals are trafficked to work in adult entertainment more so than domestic services or agricultural work, and (2) whether forced performance in adult establishments is relatively less frequent than forced prostitution or pornography. R2-481, 491; *see also* R2-518–21 (Affidavit of Dr. Kenneth C. Land, addressing the same study).

¹ In any event, many of the Association’s criticisms are simply inaccurate. For example, it claims that none of the fifteen case studies in *Hidden in Plain View: The Commercial Sexual Exploitation of Girls in Atlanta* “involve adult entertainment establishments.” Br. at 32. But one case study (“Deandra”) involved someone who “admitted to stripping” and whose “friends were strippers,” R1-249, and another (“Nadine”) “admit[ted] to traveling to Miami ... to dance in a strip club,” R1-251. They also claim that a Chicago-area study on why men purchase sex “does not discuss minors,” Br. at 33, but that ignores the study’s findings that 46 percent of men bought sex at strip clubs, R1-286, that 20 percent of these men admitted to buying sex from trafficked women, R1-297, that 32 percent of men who bought sex “thought that the majority of women in prostitution entered before the age of 18,” R1-296, and that 49 percent “*thought that there were girls under 18 years of age working at strip clubs,*” R3-568 (emphasis added).

On its own terms, none of the Association’s evidence has anything to do with the proximity and entry-point theories supported by the General Assembly’s evidence. *See* 2015 Ga. Laws 675, 676–77 § 1-2(a). And as the superior court concluded, *see* R10-3140, it certainly does not show that the General Assembly could not reasonably rely on testimony from victims and their advocates about common paths into sex trafficking here in Georgia. *See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1359 (11th Cir. 2011) (concluding that the plaintiff’s studies “neither invalidated [the county’s evidence] nor rendered the County’s reliance on [it] unreasonable”); *Daytona Grand*, 490 F.3d at 881 (“At most, Lollipop’s experts’ studies suggest that the City *could* have reached a different conclusion.”).

Regardless, even if the legislature had considered none of the studies at all, the live testimony it heard easily satisfies the State’s burden. *See Alameda Books*, 535 U.S. at 439; *Maricopa County*, 336 F.3d at 1168 (“[A]necdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects.”). These witnesses told the Committee that they or victims they knew were initially trafficked through establishments like strip clubs. The Association offered nothing to rebut or invalidate that testimony, and it cites no authority showing that the General Assembly could not reasonably rely on that testimony. *See Maricopa County*, 336 F.3d at 1168. The Association’s suggestion that the testimony was outdated or second-hand, Br. at 34–35, “simply

misconstrues the nature of the legislative process. Legislative committees are not judicial tribunals, and they are not bound by rules of evidence.” *Maricopa County*, 336 F.3d at 1168. Rather, the evidence need only allow a reasonable belief that this modest tax will advance the State’s interests in protecting victims of child sex exploitation. It does.

III. The Assessment is not subject to strict scrutiny but would satisfy it anyway.

The Association’s primary argument is that the Court should apply strict scrutiny because the Assessment is a content-based tax. Br. at 1. Nothing in Georgia or federal caselaw supports this odd argument.

1. The Association first contends that laws that refer on their face to a certain type of protected expression are invariably content-based and thus subject to strict scrutiny. Br. at 10–11. That argument derives from *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which held that strict scrutiny applied whenever “a regulation of speech on its face draws distinctions based on the message a speaker conveys,” even if the law had a “benign motive” or “content-neutral justification.” *Id.* at 163, 165 (quotation omitted); Br. at 15 (citing *Reed*). At least some courts read *Reed* to abrogate the secondary-effects doctrine. *See Reagan Nat’l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 702 (5th Cir. 2020). This Court, however, rejected the argument that *Reed* silently overruled secondary effects cases, noting that “even if we found [the *Reed* argument] persuasive (which we do not), we would continue to

follow the Supreme Court’s directly applicable prior precedent.” *Maxim Cabaret*, 304 Ga. at 191 n.4.

