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 Direct Appeal from the Superior Court of Fulton County
Case No. 2017CV297874

**APPELLANT'S REPLY BRIEF**

Gary S. Freed, Georgia Bar No. 275275
Thomas C. Grant, Georgia Bar No. 297455

Freed Grant LLC
101 Marietta Street, NW, Suite 3600
Atlanta, Georgia 30303

J. Thomas Morgan, Georgia Bar No. 522675

The Law Offices of J. Tom Morgan
160 Clairemont Avenue, Suite 425
Atlanta, Georgia

Alexander Volokh, D.C. Bar No. 500988

Emory University School of Law
1301 Clifton Road NE
Atlanta, Georgia 30322

*Counsel for Appellant Georgia Association of Club Executives, Inc.*

# TABLE OF CONTENTS

I. INTRODUCTION. ....................1

II. THE TAX IS SUBJECT TO THE FIRST AMENDMENT. ....................3

III. THE STATE RELIES ON A FALLACIOUS "GREATER-POWER-INCLUDES-THE-LESSER" ARGUMENT. ....................13

A. We Do Not Know Whether This Tax Is Less Intrusive Than Constitutional Regulations. ....................14

B. Even If This Tax Really Were Less Intrusive Than a Constitutional Regulation, It Would Not Necessarily Be Constitutional. ....................15

C. The Scrutiny Analysis Plays Out Differently for Taxes Than for Regulations. ....................16

D. Funding Activities from General Revenues Is Less Burdensome on Expressive Conduct. ....................20

IV. THE TAX IS CONTENT-DISCRIMINATORY AND THUS SUBJECT TO STRICT SCRUTINY ....................22

A. The State Continues to Mischaracterize ACE's Arguments ....................22

B. The State Misinterprets the *City of Austin* Decision. ....................26

C. The Rest of the State's Analysis Repeats Its Previous Errors. ....................27

V. CONCLUSION. ....................30

## CASES

*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) .....14
*Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) .....21
*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) ..... 7, 21, 23
*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) ..... 4, 5, 12
*Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020) .....22
*Bushco v. Utah State Tax Comm'n*, 225 P.3d 153 (Utah 2009) ..... 20, 29
*Cammarano v. United States*, 358 U.S. 498 (1959) .....8
*City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61 (2022) . 3, 22, 26
*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ..... 4, 5, 12, 29
*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) .....19
*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ..... 6, 22, 24, 28
*Combs v. Texas Entm't Ass'n*, 347 S.W.3d 277 (Tex. 2011) .....29
*Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) .....8
*Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992) .....9
*Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) .....23
*Leathers v. Medlock*, 499 U.S. 439 (1991) .....7, 28
*Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187 (2018) .....5, 24
*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) .....2
*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) ..... passim
*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) ..... 16, 19
*Pfeiffer v. Ga. Dept. of Transp.*, 275 Ga. 827 (2002) .....3
*Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) .....13
*Reed v. Town of Gilbert*, 576 U.S. 155 (2015) ..... passim
*Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) ......6, 8
*Regan v. Time*, 468 U.S. 641 (1984) .....23
*Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) .....23
*United States v. Playboy Entm't Group*, 529 U.S. 803 (2000) ..... 25, 28
*Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ..... 14, 15, 18

## STATUTES

O.C.G.A. § 15-21-201(1) ..... 9, 10, 11, 12
O.C.G.A. § 15-21-209(a) .....8

## OTHER AUTHORITIES

*Taxing Nudity: Discriminatory Taxes, Secondary Effects, and Tiers of Scrutiny*, 2 J. Free Speech L. 627, 636 (2023) ..........................................................................5

## I. INTRODUCTION.

The State's Brief, filed on behalf of Commissioner O'Connell, introduces an entirely new argument—that the Tax is not subject to the First Amendment. Although this argument has therefore been waived, it is also wrong. Many taxes do not raise First Amendment concerns—most obviously, taxes that are general. This is not true of the Tax, which is explicitly based on the type of entertainment an establishment offers. Although one can debate the applicable level of scrutiny, one cannot claim that literally no First Amendment analysis is required for the Tax.

The State relies upon a "greater power includes the lesser" argument: Because the Tax is supposedly less intrusive than regulations—and because those regulations would be constitutional—the Tax is also constitutional. This argument is a dangerous fallacy, as the U.S. Supreme Court has recognized in regard to the First Amendment.

Even if the Tax were *de minimis* or moderate (though this has no basis in the record) and less intrusive than a constitutional regulation, it still could not be declared constitutional without applying the standard constitutional analysis involving tiers of scrutiny.

Whether strict or intermediate scrutiny applies, the government must identify a goal, and must then show that the burden on speech imposed by the Tax is *necessary* (narrowly tailored) to achieve that goal. Although the degree of necessity

varies for different levels of scrutiny, the analysis is similar. Under either level of scrutiny, a very burdensome policy could be upheld if truly necessary to further the government's goal, and a very trivial policy could be struck down if it does not contribute to the government's goal.

