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Supreme Court of Texas.
Susan Combs, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas, Petitioners,
v.
Texas Entertainment Association, Inc. and Karpod, Inc., Respondents.
No. 09-0481.

March 25, 2010.

Appearances:

James C. Ho, Office of the Texas Attorney General, Austin, TX, for petitioners.
Craig T. Enoch, Winstead PC, Austin, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in the final cause of the morning. It's 09-0481, the Susan Combs, Comptroller of Public Accounts of the State of Texas and Greg Abbott, Attorney General of the State of Texas versus Texas Entertainment Association and Karpod, Inc.

MARSHALL: May it please the Court, Mr. Ho will present argument for the Petitioner and the Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

ATTORNEY JAMES HO: Mr. Chief Justice and may it please the Court. Four decades of precedent support the State's power to impose even greater restorations on adult businesses under Texas law.

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JUSTICE HARRIET O'NEILL: Now that's presuming this is interpreted to be a restriction rather than a tax and has there been any Supreme Court case that has set a fee operates as a restriction and under the Secondary Effects Analysis?

ATTORNEY JAMES HO: I think there are several things going on in Your Honor's question. I will try to hit each of them. In terms of taxes and fines, the U.S. Supreme Court has upheld regulations of adult businesses that are enforced strictly by fine. In Young, the zoning issue upheld in Young was enforced by a fine. Pap's A.M. likewise.

JUSTICE HARRIET O'NEILL: But never by a tax right? So we're on new grounds here.

ATTORNEY JAMES HO: New grounds in the sense that the terminology has changed, but the substance really is not different. If I could maybe cut to the premise of Your Honor's question, if the Court were to conclude that there were two reasons, two interests served by this law, on the one hand revenue will be raised, but on the other hand, we have certainly asserted an additional interest, an interest in deterring this combustible combination of activities in order to prevent--

JUSTICE DAVID M. MEDINA: Isn't that the primary reason is to raise revenue and it seems like that reason to raise revenue is really an umbrella to do this and that what is secondary is to fund that money to this, these situations, which actually money is needed and it seems like it's more of a punishment.

ATTORNEY JAMES HO: Well, we only need one purpose. First of all, if it's punishment, that's like the other cases where the ban was, in fact, upheld. If there's only one purpose that the Court finds legitimate, the fee is a valid and that's the Pap's A.M. case where in Pap's A.M., frankly, it was a much more difficult case for the State in that sense because in Pap's A.M., there were two interests that the Court identified. One was to combat secondary effects-- rape, sexual assault, other crimes. There was also evidence, substantial evidence that the City Council simply didn't like pornography, didn't like nude dancing and the Court said one purpose is enough.

JUSTICE DAVID M. MEDINA: But does the activity, the nude dancing as it were, have to tie into the purpose that the State is trying to protect which is raise fees for victims of violence, domestic violence?

ATTORNEY JAMES HO: The State has to be concerned with secondary effects. The question I think before the Court is where does the Court, where can the Court look to find that evidence that the government interests being served includes secondary effects and we would submit that the Supreme Court has repeatedly said you can look anywhere. In fact, the Court has never said that you have to look just in the contemporaneous legislative history.

JUSTICE HARRIET O'NEILL: But typically, the analysis on secondary effects has to be entirely eliminate them. It's either been by an outright ban or by a zoning regulation so that it's completely outlawed here, you're not outlawing the activity. You're just putting a fee on it.

ATTORNEY JAMES HO: If I may use an analogy, Your Honor, and I think it will answer Your Honor's question. Imagine speeding laws, right? If every jurisdiction in Texas were to amend its laws and to say every mile over the speed limit is now punished by $10,000 per mile. That would, frankly, have a much better deterrent effect, right? Many more deaths would be prevented, but there would be no revenues. Presumably, nobody would want to incur that fee. Now to be fair--

JUSTICE HARRIET O'NEILL: Well if you put a First Amendment overlay on that because that doesn't have First Amendment applications.

ATTORNEY JAMES HO: That's exactly what I was going to say is that not First Amendment case, but the principle is the same because the principle is there can be two purposes. There's absolutely nothing wrong or peculiar with a tax that has two effects--one to raise revenue, but another to have some sort of substantial deterrent effect and there's certainly no dispute. It's undisputed in this case that this fee has a substantial deterrent effect. We're doing exactly what California did in the LaRue case. In LaRue, the U.S. Supreme

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Court took a look at what California was concerned about. You have the combination of alcohol, which causes people to be uninhibited. You combine that with exposure to not only live nude dancing, but pornography and other aspects, that combination, the Court says you can absolutely regulate it. It would frankly be if anything turning the First Amendment on its head to say that you can criminalize, but you can't impose a sort of more modest regulation.

