No. 24-

IN THE

Supreme Court of the United States

GEORGIA ASSOCIATION OF
CLUB EXECUTIVES, INC.,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A Georgia statute imposes a tax that, on its face, singles out businesses defined by the content of their expression; the State seeks to justify the tax by the need to address "secondary effects." Is this tax subject to strict scrutiny under the First Amendment because it is facially content-discriminatory, as recently reaffirmed by *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), or does a content-neutral rationale make the tax subject to intermediate scrutiny under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)?

PARTIES TO THE PROCEEDING

The following party is the petitioner here and was the appellant below: Georgia Association of Club Executives, Inc.

The following parties are the respondents here and were the appellants below: the State of Georgia and Frank O'Connell, Commissioner of the Georgia Department of Revenue.

CORPORATE DISCLOSURE STATEMENT

The Georgia Association of Club Executives, Inc. is a non-professional organization of adult entertainment clubs in Georgia. Its members are licensed clubs and active businesses in Georgia. It has no parent corporation. No publicly held company owns 10% or more of its stock.

LIST OF RELATED PROCEEDINGS

The following are the related proceedings:

- *Georgia Ass'n of Club Executives, Inc. v. Department of Revenue Commissioner Frank M. O'Connell, Individually*, No. 2017CV297874, Superior Court of Fulton County, Georgia. Judgment entered December 4, 2023.

- *Georgia Ass'n of Club Executives, Inc. v. The State of Georgia*, No. 2022CV362896, Superior Court of Fulton County, Georgia. Judgment entered December 4, 2023.

- *Georgia Ass'n of Club Executives, Inc. v. Frank O'Connell, Commissioner*, No. S24A0772, Georgia Supreme Court. Judgment entered October 31, 2024.

- *Georgia Ass'n of Club Executives, Inc. v. State of Georgia*, No. S24A0726, Georgia Supreme Court. Judgment entered October 31, 2024.

- *Georgia Ass'n of Club Executives, Inc. v. Frank O'Connell, Commissioner*, No. S24A0772, Georgia Supreme Court. Motion for reconsideration denied November 14, 2024.

- *Georgia Ass'n of Club Executives, Inc. v. State of Georgia*, No. S24A0726, Georgia Supreme Court. Motion for reconsideration denied November 14, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Georgia Association of Club Executives, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court in this case.

OPINIONS BELOW

The opinions of the trial court in *Georgia Ass'n of Club Executives, Inc. v. Department of Revenue Commissioner Frank M. O'Connell, Individually* (App. B, *infra*, 83a-154a) and *Georgia Ass'n of Club Executives, Inc. v. The State of Georgia* (App. C, *infra*, 155a-157a) are unreported. The combined opinion of the Georgia Supreme Court in the two cases (App. A, *infra*, 1a-82a) is reported at 908 S.E.2d 551. The Georgia Supreme Court's denials of petitioner's motions for reconsideration in the two cases (App. D, *infra*, 158a; App. E, *infra*, 159a) are unreported.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on October 31, 2024. The Georgia Supreme Court denied petitioner's motions for reconsideration on November 14, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Ga. Code Ann. § 15-21-201(1) provides, in relevant part:

> (1) "Adult entertainment establishment" means any place of business or commercial establishment where alcoholic beverages of

any kind are sold, possessed, or consumed wherein:

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

Ga. Code Ann. § 15-21-209 provides, in relevant part:

> (a) By April 30 of each calendar year, each adult entertainment establishment shall pay to the commissioner of revenue a state operation assessment equal to the greater of 1 percent of the previous calendar year's gross revenue or $5,000.00. This state assessment shall be in addition to any other fees and assessments required by the county or municipality authorizing the operation of an adult entertainment business. . . .
>
> (c) The assessments collected pursuant to this Code section shall be remitted to the Safe Harbor for Sexually Exploited Children Fund Commission, to be deposited into the Safe Harbor for Sexually Exploited Children Fund.

STATEMENT

This Court has long held that content-discriminatory (i.e., content-based) governmental enactments must satisfy strict scrutiny; a content-neutral justification cannot transform a facially content-discriminatory enactment into a content-neutral one. This principle goes back several decades. *See*, *e.g.*, *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). And this Court has recently strongly reaffirmed this principle. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Barr v. Am. Ass'n of Polit. Consultants*, 591 U.S. 610, 618 (2020) (plurality opinion) [hereinafter *AAPC*].

