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 BRIEF

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I. INTRODUCTION.

This is a case about content discrimination—a category of discrimination that the U.S. and Georgia Supreme Courts have historically classified as so disfavored that it merits strict scrutiny, the most stringent form of constitutional analysis. The Department of Revenue (**"State"**), pursuant to O.C.G.A. § 15-21-209 (**"Statute"**), is seeking to raise money through a tax to address the real and serious evil of child sex trafficking. However, the alleged connection between licensed adult entertainment establishments and child sex trafficking is illusory, not supported by the State's or any evidence, and based upon stereotyping and targeted content discrimination that is inconsistent with any degree of scrutiny—strict or intermediate.

In seeking to raise these funds, the State is targeting the tax burden on a particular class of businesses defined by the content of their expression. This is improper, among other reasons, because there exists a less discriminatory alternative: raising the same amount of money from general revenues. Even under the lesser standard of intermediate scrutiny, this targeted tax still cannot survive when the State's professed interest is to raise revenue to fight a social ill, because the existence of a general-revenue option means that the targeted burden does not contribute to solving the social problem.

II. JURISDICTIONAL STATEMENT.

The Supreme Court has jurisdiction because "the constitutionality of a law . . . has been drawn in question," Ga. Const. art. VI, § VI, ¶ II(1). Appellant Georgia Association of Club Executives, Inc. ("**ACE**") appeals the "Final Order on Cross-Motions for Summary Judgment" ("**Final Order**") (V11-67) entered on December 4, 2023, in *Georgia Ass'n of Club Executives v. O'Connell* (Civil Action File No. 2017CV297874).[1]

ACE challenged the constitutionality of the Statute in its Second Amended Complaint (V7-246)[2] which sought a declaratory judgment that the Statute is unconstitutional, and injunctive relief. ACE sought summary judgment on those claims (V10-1, 5), which the Trial Court denied in the Final Order.

ACE timely filed its Notice of Appeal (V2-1) on December 19, 2023, within 30 days after entry of the Final Order, entered on December 4, 2023. This Court entered an Order (attached as Exhibit A) extending the filing deadline for this Brief until April 15, 2024.

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[1] ACE also appeals the "Final Order on Cross-Motions for Summary Judgment" entered on December 4, 2023, in a related case (Appeal No. S24A0726) that involves identical issues.

[2] ACE filed a Third Amended Complaint on December 8, 2023 to update the name of the current Revenue Commissioner. (V11-194.)

III. ENUMERATION OF ERRORS.

1. The Trial Court erred by erroneously applying the wrong standard of review, intermediate scrutiny rather than strict scrutiny.

2. The Trial Court erred by finding the Statute to be constitutional under intermediate scrutiny.

3. The Trial Court erred by finding that the State met its burden to show that the legislature reasonably relied upon credible evidence that the Statute is directed at the secondary effects of protected conduct.

4. The Trial Court erred by finding that O.C.G.A. § 15-21-201(1)(A) is not unconstitutionally overbroad**.**

IV. STATEMENT OF THE CASE.

ACE is an association of licensed adult entertainment clubs in Georgia. ACE filed this case to challenge the constitutionality of the Statute, which imposes an annual "state operating assessment" (**"Tax"**), payable to the Georgia Department of Revenue, on "adult entertainment establishments." ACE's members come under the Statute and are subject to a significant annual tax equal to the greater of $5,000 or one-percent of the previous year's gross revenue. This is a considerable amount of money, burdening an already heavily taxed and regulated entertainment industry.

The Statute was passed to raise funds to combat the sexual exploitation of children based upon an assumed nexus between adult entertainment clubs and sexual

exploitation. O.C.G.A. § 15-21-209(c). While ACE condemns, and wholeheartedly supports efforts to combat, sexual exploitation, its members have been unconstitutionally stigmatized and penalized by the Statute, because licensed adult entertainment clubs are not involved in, and do not contribute to, this insidious crime.

ACE originally sued Revenue Commissioner Lynnette Riley. Initial litigation resulted in an appeal to this Court and a remand to the Trial Court, *Riley v. Georgia Ass'n of Club Executives*, 313 Ga. 364 (2022). ACE relitigated against the new Revenue Commissioner, most recently substituting current Commissioner Frank O'Connell. ACE also sued the State of Georgia, which is now a proper party due to a constitutional amendment, Ga. Const. art. I, § II, ¶ V, that partially waived the State's sovereign immunity. The issues in the two cases are identical.

ACE preserved the Trial Court's errors for review as explained in Section II.

V. SUMMARY OF ARGUMENT.

Rather than write its own order, the Trial Court requested the State, 17 months after conducting its summary judgment hearing, to submit a proposed order. Two weeks later, the State submitted a proposed order repeating the arguments made in its briefs, which the Trial Court adopted *verbatim* the same day. (V11-263.) The Final Order repeated clear mischaracterizations of ACE's arguments and failed to address ACE's rebuttals of the State's points (as properly stated in ACE's reply

brief). While this is not in itself reversible error, it calls for thoroughly searching review by this Court.

The Tax burdens protected expression and is content-based, making it subject to strict scrutiny. It fails strict scrutiny because the State has not shown that it is the least content-discriminatory means to combat the sexual exploitation of children: the government could pursue the same goal content-neutrally by obtaining funding from general revenues. Certain regulations aimed at combating the secondary effects of adult businesses on surrounding communities (particularly zoning and land-use regulations) have been analyzed under intermediate scrutiny, but that limited exception has never been applied by the U.S. or Georgia Supreme Courts to taxes.

Although strict scrutiny is the appropriate standard, the Statute also fails if analyzed under intermediate scrutiny. Simply, the State has not shown that the law is narrowly tailored. Narrow tailoring, in the intermediate-scrutiny context, does not require a least-restrictive alternative, but the Tax still must not burden substantially more speech than necessary to further the government's legitimate interests. Where (as here) the State has asserted no interest other than raising revenue to combat a particular problem, providing the same amount from general revenues would serve that interest exactly as well as this targeted Tax, but with less burden on speech. This targeted Tax is thus not narrowly tailored.

Additionally, the State has not shown a sufficient connection between the secondary effect and the targeted group. Intermediate scrutiny requires that the legislature relied on credible evidence establishing a reasonable connection between its goal (combating the sexual exploitation of children) and the establishments targeted by the tax. Here, the legislature's evidence fails to establish any reasonable connection.