JUSTICE EVA GUZMAN: So could the fee be $5? Wouldn't it be a greater deterrent if it wass $10 or $15?

ATTORNEY JAMES HO: It may be and that we would submit as a quintessential legislative policy call. All the time, the legislature will determine a certain crime should be punished by a felony or by a misdemeanor, a different level of penalty and in this case, the U.S. Supreme Court has been emphatically clear we want to especially encourage deference to legislature to make different calls.

JUSTICE EVA GUZMAN: And in looking at secondary effects, what, can any group then come up and say you know we are also affected by the talks at combination that you've described and then also receive funding or look for funding or look for an additional tax.

ATTORNEY JAMES HO: Well I should be clear. How the money is spent isn't necessary to our defense of the statute. If the money were burned at the [inaudible] square, it'd still be valid. For example, in the cases that the U.S. Supreme Court has upheld where there was a financial assessment, not jail time or at least jail was an option, but they had fine as an option, they never said well it depends on how the fine is spent. They've never said that because that's not, the critical point is the deterrence of this combination. It is undisputed in the record both in the trial and in the briefing of this Court. This fee will discourage, is substantially discouraging adult businesses from combining alcohol consumption with live nudity. That's exactly what the U.S. Supreme Court said we could do in numerous cases from California v. LaRue all the way up to 44 Liquormart. 44 Liquormart, in fact, the Court was unanimous enforcing that control.

CHIEF JUSTICE WALLACE B. JEFFERSON: Under that principle, could you also, could the State also want to discourage drinking and accent, a cover charge for every establishment that serves liquor.

ATTORNEY JAMES HO: Absolutely. In fact, that's what the U.S. Supreme Court said in Bellanca. In Bellanca, the U.S. Supreme Court said that certainly governments can say we're going to limit the sale of alcohol and the U.S. Supreme Court further said, if you can do that, then certainly you can limit alcohol just in adult businesses. Both of those powers are well within State governmental discretion.

JUSTICE DON R. WILLETT: One of the Amici aligned with the State argues that this case is not really about nude dancing at all. It doesn't implicate the First Amendment at all. It's really about being able to drink while watching nude dancing. What do you make of that Amici's argument?

ATTORNEY JAMES HO: I think that's a powerful argument. This law is just like California v. LaRue in the sense that if you want to continue on, don't have alcohol or, for that matter, engage in different forms of adult expression other than live nude dancing, which live nude dancing we know from Barnes and Pap's A.M. is actually not subject to absolute protection. In those cases, the government completely prohibited it and the Court upheld it in both cases.

JUSTICE PAUL W. GREEN: So it can apply to films as well as live entertainment, same theory being in place?

ATTORNEY JAMES HO: It would depend on what the fee says. If the regulation is no alcohol combined with any number of adult forms of entertainment, that would be just like LaRue. But if Your Honor is saying what if you don't, put aside the alcohol, what if it's just a total ban on all adult expression. Candidly, we think that would be a more difficult case. That is interestingly pretty much what the legislature thought about when they looked at an alternative proposal by Representative Thompson, a Bill that I believe plaintiffs seem to believe is valid, according to the legislative record. That law would have said a tax on door charges on all forms of adult entertainment. That's we would say is very different from this law and, frankly, harder to defend because our law only circumscribes a very small category of adult entertainment--

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nudity and alcohol--whereas Thompson covers everything. We can ban what the Texas law currently targets. We can get rid of all adult entertainment that combines those two things. Under current precedent, we can't ban all adult entertainment altogether.

JUSTICE PAUL W. GREEN: Well, I'm having a hard time with the distinction. Certainly live versus videos is different. But it's still a sexually oriented business and why the one was singled out rather than one category.

ATTORNEY JAMES HO: The key point of distinction is the alcohol alright. Because our case only applies to alcohol, LaRue covers it completely.

JUSTICE PAUL W. GREEN: So the fact that you're trying to deter with the fee, that is to say what have you applied for, would not apply with respect to alcohol being served at the say the picture theater showing pornographic films.

ATTORNEY JAMES HO: The current Texas law would not apply if it was not live nudity.

JUSTICE DALE WAINWRIGHT: Amicus also argues that there's no expressive conduct at all at issue here. You think there's no free speech issue at all?

ATTORNEY JAMES HO: Under the Scalia and Thomas view, there would be no First Amendment issue whatsoever. Under the holdings of the Court, there is only the most minimal protection and that protection does not apply here because our interest is in combating secondary effects. Again, I think the fatal flaw of plaintiff's position is this. When we talk about the regulation of expressive conduct, that's the O'Brien framework and all the cases following that cite O'Brien. You have to distinguish between State interests that focus on the expression and State interests that focus on the conduct. The Thompson Bill seems to focus on the expression by saying we're going to get rid of all of it. This Bill that the current law targets not all adult entertainment, not all adult expression, but just when it combines alcohol with live nude dancing. Let me be very clear on this point. We can get rid of all the alcohol. That's LaRue and all of its progeny including 44 Liquormart. We can also get rid of all live nudity. That's Pap's and Barnes.