Here, the government has identified one goal: raising revenue. Although a tax is necessary to raise revenue, the issue is not the necessity of the tax as such. It is the necessity of *the burden imposed by this targeted Tax*—the discriminatory burden on protected speech. Here, that burden is unnecessary because The Safe Harbor Fund could be funded by general taxation, which would not discriminatorily burden any protected speech or pose any First Amendment problems. When the governmental interest is merely raising revenue, the targeted nature of the tax does not promote that interest.

The tax clearly targets a licensed group of legitimate, profitable businesses that generate substantial revenue and resulting taxes and assist in catering to lucrative State tourism, which business certain members of the Georgia legislature desire to entirely eliminate. As Chief Justice John Marshall said centuries ago, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). There is no reasonably relevant or credible evidence that these licensed clubs have anything to do with child sex trafficking. If there were a nexus, the record would reflect more recent instances showing some association

between these heavily licensed and already taxed businesses and prostitution and sex trafficking in the media or otherwise—it does not, because there are none.

Here, strict scrutiny applies to the Tax. *Reed v. Town of Gilbert* and its progeny reaffirm the rule that strict scrutiny is required for content-discriminatory government policies. And *Reed* and *City of Austin v. Reagan National Advertising of Austin* reaffirm that—where discrimination against particular subject matter is present on the face of a statute—the policy is content-discriminatory. The Tax is clearly content-discriminatory and fails under strict scrutiny because content-neutral methods are available to raise revenue.

## II. <u>THE TAX IS SUBJECT TO THE FIRST AMENDMENT.</u>

For the first time in this case, the State now makes the extraordinary argument that the First Amendment does not apply, at all. This Court should not consider that argument because the State did not raise it at trial. *See, e.g., Pfeiffer v. Ga. Dept. of Transp.*, 275 Ga. 827, 829 (2002). Even if the Court does, it should reject this shocking and unsupported argument.

The State concedes that "a tax raises constitutional concerns if it discriminates based on the content of taxpayer speech" (State's Br. at 13; *see also id.* at 7, 16), which is precisely ACE's contention: that the Tax targets nude dancing, which is protected expression. Therefore, the First Amendment applies.

Even if the State could argue that the Tax is content-neutral, the Tax would still burden protected expression—and would be analyzed under at least intermediate scrutiny. This is because one category of taxed entities is defined based on whether the entertainment consists of "nude or substantially nude" dancing. O.C.G.A. § 15-21-201(1)(A). In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), eight Justices agreed that nude dancing "is expressive conduct protected by the First Amendment." *Id.* at 565 (plurality opinion); *see also id.* at 581 (Souter, J., concurring in the judgment); *id.* at 587 (White, J., dissenting). The Court reaffirmed this in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). *Id.* at 293, 296 (plurality opinion) (repeatedly noting "the erotic message" of nude dancing); *id.* at 310-11 (Souter, J., concurring in part and dissenting in part) (providing the fifth vote "agree[ing] with the [plurality's] analytical approach").

The State takes an overly limited approach to whether nude dancing has a message or expresses ideas. (State's Br. at 2 ("any ideas expressed through nude dancing (whatever those supposedly are"); *id.* at 21 ("much less whatever 'messages' might be expressed through nude dancing in your average strip club").) But this skepticism about the expressiveness of nude dancing is inconsistent with doctrine and reflects disdain for the business of ACE. The U.S. Supreme Court has upheld regulation of nude dancing, but never because it was non-expressive. On the contrary, the Court has accepted that nude dancing conveys a particular message—

a message of eroticism. In *Barnes*, a plurality wrote that requiring dancers to wear pasties and G-strings "does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Barnes*, 501 U.S. at 571 (plurality opinion); *see also City of Erie*, 529 U.S. at 291 (plurality opinion); Alexander Volokh, *Taxing Nudity: Discriminatory Taxes, Secondary Effects, and Tiers of Scrutiny*, 2 J. Free Speech L. 627, 636 (2023).

Some Justices have argued that nude dancing is outside the First Amendment—*e.g., Barnes*, 501 U.S. at 572 (Scalia, J., concurring in the judgment); *City of Erie*, 529 U.S. at 307-08 (Scalia, J., concurring in the judgment)—and the State quotes their skeptical statements. (State's Br. at 15, 26.) This is not a view reflected in binding precedent, however. *Cf. Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 195-98 (2018) (Peterson, J., concurring) (merely questioning whether the Georgia Constitution should be interpreted, in light of its own language, history, and context, to protect nude dancing) (*cited in* State's Br. at 15).

In the face of this precedent holding that nude dancing has First Amendment protection, the State cannot honestly assert that "[t]he Assessment does not implicate the First Amendment at all." (State's Br. at 11.) Yet, the State argues that "[t]he Assessment . . . regulates nothing," and "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." (*Id.* at 12.)