Finally, the Statute covers a substantial amount of protected speech by third parties and is therefore unconstitutionally overbroad.

VI. ARGUMENT.

A. The Trial Judge's 54-Page Opinion Was Entirely Written by the State's Counsel.

Seventeen months passed following oral argument in the Trial Court when the Judge requested a proposed order from the State. The State submitted a proposed order two weeks later that substantially repeated its briefs, which was entered the same day by the Trial Court. (V11-265.) In various places, the State clearly mischaracterized ACE's legal arguments—attributing to ACE obviously incorrect arguments that ACE had not made. ACE addressed the State's misstatements in its reply brief, pointing to the pages where it had taken the *opposite positions* to those that the State had ascribed to it. However, in its proposed order, the State repeated its original mischaracterizations, with no change whatsoever.

The Judge adopted the State's proposed order the same day, with no substantive modifications—down to the State's typos. *See* tr. op. at 45 n.16 ("locaitons"). (Compare V2-49 to V1-111.) Two mischaracterizations that the Trial Judge repeated verbatim are explained in footnotes 3 and 4 *infra*, and one instance where the Trial Judge entirely ignored ACE's rebuttal of the State's argument is explained in footnote 5 *infra*. It appears that the Trial Court simply adopted the State's positions without any independent determination and legal analysis.

"The . . . practice of directing counsel for the prevailing party to prepare the judgment for the trial court's signature . . . has been greatly disfavored by [the Georgia Court of Appeals], as well as by the United States Supreme Court." *PDA v. Haas Corp.*, 185 Ga. App. 785, 786 (1988) (citing cases including *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 n.4 (1964)); *see also Richardson v. Barber*, 241 Ga. App. 254, 255 (1999). The purpose of this disfavor is to "evok[e] care on the part of the trial judge." *PDA*, 185 Ga. App. at 786.

This case shows why that is sound policy: a court that does not do its own research risks repeating errors introduced (accidentally or deliberately) by self-interested parties, and (as here) rebutting arguments never made—misunderstanding some of the opposing party's actual arguments. As the First Circuit has written:

> [W]e must determine whether or not the scope of our review is affected by the fact that the lower court, in rendering its opinion, adopted almost verbatim the proposed findings of fact and conclusions of law submitted by the [prevailing party] at the close of trial so that the entire opinion occupying some twenty printed pages was written from end to end by counsel. . . .
>
> [A] clash of interests must be recognized to exist between efficient administration that leads hard pressed judges to turn to counsel for help and the undeniable right of losing counsel to be assured that his position has been thoroughly considered. The court's findings must ultimately represent the judge's own determination. The independence of the court's thought process may be cast in doubt when the findings proposed by one of the parties winds up as the court's opinion and the courts have not looked with favor upon the practice. . . .
>
> [T]he greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review.

In re Las Colinas, 426 F.2d 1005, 1008–10 (1st Cir. 1970) (citations omitted).

While this is not in itself reversible error, this lack of thorough, if any, consideration calls for searching review by this Court and counsels against granting the Trial Court's findings any deference.

B. The Statute Should Be Struck Down Under Strict Scrutiny.

1. Nude Dancing and Similar Activities Are Protected Expression.

Federal and Georgia cases make clear that the dancing covered by the Statute is expressive conduct protected by the First Amendment, and that nude dancing (unlike nudity as such) communicates an erotic message. *See, e.g.*, *Barnes*, 501 U.S. at 570-71; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293, 296 (2000) (plurality

opinion) (noting "the erotic message" of nude dancing); *Maxim Cabaret v. City of Sandy Springs*, 304 Ga. 187, 191 (2018); *Oasis Goodtime Emporium I v. City of Doraville*, 297 Ga. 513, 520 (2015) ("Erotic dancing—which includes the type of dancing while nude done by Oasis's employees—is a form of expression protected by the free speech provisions of both the United States and Georgia Constitutions.").

Indeed, when the U.S. Supreme Court upheld a requirement that dancers wear pasties and G-strings, it did not rely on any theory that nude dancing was non-communicative; rather, it held that this requirement "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.

That nude dancing and similar 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," *Pap's*, 529 U.S. at 289 (plurality opinion), is irrelevant: the First Amendment still applies, and this Court has not hesitated to enforce it in this context. *See, e.g.*, *Secret Desires Lingerie v. City of Atlanta*, 266 Ga. 760 (1996); *Harris*, 259 Ga. at 703-04; *see also* Alexander Volokh, *Taxing Nudity: Discriminatory Taxes, Secondary Effects, and Tiers of Scrutiny*, 2 J. Free Speech L. 627, at 636-37 (2023).

2. Content-Based Laws Are Presumptively Subject to Strict Scrutiny.

Federal and Georgia cases make clear that content-based government action is subject to strict scrutiny. This principle has been established for decades. *See Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) [hereinafter *AAPC*]; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813-15 (2000); *State v. Café Erotica*, 269 Ga. 486, 489 (1998); *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays*, 266 Ga. 393, 401 (1996).

This is true whether or not "conduct" is involved: the intermediate-scrutiny test for expressive conduct associated with *United States v. O'Brien*, 391 U.S. 367 (1968), applies only when state action is content-neutral. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) ("*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech . . . ."); *see also* Volokh, *supra* at 646.

3. Whether a Law Is Content-Based Is Generally Determined on the Face of the Law.

The U.S. Supreme Court uses a simple approach to determine whether a law is content-based: "a law is content-based if a regulation of speech on its face draws distinctions based on the message a speaker conveys. That description applies to a law that singles out specific subject matter for differential treatment." *AAPC*,

140 S. Ct. at 2346 (plurality opinion) (internal quotation marks omitted). In that case, the law discriminated between robocalls on different topics, giving preferential treatment to robocalls made to collect government debt. "A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech." *Id.*; *see also id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part). All nine Justices agreed that the law was content-based, though a minority disagreed regarding strict scrutiny. *See id.* at 2358 (Breyer, J., concurring in the judgment in part and dissenting in part); *see also id.* at 2356 (Sotomayor, J., concurring in the judgment).

The Court had already endorsed this approach in *Reed*, a case about a sign code treating political signs differently than other signs. "The Town's Sign Code," the Court wrote, "is content based on its face. . . . The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 576 U.S. at 164.