However, in other cases, this Court has stated that even a facially content-discriminatory regulation can be treated as a content-neutral "time, place, and manner restriction" and evaluated under intermediate scrutiny, so long as it is *justified* without reference to content. This rule has been stated in the context of adult entertainment, where the government's claimed justification has been the need to combat "secondary effects." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). But this "content-neutral justification" rule has since grown to be applied in very different areas—for instance, the regulation of sound amplification in a municipal park, *see Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and abortion-clinic buffer zones, *see Hill v. Colorado*, 530 U.S. 703, 719 (2000).

And this Court has assumed the validity of the content-neutral justification rule in even more areas—the

regulation of political protests near foreign embassies, *see Boos v. Barry*, 485 U.S. 312, 320 (1988), the regulation of the display of symbols that arouse anger based on factors such as race, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), and the regulation of newsracks, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993). In some of these cases, the precise doctrinal statement has not made a difference (the regulation in *Ward*, for instance, would have been content neutral under any standard), but in other cases (such as *City of Renton* and *Hill*), the reliance on the content-neutral justification theory made a real difference to the bottom line.

These two lines of doctrine are inconsistent. Or, at least, they are in substantial tension with each other. Perhaps each doctrine is valid within its own domain—but it is unclear what these domains are. Clearly, the content-neutral justification rule is not limited to the handful of assorted areas where those cases arose, including adult entertainment and abortion-clinic buffer zones. Nor is that framework always used for all cases within those areas. In *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), this Court applied strict scrutiny in an adult-entertainment context. And in *McCullen v. Coakley*, 573 U.S. 464 (2014), this Court applied intermediate scrutiny in an abortion-clinic buffer-zone context without relying on the *City of Renton/Hill* reasoning, endorsing the facial approach that it would later strongly restate in *Reed*. *Id.* at 479-81.

The *City of Renton* framework was developed in a zoning and land-use context, and its rationale has been closely tied to the justifications for zoning and land-use regulation; indeed, this Court has described *City of Renton* and its progeny as "[o]ur zoning cases." *Playboy*,

529 U.S. at 815. And yet, lower courts—including the Georgia Supreme Court in this case, and the Texas Supreme Court in a similar case, *Combs v. Tex. Entm't Ass'n*, 347 S.W.3d 277, 286 (Tex. 2011)—have extended the content-neutral justification rule, even after *Reed*. These courts have applied *City of Renton* to facially content-discriminatory taxes, even though there is no precedent from this Court for extending the *City of Renton/Hill* doctrine that far. There has also been confusion among lower courts about the fate of *City of Renton* after *Reed*. Some have assumed that *City of Renton* is still good law; others have held that some of their pre-*Reed* case law that relied on *City of Renton* has been abrogated.

This Court should grant certiorari in this case to resolve this confusion among lower courts and to prevent courts from diluting the *Reed* doctrine by an unjustified expansion of *City of Renton/Hill* analysis. This case presents the content-neutral justification reasoning cleanly, without any of the vehicle problems that may have led this Court to deny certiorari in recent cases that presented the issue in the context of abortion-clinic buffer zones, like *Bruni v. City of Pittsburgh*, 141 S. Ct. 578 (2021) (mem.) (denying certiorari), *Vitagliano v. County of Westchester*, 144 S. Ct. 486 (2023) (mem.) (denying certiorari), and *Reilly v. Harrisburg*, 144 S. Ct. 1002 (mem.) (2024) (denying certiorari). *See Bruni*, 141 S. Ct. at 578 (Thomas, J., respecting denial of certiorari) ("[T]he Court should take up this issue in an appropriate case to resolve the glaring tension in our precedents" between the *Reed/McCullen* and *Hill* frameworks).

There are at least three ways that this Court could clarify the doctrine.

First, this Court could overrule *City of Renton/Hill* intermediate scrutiny as being inconsistent with the *Reed* rule of strict scrutiny. After all, this Court has already stated that *Hill* is a "distort[ion]" of "First Amendment doctrines," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 & n.65 (2022), and the *Hill* problem extends to *City of Renton* and other cases as well. As some of this Court's Justices have noted, this Court's intervening decisions have "all but interred" *Hill*, rendering it "an aberration in [the Court's] case law." *City of Austin*, 596 U.S. at 91-92, 103-04 (2022) (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting); *Bruni*, 141 S. Ct. at 578 (Thomas, J., respecting denial of certiorari) (noting that the Court's use of intermediate scrutiny in *Hill* "is incompatible with current First Amendment doctrine" (quoting *Price v. City of Chicago*, 915 F.3d 1107, 1117 (7th Cir. 2019))).