None of these factors are relevant to the threshold question of whether the First Amendment applies at all.

***Is there something special about a tax?*** No. Even though the relevant analysis plays out differently for taxes than for regulations, taxes and regulations are similar because both impose governmental burdens. Because the government can suppress speech through taxation as it can through regulation, the analysis is the same. Unless some special doctrine distinguishes between them (as in the case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), or *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), discussed below), content-discriminatory taxes are subject to the same scrutiny level as content-discriminatory regulations.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the U.S. Supreme Court wrote:

> It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment.

*Id.* at 581. Here, the Court treats taxes as just a subset of regulation.

Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court wrote, discussing *Minneapolis Star & Tribune*: "[I]n contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises." *Id.* at 228. The contrast was not between regulations and taxes, but between generality and discrimination.

To reach a contrary conclusion, the State relies on *Leathers v. Medlock*, 499 U.S. 439 (1991), which has language affirming legislatures' "broad latitude" to "formulat[e] sound tax policies" and "creat[e] classifications and distinctions." *Id*. at 451. Of course, legislatures also have broad latitude to enact sound regulatory policies and create regulatory classifications and distinctions. Minimal rational-basis scrutiny applies in either case unless the classification is somehow problematic. *Leathers* does not provide any basis for treating taxes and regulations differently in this respect.

The *Leathers* Court upheld a tax treating cable television differently than print media—without reference to the programming on cable television. Differential taxation of an entire class of media is subject to minimal rational-basis scrutiny, because such taxes discriminate among types of speakers without referring to protected expression. The *Leathers* Court listed some (non-exclusive) features of a tax regime that would still be problematic, such as discrimination against the press,

targeting a small number of speakers, and content discrimination. *Id*. at 447-48. The Tax is unlike the general tax regime in *Leathers*, because it specifically taxes businesses whose entertainment has a particular content, erotic nude dancing, so the discriminatory burden on protected expression is clear.

Although the State also relies on *Taxation with Representation of Washington*, that case also does not support the State's argument. Unlike the present case, *Taxation with Representation* concerns tax exemptions. It is blackletter law that tax exemptions are treated like subsidies and that "the government can make content-based distinctions when it subsidizes speech." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007); *see also Taxation with Representation*, 461 U.S. at 545-47; *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959).

***What about the Tax being* de minimis*?*** The Tax is equal to the greater of 1% of gross revenues or $5,000.00. O.C.G.A. § 15-21-209(a). This is a tax of at least 1% on *gross revenues*, not *profits*. Many businesses operate on extremely slim profit margins; thus, if costs equal 99% of revenues, a 1% tax on revenues could consume a business's profits. Because the record contains no evidence as to how burdensome this particular Tax is, there is no basis to assume that this Tax is *de minimis* or moderate, as the State asserts repeatedly. (State's Br. at 1, 3, 9, 12, 22-24, 37, 39-40.)

Even if the Tax were *de minimis*, that would be irrelevant because the U.S. Supreme Court has refused to draw constitutional lines based on the size of a tax. "A tax based on the content of speech does not become more constitutional because it is a small tax." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992). Small taxes have been treated like large taxes, because a small tax—once accepted—could in the future become larger. *E.g., Minneapolis Star & Tribune*, 460 U.S. at 588. The refusal to draw such quantitative lines makes sense, because "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Id*. at 589; *see also* Volokh, *supra*, at 663. Therefore, a *de minimis* tax is subject to the same analysis as a larger tax. And it is inconceivable that a large tax targeting protected expression would be immune from First Amendment constraints.

***What about the fact that the Tax falls on "an entire industry"?*** The Statute, the State argues, "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." (State's Br. at 16; *see also id.* at 7-8, 39.)

The category of business being taxed under O.C.G.A. § 15-21-201(1)(A) is explicitly defined in terms of the type of entertainment offered there. The alleged distinction between the message and the type of business is illusory. If a government taxed "theaters that present political shows," such a tax would obviously

discriminate based on content, and one could not defend the tax by arguing that the content was only used to define the establishment.

But, the State argues, the taxed establishments are not *exclusively* defined by nude dancing. (State's Br. at 16-17.) While it is true that the establishments must feature "nude or substantially nude persons . . . engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation," O.C.G.A. § 15-21-201(1)(A), this is a description of particular content with an erotic message. This listing of elements only reaffirms that the Tax discriminates based on content.

Additionally, the establishments must be commercial establishments that serve alcohol. O.C.G.A. § 15-21-201(1). But if the Legislature had taxed "commercial establishments that serve alcohol and present political shows," the content discrimination would still be clear. It would be obvious that the addition of extra elements (commerce and alcohol) would not negate the focus on content, and therefore would not prevent application of the First Amendment.