And this facial approach is rooted in longstanding precedent. *See, 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 Board*, 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."); *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 229 (1987) ("[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.

Georgia cases have followed the same approach. *See, e.g.*, *Cafe Erotica*, 269 Ga. at 489 ("Because the regulation at issue is predicated on the content of the regulated speech, it is a content-based restriction which is subject to judicial review under the 'strict scrutiny' analysis."); *Justice Outdoor Displays*, 266 Ga. at 401 ("Because the seven-week durational limitation, applicable only to political signs, is determined by the message displayed, the restriction is 'content based.'").

4. This Tax Is Content Based.

The Statute here is content-based because it taxes establishments defined by their expression.

An establishment can fall within the Statute by having "nude or substantially nude persons dancing." Second, an establishment can fall within the Statute by having "movements of a sexual nature"—and one cannot determine whether movements are sexual (or "simulat[e] sexual intercourse") without examining their content and inspecting their message. Third, an establishment can fall within the Statute by presenting all this as "entertainment"; the wording confirms that what is taxed is a performance before spectators. *See, e.g.*, *Barnes*, 501 U.S. at 581 (Souter, J., concurring in the judgment) ("[S]uch performance dancing is inherently expressive…."); *see also* Volokh, *supra*, at 643-46.

A revenue officer will have to inspect the "entertainment" to determine whether the subject matter is erotic. This is the very definition of "content-based." (By contrast, mere nudity is "not an inherently expressive condition," *see City of Erie*, 529 U.S. at 289 (plurality opinion), and so laws concerning mere nudity are content-neutral and receive intermediate scrutiny. *See Bushco v. Utah State Tax Comm'n*, 225 P.3d 153, 160-61 (Utah 2009).)

The U.S. Supreme Court has held that this facial approach does not *always* apply—the mere fact that one must inspect content to see whether a law applies is not always enough to make that law content-discriminatory. *See City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 69 (2022). But in so holding, the Court reaffirmed that, in cases like this one, the facial approach of *Reed*

and *AAPC* still applies. In *City of Austin*, a sign code regulated advertising for things located on different premises than the sign more heavily than advertising for things located on the same premises. This may seem content-based, because one can't tell whether a sign contains on-premises or off-premises advertising without reading it. But, the Court wrote, this sign code was nonetheless considered content-neutral: "Unlike the sign code at issue in *Reed*," the code "[did] not single out any topic or subject matter for differential treatment." *Id.* at 71. The code's focus on a neutral factor like location made it different from codes turning on "[a] sign's substantive message," embodying, for instance, "content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations." *Id.*

Thus, even while it upheld that particular code, the Court reaffirmed that the facial approach still applies when a policy turns on *substantive content*. The *Reed/AAPC* approach is thus unaffected in this case, where the tax depends precisely on the *erotic subject matter*. *See, e.g.*, *Barnes*, 501 U.S. at 570-71 (noting that nude dancing conveys an "erotic message"); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293, 296 (2000) (plurality opinion).

And, *once one determines that the Tax is content-based and therefore receives strict scrutiny, it necessarily fails*. Strict scrutiny requires that the government

choose the least content-discriminatory means of pursuing its goal. But the government can always pursue its goal (here, combating child sex trafficking) by providing the same amount from general revenues.

5. Whether the Law's Justification Is Content-Neutral Is Irrelevant.

But what if, despite facial discrimination based on content, the government *justifies* the law using a content-neutral rationale? (I.e., what if the *purpose* of the content discrimination is to combat "secondary effects" unrelated to content?) Does that alter the result that the law is content-based, or lower the level of scrutiny?

The general answer is easy: where (as here) the government has singled out particular content or subject matter, the neutrality of the justification is irrelevant. According to *Reed*:

> On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny….
>
> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech…. [I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive. Although a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary…. [A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 576 U.S. at 164-66 (internal quotation marks, citations, and alterations omitted).

Neutrality of purpose is not always irrelevant; in addition to the secondary-effects doctrine, the *City of Austin* decision suggested that neutrality of purpose, *together with neutrality as to subject-matter or substantive content*, could make a policy content-neutral even if it could technically be described as content-discriminatory. But that narrow exception does not apply here where the Tax is decidedly *not* "agnostic as to content"—where the Tax explicitly depends on the substantive content of ACE's members' expression, i.e., erotic subject matter.

The general irrelevance of neutral justifications is not a new invention; countless First Amendment cases have stated this principle. In *Simon & Schuster*, the State was pursuing the neutral goal of ensuring that criminals didn't profit from their crimes, but the U.S. Supreme Court applied strict scrutiny to the content-discriminatory "Son of Sam" law. 502 U.S. at 118-21. In *Humanitarian Law Project*, the government was pursuing the neutral goal of depriving terrorist organizations of resources, but the Court rejected intermediate scrutiny and applied "a more demanding standard." 561 U.S. at 28 (internal quotation marks omitted). In *Arkansas Writers' Project*—a case, like this one, involving a content-based tax—the Court applied strict scrutiny even though the State asserted neutral justifications like

"encourag[ing] 'fledgling' publishers." 481 U.S. at 231-33; *see also* Volokh, *supra*, at 651-56.

6. The Secondary-Effects Doctrine Is a Limited Exception to This Rule.

But what about the "secondary effects" doctrine? In *Renton*, a zoning ordinance discriminated against adult movie theaters. This was, on its face, content-based. And yet, the U.S. Supreme Court wrote, the ordinance was "aimed not at the *content* . . . but rather at the *secondary effects* of such theaters on the surrounding community," 475 U.S. at 47, and was therefore properly examined under the more lenient standard applicable to time, place, and manner regulations, i.e., intermediate scrutiny, *id.* at 49-50.

Renton's secondary-effects doctrine is an exception to the general rule stated above. *Reed* did not overrule the secondary-effects doctrine, as Georgia and federal cases have properly recognized. *See, e.g.*, *Maxim Cabaret*, 304 Ga. at 191 n.4; *Flanigan's Enters. v. City of Sandy Springs*, 703 Fed. Appx. 929, 934-35

(11th Cir. 2017).[3] But the secondary-effects doctrine has *always*, from the very start, been a *limited* exception.