Moreover, *Hill* has been criticized ever since it was decided, even by commentators who support abortion rights. *See*, *e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49, 59 (2000); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737-38 (2001). Much of the critique of the *Hill* reasoning is a critique of the entire content-neutral justification rule; this case would thus allow this Court to clarify that strict scrutiny is the rule in all these diverse areas.

Second, this Court could clarify that the *City of Renton* reasoning is strictly limited to the zoning and land-use context in which it arose. The *City of Renton*

reasoning would thus no longer be available to support regulations that have nothing to do with land use (such as abortion-clinic buffer zones), and certainly would not be available to support non-regulatory enactments, such as the tax at issue in this case.

Third, this Court could clarify that, however far the *City of Renton* reasoning extends, it certainly does not apply to taxation. This option would retain the *City of Renton* reasoning for regulatory cases of various kinds (perhaps including buffer zones), but would prevent the expansion of the secondary effects doctrine to taxation—an expansion that would be inconsistent with cases like *Arkansas Writers' Project* and that could substantially undo the *Reed* rule of strict scrutiny.

Either way, this Court has been right to stress the general rule that content discrimination is highly suspect and that strict scrutiny is the norm in such cases, even when the government asserts content-neutral justifications. "The vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny—is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part). The *City of Renton/Hill* exception should not continue to expand to erode or swallow up this salutary rule.

A. The State Operation Assessment

In 2015, the Georgia Legislature passed a tax—labeled a "state operation assessment"—on "adult entertainment

establishment[s]." Ga. Code Ann. §§ 15-21-209, -201(1)(A). The purpose of the tax was to fund the Safe Harbor for Sexually Exploited Children Fund ("Safe Harbor Fund"), the primary purpose of which "is to disburse money to provide care and rehabilitative and social services for sexually exploited children." *Id.* § 15-21-202(c).

The category of "[a]dult entertainment establishment" was defined, in part, in a way that facially discriminates based on content: an establishment could qualify by having "entertainment" that "consists of nude or substantially nude persons . . . engaged in movements of a sexual nature" or simulating specified sexual activities. *Id.* § 15-21-201(1)(A).

B. The Georgia Trial Court Opinion

Petitioner Georgia Association of Club Executives, an organization of adult entertainment clubs in Georgia, sued to enjoin the collection of the tax. After some initial litigation, petitioner filed new complaints in the Georgia trial court against the State of Georgia and the Commissioner of the Georgia Department of Revenue (now Frank O'Connell), arguing that the tax violated the First Amendment. The cases against the State of Georgia and against Revenue Commissioner O'Connell were separate but raised substantively identical issues.

First, petitioner argued that the tax was content discriminatory and therefore had to be evaluated under strict scrutiny. Petitioner conceded that the State's interest, fighting child sexual exploitation, was compelling. But the tax could not satisfy strict scrutiny because there existed a less discriminatory alternative: funding the Safe

Harbor Fund out of general revenues. The tax did not fall within the *City of Renton* exception. The *City of Renton* secondary effects doctrine has always been a limited exception to the general rule that content-discriminatory enactments are subject to strict scrutiny; and *City of Renton*, which was developed in a land use and zoning context, does not apply to taxes.

Next, petitioner argued that even if the tax were evaluated under intermediate scrutiny, it would still fail, because it would still have to be "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). In the intermediate scrutiny context, narrow tailoring merely requires that an enactment "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation marks omitted). But the only interest ever asserted by the State was to raise revenue to fund the programs that fell within the purpose of the Safe Harbor Fund. And, because that interest would be served just as effectively if the money were raised from general revenues, the tax failed narrow tailoring even in the context of intermediate scrutiny. Moreover, petitioner argued, the tax failed intermediate scrutiny for the additional reason that the evidence relied on by the Legislature was woefully insufficient to establish a rational connection between adult entertainment establishments and child sexual exploitation.

Finally, petitioner raised an overbreadth challenge.

In the case against Revenue Commissioner O'Connell, the Georgia trial court (adopting verbatim respondents'

proposed order) upheld the tax, ruling that strict scrutiny did not apply, *see* App. B, *infra*, at 95a-112a, that the tax satisfied intermediate scrutiny, *see id.* at 112a-128a, and that the tax was not overbroad, *see id.* at 128a-153a. In the (substantively identical) case against the State of Georgia, the Georgia trial court incorporated all of its legal reasoning from the case against the Commissioner. *See* App. C, *infra*, at 155a-157a.