It does not matter that the Tax is assessed on the business and not on the activity or on the viewers, because taxing theaters is equivalent to taxing shows or taxing viewers, provided the description of the taxed entities depends on the content. (State's Br. at 2, 7-8, 17.)

It also does not matter that businesses can avoid the Tax by avoiding commerce or alcohol. (State's Br. at 23 ("the expressive conduct itself is not taxed because the tax can be completely avoided"); *see also id.* at 2, 17, 24.) This does not affect the threshold question of whether the First Amendment applies. If the Legislature had taxed "commercial establishments that serve alcohol and present political shows," one could avoid the tax by excluding commerce or alcohol. But the First Amendment content-discriminatory problem would still be the differing treatment between commercial-shows-with-alcohol that are political, and ones that are non-political. Adding additional (permissible) bases of discrimination (based on commerce and alcohol) does not negate the other (constitutionally suspect) basis of discrimination.

***What of the fact that "only part" of the taxed industry "features some expression" within the First Amendment?*** (State's Br. at 12.) The State argues that "the Assessment *mostly* applies to businesses involving no protected expression at all—massage parlors and lingerie-modeling studios." (*Id.* at 14; (emphasis added); *see also id.* at 2, 22.) Because there is no evidence in the record showing how many establishments of different types are subject to the Tax, if comparative analysis was sought, there would be no basis for the State's use of "mostly." Moreover, the fact that O.C.G.A. §§ 15-21-201(1)(B) and 15-21-201(1)(C) apply to different types of businesses is irrelevant. Those are separate subsections, which ACE does not

challenge in this Court. ACE only challenges one problematic subsection, O.C.G.A. § 15-21-201(1)(A), which describes businesses based on the content of their entertainment. The Legislature cannot save one unconstitutional subsection by adding other, permissible subsections.

Moreover, ACE's member clubs have more than *some* protected expression. As the State itself argues (State's Br. at 41), the phrase "consists of" covers establishments whose entertainment is "made up of" nude dancing, not any establishment "that happens to host [nude dancing] at any isolated time." Not only are ACE's member clubs targeted in O.C.G.A. § 15-21-201(1)(A) with specific reference to their content, such content is obviously a major part of their entertainment.

***What of the fact that nude dancing falls "on the margins of First Amendment protection"?*** These activities have been characterized as being "within the outer perimeters of the First Amendment," *Barnes*, 501 U.S. at 566 (plurality opinion), or "within the outer ambit of the First Amendment's protection," *City of Erie*, 529 U.S. at 289 (plurality opinion). The State pushes this idea repeatedly. (State's Br. at 1, 14-15, 21.) But these statements reaffirm that nude dancing *is* covered by the First Amendment, and do not support the argument that a tax on nude dancing is altogether exempt from First Amendment considerations.

In short, the State, for the first time on appeal, seeks to establish a new and dangerous precedent that would create a "First-Amendment-free zone." The State did not make this mistake at oral argument or in previous rounds of litigation; the trial courts involved in this case did not make this mistake; and neither should this Court.

## III. THE STATE RELIES ON A FALLACIOUS "GREATER-POWER-INCLUDES-THE-LESSER" ARGUMENT.

The State repeatedly applies a three-step rhetorical strategy. First, it notes that governments have considerable regulatory power over adult-oriented businesses. Second, it argues that the Tax is "far less intrusive . . . than direct regulation or prohibition." (State's Br. at 1; *see also id.* at 27-28.) Third, it follows that if more-intrusive regulations are constitutional, it makes no sense to invalidate this less-intrusive tax.

The State uses this strategy repeatedly. (State's Br. at 1, 10, 20, 23-24, 26-28.) Supposedly, the greater power to regulate or ban includes the lesser power to tax. This argument may at first glance sound plausible. Indeed, the U.S. Supreme Court once accepted it: "[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986).

But, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court expressly disavowed that reasoning. There, the State had argued—relying on *Posadas*—that a ban on alcohol price advertising should be upheld because "the State could, if it chose, ban the sale of alcoholic beverages outright." *Id.* at 508. The Court wrote that "the 'greater-includes-the-lesser' argument should be rejected [because] it is inconsistent with both logic and well-settled doctrine." *Id.* at 511.

The State's reliance on this fallacious theory is related to its misunderstanding of why the constitutional analysis produces different results for taxes than for regulations.

### A. We Do Not Know Whether This Tax Is Less Intrusive Than Constitutional Regulations.

Although the State can impose some regulations, those regulations would have to comply with the appropriate level of scrutiny. The State cannot argue that it could constitutionally impose any and all conceivable regulations. Under intermediate scrutiny, for instance, the State must first establish a significant government interest. Then it must establish the requisite degree of necessity, *i.e.*, "narrow tailoring," showing that its chosen means "promote[] a substantial government interest that would be achieved less effectively absent the [burden]." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In other words, the governmental action could not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

Thus, one cannot say with certainty that the State could impose some unspecified hypothetical regulation—or ban. It would depend on the degree of necessity linking the government's goal with its chosen means in a particular case. A draconian regulation or ban would need substantial evidence. The State could not avoid establishing the degree of necessity required by the appropriate level of scrutiny.