Renton does not apply every time a government identifies some secondary effect: that is obvious from *Simon & Schuster*, *Humanitarian Law Project*, and *Arkansas Writers' Project*. Nor does *Renton* govern all adult entertainment cases. *Renton* does not always apply when adult entertainment or pornography is at issue, *see, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (involving virtual child pornography). And sometimes *Renton* applies even beyond the adult entertainment context, *see, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (involving sound-amplification guidelines for a concert in a park).

Renton secondary-effects analysis has a very particular scope. It applies *in a regulatory context*, especially when traditional zoning or land-use considerations are

[3] The Trial Court's opinion wrongly states that ACE argues that *Reed* and *AAPC* "silently overrule[] the secondary-effects doctrine with the facial approach." Tr. op. at 15. The Trial Court spent a paragraph explaining why this legal argument was incorrect, citing *Maxim Cabaret*, *Flanigan's Enterprises*, and other cases. But ACE never made the incorrect argument that the Trial Court attributed to it. To the contrary, ACE explicitly explained that *Reed* did *not* overrule the secondary effects doctrine—citing, indeed, *Maxim Cabaret* and *Flanigan's Enterprises*. Br. in Support of Pl.'s Amended MSJ, at 12-13. (V10-16.) It was the government that first made this incorrect claim about what ACE argued—a claim that was easily refuted by consulting ACE's brief. Def.'s Resp. in Opp. to Pl.'s Amended MSJ, at 10. (V10-200.) ACE addressed the government's clear mischaracterization in its reply brief. Pl.'s Reply to Def.'s Resp. to Pl.'s MSJ, at 11-12. (V11-11-12.) Undaunted, the government continued to falsely attribute this clearly incorrect legal argument to ACE in its proposed order that the Trial Court adopted verbatim.

at issue—when the regulation can fairly be characterized as a "time, place, or manner regulation." (The U.S. Supreme Court's recent *City of Austin* decision characterizes the "on-/off-premises distinction" as being "similar to ordinary time, place, or manner restrictions," 596 U.S. at 71, and also arose in a land-use regulation context, i.e., sign codes.) The U.S. Supreme Court has never applied it to taxes.

It makes sense that the secondary-effects doctrine applies to regulation and licensing—but not taxation—for the following four reasons.

First, from its beginnings in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the secondary-effects doctrine has been closely tied to zoning and land use. The plurality upheld a zoning ordinance targeting adult theaters based on "the city's interest in preserving the character of its neighborhoods," *id.* at 71; "[i]t is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.* at 71 n.34. Justice Powell concurred, stating that local land-use regulation is special because zoning is "the most essential function performed by local government": "I view [this] case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." *Id.* at 73, 80 (Powell, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

When a U.S. Supreme Court majority adopted the secondary-effects doctrine in *Renton*, the context was also a zoning ordinance targeting adult theaters and the

rationale was closely tied to land use. The case, the Court wrote, was "largely dictated" by *American Mini Theatres*, *id.* at 46, and the concerns discussed were ones related to "the vital governmental interests" in "attempting to preserve the quality of urban life," *id.* at 50 (internal quotation marks omitted). In stating the rule of law, the Court wrote: "in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, *zoning ordinances* designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49 (footnote omitted) (emphasis added). Small wonder that the U.S. Supreme Court later described this line of precedent as "[o]ur zoning cases." *Playboy*, 529 U.S. at 815.

To be sure, this doctrine has been applied beyond zoning in the narrowest sense: in *Ward*, it was used to uphold municipal sound-amplification guidelines. But this is still a closely related land-use regulation context. *Cf. Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981, 991 (S.D. Ind. 2008) (describing a licensing statute as having "'zoning-like' aims"). Georgia cases applying this doctrine have arisen in similar *regulatory* contexts: from zoning and alcohol licensing in *Maxim Cabaret* to alcohol prohibition for sexually oriented businesses in *Oasis Goodtime*

Emporium or *Goldrush II v. City of Marietta*, 267 Ga. 683 (1997), to closing-time regulation in *Great American Dream v. DeKalb County*, 290 Ga. 749 (2012).[4]

The secondary-effects doctrine was developed in a context of deference to local governments' traditional land-use authority, where the secondary effects were ones stemming from physical proximity. This is consistent with the law's deferential attitude toward zoning, *see, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Second, zoning and other land-use regulations fit within the overarching rubric of "time, place, or manner regulations." *Renton*-type cases generally come down to the following: "Don't have nude dancing at these hours—have them at these other hours instead" (time); "Don't have nude dancing in this part of town—have it in this other part of town instead" (place); "Don't have entirely nude dancing—wear

[4] The Final Order wrongly states that ACE argues that the secondary-effects doctrine applies "only for zoning regulations." Tr. op. at 15. The Trial Court spent a paragraph explaining why this legal argument was incorrect, citing *Maxim Cabaret*, *Oasis Goodtime Emporium*, and *Great American Dream*. But ACE never made the incorrect argument attributed to it. To the contrary, ACE explicitly explained that the secondary-effects doctrine applied in a variety of regulatory contexts beyond zoning—citing *Maxim Cabaret*, *Oasis Goodtime Emporium*, and *Great American Dream*. Br. in Support of Pl.'s Amended MSJ, at 14-15. (V10-18-19.) Again, the State first made this incorrect claim about what ACE argued—a claim that was easily refuted by consulting ACE's brief. Def.'s Resp. in Opp. to Pl.'s Amended MSJ, at 10. (V10-200.) ACE corrected the government's clear mischaracterization in its reply brief. Pl.'s Reply to Def.'s Resp. to Pl.'s MSJ, at 13. (V11-13.) The State continued to falsely attribute a clearly incorrect legal argument to ACE in its proposed order adopted verbatim.

G-strings instead" (manner). By contrast, a tax cannot easily be described as a time, place, or manner regulation, because it does not prescribe when, where, or how to conduct any activities; it merely attaches a price to such activities. Taxation does not fit well with the theory of *Renton*.

Third, the U.S. Supreme Court has always taken a negative, bright-line attitude toward discriminatory taxation. As far back as *McCulloch v. Maryland*, the Court has not drawn lines between moderate and excessive taxation; it has reasoned instead that a tax, once allowed, can be increased without limit. *See* 17 U.S. (4 Wheat.) 316, 430-31 (1819). The same idea has been applied in First Amendment cases. For religious speech, a license tax is unconstitutional because it could become too "costly." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). For the press, even a small content-discriminatory tax is unconstitutional because of "the possibility of subsequent differentially more burdensome treatment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 588 (1983); *cf. also Leathers v. Medlock*, 499 U.S. 439, 447 (1991). ACE does not concede that this Tax is small, but even if it were, that would be irrelevant.