JUSTICE DAVID M. MEDINA: But then the State wouldn't been able to have this statute that raises $25 million towards intended purpose. Let me ask you this--

ATTORNEY JAMES HO: But it depends because a lot of the laws that were upheld by the Supreme Court did generate funds through fines.

JUSTICE DAVID M. MEDINA: Well but if there's no entertainment business, then there's no revenue to collect. Let me ask you this.

ATTORNEY JAMES HO: Well, it's like speeding. Speeding occurs even though it's technically illegal.

JUSTICE DAVID M. MEDINA: Okay, the DA says that the State improperly uses post enactment evidence to analyze this and that on a constitutional basis that it's not narrowly tailored. Could you address that?

ATTORNEY JAMES HO: Absolutely, Your Honor. A majority of the Court below essentially agreed that we have the power to do this. The issue below was really the evidentiary issue that Your Honor is asking so let me address this straight on. I want to commend whoever scheduled the cases this morning because I think this case provides a very nice contrast to the first case, from the first case that we heard this morning because in the first case, we have the U.S. Supreme Court repeatedly telling courts that there's a very high evidentiary burden when it comes to Congress wanting to abrogate State-sovereign immunity. At the same time, for purposes of this case, the U.S. Supreme Court has repeatedly urged the opposite. They've urged a very low evidentiary standard when it comes to State and local governments wanting to regulate in this very sensitive area of alcohol and adult businesses. The Court has said time and time again that it will uphold regulations of adult businesses so long as they can find a valid interest in secondary effects. They

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have to find a secondary effects interest, but they can find it anywhere. They can find it in the statutory text. They can find it in the legislative history, but they could also forget all of that and find it only in current governmental interest, only in legal briefs filed in the U.S. Supreme Court. In Barnes at page 2---

JUSTICE HARRIET O'NEILL: Well let me just ask you this. How should we look at the fact that the regulation here is in the form of a tax? Should we look at that a little more strictly that you're putting a tax on expressive conduct as opposed to a regulatory type scheme? And that seems to be Counsel's argument that this is first and foremost a tax on speech.

ATTORNEY JAMES HO: It is, indeed, Counsel's argument. It was an argument that a majority below rejected and I think rightly so for this reason. All the tax cases they cite involve activities that the State could not ban. Whereas, and so the traditional principle or the power to tax or the power to destroy has real purchase in those cases. That's not true here. We can ban this.

JUSTICE HARRIET O'NEILL: Can you distinguish Simon and Schuster? I was surprised that there wasn't much discussion of that case and that seemed fairly similar scenario.

ATTORNEY JAMES HO: Well Simon and Schuster involved talking about books like Malcolm X and the autography of MLK, things that we can't ban. There's no question that we cannot ban books.

JUSTICE HARRIET O'NEILL: Well, my understanding of the statute in Simon and Schuster was books that were, and this particular book graphically recounted crimes and that that's sort of reprehensible conduct which some viewed this conduct as as well and so if that type of speech is protected, then why shouldn't this be or the same analysis of why?

ATTORNEY JAMES HO: Because it's a very different kind of speech, Your Honor. That kind of speech in Simon and Schuster is entitled to full protection. The U.S. Supreme Court has repeatedly warned courts not to equate traditional core First Amendment speech, artistic speech, political speech, not to equate that with adult speech. In LaRue, at page 118, the Court was very emphatic not to confuse the two and even Justice Brennan, who dissented in many of these cases, explained in Renton at 55 and 56 that these are two very different areas. Just because you're upholding adult regulation doesn't mean you would uphold artistic or other forms of regulation. I see my time is running out. If I may make one brief point if there are no other questions. The plaintiff's argument is essentially premised on characterizing Texas as a content-based tax, not withstanding decades of precedent regulating similar laws targeting precisely the same activities. We think this is especially curious because if anything might be a content-based tax- it might be the proposal by Representative Thompson, which plaintiffs say is valid. After all, Texas law applies only to adult businesses that combine alcohol with live nudity, a combustible combination of activities that Texas can ban. By contrast, the Thompson proposal applies to all adult businesses, which Texas cannot ban under current U.S. Supreme Court precedent. So it's difficult to reconcile their position here with 40 years of precedents not to mention their position on Thompson. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, counsel. The Court is now ready to hear argument from the respondents.

MARSHALL: May it please the Court, Mr. Enoch will present argument for the Respondent.

