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 SUPPLEMENTAL REPLY BRIEF

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I. INTRODUCTION.

The Department of Revenue ("**State**") asserted in its brief that "the only courts that have considered First Amendment challenges to taxes that reference nude dancing have squarely rejected arguments for strict scrutiny." State's Br. at 38. ACE responded that this claim was less impressive than it seemed, because only two courts had considered similar issues—the Utah Supreme Court in *Bushco v. Utah State Tax Comm'n*, 225 P.3d 153 (Utah 2009), and the Texas Supreme Court in *Combs v. Texas Entm't Ass'n*, 347 S.W.3d 277 (Tex. 2011). ACE argued that *Bushco* is inapposite, because—unlike the Georgia tax challenged here—the Utah 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 v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion), the *Bushco* Court properly applied the intermediate scrutiny appropriate for content-neutral government action. Thus, the only opinion to really have upheld a tax similar to the one here is *Combs*. *See* ACE's Reply Br. at 29.

However, a recent opinion escaped the notice of both ACE and the State. It is the Southern District of Texas's recent opinion in *9000 Airport LLC v. Hegar*, 2023 WL 7414581 (S.D. Tex. Nov. 9, 2023), which involves a club's challenge of the same Texas tax that was challenged in *Combs*. The club's arguments were not barred by *res judicata*, since the club was not a party to (or adequately represented by a

party to) the *Combs* litigation; and so, despite its "respect[]" for "the thoughtful decision of the Texas Supreme Court," the federal district court considered the club's arguments based on "the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law." *Id.* at *3 (citing *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000)).

As relevant here, the district court held that, at that preliminary injunction stage, the club could show a likelihood of success on the merits on its First Amendment claim. *Id.* at *4-*7.

First, the court correctly stated that "[n]ude dancing is expressive conduct protected by the First Amendment," *id.* at *4, and thus that the tax had to satisfy the standards of the relevant First Amendment caselaw. This directly conflicts with the State's contention here that "[t]he Assessment does not implicate the First Amendment at all." State's Br. at 11; *see also* ACE's Reply Br. at 3-13.

Next, the court rejected the state's argument that, under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the tax need only satisfy intermediate scrutiny because it was aimed at combating secondary effects. "The First Amendment permits restrictions only on the time, place, or manner of protected expression in a secondary effects case," the Court wrote, and a tax is not a time/place/manner restriction. *9000 Airport*, 2023 WL 7414581 at *4. This agrees

with ACE's contention that the *Renton* regime does not apply to taxes, and conflicts with the State's contrary contention. ACE's Br. at 17-24; State's Br. at 25-28; ACE's Reply Br. at 24-25.

Next, the court rejected the state's argument that the tax is content-neutral because it is aimed not at nude dancing as such, but at "the secondary effects of the combination of nude dancing and alcohol." *9000 Airport*, 2023 WL 7414581 at *5. "[T]his does not immunize the statute," the court wrote: "a statute cannot shield itself from targeting a protected behavior by requiring an additional behavior for the statute to trigger. Requiring a second attribute that almost always attends the first attribute changes the number of words in the statute, but it does not change its constitutionality." *Id.* at *5. This supports ACE's argument that one cannot remove content discrimination by adding discrimination based on a second factor, and conflicts with the State's contrary contention. ACE's Br. at 24-27; State's Br. at 36-37; ACE's Reply Br. at 10-11, 27.

The Court also stated that "[t]he State's interest in revenue—even if taken sincerely and not as a pretext for targeting expression—cannot justify . . . a targeted fee." *9000 Airport*, 2023 WL 7414581 at *5. Here, the Court quoted the U.S. Supreme Court's discussion in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983):

> 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 [a targeted business], 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.

9000 Airport, 2023 WL 7414581 at *5 (quoting *Minneapolis Star*, 460 U.S. at 586) (alteration in original).

This supports ACE's argument that the tax fails because the State could fund the Safe Harbor Fund out of general revenues—and that this is true under either level of scrutiny, because, given this general-funding option, the targeted nature of the tax does not further the State's revenue interest in any way. And it conflicts with the State's contention that the general-funding option would be *more* burdensome than a targeted tax. ACE's Br. at 14-15, 28-29; State's Br. at 23-25; ACE's Reply Br. at 20-22.

The court also faulted the state for its explanation of the theoretical connection between the category of taxed businesses and the relevant secondary effects, and for the evidence that the state presented. *9000 Airport*, 2023 WL 7414581 at *6-*7. This discussion is less relevant here—the stated purpose of the Assessment is different, and so is the legislative record—but the court's analysis treats the government's claims with skepticism, as is appropriate for a case involving heightened scrutiny (whether intermediate or strict). *See* ACE's Br. at 36.

Respectfully submitted this 23rd day of July, 2024.

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CERTIFICATE OF SERVICE

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

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