If that weren’t enough to foreclose the Association’s argument, the U.S. Supreme Court’s recent ruling in *Reagan*, 596 U.S. 61 (2022), removes any doubt. The Court made clear in *City of Austin* that the Fifth Circuit’s understanding of *Reed* was “too extreme,” and “rejected ... the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern.” *Id.* at 69, 73. The Court instead clarified that its pre-*Reed* precedents, which remain undisturbed, “have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.” *Id.* at 72. Based on that principle, it held that a sign ordinance that drew location-based distinctions was content neutral even though one had to examine the content to determine whether a sign was compliant. That laid to rest any notion that *Reed* abrogated or qualified *Leathers* or the secondary-effects doctrine.

2. The Association also argues that the government cannot transform a content-discriminatory tax into a content-neutral tax simply by “adding discrimination based on something else.” Br. at 26. They argue that the Assessment is subject to strict scrutiny (even though it applies to businesses, not expression, *per se*), because it is like a tax on political speech by people wearing hats. *Id.*

But as explained, the Act’s mention of the combination of nude dancing and alcohol does not discriminate against *any* content; the two

things together simply identify one of the several types of businesses covered by the tax: strip clubs. More generally, the Association’s argument ignores that the commonplace pairing of alcohol and nudity in regulations of adult businesses is not simply arbitrary, like their speech and hats example; instead, it reflects the “[c]ommon sense” reality that “any form of nudity coupled with alcohol in a public place begets undesirable behavior.” *Bellanca*, 452 U.S. at 718 (quotation omitted). The Act’s definition provides a clear path for anyone to engage in or view otherwise legal nude dancing everywhere without even being subject to a de minimis tax, except places where nude dancing is combined with alcohol at a commercial enterprise. That is narrow tailoring, not discrimination.

3. As a fallback, the Association argue that even if governments have wide latitude to *regulate* the speech associated with adult businesses without triggering strict scrutiny, something special about taxes means that they necessarily come in for strict scrutiny. Br. at 21–23. But none of the Association’s purported authority for this novel point helps them. Their tax cases are inapposite because they involved targeted, content-based taxation of speech falling within the core of First Amendment protection, whether freedom of assembly, *see Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (fees for parade permits based on message conveyed and expected public response), or the press, *see Grosjean*, 297 U.S. at 250 (punitive tax on newspapers critical of the government), *Minneapolis Star*, 460 U.S. at

591 (tax targeting large newspapers), *A.W.P.*, 481 U.S. at 229 (tax distinguished between general interest and publications covering religion or sports). As discussed in Part I, *supra*, the Supreme Court has made clear that industry-specific taxes—even those that facially distinguish between speakers—generally pose no First Amendment problem.

Indeed, the only courts that have considered First Amendment challenges to taxes that reference nude dancing have squarely rejected arguments for strict scrutiny. *Combs*, 347 S.W.3d at 286 (\$5-per-customer fee on adult businesses was not the sort of “content-based” tax subject to strict scrutiny); *Bushco*, 225 P.3d at 158–60 (tax on sexually explicit businesses used to fund special initiatives was triggered solely by conduct, and not subject to strict scrutiny). The Association do not even address these persuasive decisions.

4. Finally, Justice Kennedy’s concurrence in *Alameda Books*—the Association’s only example dealing with live adult entertainment—does not change the analysis. *See* Br. at 24 (citing 535 U.S. at 445 (noting that “[a] city may not ... impose a content-based fee or tax”)). A commonsense reading of Justice Kennedy’s (non-controlling) opinion shows that his point was simply that “a [government] may not regulate the secondary effects of speech by *suppressing* the speech itself.” *Alameda Books*, 535 U.S. at 445 (emphasis added). As the Supreme Court of Texas explained in *Combs*, “[t]hat, of course, is true of a zoning restriction as well as a tax.” 347 S.W.3d at 287. So while “[t]he zoning

context provides a built-in legitimate rationale,” Justice Kennedy “did not suggest that a fee like [this one] would never be permissible.” *Id.* (quoting *Alameda Books*, 535 U.S. at 449).

The Assessment doesn’t propose to tax speech, just certain businesses. 2015 Ga. Laws 675, 676–77, § 1-2. Indeed, as in *Alameda Books*, “[t]he ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the [state] has found to cause similar secondary effects.” 535 U.S. at 447; compare O.C.G.A. § 15-21-201(1)(C). Simply put, Justice Kennedy’s concurrence, even if it were binding, would not call into question taxes like the Assessment.