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE RESPONDENT

ATTORNEY CRAIG ENOCH: This actually isn't for the Court's help. It's for me to remember what my argument is. I will follow the chart through. May it please the Court, Stewart Whitehead is sitting at counsel with me and has been the main counsel in this case throughout. This is a tax case. There is no question about it and the tax statute is targeted, uses as one of its identifiers for when the tax is imposed protected speech. The State concedes that they cannot meet strict scrutiny and they have not cited any case to this Court and we have cited several.

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JUSTICE HARRIET O'NEILL: What about the Utah case?

ATTORNEY CRAIG ENOCH: Your Honor, the Utah case in its very opening statement said this is not a content-based tax and, in fact, the tax was imposed on nudity and the tax was not imposed on nude, live nude performance. Our tax is imposed only in the presence of live, nude performance. This is a content-based tax.

JUSTICE DON R. WILLETT: Do you disagree with the State that the lawmakers could, if they wanted to, just impose an outright ban on live nude entertainment?

ATTORNEY CRAIG ENOCH: I disagree that they could impose an outright ban on live nude entertainment. I'm not even sure if Justice Scalia can be convinced that there is a message with live nude entertainment and it was that message that was targeted that it would violate the First Amendment. He's just not convinced that there's a message worth protecting, but that does tell you that if it's the message that you're targeting, you cannot ban live nude entertainment. Let me briefly call the Court's attention to the chart.

JUSTICE DALE WAINWRIGHT: Counsel, before you go to the chart.

ATTORNEY CRAIG ENOCH: Yes, sir.

JUSTICE DALE WAINWRIGHT: How do you reconcile Erie v. Pap's with your statement that the State cannot ban public nudity generally, not Justice Scalia's concurrence, but the majority judgment in that case.

ATTORNEY CRAIG ENOCH: Your Honor, I disagree. In Pap's, the whole question was whether they were banning nudity, which is a conduct or banning live nude entertainment. The discussion in Barnes and the discussion in Pap's was whether the banning of conduct, the banning of conduct, which had an incidental impact on speech was prohibited and they said it was content neutral. It had an incidental impact and therefore the ordinance was permissible in those cases, but I'm not sure it was a complete ban.

JUSTICE DALE WAINWRIGHT: So your distinction is that this situation involves expression and regulation of content and Erie v. Pap's did not involve those two things?

ATTORNEY CRAIG ENOCH: Erie and Pap's, the argument was made because it incidentally affected speech.

JUSTICE DALE WAINWRIGHT: That's the distinction?

ATTORNEY CRAIG ENOCH: That's the distinction.

JUSTICE DON R. WILLETT: So you believe they could ban public nudity, but not nude public entertainment?

ATTORNEY CRAIG ENOCH: That's correct, Your Honor, because the differences between the conduct that's being banned that incidentally affects speech and conduct that is targeted for its speech to be banned and let me call the Court's attention. I go from the beginning--

JUSTICE DAVID M. MEDINA: Mr. Enoch, I know you're eager to get to that chart and maybe to answer a lot of the questions that we have, but just let me ask you-- how does this tax if it is a tax, it's only $5, how does that affect the First Amendment and the right to express this, if it is an expression, as free speech? I can see if maybe it was $100, but it's $5.

ATTORNEY CRAIG ENOCH: Well, as a matter of fact, Your Honor, let's talk about the fee cases. We've cited the Court to the fees cases. They've ignored them altogether. The fee cases really impact the issue of restriction, pre-restriction on speech. If you have to pay a fee in order to make this speech, it's like a timing issue. There's a constitutional limit. The courts that talk about a fee for the privilege of making speech has

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to be reasonably related to the cost of policing the activity surrounding the speech and, therefore, has to be revenue neutral. The financial report on this statute was that it would tax 169 businesses and generate $87 million for the fund in Texas. That's over $500,000 a year per establishment. This is not a $5 head tax, which seems to be nominal.

JUSTICE DAVID M. MEDINA: It's not really costing the establishment. It's costing the patrons that visit there, right?

ATTORNEY CRAIG ENOCH: Well, the statute said you could charge the patrons or you could charge it from the establishment, but the fee cases are very careful to point out, very careful to point out that we measure the fee against the cost of policing. There is no policing here. There is no showing here. They don't even make an argument that $87 million a year is what's necessary to police these establishments and, in fact, there's no policing the establishments at all. So in answer to your question, it's not the issue of the $5. You can't tax content-based speech. You can have a fee or a permit, but it has to be revenue neutral. That's the answer to the question about a tax on content-based speech.

JUSTICE NATHAN L. HECHT: But to take you back just a moment to something you said earlier, you think the issue is with nude entertainment that if the statute just said businesses that serve alcohol and have nude employees that you wouldn't have any problem with that.