Similarly, one cannot say that a tax in general—or this particular tax—is "far less intrusive . . . than direct regulation or prohibition." As discussed in Part II *supra*, there is no basis in the record for calling the Tax *de minimis*; it could be ruinous for businesses with slim profit margins. And it amounts to tens of millions of dollars.

Thus, even if the "greater-implies-the-lesser" argument were valid, there would be no reason to assume that the Tax is less intrusive than some hypothetical regulation, or that the hypothetical regulation would be constitutional.

### B. Even If This Tax Really Were Less Intrusive Than a Constitutional Regulation, It Would Not Necessarily Be Constitutional.

Even if the Tax imposed a lesser burden than some constitutional regulation, the Tax would not necessarily be constitutional. The reason is necessity. Even large burdens can be constitutional if the State shows the appropriate degree of necessity, *i.e.*, that the burden "promotes a substantial government interest that would be achieved less effectively absent the [burden]." *Ward*, 491 U.S. at 799. And even

much smaller burdens can be unconstitutional if that showing is absent, *e.g.*, if the burden does not contribute to the governmental interest.

This point is key. Under any scrutiny level, a burden that does not contribute at all to promoting a governmental interest is necessarily unconstitutional—regardless of how trivial that burden is, even if it is much less burdensome than some regulation that is constitutional. What matters is the degree of necessity, not the absolute burden. Governments cannot establish the constitutionality of a highly burdensome (but necessary) regulation, and then use that to bootstrap the constitutionality of all less-burdensome regulations (even if they are useless).

"Greater-includes-the-lesser" arguments have thus been soundly rejected in the First Amendment and elsewhere in constitutional law. *E.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("[E]ven 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.").

### C. **<u>The Scrutiny Analysis Plays Out Differently for Taxes Than for Regulations.</u>**

Although taxes and regulations are generally similar because they both impose governmental burdens, applying the constitutional framework to each produces different results. The State dismisses ACE's distinction between taxes and regulations. (State's Br. at 1 ("The Association argues that this case is distinguishable from decades of precedent because it involves a tax, and taxes are

just . . . different."); *id.* at 24 ("The Association has no real answer to this apart from repeating their mantra that 'taxes are different.'"); *id.* at 37 ("something special about taxes").) But, despite the State's dismissive attitude, the distinction is clear because of the degree of necessity.

If the Tax burdens protected expression to some extent, the State must justify that burden using strict or intermediate scrutiny.

First, we must identify the governmental interest. The State has been clear that the Tax has the singular purpose of raising revenue: "The express purpose of the Assessment is to raise money for the Safe Harbor for Sexually Exploited Children Fund . . . . The Assessment, in other words, has the same purpose as the vast majority of taxes—generating income for government programs and operations." (State's Br. at 22; *see also id*. at 8 ("[The Act's] purpose is the same as almost all taxes: to raise revenue."); *id*. at 19 ("The Assessment is simply a tax to raise revenue and does not regulate anything."); *id.* at 22 ("The express purpose of the Assessment is to raise money for the Safe Harbor for Sexually Exploited Children Fund . . . . The Assessment, in other words, has the same purpose as the vast majority of taxes—generating income for government programs and operations").)

A goal of the Tax is to alleviate supposed secondary effects, but—in light of the State's repeated insistence that the Tax is *de minimis* and that its burden is "virtually nil" (State's Br. at 22)—the State does not argue that the Tax does so by

suppressing the activity itself. Rather, the Tax is designed to address secondary effects solely by way of raising revenues to fund relevant activities.

Second, we consider the question of necessity. Strict scrutiny concerns whether the burden of the Tax is the least discriminatory means of pursuing the State's interest. Intermediate scrutiny concerns whether the burden of the Tax "promotes a substantial government interest that would be achieved less effectively absent the [burden]." *Ward*, 491 U.S. at 799. Regardless, it is clear that if the burden on protected expression does not promote a governmental interest, the tax is necessarily unconstitutional.

The State must not justify the necessity of the Tax itself—taxes as such are not constitutionally problematic. Rather, the State must justify the necessity of the Tax's burden on protected expression. As the U.S. Supreme Court wrote in another targeted tax case, *Minneapolis Star & Tribune*:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.

460 U.S. at 586. Although this is not a case about the press, the principle is the same: In any targeted tax case, the government must show the required degree of necessity

between the revenue-raising interest and the differential burden that is being challenged.

When the State's sole interest is raising revenue, the above quote shows why a targeted tax is not narrowly tailored. Under strict scrutiny, this is because general taxation is always a less-discriminatory alternative. Under intermediate scrutiny, the least-discriminatory alternative is not required—but the possibility of raising the same funds from general revenues means that the governmental interest would be achieved equally effectively, without burdening protected expression. Either way, the burden contributes nothing to further the governmental interest.