Why can't one draw a constitutional line between moderate and excessive taxes? Perhaps because "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Minneapolis Star*, 460 U.S. at 589. Or perhaps because the very idea of a discriminatory tax offends

First Amendment values: "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); *see also Ark. Writers' Project*, 481 U.S. at 229 (content-based taxes are "particularly repugnant to First Amendment principles"). Regardless, this treatment of taxation stands in sharp contrast to the "time, place, or manner" inquiry under which we ask whether regulations "do not *unreasonably* limit alternative avenues of communication," *Renton*, 475 U.S. at 47 (emphasis added). The bright-line treatment of taxation would be out of place in *Renton*'s flexible balancing inquiry.

Fourth, if we engaged in intermediate scrutiny under *Renton*, we would have to determine whether the tax is "narrowly tailored to serve a significant governmental interest." *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-94 (1984). Unlike strict scrutiny, intermediate scrutiny's narrow tailoring does not require that the government select the least-restrictive alternative. *See id.* at 299. But the regulation must still "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (internal quotation marks omitted). Even under this lower standard, a targeted tax likely fails: if the government (as here) is asserting a revenue goal, it could achieve that goal equally well by merely applying

a more broad-based tax—here, by using general revenues. This is another reason why *Renton* intermediate scrutiny makes little sense for taxation.

Justice Kennedy rightfully observed in *Alameda Books* that government "may not . . . impose a content-based fee or tax . . . even if [it] purports to justify the fee by reference to secondary effects." 535 U.S. at 445 (Kennedy, J., concurring in the judgment). Justice Kennedy was merely restating sound doctrine. *Renton* secondary-effects doctrine does not apply, *and has never applied*, to taxes. Recent case law merely clarifies the background rule, which is that content discrimination singling out particular subject matter is determined on the face of the statute—and that content-based enactments are analyzed under strict scrutiny. *See* Volokh, *supra*, at 657-64.

7. The Fact That This Case Also Involves Alcohol Is Irrelevant.

It is true that the government has wide discretion to regulate alcohol. But this case is not about alcohol licensing. It is about a content-discriminatory tax where the entities subject to the tax also serve alcohol. The presence of alcohol does not alter the doctrine.

Consider an establishment that serves alcohol. Initially, it is not subject to the Tax; but if it offers nude dancing, it becomes subject to the Tax. Clearly, the presence of nude dancing determines whether the tax applies. One could tell the establishment that the tax is easy to avoid—just stop serving alcohol. This is true, but irrelevant:

the First Amendment problem is that the establishment can also avoid the tax by not having nude dancing. This is what makes the tax a content-based tax on establishments that serve alcohol.

The Final Order repeated the State's argument that the Statute is "not 'content specific' in any real sense" because the Tax is assessed not on speech as such but on "a commercial enterprise": "it is the combination of conduct (the conduct of a business that sells alcohol) plus expression (nude dancing) that makes SB 8 not a content-based tax, but the content-neutral taxation of a certain type of business enterprise." Tr. op. at 10. In that sense, this case supposedly differs from contrary precedents that regulate "*speech alone*." *Id.* at 11 & n.4. In the "speech alone" cases, one can avoid the law or tax only by changing one's expression—whereas here, one can avoid the tax entirely by merely "altering [one's] business model to exclude alcohol." *Id.* at 11.

This is incorrect even on its own terms. The statute in *AAPC* discriminated against certain content (calls not made to collect government debt), but only in the context of robocalls: this is a combination of speech and conduct. *AAPC*, 140 S. Ct. at 2344-45. One could avoid the statute merely by calling people without using robocalls. The statute in *Playboy* regulated adult programming, but only on cable TV. One could avoid it merely by distributing adult programming outside of cable.

But fundamentally, this argument is astounding: a government can transform a content-discriminatory tax into a content-neutral tax simply by taking existing content discrimination *and adding discrimination based on something else*. By that logic, a tax on political speech would be content-discriminatory but a tax on political speech by people wearing hats would become content-neutral because of the addition of an extra basis of discrimination. (Just remove your hat.) By that logic, the affirmative action plans challenged in *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), were not really racially discriminatory, simply because they considered race together with many other features in a "holistic" system of review. The idea that discrimination becomes non-discriminatory by adding extra factors would be, if taken seriously, a recipe for discrimination everywhere.

Alcohol licensing does not water down the First Amendment. The U.S. Supreme Court once suggested that First Amendment considerations were reduced when alcohol licensing was involved: "[T]he critical fact is that California has not forbidden [nude dancing] across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *California v. LaRue*, 409 U.S. 109, 118 (1972). The Court rooted its holding in part on states' reserved liquor-regulation powers under the Twenty-First Amendment. *Id.* at 118-19. But the U.S. Supreme Court later rejected this reasoning.

See 44 Liquormart v. Rhode Island, 517 U.S. 484, 515-16 (1996) ("disavow[ing]" the reasoning of *LaRue* "insofar as it relied on the Twenty-first Amendment").

The Court wrote (citing its adult theater zoning and public indecency caselaw, *American Mini Theatres* and *Barnes*), "the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations" and to restrict "bacchanalian revelries." *Id.* at 515 (internal quotation marks omitted). Governments may obviously pass ordinances regulating nude dancing in establishments that serve alcohol, but such regulations would have to satisfy the First Amendment caselaw that would otherwise apply. *See* Volokh, *supra*, at 648-50.

C. The Statute Should Be Struck Down Under Intermediate Scrutiny.

One of the requirements of intermediate scrutiny is that the Tax must be "narrowly tailored to serve a significant governmental interest." *See, e.g.*, *Clark*, 468 U.S. at 293-94. Narrow tailoring, in the context of intermediate scrutiny, does not require a least-restrictive alternative, *see id.* at 299, but the tax must still "promote[] a substantial government interest that would be achieved less effectively absent the regulation" or must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799 (internal quotation marks omitted). Georgia cases hold, similarly, that the incidental restriction must be "no greater than is necessary to further the important governmental interest," *Maxim Cabaret*, 304 Ga. at 192—a standard from

Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 256 (1982), which itself comes from *O'Brien*, 391 U.S. at 377.