C. The Georgia Supreme Court Opinion

Petitioner appealed both cases to the Georgia Supreme Court. In a combined opinion, the Georgia Supreme Court affirmed the trial court by a vote of 7-1.

First, the court held, relying on *City of Renton*, that the tax was content neutral because it was aimed at the suppression of secondary effects, and that it was therefore not subject to strict scrutiny. *See* App. A, *infra*, at 12a-18a.

Second, the court assumed that the tax was subject to intermediate scrutiny and held that it met that standard. Though the State had only asserted a bare revenue-raising interest, the court recharacterized the State's interest, asserting that "implicit within the State's interest is an element of seeking not to burden taxpayers in general with the costs of remedying the harm that the adult entertainment industry causes." *See id.* at 18a-20a. That interest was "important" within the meaning of intermediate scrutiny. And, the court said, deferring to the State's empirical studies, the tax furthered that interest. *See id.* at 20a-27a. The State's interest was unrelated to suppressing free expression. *See id.* at 28a. And the tax's burden on expression was incidental and promoted the State's interest (as recharacterized) more

effectively than if the money came from general revenues. *See id.* at 28a-39a.

Third, the court held that the tax was not overbroad. *See id.* at 39a-45a.

Justice Warren dissented. *See id.* at 46a-82a. She agreed with the majority that the tax should be considered content neutral in light of *City of Renton*, and she wrote that the tax should thus be analyzed under intermediate scrutiny. But she disagreed with the majority on how to characterize the State's interest. She argued that the State's interest was merely raising revenue; the State's supposed interest in targeting the tax at the industry responsible for the secondary effects was not one that it had ever argued. In her view, this recharacterization "undermine[d] . . . the four-prong test [of *United States v. O'Brien*, 391 U.S. 367 (1968)] and create[d] potential work-arounds for government entities to target protected expression." *See* App. A, *infra*, at 66a-71a. When the State's interest was properly viewed as the interest in raising revenue, it failed narrow tailoring because of the availability of generally applicable taxes.

The Georgia Supreme Court denied reconsideration in the two cases. *See* Apps. D & E, *infra*, 158a-159a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the boundary between the *Reed* and *City of Renton* doctrines is unclear; lower courts, including the Georgia Supreme Court in this case, have been wrongly extending the *City of Renton* reasoning to areas where it does not apply.

Reed correctly reaffirmed the general rule that content-discriminatory governmental enactments are evaluated under strict scrutiny. But *City of Renton* stated that certain enactments, even if facially content discriminatory, can be evaluated under intermediate scrutiny if the government seeks to justify them by the need to combat secondary effects. Because the proper scope of the *City of Renton* exception has never been clarified, lower courts have disagreed on what previous case law survives *Reed*, and some lower courts have extended *City of Renton* into areas far afield from its original grounding in judicial deference to zoning and land-use regulation. This Court should resolve this important question of First Amendment law, either by overruling the *City of Renton/Hill* line of cases or by cabining the scope of the content-neutral justification rule, for instance by holding that this reasoning is limited to zoning and land-use regulation, or by holding that this reasoning does not apply to facially content-discriminatory taxes.

A. This Court's Recent Case Law Reaffirms the Traditional Rule on Content Discrimination and Strict Scrutiny.

1. Content-Discriminatory Government Action Is Subject to Strict Scrutiny.

Content-discriminatory (i.e., content-based) government action is subject to strict scrutiny. This principle has been established for decades. *See Reed*, 576 U.S. at 163; *AAPC*, 591 U.S. at 618 (plurality opinion); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813-15 (2000).

This is true whether or not "conduct" is involved: the intermediate-scrutiny test for expressive conduct associated with *O'Brien* applies only when state action is content neutral. *See, e.g.*, *Humanitarian Law Project*, 561 U.S. at 27 ("*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech. . . ."); *see also* Alexander Volokh, *Taxing Nudity: Discriminatory Taxes, Secondary Effects, and Tiers of Scrutiny*, 2 J. Free Speech L. 627, 646 (2023). Even if the activity in this case were labeled as conduct, this Court's doctrine on content discrimination would still apply: "The law here may be described as directed at conduct, as the law in *Cohen* [*v. California*, 403 U.S. 15 (1971),] was directed at breaches of the peace, but as applied to [petitioner] the conduct triggering coverage under the statute consists of communicating a message." *Humanitarian Law Project*, 561 U.S. at 28.

This Court has used 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*, 591 U.S. at 618-19 (plurality opinion) (internal quotation marks omitted). In *AAPC*, 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.* at 619; *see also id.* at

649 (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 whether strict scrutiny should be required. *See id.* at 639 (Breyer, J., concurring in the judgment in part and dissenting in part); *see also id.* at 636 (Sotomayor, J., concurring in the judgment).