ATTORNEY CRAIG ENOCH: Your Honor, the only prob--you would have to go through the intermediate scrutiny test. You would have to go through the intermediate scrutiny test because it does incidentally affect speech and so you do have to go through the First Amendment test.

JUSTICE NATHAN L. HECHT: Well I thought I understood you to concede earlier that the State could regulate public nudity?

ATTORNEY CRAIG ENOCH: Yes, Your Honor, under Barnes and Pap's, they could regulate public nudity if they satisfy the intermediate scrutiny test.

JUSTICE NATHAN L. HECHT: Would this do that?

ATTORNEY CRAIG ENOCH: No, Your Honor.

JUSTICE NATHAN L. HECHT: Why not?

ATTORNEY CRAIG ENOCH: Because it's not narrowly tailored. There's no predominant purpose to address secondary effects.

JUSTICE NATHAN L. HECHT: Why does it have-- there is a purpose. Why isn't it, why do you think it's not predominant?

ATTORNEY CRAIG ENOCH: Predominant, Your Honor, going to my wonderful chart. These cases break down between two issues--the revenue power of the state and the police power of the state. If it's the revenue power being exercised and it's content based, strict scrutiny applies--

JUSTICE HARRIET O'NEILL: Well, but an argument's been made that the revenue power in certain circumstances is a regulatory power.

ATTORNEY CRAIG ENOCH: Your Honor, the argument is only made because they tell you to ignore the difference between a tax, a fee and a regulation. That's the State's argument. The foundation of their argument is to ignore whether it's a tax or a regulation or a fee, but one thing for certain in the U.S. Supreme Court whether they disagree about its protected speech or not protected speech, they almost universally are in agreement that whether it's a tax or whether it's to exercise a police power does make a difference. Anthony Kennedy says while the city can zone adult businesses, it can't accomplish the same purpose affecting the secondary effects by imposing a fee on the adult business and Justice Scalia addresses

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the very argument that the State made here this morning that if I'm speeding down the road and I get caught and I pay a fine, that's the same thing as paying a license fee to speed down the road. Justice Scalia is very pointed about that. It is a fundamental difference between prohibiting yelling fire in a crowded theater and charging a tax for the privilege and the reason there's a difference is because the tax for the privilege disconnects, delinks this police power from the secondary effects it's affecting.

JUSTICE HARRIET O'NEILL: Well, in that situation, the fee doesn't advance the purpose. In fact, it undermines the purpose of the ban on crying fire in a crowded theater. In this situation, the argument is made that the fee or the license, if you will, to be able to view nude expression and drink alcohol, it does have that secondary effect. It does reduce the number of people who frequent these establishments. So it is distinguishable from that case isn't it?
ATTORNEY CRAIG ENOCH: I disagree, Your Honor, because that's a primary effect not a secondary effect. Secondary effects are crime. It's the linking of alcohol and viewing live nude performances that leads to sexual assault. That's the secondary effect; if the police power is being exercised you can move it. That's what Scalia was getting at in the fire analysis. If the State really believes that crime is caused by this connection, then the State is inconsistent by giving you permission to do exactly that subject to paying a tax. It is an entirely different thing to have permission to do the thing that harms your community if you pay a tax as opposed to the State sign, this is harming the community. We can step in and we can prohibit the conduct. We can slow the conduct down. We can change the manner of the conduct.

JUSTICE HARRIET O'NEILL: Hasn't the Court sort of created some leeway here to experiment in terms of reducing secondary effects in this area?

ATTORNEY CRAIG ENOCH: Your Honor, only, only if the predominant purpose in the statute is to address the secondary effects. If the predominant purpose in the statute has nothing to do with the secondary effects, White River and under the Second Circuit, we'd say wait a minute, you've never dropped out of strict scrutiny. Part of the issue that they raise in their briefs, they want the Court to immediately jump to strict scrutiny, I mean intermediate scrutiny to assess whether you've got a predominant purpose. The predominant purpose has to be established through the statute first before the Court drops to whether they've satisfied intermediate scrutiny.

JUSTICE DON R. WILLETT: If the statute says the predominant purpose is to prevent sexual assault and you are argue that predominant purpose is to suppress erotic speech is that correct?

ATTORNEY CRAIG ENOCH: Your Honor, I don't think the statute says the predominant persons to address sexual assault. As a matter of fact, the predominant purpose is to raise a fee that will be deposited 25 million.

JUSTICE DON R. WILLETT: [Inaudible] an act, I'll read it, an act relating to the imposition and use of a fee on certain sexually oriented businesses and certain programs for the prevention of sexual assault, but you don't read it, you don't read that sentence as expressing a purpose to prevent sexual assault?