The Tax fails "narrow tailoring" for three reasons: (1) funding the Fund out of general revenues would be equally effective; (2) the Statute is overbroad; and (3) the State has not shown a sufficient connection between the secondary effects and the targeted group.

1. The Tax Is Not Narrowly Tailored Because Funding the Programs out of General Revenues Would Be Equally Effective.

To evaluate a regulation or tax that burdens expression under intermediate scrutiny, one must first identify what governmental interest the Tax seeks to further. This is easy, because the State written Final Order identified that interest: "The Act advances Georgia's interest in combatting the sexual exploitation of children with the proceeds of the Safe Harbor Fund." Tr. op. at 23. The State's interest is the interest in raising revenue to combat a particular social problem. (All parties agree that this interest is substantial, and indeed compelling.)

Next, to see whether the challenged speech-burdening policy is justified, one must see whether the tax "promotes a substantial government interest that would be achieved less effectively absent" that burden, or "burden[s] substantially more speech than is necessary to further" that interest. *Ward*, 491 U.S. at 799 (internal quotation marks omitted). The State need not adopt the least-restrictive alternative.

Clark, 468 U.S. at 299. But if one can identify an alternative policy that *does not* burden speech and that furthers the government interest *to exactly the same extent*, then it is necessarily true that the challenged policy contributes nothing to promoting the interest; i.e., it burdens more speech than necessary to promote the interest.

And this is true here. Revenue-raising taxes are radically dissimilar from regulations for purposes of this doctrine. A zoning ordinance might combat a secondary effect by directly controlling the contributory activities: the more targeted, the better. Surely, one can't zone *all* businesses into one part of town; and fighting the secondary effect using public funds may be less effective. But, *where the State has asserted no interest except raising revenue*, targeting serves no purpose. A broad-based tax raising the same revenue furthers the revenue interest to the same extent—but without burdening expression. The possibility of using general revenues is fatal to the Tax under intermediate scrutiny, just as it is under strict scrutiny. *See* Volokh, *supra*, at 669-72.

2. The Statute Is Not Narrowly Tailored Because It Is Overbroad.

A statute is overbroad if it reaches substantial protected conduct by parties not before the Court. That necessarily implies that the Statute burdens more speech than necessary—i.e., that it is not narrowly tailored. This is argued in Section D below.

3. The Statute Is Not Narrowly Tailored Because the Legislature Did Not Reasonably Rely on Evidence Connecting Adult Entertainment Establishments with Child Exploitation.

The Statute is not narrowly tailored because the State has not substantiated the relationship between licensed adult entertainment establishments and the secondary effects.

For the Statute to pass narrow tailoring, the State must show the legislature relied on evidence that "fairly support[s] the [government's] rationale for the law." *Alameda*, 535 U.S. at 438 (plurality opinion). The State cannot "get away with shoddy data or reasoning," *id.*, and the evidence must be "reasonably believed to be relevant to the secondary effects that [the legislature] seek[s] to address," *id.* at 442 (quoting *City of Erie*, 529 U.S. at 296 (plurality opinion)) (internal quotation marks omitted). Plaintiffs may cast doubt on the government's rationale "either by demonstrating that the [legislature's] evidence does not support its rationale or by furnishing evidence that disputes the [legislature's] factual findings." *Id. at* 438-39; *see also City of Erie,* 529 U.S. at 313 (Souter, J., concurring in part and dissenting in part) ("[I]ntermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, *and* for the alleviation expected from the restriction imposed." (emphasis added)).

ACE agrees that fighting child sex trafficking is an important, indeed compelling, interest. ACE agrees that the State and private entities alike should take steps to stamp out this plague. To that end, ACE's member clubs are trained by the Coalition Against Sex Trafficking ("**COAST**") to work with police and other officials to identify suspected traffickers and aid suspected victims. However, the Statute baselessly lumps legitimate adult venues together with pimps, panderers, and sex traffickers as guilty of sexual exploitation of children. This stigmatizing characterization is deeply offensive and has no factual basis.

The studies and testimony that the State relies on do not establish a connection between adult entertainment establishments and child exploitation or sex trafficking. ACE has submitted evidence supporting the view that no such connection exists. And a purported connection is also implausible as a matter of common sense.

a. The State's Studies Do Not Establish a Connection Between Adult Entertainment Establishments and Child Sex Trafficking.

The studies submitted by the State do not establish a connection between adult entertainment establishments and child exploitation or sex trafficking. Some studies do not analyze adult entertainment establishments at all; some do not discuss child sex trafficking; some rely on the mere rough spatial proximity between juvenile prostitution arrests and "adult sex venues" (a category that does not track the statutory definition of "adult entertainment establishments"), a proximity that is

unsurprising since many kinds of adult-oriented businesses are located near each other.

The State alleges that the legislature properly relied on evidence which showed a connection between adult entertainment clubs and child sex trafficking. The state has filed all pre-enactment evidence relied upon by the legislature; the studies and reports are Exhibits B through I to the State's Answer. (V2-88, 112-365.) *None of the studies or reports the legislature claims to have relied upon in passing the law can be reasonably believed to connect adult entertainment clubs with child sex trafficking.*

Exhibit B (V2-111), *Final Report of the Commercial Sexual Exploitation of Minors Joint Study Commission*, is a 2008 Georgia legislative committee report which conveys the committee's conclusions and does not serve as supporting evidence in and of itself. Mostly, the report refers to the findings of *Hidden in Plain View*, discussed below at Exhibit E. Otherwise, the report quotes a law enforcement official who opined on a connection between "exotic dancing and similar work" and prostitution generally (not child sex trafficking), then goes on to speculate that minors could possibly dance in adult entertainment establishments if they used fake IDs.

Exhibit C (V2-123), *Draft Report of the Joint Human Trafficking Study Commission*, does not discuss adult entertainment establishments.

Exhibit D (V2-138), *Commercial Sexual Exploitation of Children in Georgia: Service Delivery and Legislative Recommendations for State and Local Policy Makers*, does not discuss adult entertainment establishments.