This 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 . . . depend entirely on the communicative content of the sign." *Reed*, 576 U.S. at 164.

And this facial approach is rooted in long-standing precedent going back several decades. *See*, *e.g.*, *Humanitarian Law Project*, 561 U.S. at 27 ("Plaintiffs want to speak to [various organizations], and whether they may do so under [the statute] depends on what they say."); *Simon & Schuster*, 502 U.S. at 115-16 ("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*, 481 U.S. at 229 ("[T]he basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content."); *Regan v. Time*, 468 U.S. 641, 648 (1984) ("A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers."); *see also* Volokh, *supra*, at 641-43.

2. The Tax Here Is Content Discriminatory.

The tax here is content discriminatory because it taxes establishments defined by their expression.

First, an establishment can become subject to the tax by having "nude or substantially nude persons dancing." Second, an establishment can become subject to the tax 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 become subject to the tax by presenting all this as "entertainment"; the wording confirms that what is taxed is a performance before spectators. *See*, *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991) (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, merely appearing in public naked is "not an inherently expressive condition," *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion), and so laws that merely depend on whether one is in public naked are content neutral and receive intermediate scrutiny. *See Bushco v. Utah State Tax Comm'n*, 225 P.3d 153, 160-61 (Utah 2009).)

To be sure, this Court's facial approach is not absolute; 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 Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022). But this Court's holding in *City of Austin* was narrow, and it does not affect *Reed*'s facial approach in cases like this one.

In *City of Austin*, a sign code regulated off-premises advertising (i.e., advertising for things located on different premises than the sign) more heavily than on-premises advertising (i.e., advertising for things located on the same premises). This may seem content discriminatory because one can't tell whether a sign contains on-premises or off-premises advertising without reading it. But this Court nonetheless considered this sign code 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, this Court reaffirmed in *City of Austin* that the facial approach still applies when a policy turns on substantive content or a specific subject matter. The *Reed* approach is thus unaffected in this case, where the tax depends precisely on the subject matter. *See*, *e.g.*, *Barnes*, 501 U.S. at 570-71 (noting that nude dancing conveys an "erotic message"); *City of Erie*, 529 U.S. at 293, 296 (2000) (plurality opinion).

And, once one determines that the tax is content discriminatory and therefore receives strict scrutiny, it

necessarily fails. Strict scrutiny requires the government to choose the least content-discriminatory means of pursuing its goal. But the government can always pursue its goal (here, raising revenue to fund programs that combat child sex trafficking) equally well by providing the same amount from general revenues.

3. Whether the Law's Justification Is Content Neutral Is Irrelevant.

But what if, despite facial discrimination based on content, the government seeks to justify 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 discriminatory, lowering 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).

There are two exceptions to this general rule: First, there is the *City of Austin* exception, which, as discussed above, does not apply here. Second, there is the *City of Renton/Hill* content-neutral justification rule, which will be discussed in Part B *infra*. Apart from these two exceptions, the general irrelevance of neutral justifications is not some new invention. Countless First Amendment cases have stated this principle:

- In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), a pre-*City of Renton* case, this Court applied strict scrutiny to strike down a prohibition on picketing near schools, with an exception for labor picketing—even though the government sought to justify its ordinance by reference to the neutral secondary effect of avoiding disruption of the school. *Id.* at 98-102.

- In *Simon & Schuster*, the state was pursuing the neutral goal of ensuring that

criminals didn't profit from their crimes, but this Court applied strict scrutiny to the content-discriminatory "Son of Sam" law. 502 U.S. at 118-21. (This Court noted, though, that the precise standard didn't much matter: even if the neutral goal could make the statute content neutral, the statute would still be unconstitutional because of its overinclusivity. *Id.* at 122 n.*.)

- In *Humanitarian Law Project*, the government was pursuing the neutral goal of depriving terrorist organizations of resources, but this 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—this Court applied strict scrutiny even though the state asserted neutral justifications like "encourag[ing] 'fledgling' publishers." 481 U.S. at 231-33.

- In *City of Cincinnati*, the government was pursuing the neutral goal of safety and aesthetics in regulating commercial newsracks, but this Court wasn't impressed by this neutral justification because the regulation was still facially discriminatory: despite the lack of "animus toward the ideas contained in those publications," "the very basis for the regulation [was] the difference

> in content between ordinary newspapers and commercial speech." 507 U.S. at 429. This Court didn't apply strict scrutiny in this case because of the commercial-speech context, *id.* at 416-28, but it still rejected the more lenient standard that would have applied if the regulation were truly content neutral.