Yet, the State calls this a straightforward application of scrutiny analysis "novel." (State's Br. at 37.) The idea that taxes can fail when regulations can succeed is not new, however. In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), Justice Kennedy observed that a government may not "impose a content-based fee or tax . . . even if [it] purports to justify the fee by reference to secondary effects." *Id.* at 445 (Kennedy, J., concurring in the judgment). And in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court wrote that "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, [the tax] would not pass constitutional muster." *Id.* at 837.

In short, the State's misplaced reliance on its "greater-includes-the-lesser" theory is related to its misunderstanding of why taxes can be vulnerable when regulations are not.

### D. Funding Activities from General Revenues Is Less Burdensome on Expressive Conduct.

The State argues that funding the Safe Harbor Fund from general revenues would be more burdensome, not less. It argues this as "a matter of common sense." The alternatives to this targeted Tax would be "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, [or] (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." (State's Br. at 24; *see also id.* at 9, 39.)

The State's argument is not novel and repeats the Utah Supreme Court's egregious mistake in *Bushco v. Utah State Tax Comm'n*, 225 P.3d 153, 168 (Utah 2009).

This position flies in the face of *Minneapolis Star & Tribune* (quoted above), where the U.S. Supreme Court wrote, in response to a discriminatory tax, that "rais[ing] the revenue by taxing businesses generally" would be "an alternative means of achieving the same interest without raising concerns under the First Amendment." 460 U.S. at 586. The Court reaffirmed this in *Arkansas Writers'*

*Project*, 481 U.S. at 232. This point has nothing to do with the specific press context of those cases: Generally applicable taxes (unlike taxes targeted to protected expression) do not burden expression in ways that implicate the First Amendment. *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) ("[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," but "we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity.").

If this were not so—if a broad-based tax really were more burdensome for First Amendment purposes—then we could challenge the income tax itself (or any general tax), which falls on some expressive activities along with everything else. But of course, that is not the law.

The State has it exactly backwards. The Tax is not at all general, because it falls on a set of establishments defined by the content they present. On the contrary, it is nakedly content-discriminatory, and therefore calls for First Amendment scrutiny. The general tax that one could substitute for this targeted Tax would be less burdensome on protected activity, however, because it would not be based on anyone's content. Any burdens on protected activity would be incidental, and it thus

would not present any First Amendment problem. The State has repeated the Utah Supreme Court's egregious error. This Court should not.

## IV. THE TAX IS CONTENT-DISCRIMINATORY AND THUS SUBJECT TO STRICT SCRUTINY.

In arguing that the Tax "is not subject to strict scrutiny but would satisfy it anyway" (State's Br. at 35), the State continues to mischaracterize ACE's arguments. It misinterprets the U.S. Supreme Court's recent decision in *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61 (2022). And, it repeats various of its previous errors.

### A. The State Continues to Mischaracterize ACE's Arguments.

The State continues to mischaracterize ACE's arguments regarding the content-discrimination framework of *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020) (plurality opinion) [hereinafter *AAPC*], and its relationship to the secondary-effects doctrine of *City of Renton*.

*Reed* and *AAPC* reaffirm the traditional rule that content-discriminatory government action is subject to strict scrutiny; that to determine whether a law is content-discriminatory, it generally suffices to consider whether the law draws content-based distinctions on its face; and that content-neutral justifications are irrelevant. *Reed*, 576 U.S. at 164-66; *AAPC*, 140 S. Ct. at 2346 (plurality opinion); *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

As ACE explained in its opening brief, this approach is rooted in longstanding precedent. *E.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) ("Plaintiffs want to speak to [various organizations], and whether they may do so under [the statute] depends on what they say."); *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) ("The Son of Sam law . . . singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."); *Ragland*, 481 U.S. at 229 ("[T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content."); *Regan v. Time*, 468 U.S. 641, 648 (1984) ("A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers."); *see also* Volokh, *supra*, at 641-43.

This establishes that the Tax is subject to strict scrutiny. It applies to a set of businesses defined by reference to the subject matter of their entertainment—which makes it content-discriminatory by definition. Therefore, under *Reed*, it is subject to strict scrutiny and must be the least-discriminatory means of pursuing a compelling interest. And a targeted tax is not the least-discriminatory means of raising revenue, because raising the same amount from general taxation is always an option.

The *Reed* framework has one big exception: the *City of Renton* "secondary-effects" doctrine, which holds that sometimes, a content-discriminatory regulation may be treated as content-neutral and evaluated under intermediate scrutiny.