ATTORNEY CRAIG ENOCH: All I see in the statute is to raise funds for a sexual assault funding program that could be resurrected from a general fund. If that were the case, then you dropped intermediate scrutiny and it has to be narrowly tailored and so the narrowly tailored is that it has to address the secondary effects.

JUSTICE DAVID M. MEDINA: Which is post-enactment evidence that your client complains of?

ATTORNEY CRAIG ENOCH: Your Honor, well, the post-enactment evidence was to come in and start arguing that there really was a connection, a linking between the conduct, the alcohol and the live nude performance. Actually the connection was between alcohol and sexual abuse, but the argument was well alcohol was consumed at these places so they could control it. That's post enactment, but the confusion that's made is they want to use the post-enactment evidence to establish the predominant purpose of the statute and the statute pays an indoor fund. The statute does not address the secondary effects, which is to stop the conduct, which goes back to the point that they give permission to do the very thing that they claim causes the harm to community.

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JUSTICE DAVID M. MEDINA: So is there a way for the State to rewrite this statute so it complies and passes constitutional muster?

ATTORNEY CRAIG ENOCH: Your Honor, I do not think that the State could come and say the predominant purpose of this statute is to regulate the serving of alcohol at a live nude performance and use it to assess a tax. As a matter of fact, every case, every case that has looked at zoning and regulation, every case that's looked at that has cautioned governments that what they can do through their police power by time, place and manner restrictions, they cannot do through their general power to raise revenue which is to use a tax.

JUSTICE DALE WAINWRIGHT: Counsel, the State's response to that is all the tax cases you cite involve conduct that the State is not at liberty to ban, which is different from the conduct here. What's your answer to that?

ATTORNEY CRAIG ENOCH: Your Honor, I think that's a misreading of Barnes and Erie. Barnes and Erie is deciding is live nude performance protected speech and they say just barely, if only marginally so. The 8th Circuit reversed some of the words attempting to put Barnes and said, came to the conclusion that live nude entertainment was barely protected as speech. The significance is that that's why in Alameda books, that's why even I think it's in Fly Fish, as a matter of fact, the 11th Circuit case, the courts are very careful to distinguish between the exercise of the police power, time, place, manner restrictions and the tax on speech because of the very question that's been raised, they don't want a state to use its revenue power to raise funds off of speech. I--

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it proper or not for the State to have the position that live nude dancing should be discouraged either through a complete ban or zoning or a tax? Is it unconstitutional for the state to target live nude dancing because it believes it's culturally unsound? It's immoral? It's the kind of speech that should not occur and maybe ought to be banned or at least restricted? Is that not in conformity with the Constitution in your view?

ATTORNEY CRAIG ENOCH: I think it would be very difficult for the State to say as its predominant purpose we don't approve of live nude dancing and, therefore, we prohibit live nude dancing solely.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, if it's not banned completely, can it be regulated? Can it be restricted to certain areas of the county or can it be removed from churches and schools through zoning and if that can be done, then why can't it be discouraged through a tax?

ATTORNEY CRAIG ENOCH: Your Honor, the first question. I do believe that if the predominant purpose of the statute was to address the secondary effects of which there's evidence of secondary effects and they applied a reasonable time, place, manner, restriction, then the State could regulate to the extent of moving it someplace or the hours because they meet the intermediate scrutiny test on that. If they cannot meet the intermediate scrutiny test because they cannot meet the predominant purpose test if it's a tax because if it's a tax, they disconnected the predominant purpose to address secondary effects, the crime, by time, place and manner restrictions to a tax to generate revenue over the commission of the very thing they're claiming causes harmful effects and it becomes a primary, a primary effect. I don't like the speech, therefore I tax the speech. That's what this is all [inaudible].

JUSTICE NATHAN L. HECHT: Your concern about the record, I'm not clear on it. It's not so simple, I assume that the legislature could just go back and make a fuller record. You don't think a record could be made or that they just stubbed their toe?

ATTORNEY CRAIG ENOCH: Your Honor, to impose a tax like this, I don't think the record can be made and I want to avoid the confusion.

JUSTICE NATHAN L. HECHT: Well then what difference does it make if we look at post-enactment evidence? If it doesn't legitimize the tax, it doesn't. If it does, you could just put it in the record.

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ATTORNEY CRAIG ENOCH: Your Honor, it is correct to ask the question. I have not been clear. Post-enactment evidence has nothing to do with whether this tax is permissible, but the entire breadth of the State's argument has been to ignore the tax cases. It doesn't apply based on footnote and to go immediately to intermediate scrutiny.

JUSTICE NATHAN L. HECHT: Right, the court of appeals expressed some concern about post-enactment evidence and you don't share that concern or you do?