See also Volokh, *supra*, at 651-56.

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

But what about the "secondary effects" doctrine? In *City of Renton*, a zoning ordinance discriminated against adult movie theaters. This was, on its face, content discriminatory. 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.

City of Renton's secondary effects doctrine is not an isolated phenomenon. This Court relied on the same content-neutral justification rule to uphold an abortion-clinic buffer zone in *Hill*, 530 U.S. at 719 (citing *Ward*, 491 U.S. at 791 (citing *City of Renton*, 475 U.S. at 47-48)), and in various other cases listed in Part B.1 *infra*. The theme running through these cases, from adult entertainment to abortion-clinic buffer zones, is that even a facially content-discriminatory enactment can be treated as if it

were content neutral—and evaluated under intermediate scrutiny—if it is *justified* without reference to content.

The *City of Renton/Hill* doctrine—the content-neutral justification rule, of which the secondary effects doctrine is one example—is an exception to the general rule stated above. The domain of this doctrine is unclear; but whatever the precise boundaries of the doctrine, it has always been a limited exception.

1. The Proper Scope of *City of Renton* Remains Unclear.

It has long been clear that the *Reed* and *City of Renton* doctrines are inconsistent, or at least in substantial tension, with each other. Scholars have repeatedly noted this. *See*, *e.g.*, Genevieve Lakier, Reed v. Town of Gilbert, Arizona, *and the Rise of the Anticlassificatory First Amendment*, 2016 Sup. Ct. Rev. 233, 293; Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After* Reed v. Gilbert, 57 Santa Clara L. Rev. 385, 388-89 (2017); Anthony Lauriello, *Panhandling Regulation After* Reed v. Town of Gilbert, 116 Colum. L. Rev. 1105, 1140-41 (2016). So have lower-court judges. *See Free Speech Coalition, Inc. v. Attorney General*, 825 F.3d 149, 174 (3d Cir. 2016) (Rendell, J., dissenting) ("The secondary effects doctrine thus seems logically irreconcilable with *Reed*.").

Some courts have assumed that *City of Renton* is still good law after *Reed*. *See*, *e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015); *Maxim Cabaret, Inc. v. City of Sandy Springs*, 816 S.E.2d 31, 36 n.4 (Ga. 2018); *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 703 F. App'x 929, 934-35 (11th Cir. 2017); Jacobs, *supra*,

at 414-16 (2017). Other courts have decided that at least some of their prior case law—which had relied on *City of Renton*'s content-neutral justification rule—had to be revisited in light of *Reed*. *See*, *e.g.*, *Free Speech Coalition*, 825 F.3d at 161 n.9; *Cahaly v. Larosa*, 796 F.3d 399, 404-05 (4th Cir. 2015); *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 702-03 (5th Cir. 2020), *rev'd on other grounds*, 596 U.S. 61, 69 (2022); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 706 (6th Cir. 2020).

But even when a lower court recognizes that *City of Renton* has not been overruled and must therefore be applied within its proper domain, it is hard to tell when to apply *Reed* and when to apply *City of Renton*. The boundary between the *Reed* and *City of Renton* domains is unclear.

City of Renton does not apply every time a government identifies some secondary effect: that much is obvious from cases like *Simon & Schuster*, *Humanitarian Law Project*, and *Arkansas Writers' Project*, in all of which the government was pursuing some goal unrelated to speech. Indeed, applying it this way would substantially unravel the *Reed* doctrine: as Justice Brennan noted in *Boos*, the *City of Renton* analysis "creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." 485 U.S. at 335 (Brennan, J., dissenting).

Nor is the domain of *City of Renton* coterminous with adult entertainment. First, *City of 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

second, *City of Renton* has been applied even beyond the adult entertainment context:

- In *Boos*, a plurality distinguished *City of Renton* (thus assuming that it would otherwise apply) in analyzing a D.C. ordinance barring some forms of protest outside embassies, 485 U.S. at 320-21 (plurality opinion).

- In *City of Cincinnati*, 507 U.S. at 430, a majority likewise distinguished *City of Renton* in analyzing a city's policy against newsracks for commercial handbills.

- This Court cited *City of Renton* positively in *R.A.V.*, 505 U.S. at 389, a case involving the display of symbols that arouse anger based on factors such as race.

- In *Ward*, 491 U.S. at 791, this Court relied on *City of Renton* to uphold the constitutionality of sound-amplification guidelines for a concert in a park.