Exhibit E (V2-205), *Hidden in Plain View: The Commercial Sexual Exploitation of Girls in Atlanta* (**"HIPV"**), was published in 2005 by the Atlanta Women's Agenda. The study examines 15 case studies of exploited minors, *see* HIPV at 8-13, 41-48, none of which involve adult entertainment establishments. The study creates maps attempting to correlate prostitution activity or juvenile delinquency with "adult sex venues," *see id.* at 23-27, 60-67. These maps are virtually impossible to interpret, are purely graphical, and provide no credible quantitative data that would allow the reader to go beyond casual "eyeballing." *See, e.g.*, *id.* at 24 ("There appears to be a spatial association between hotels and prostitution related activities."). Second, they use a highly aggregated category of "adult sex venues" that includes "strip clubs, lingerie modeling venues and sex shops," *see id.* at 22, 24; thus, the study's own classification methodology precludes drawing conclusions about the statutory category of "adult entertainment establishments." The authors lump different adult businesses together, *see, e.g.*, *id.* at 5 ("[M]any girls remain hidden behind closed doors in escort services, massage parlors, dance clubs and other 'legal' establishments."), whereas the issue here is

whether the licensed businesses described in the *specific* challenged section have the requisite causal connection to child sex trafficking.

Even if the spatial association were documented quantitatively, it would remain difficult to interpret due in part to past zoning, different adult businesses are often clustered, so a map might find a spatial association even with categories of adult businesses that are innocent of connection to child sex trafficking. In that context, "spatial association" is just a fancy way of saying "these businesses are near reprehensible activity," and taxing businesses based on being "near" bad actors does not comport with intermediate scrutiny. That is precisely the kind of "shoddy data and reasoning" that the U.S. Supreme Court has said is unacceptable.

Exhibit F (V2-274), *Deconstructing the Demand for Prostitution: Preliminary Insights from Interviews with Chicago Men Who Purchase Sex*, does not discuss minors.

Exhibit G (V2-311), *Adolescent Girls in Georgia's Sex Trade: An In-Depth Tracking Study*, discusses four sources of exploitation of adolescent girls: the streets, the Internet, escort services, and major hotels. It explicitly disclaims any analysis of strip clubs, in part because the other sources are more plausible: "In the City of Atlanta, where many of the State's adult entertainment clubs are located, every dancer is required to obtain a photo ID permit that—while not impossible to falsify—certainly would require a significant and well-coordinated fraud scheme to

get around. The City of Atlanta Police Department conducts sweeps regularly to check dancers' permits. Adult entertainment clubs further have to weigh the risk-to-reward ratio of employing underage girls; the consequences of getting caught can be quite severe" (p. 5). The State's own source casts doubt on a connection between adult clubs and child sex trafficking.

Exhibit H (V2-324), *Men Who Buy Sex with Adolescent Girls: A Scientific Research Study*, does not mention adult entertainment establishments.

Exhibit I (V2-341), *Adolescent Girls in the United States Sex Trade*, does not mention adult entertainment establishments.

Thus, none of the pre-enactment studies relied on by the legislature reasonably support the proposition that legal adult entertainment venues are connected to the sexual exploitation of children.

b. Legislative Testimony Does Not Establish a Connection Between Adult Entertainment Establishments and Child Sex Trafficking.

The legislature also relied on the testimony of three witnesses at a committee hearing. One witness described her experiences at a strip club *19 years before the hearing* (V9-244-248); another witness read a statement by someone else who described how her daughter was trafficked "out of an adult entertainment industry" [sic] (without detail as to what sorts of establishments) *more than 10 years before the hearing* (V9-248-251); and a third told the story of someone else with apparently

recent experience of underage dancing at local clubs, and generally talked about a connection between child trafficking and adult entertainment establishments (V9-251-253).

This falls far short of the "reasonably believed to be relevant" standard that *Renton* requires, 475 U.S. at 51-52. The secondary-effects doctrine is not a rational-basis doctrine that justifies extreme deference; it is an intermediate-scrutiny doctrine, where the burden is on the government and where courts must guard against unjustified assumptions and casual generalizations. The evidentiary requirement is not overwhelming, and no particular evidence is absolutely required, but what evidence there is must be on point and must justify a reasonable belief in its relevance. Such a belief becomes less reasonable as the State presents evidence that is out of date or anecdotal (especially when the anecdotes are second- or third-hand), or as the challengers present evidence that is more quantitative or rooted in social science (even if it does not negate every conceivable theory that might justify the Statute). Accepting that sort of evidence requires a degree of deference that one expects under rational-basis review, not in a First Amendment case.

Consider, for instance, *McCullen v. Coakley*, involving a challenge to a Massachusetts statute seeking to preserve access to abortion clinics by imposing strict limits on standing near such clinics. The U.S. Supreme Court analyzed this content-neutral statute under intermediate scrutiny, but it refused to defer to the

State's assertion that the problem of blocking clinic access was so widespread and intractable that it required a statewide, draconian solution. There was insufficient evidence that the State had relied on less-intrusive options, like individual injunctions or prosecutions. And, the Court pointed out, "far from being 'widespread,' the problem appears from the record to be limited principally to the Boston clinic on Saturday mornings." 573 U.S. 464, 494-95 (2014). This is how intermediate scrutiny should work: courts do not take government assertions at face value, and do not tolerate mere anecdotes as a basis for policy.

In short, the State has failed to show that the pre-enactment evidence supports a connection between adult venues and the sexual exploitation of minors.

c. A Purported Connection Is Implausible as a Matter of Common Sense.

ACE has submitted evidence supporting the view that there is no statistically significant correlation between adult entertainment clubs and child sex trafficking. Both studies, one by Professor Kenneth Land and another by Angelina Spencer, support the view that there is no significant correlation between adult entertainment clubs and the sexual exploitation of minors.

The State's studies should be examined critically because common sense suggests that adult clubs are a poor fit for crimes against children. As stated in *HIPV*, those seeking to exploit children go where children are. In Georgia, both patrons and employees of adult entertainment clubs are required to be adults. As noted by one of

the State's studies (Exhibit G), "In the city of Atlanta, where many of the State's adult entertainment clubs are located, every dancer is required to obtain a photo ID permit that—while not impossible to falsify—certainly would require a significant and well-coordinated fraud scheme to get around. The City of Atlanta Police Department conducts sweeps regularly to check dancers' permits." Because minors are not permitted to enter or work in adult entertainment venues, it is unlikely that adult entertainment clubs are "a point of access for children to come into contact with individuals seeking to sexually exploit children." SB 8. Someone looking for children will instead seek them out in other far-less-regulated venues—e.g., the Internet, the streets, or massage parlors.