At the hearing, the State mischaracterized ACE's position as arguing that *Reed* silently overruled *City of Renton*. Instead, ACE had explicitly disclaimed that argument, which would have contradicted this Court's precedent in *Maxim Cabaret*, 304 Ga. at 191 n.4. ACE corrected the State's mischaracterization in its reply brief. However, the State again mischaracterized ACE's position in the proposed order that the trial court adopted virtually *in toto* and pasted into its opinion. Although ACE explained this in its opening brief in the present appeal (ACE's Br. at 6, 17 n.2), the State continues to mischaracterize ACE's position. First, it states that *Maxim Cabaret's* holding that *Reed* does not overrule the secondary-effects doctrine is "enough to foreclose [ACE's] argument." (State's Br. at 36.) Next, it states that *City of Austin* also "laid to rest any notion that *Reed* abrogated or qualified . . . the secondary-effects doctrine." *Id.* The State continues to rebut the same strawman.

ACE's argument has always been that the *City of Renton* secondary-effects doctrine does not apply, and has never applied, to taxes. ACE explained this in its brief. (ACE's Brief at 16-23.) The secondary-effects doctrine arose in a zoning context, and from its beginning was closely tied to zoning and land use. The U.S. Supreme Court has described these precedents as "[o]ur zoning cases,"

*United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000). The doctrine has evolved beyond zoning, but has still been applied exclusively in regulatory contexts, often related to land use or licensing—contexts that fit naturally in the "time/place/manner" intermediate-scrutiny framework. In contrast, as the State itself says, the Tax "does not prohibit nude dancing, regulate the content of nude dancing, or even restrict or dictate the time, place, or manner of nude dancing." (State's Br. at 22.)

The U.S. Supreme Court has taken a negative, bright-line attitude toward taxation that discriminates based on protected expression, refusing to distinguish between moderate and excessive taxation. And finally, as explained in Part III, *supra*, the analysis plays out differently for taxes than for regulations. Targeting is often good for regulations, because a more tightly focused regulation is often more effective than one that sweeps more broadly. However, when the State only asserts a revenue-raising interest, a general tax achieves the same goal without burdening protected expression.

For these reasons, the secondary-effects doctrine does not apply. Therefore, *Reed* applies in full force, such that this content-discriminatory Tax must be invalidated under strict scrutiny.

### B. The State Misinterprets the *City of Austin* Decision.

The State wrongly claims that *City of Austin* forecloses ACE's strict-scrutiny argument. In *City of Austin*, the U.S. Supreme Court clarified the limits of the facial approach for deciding whether a law is content-discriminatory. In *City of Austin*, a sign code had one rule governing advertising for things located on different premises than the sign ("off-premises" advertising), and another rule governing advertising for things located on the same premises ("on-premises" advertising). Under an extreme, facial approach, this may seem content-discriminatory, because one cannot tell whether a sign contains on-premises or off-premises advertising without inspecting the content.

But, the Court wrote, such an approach would go too far. The distinction between on-premises and off-premises advertising should be considered content-neutral because the on-premises/off-premises distinction was neutral as to "topic, subject matter, or viewpoint." 596 U.S. at 72. The code did "not single out any topic or subject matter for differential treatment." *Id.* at 71. The code in *Reed*, by contrast, explicitly discriminated based on topic or subject matter—drawing distinctions between political, ideological, and directional signs.

Rather than foreclosing ACE's argument, *City of Austin* supports it. The Tax discriminates explicitly against establishments whose entertainment consists of erotic nude dancing. This is a form of protected expression that has a particular

message—an erotic message. *See* Part II, *supra*. The Tax "single[s] out [a particular] topic or subject matter for differential treatment"—exactly what *City of Austin* says constitutes content discrimination and triggers strict scrutiny.

### C. The Rest of the State's Analysis Repeats Its Previous Errors.

The rest of the State's strict-scrutiny analysis mostly repeats errors that it made previously in its brief. The State argues that a content-discriminatory tax ceases to be content-discriminatory if the content is offered merely as a way to identify a class of covered entities. (State's Br. at 36-37.) In other words, "let's tax political shows" is content-discriminatory, whereas "let's tax theaters that present political shows" is merely an innocuous business tax.

The State argues that *de minimis* taxes are innocuous, and that taxing the combination of particular content with commerce and alcohol makes everything permissible. *Id.* In other words, "let's tax political shows" is content-discriminatory, whereas "let's tax commercial businesses that serve alcohol and present political shows" is not. The contention that this is not content-discriminatory because you can still present political shows and avoid the tax simply by abandoning commerce and alcohol is absurd. (This *is* content-discriminatory, because those who put on nonpolitical shows are not put to that choice.)