- And in *Hill*, 530 U.S. at 719, this Court relied on the content-neutral justification principle, citing *Ward*, to uphold an abortion-clinic buffer zone.

In some of these cases, the precise doctrinal statement has not made a difference (the regulation in *Ward*, for instance, would have been content neutral under any standard), but in other cases (such as *Hill*), the reliance on the content-

neutral justification theory made a real difference to the bottom line. Some lower courts have mistakenly said that this Court has only ever applied *City of Renton* in the context of "regulations affecting physical purveyors of adult sexually explicit content," *see Free Speech Coalition*, 825 F.3d at 161, but this is incorrect: unfortunately, *City of Renton*'s domain resists any easy characterization.

2. At the Very Least, *City of Renton* Does Not Apply to Taxation.

While this Court has never explained the precise scope of *City of Renton* secondary effects analysis, there are some guideposts. This Court has *always* applied the doctrine in a regulatory context, especially when traditional zoning or land-use considerations are at issue—when the regulation can fairly be characterized as a "time, place, or manner regulation." (Thus, *City of Austin*, where this Court characterized the "on-/off-premises distinction" as being "similar to ordinary time, place, or manner restrictions," 596 U.S. at 71, also arose in a land-use regulation context, i.e., sign codes.) This Court has *never* applied the *City of Renton* approach to taxes—and, in fact, *Arkansas Writers' Project* is a good example of the contrary, where this Court applied strict scrutiny to a content-discriminatory tax even though the government had asserted a content-neutral rationale. *See* Part A.3 *supra*.

It makes sense that the secondary effects doctrine is limited to, at most, regulation and licensing—but does not extend to taxation—for the following five reasons.

First, from its beginnings in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the secondary effects

doctrine has been closely tied to zoning and land use. The plurality in that case 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 this Court officially adopted the secondary effects doctrine in *City of Renton*, the context was also a zoning ordinance targeting adult theaters, and the rationale was closely tied to land use. The case, this 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, this 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 this 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. And even the abortion-clinic buffer zones at issue in *Hill* were regulatory.

Thus, 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 this Court'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 at least fit within the overarching rubric of "time, place, or manner regulations" (even if there may still be controversy over whether they are nonetheless unconstitutionally content discriminatory). In the context of the regulation of adult entertainment, *City of 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 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 *City of Renton*.

Third, this 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). Petitioner does not concede that this tax is small, but even if it were, that would be irrelevant. *Cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.").

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," *City of Renton*, 475 U.S. at 47 (emphasis

added). The bright-line treatment of taxation would be out of place in *City of Renton*'s flexible balancing inquiry.

Fourth, a relatively permissive intermediate-scrutiny approach to content-based taxes would be in tension with this Court's case law on permitting fees. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), this Court upheld a system of license fees for parades and processions. The state court had interpreted the fee to be "not a revenue tax, but one to meet the expense incident to the administration of [a statutory scheme] and to the maintenance of public order in the matter licensed." *Id.* at 577 (internal quotation marks omitted). This Court stated that "[t]here is nothing contrary to the Constitution in the charge of a fee limited" to such a purpose. *Id.* Shortly afterward, in *Murdock*, this Court struck down a fee on "canvassing" and "soliciting" because "the fee [was] not a nominal one"; it was not merely "imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." 319 U.S. at 116. More recently, in *Forsyth County*, this Court struck down a content-discriminatory permitting fee; the government's justification for the fee—"raising revenue for police services"—was "an important government responsibility" but did not "justify a content-based permit fee." 505 U.S. at 135.

These cases have become the basis for lower-court case law that prevents governments from using permitting fees on speech to fund programs that go beyond the expenses of administering the permitting system itself. *See*, *e.g.*, *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) ("Only fees that cover the administrative expenses of the permit or license are permissible."); *E. Conn. Citizens*

Action Gp. v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983) ("Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose."); *Int'l Women's Day March Planning Cmte. v. City of San Antonio*, 619 F.3d 346, 371 (5th Cir. 2010) (fees "clearly linked to the expense of '[c]leaning up the procession route' and the cost of any 'personnel' and 'devices' needed for traffic control"). Allowing the State here to use the fees collected to fund services distant from the administration of the tax program itself would weaken this Court's more stringent regulation of permitting fees.