ATTORNEY CRAIG ENOCH: Well I do share the concern if you reach the question post-enactment, I think Judge Jones went beyond where he needed to be because we were never in the intermediate scrutiny level anyway, but the post, the enactment evidence, the evidence relied upon has to appear some place at the time they're doing the legislation.

JUSTICE NATHAN L. HECHT: Why, that's what I'm getting at, why?

ATTORNEY CRAIG ENOCH: I think illusions helps explain. You can tell the intent of the legislature by the language it uses in the statute, but sometimes the language in the statute isn't sufficient and so you look to the legislative history, but something has to appear at the time the statute's enacted to demonstrate the predominance. You can't take this statute which is a fee imposed on the deal and then come in years later and say oh, but wait a minute: we have a different idea that is inconsistent with what the language of the statute is.

JUSTICE NATHAN L. HECHT: In the earlier case, it's important to know what the legislature was intending, what the Congress was intending because the 14th Amendment does not let them set aside state immunity without clearly intending to do that, but here, aren't we more concerned with the effect of the statute whatever the intent was of the legislature.

ATTORNEY CRAIG ENOCH: Your Honor, Simon and Schuster says, cautions courts not to divine the predominant purpose of the statute by the effect of the statute because this predominant purpose has to be showing contemporaneously with the Court coming in. The problem with Judge Puryear who is one of its dissents was he looked at well he did have a reduction, I'm not sure that's the case, in alcohol consumption at least over some testimony that somebody might drink one less beer if they had to pay $5 and he said that could be a purpose for the statute, but that's not intermediate scrutiny analysis.

JUSTICE NATHAN L. HECHT: I still don't understand if the legislature intended to address secondary effects and the post-enactment evidence showed that it just didn't happen. What difference would their intent make? It wouldn't say the statute.

ATTORNEY CRAIG ENOCH: Your Honor-- no, it wouldn't. The-- Your Honor--

JUSTICE NATHAN L. HECHT: So it looks to me like you can look it for some things and not for others.

ATTORNEY CRAIG ENOCH: Your Honor, on whether you're trying to establish that you have a legitimate government concern, it doesn't matter if it, in fact, didn't address the government concern. In other words, post enactment didn't have any effect on whether it was going to stop sexual assault or not, that is not sufficient to eliminate the government's substantial concern that they claim it to be. That's a different question than whether at the time the statute's enacted. You have evidence on the face of the statute in the legislative history that the purpose of the statute was to suppress a secondary effect, otherwise, well, otherwise as the courts will say, facially, content-based statute is presumptively unconstitutional. The way it has survived, the way it survives is you have a predominant purpose to the statute that addresses a secondary effect, not the speech, and you do an intermediate scrutiny effect to determine whether it's addressing the secondary concerns. When you get to that point, it is irrelevant whether, in fact, ameliorated the concerns so the post enactment is not the issue.

JUSTICE DALE WAINWRIGHT: Counsel, to get in the First Amendment arena, there must be some

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expression or communication that is taxed or regulated as the case may be. We haven't asked, what is the expression or communication here?

ATTORNEY CRAIG ENOCH: Your Honor, the expression is the dancing. Dancing is expressive. The act of dancing is expressive. And the threshold is not necessarily addressing speech. The threshold is whether speech is affected. If speech is affected and it's taxed, then it's strict scrutiny. If speech is affected, but only incidentally, then you can have intermediate scrutiny reviewed and say yes to a certain extent we commit speech to be imposed on because there are other effects of that speech that the police power entitles us to regulate.

JUSTICE DON R. WILLETT: What is being expressed? I don't mean to be flip, but you say the dancing is the expressive activity, but what is the message conveyed? What is being expressed?

ATTORNEY CRAIG ENOCH: Eroticism. It's seeking to create emotion. It's seeking to create reaction. Not unlike angels in America or hair.

JUSTICE HARRIET O'NEILL: But that's not what's banned here. I mean, this regulation doesn't ban expression.

ATTORNEY CRAIG ENOCH: Your Honor, it expressly taxes live nude performance.

JUSTICE HARRIET O'NEILL: No, nude expression, but it doesn't ban dancing or any sort of expressive dancing. It really is just more a ban on nudity combined with the expressive dancing, which is why the Supreme Court cases have afforded it minimal First Amendment protection. It's not an outright ban on expression.

ATTORNEY CRAIG ENOCH: Your Honor, if I may, reading those cases, in no case, in no case has a court banned live nude dancing. In every case, they've looked to see if nudity itself beyond dancing was either taxed or regulated and because nudity beyond dancing was taxed or regulated, it was content neutral, not content based.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Mr. Enoch.