Similarly, Georgia Bureau of Investigation Director Vernon Keenan testified (at the same hearing discussed above) that the Bureau does not investigate adult entertainment venues in connection with child sex trafficking, and that they focus on the internet and escort services—the most common sources of underaged prostitution.

In short, the evidence and lack of any corroborating news provides little reason to credit a correlation between minor sex trafficking (or other child exploitation) and adult entertainment clubs. The Trial Court accepted the government's interpretation of its evidence apparently without any independent analysis, adopting the government's characterization of its own evidence verbatim

from its own briefs. The Statute is not narrowly tailored and thus fails intermediate scrutiny.

D. The Statute Is Unconstitutionally Overbroad.

The overbreadth doctrine has been recognized by the U.S. and Georgia Supreme Courts. *See Thornhill v. Alabama*, 310 U.S. 88 (1940); *NAACP v. Button*, 371 U.S. 415 (1963); *Johnson v. State*, 264 Ga. 590 (1994). An overbreadth challenge states that, even if the statute could constitutionally be applied to the challenger, it should nonetheless be facially invalidated because it would reach a substantial amount of protected conduct by other parties not before the Court. Thus, *even if the First Amendment arguments in Sections B and C above fail*, the Statute should still be invalidated because it is unconstitutionally overbroad.

1. Taxes Can Be Challenged for Overbreadth.

The overbreadth doctrine has been applied against taxes or fees, such as registration fees or charges for security assessed as part of special-event permitting. *See, e.g.*, *Bledsoe v. City of Jacksonville Beach*, 20 F. Supp. 2d 1317, 1325 (M.D. Fla. 1998) ("With each officer being paid a minimum of $20 for at least three hours, the event could be taxed out of existence before the first speaker takes the stage. This section fails . . . because it is overbroad and vague."); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981, 998-99 (S.D. Ind. 2008) (striking down a

$250.00 registration fee for selling sexually explicit materials, which the federal district court characterized as a "tax," as "unconstitutionally . . . overbroad").

There is nothing about the tax context that excludes an overbreadth challenge.[5]

2. The Vagueness of a Statute Contributes to Its Overbreadth.

Note the difference between vagueness and overbreadth challenges. A vagueness challenge states that the Statute is vague *as to the challenger's own activity*. *ACE is not making a vagueness challenge*, because the Statute clearly covers the activity in ACE's member clubs.

By contrast, an overbreadth challenge states that the Statute should be struck down because it reaches protected activity *by others not before the Court*. The focus of an overbreadth challenge is thus the applicability of the Statute to third parties. Such a challenge requires first determining what the Statute covers. And "[i]n

[5] The Trial Court's statements that "taxes are rarely unconstitutionally overbroad" and that courts have "rarely—if ever—found a tax unconstitutionally overbroad," (V11-109), like the rest of its opinion, were taken verbatim from the State's proposed order, which in turn was substantially lifted from its briefs. ACE explained why the cases cited in that paragraph were inapposite, and cited *Bledsoe* and *Big Hat Books* as examples of tax overbreadth cases. Pl.'s Reply to Def.'s Resp. to Pl.'s MSJ. (V11-29.) ACE is unaware of any statistical analysis of tax overbreadth cases, so the State's "rarely—if ever" statement seems unwarranted, and even if it is true, that reflects not a doctrinal difference but perhaps the fact that governments usually have the good sense not to pass such schemes in the first place. The State ignored ACE's rebuttal in its proposed order, and so the Trial Court's opinion entirely ignores important arguments from ACE's briefs.

making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The [U.S. Supreme] Court has long recognized that ambiguous meanings cause citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982) (internal quotation marks omitted).

It is thus blackletter law that an overbreadth challenge may use the vagueness of statutory terms in arguing that the Statute reaches substantial protected activity *by third parties*. This is not a conflation of overbreadth with vagueness, tr. op. at 36-37, but rather an appropriate invocation of vagueness (as to third parties) as part of an overbreadth challenge.

3. The Statute Is Overbroad.

Under the Statute, an establishment can be an "adult entertainment establishment" subject to the Tax if its entertainment consists of substantially nude persons dancing or engaged in movements of a sexual nature. "Substantially nude" is extraordinarily broad; because it includes any display of the female breast below the areola, any costume that shows the side or underside of the breast (now common in women's fashion) counts as "substantially nude." Many performances or concerts

where a person clothed this way dances or makes sexually suggestive movements would be covered.

Because "consists of" is vague and undefined, we do not know whether a single such performance or a regular run of a single show would be enough to make a business liable for 1% of their gross revenue for the entire year, whether one should measure what proportion of total time (or what absolute amount of time) is spent with a "substantially nude" person on stage, or whether one should measure what contribution such displays have to the venue's revenue.

The term "movements of a sexual nature" is also vague. This is the sort of language, like the definition of "loiter[ing]" as "remain[ing] in any one place with no apparent purpose," *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999) (plurality opinion), or the prohibiting of conducting oneself "in a manner annoying to persons passing by," *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), that is so subjective as to not even be ascertainable. The sweep of the statute is thus extremely broad.

The Statute could cover traditional shows with risqué content, such as *Cabaret*, *The Rocky Horror Show*, *Spring Awakening*, or *The Best Little Whorehouse in Texas*, in venues like the Fox Theatre, Mercedes Benz Stadium, or State Farm Arena. These venues would also be subject to the Tax if they host entertainers known for revealing costumery like Rihanna, Miley Cyrus, Lady Gaga, Beyoncé, or

Madonna. Any venue that permits alcohol and hosts drag, burlesque, or similar variety shows could be subject to the Tax. Another example would be hotels that offer in-room television entertainment including movies with sexual content (even non-pornographic), or movie theaters (many of which serve or permit alcohol) that show movies with sexual content (again, not just pornographic).

This is clearly a "substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). The Statute should therefore be struck down on overbreadth grounds.

VI. CONCLUSION.

The application of the Tax to ACE's member clubs should be declared unconstitutional, the State should be permanently enjoined from collecting or enforcing the Tax, and those who have paid the Tax already should receive a refund with interest.

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

Respectfully submitted this 15th day of April, 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 BRIEF**" via U.S. mail and by email, pursuant to agreement of counsel, as follows:

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EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S24A0772

March 28, 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 appellant in the above case is granted. You are given an extension until April 15, 2024.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 51(1).

A copy of this order **MUST** be attached as an exhibit to the document for which you 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