5. In any event, the Assessment would survive even strict scrutiny. That standard requires the State to establish that “its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *State v. Cafe Erotica, Inc.*, 269 Ga. 486, 489 (1998) (quotation omitted). The Association concedes that the State’s interest in combatting child sexual exploitation is compelling. *See* Br. at 31. And, as discussed above, the Assessment is narrowly drawn because it applies only to the industry with a well-documented connection to prostitution (including child prostitution), rather than burdening taxpayers as a whole. It applies only to commercial establishments that sell alcohol, leaving any underlying expression untouched. And the tax rate is low: the larger of 1% of gross revenue or \$5,000. It is difficult to

imagine a revenue-raising option less restrictive than this focused, *de minimis* tax.

IV. The Assessment is not unconstitutionally overbroad.

The Association also claims that the Assessment is unconstitutionally overbroad. Br. at 39–43. But the overbreadth doctrine is demanding, *United States v. Williams*, 553 U.S. 285, 292 (2008), and applies only when a “substantial” amount of protected speech is implicated, “not only in an absolute sense, but also relative to [the statute’s] plainly legitimate sweep,” *Scott v. State*, 299 Ga. 568, 570 (2016) (quoting *Williams*, 553 U.S. at 292); *see also Hansen*, 599 U.S. at 774 (law is subject to overbreadth invalidation if “its applications to protected speech ... swamp its lawful applications”). Here, the tax does not come close to that high bar for invalidation.

To begin with, taxes are almost never unconstitutionally overbroad. *See Deja Vu*, 334 P.3d at 398. Moreover, the tax poses less of a risk of chilling speech because it imposes no criminal penalties of the sort that typically trigger overbreadth doctrine, *see Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–99 (1982), and it implicates only commercial enterprises that are well equipped to determine their legal rights, *see Hicks*, 539 U.S. at 119. In short, this minimally intrusive revenue tax is not the type of law that warrants the “strong medicine” of overbreadth invalidation. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Those issues aside, the Association’s overbreadth argument misreads the statute. “To assess the extent of a statute’s effect on protected expression, a court must determine what the statute actually covers,” so “the first step in any overbreadth analysis is to construe the statute in question.” *Scott*, 299 Ga. at 570. Read naturally and according to its plain terms, the tax here does not remotely sweep as broadly as the Association suggests, *see* Br. at 42–43 (suggesting applicability to mainstream theaters, concert venues, and movie theaters).

The definition of “[a]dult entertainment establishment” covers businesses where alcohol is served and “[t]he entertainment or activity therein *consists of*” the activities described in subparts A through C. O.C.G.A. § 15-21-201(1)(A) (emphasis added). The term “consists of” is commonly defined to mean “made up of.” *Consist*, Merriam-Webster's Collegiate Dictionary 266 (11th ed. 2003); *see Consist*, Webster’s Third New International Dictionary 484 (3rd ed. 1961). Subpart A, for example, covers an establishment only when its business consists of nude dancing for entertainment—not any establishment that happens to host such an activity at any isolated time. Thus, even assuming some mainstream venues occasionally featured shows or movies that would sometimes fall under the definition, those venues would not be covered because their entertainment does not “consist of” an isolated performance. And this Court reads “provisions that regulate adult businesses and impact the First Amendment ... narrowly to not reach

mainstream venues, exhibitions, shows, and productions.” *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1377 (11th Cir. 2021) (citing *Gravelly v. Bacon*, 263 Ga. 203, 205–07 (1993)).

Regardless, even if one could imagine a hypothetical application that might raise constitutional concerns, the Association has not come close to identifying so many problematic applications that they “swamp” the legitimate applications of the statute. *See Hansen*, 599 U.S. at 774.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the superior court.

Respectfully submitted.

This submission does not exceed the word count limit imposed by Rule 24.

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I hereby certify that on May 16, 2024, I served a copy of this brief
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SUPREME COURT OF GEORGIA
Case No. S24A0772

April 29, 2024

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GEORGIA ASSOCIATION OF CLUB EXECUTIVES, INC. v. FRANK
O'CONNELL, COMMISSIONER.

Your request for an extension of time to file the brief of appellee in the above case is granted until May 16, 2024. Given the oral argument date in this case, no party should expect further extensions to be granted.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.


, Clerk