JUSTICE DON R. WILLETT: Mr. Ho, looking at opposing Counsel's First Amendment flowchart, do you quibble with the chart itself? I know you quibble with where this case ought to reside on the flowchart, but is the flowchart itself accurate in your view?

REBUTTAL ARGUMENT OF JAMES C. HO ON BEHALF OF PETITIONER

MR. JAMES HO: I think the chart frankly proves our point and let me explain why. The cases in the lower right-hand corner, Barnes, Pap's, Alameda Books, 44 Liquormart, all the cases that 44 Liquormart endorses, LaRue, Renton, all support, that's our whole case. That's why we went. White River is really sort of the bullet that they put in there. White River is a lower court case. We've never contested that different judges have different philosophies in this area. White River takes one view. Some Supreme Court justices, Brennon and others, take a different view. White River conflicts with Fantasy Ranch, the 5th Circuit case. Now granted it's 5th Circuit case, not binding on this Court, although it's written by former members of this Court. Fantasy Ranch is also directly addresses all these issues, goes exactly the opposite of what they're saying.

JUSTICE EVA GUZMAN: If this, in fact, a police power, can you address Mr. Enoch's arguments regarding the predominant purpose and at the time of the enactment, we obviously didn't have some post-enactment evidence, but can you address that?

MR. JAMES HO: I would love to. They said that we ignored other purposes. I think actually I was embracing all the other purposes. The test is not predominant purpose. The test is one purpose. As long as

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we have one valid purpose, and that one valid purpose can be found anywhere, including in legal briefs.

JUSTICE EVA GUZMAN: At the time of enactment?

MR. JAMES HO: We were fine.

JUSTICE EVA GUZMAN: At the time of enactment?

MR. JAMES HO: No, in Barnes and in Alameda Books, the Court looked at legal briefs and just legal briefs. In Alameda Books, let me give you the page cites. Alameda Books at 436, Justice O'Connor looks at legal briefs in Section 3 of Kenby's concurrence, he's looking at either our legal briefs or, frankly, I think he's identifying his own interests that nobody identified and using that to uphold the statute and, of course, Justice Sutter in Barnes looks at legal briefs at page 582.

JUSTICE EVA GUZMAN: What is the strongest argument of what we should look at here for the--?

MR. JAMES HO: The best evidence of our government interests? It's in the statutory text because they are limiting just to the nude dancing and the alcohol consistent with 40 years of precedent and our briefs. We're asserting our government interests right here and now as Justice Sutter allowed.

JUSTICE EVA GUZMAN: As it relates to this being the predominant purpose to suppress the secondary effects of the sexual assault?

ATTORNEY JAMES HO: Right, like I said, that is the evidence of the purpose and it's not predominant purpose. They keep saying that. Renton says that a predominant purpose is more than adequate. We just needed one purpose. That's Pap's A.M.

CHIEF JUSTICE WALLACE B. JEFFERSON: Now this is sort of an exaggeration of your opponent's argument, but he's saying in effect the state is a hypocrite, that the state is exploiting the source of the secondary effect itself. It's making money off of a business that has this sexual assault component to it and is that really a tax or a regulation and if it's a tax, it's more of a tax on the expression itself? The State doesn't like that expression and so it's trying to get rid of it and strict scrutiny would apply?

ATTORNEY JAMES HO: There are a lot of taxes that have multiple purposes and so if the Court wants to conclude that we have multiple purposes here, that's certainly a reasonable conclusion and we would win under that conclusion because all we need is one purpose and that one purpose could be found anywhere. The majority--

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, but the point is the goal is to minimize the secondary effect, right? And you're using money through the live music combined with alcohol in order to minimize that impact and what I understand part of the argument over there to be is this is really a tax on the expression and it's being weighed, used in sort of a hypocritical way because it is profiting off of the very thing that it condemns.

ATTORNEY JAMES HO: I see your point, Your Honor. My answer is this, could we have imposed a stricter requirement, make it a crime? Sure. That exact same analysis was addressed and rejected in Pap's A.M. In Pap's A.M., as Justice O'Neill noted, and Barnes, one last stitch. That's pretty minimal requirement. A lot of the justices objected that that doesn't really do very much. It doesn't affect your interest at all. Frankly, you'd be better off imposing more clothing requirements. The Court nevertheless upheld it because we're talking about giving states reasonable opportunity to regulate and that's exactly what's going on here. Could we have made it a crime? Sure. We could have made it a felony, I suppose, but we don't have to. This is a quintessential legislative judgment and the U.S. Supreme Court has specifically said in this area in particular, you have reasonable opportunity to experiment. The majority below rejected most of the plaintiffs' arguments. The U.S. Supreme Court has, frankly, rejected them all. I see that my time is up. If there are no further questions--

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CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted.

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