The State argues that all of ACE's tax cases are "inapposite" because they arose not in the adult-entertainment context but in more "core" areas like assembly

or the press. (*Id.* at 37-38.) But First Amendment doctrine transcends individual subject areas and is one of the most intricately developed areas in constitutional law. If certain domains have lower levels of protection, there is explicit case law providing a specific regime for those domains. Thus, when it comes to commercial speech, government-employee speech, obscenity, etc., there is no need to gesture at some vague, lower level of protection; rather, one cites the applicable case law and applies the relevant doctrine. But there is no special lower level of protection for adult entertainment. Some aspects of adult-entertainment regulation are subject to a lower scrutiny level, as explained by *City of Renton* (though that area of doctrine is broader than just adult entertainment); other aspects of adult entertainment are analyzed under strict scrutiny, *see Playboy*. In short, adult entertainment is not a First-Amendment-free zone, and there is no reason to ignore press and assembly cases that are otherwise on point.

Moreover, though taxes and regulations often play out differently in practice, they are both governmental burdens and are generally analyzed similarly. The cases establishing that content-discriminatory government action must satisfy strict scrutiny have arisen in a variety of contexts. Meanwhile, the State's preferred tax case, *Leathers*, merely establishes that discrimination among speakers, like differential taxation of different media (*e.g.*, cable television), is generally not

constitutionally problematic. It has no application to a case like this one, where subject matter discrimination is present on the face of the law.

The State asserts that "the only courts that have considered First Amendment challenges to taxes that reference nude dancing have squarely rejected arguments for strict scrutiny." *Id.* at 38. This may seem impressive, but there are literally only two cases that have considered the issue. *Bushco* is inapposite, because that tax was assessed on businesses whose employees "perform services while nude or partially nude." 225 P.3d at 157. Because mere nudity is "not an inherently expressive condition," *City of Erie*, 529 U.S. at 289 (plurality opinion), the *Bushco* Court properly applied content-neutral, intermediate scrutiny. The only case on point is thus *Combs v. Texas Entm't Ass'n*, 347 S.W.3d 277 (Tex. 2011). There, the Texas Supreme Court wrongly rejected the strict-scrutiny argument, and this Court should not repeat that court's error.

The State concludes that "[i]t is difficult to imagine a revenue-raising option less restrictive than this focused, *de minimis* tax." (State's Br. at 39-40.) But the only reason this is difficult for the State to imagine is because it is unclear on the distinction between discrimination and narrow tailoring. The legislature has enacted a Tax that discriminates against a very precise set of businesses, defined by the subject matter of the entertainment they provide. The State's burden is to take seriously the need to consider alternative funding mechanisms that would achieve

the State's asserted goal just as well, while burdening protected expression less—such as funding from general revenues. Instead, the State boasts that its Tax is narrowly tailored because of how precisely it discriminates. It dismisses the option of general taxation because this would be more burdensome on taxpayers as a whole—even though the test is whether general taxation would be less burdensome on the protected expression at issue in the case. "That is narrow tailoring, not discrimination," the State says (State's Br. at 37), but the State has it exactly backwards.

## V. CONCLUSION.

For these reasons, this Court should hold that the Tax is unconstitutional.

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted this 28th day of May, 2024.

**FREED GRANT LLC**

101 Marietta Street, NW, Suite 3600
Atlanta, Georgia 30303
Telephone: (470) 839-9300
Facsimile: (470) 839-9301
gary@freedgrant.com
tom@freedgrant.com

*/s/ Gary S. Freed*
Gary S. Freed
Georgia Bar No. 275275
Thomas C. Grant
Georgia Bar No. 297455

**THE LAW OFFICES OF J. TOM MORGAN**

160 Clairemont Avenue, Suite 425
Decatur, Georgia 30030
Telephone: (404) 687-1002
jtom@jtommorganlaw.com

*/s/ J. Thomas Morgan*
J. Thomas Morgan
Georgia Bar No. 522675

**ALEXANDER VOLOKH**

Emory University School of Law
1301 Clifton Road NE
Atlanta, Georgia 30322-2770
Telephone: (404) 712-5225
svolokh@gmail.com

*/s/ Alexander Volokh*
Alexander Volokh
D.C. Bar No. 500988
*Admitted Pro Hac Vice*

*Counsel for Appellant*

## CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing "**APPELLANT'S REPLY BRIEF**" via U.S. mail and by email, pursuant to agreement of counsel, as follows:

Ron J. Stay, Jr.
Ross W. Bergethon
Stephen Petrany
State of Georgia
Office of the Attorney General
40 Capital Square, S.W.
Atlanta, Georgia 30334-1300
rstay@law.ga.gov
rbergethon@law.ga.gov
spetrany@law.ga.gov

*Counsel for Appellee*

This 28th day of May, 2024.

**FREED GRANT LLC**

101 Marietta Street, NW, Suite 3600
Atlanta, Georgia 30303
Telephone: (470) 839-9300
Facsimile: (470) 839-9301
gary@freedgrant.com
tom@freedgrant.com

*/s/ Gary S. Freed*
Gary S. Freed
Georgia Bar No. 275275
Thomas C. Grant
Georgia Bar No. 297455

*Counsel for Appellant*