Fifth, if one engaged in intermediate scrutiny under *City of Renton*, one would have to determine whether the tax is "narrowly tailored to serve a significant governmental interest." *See*, *e.g.*, *Clark*, 468 U.S. at 293-94. 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*, 491 U.S. at 799 (internal quotation marks omitted). Even under this lower standard, a targeted tax likely fails: if the government (as here) is merely asserting a revenue goal, it could achieve that goal equally well by simply applying a more broad-based tax—here, by using general revenues. *City of Renton* intermediate scrutiny thus tends to be a poor fit for taxation.

Justice Kennedy was right to observe in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), that government "may not . . . impose a content-based fee or tax . . . even if [it] purports to justify the fee by reference to secondary effects." *Id.* at 445 (Kennedy, J., concurring

in the judgment). Justice Kennedy was merely restating sound and well-established doctrine. The *City of 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.

C. Lower Courts Have Wrongly Been Expanding the Content-Neutral Justification Rule.

The lack of clarity in the respective domains of *Reed* and the content-neutral justification rule has had predictable effects.

First, as documented in Part B.1 *supra*, lower courts have disagreed on whether *City of Renton* is still good law after *Reed*, and how much of their prior case law needs to be revisited in light of *Reed*.

Second, despite the strong connection between the *City of Renton* rationale and zoning and land-use regulation, some courts—not only the Georgia Supreme Court in this case, but also the Texas Supreme Court—have departed from the regulatory context and applied *City of Renton* to uphold taxes, even ones that are facially content discriminatory. *See Combs*, 347 S.W.3d at 286. On the other hand, a federal district court—analyzing a challenge to the same Texas tax that had been upheld in *Combs*—ruled, at the preliminary injunction stage, that the challenger could show a likelihood of success on the merits on its First Amendment claim. *9000 Airport*

LLC v. Hegar, No. 4:23-CV-03131, 2023 WL 7414581, at *4-*7 (S.D. Tex. Nov. 9, 2023). The court rejected the applicability of *City of Renton*: "The First Amendment permits restrictions only on the time, place, or manner of protected expression in a secondary effects case," and a tax is not a time, place, or manner restriction. *Id.* at *4.

D. The Conflict Between These Doctrines Should Be Resolved.

"The distinction between content-based and content-neutral regulations of speech is one of the most important in First Amendment law." Lakier, *supra*, at 233. It is therefore imperative that the conflict between these two doctrines be resolved.

That conflict could be resolved in at least the following three ways.

First, this Court could overrule the *City of Renton*/*Hill* content-neutral justification rule as being inconsistent with the *Reed* rule of strict scrutiny.

That is certainly a plausible approach. After all, this Court has already stated that *Hill* is a "distort[ion]" of "First Amendment doctrines," *Dobbs*, 597 U.S. at 287 & n.65, and the *Hill* problem extends to *City of Renton* and other cases as well. As some of this Court's Justices have noted, this Court's intervening decisions have "all but interred" *Hill*, rendering it "an aberration in [the Court's] case law." *City of Austin*, 596 U.S. at 91-92, 103-04 (Thomas, J., joined by Gorsuch & Barrett, JJ., dissenting); *Bruni*, 141 S. Ct. at 578 (Thomas, J., respecting denial of certiorari) (noting that the Court's use of intermediate

scrutiny in *Hill* "is incompatible with current First Amendment doctrine" (quoting *Price*, 915 F.3d at 1117)).

Moreover, *Hill* has been criticized ever since it was decided, even by commentators who support abortion rights. *See*, *e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49, 59 (2000); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737-38 (2001). Much of the critique of the *Hill* reasoning is a critique of the entire content-neutral justification rule; this case would thus allow this Court to clarify that strict scrutiny is the rule in all these diverse areas.

Second, this Court could clarify that the *City of Renton* reasoning is strictly limited to the zoning and land-use context in which it arose. The *City of Renton* reasoning would thus no longer be available to support regulations that have nothing to do with land use (such as abortion-clinic buffer zones), and certainly would not be available to support non-regulatory enactments, such as the tax at issue in this case.

Third, this Court could clarify that, however far the *City of Renton* reasoning extends, it certainly does not apply to taxation. This option would not invalidate very much—see Volokh, *supra*, at 634-40, for a discussion of the handful of adult-entertainment taxes that would or would not be affected. This option would also retain the *City of Renton* reasoning for regulatory cases of various kinds (perhaps including buffer zones), but would prevent the expansion of the secondary effects doctrine to taxation—

an expansion that would be inconsistent with cases like *Arkansas Writers' Project* and that could substantially undo the *Reed* rule of strict scrutiny.

Either way, this Court has been right to stress the general rule that content discrimination is highly suspect and that strict scrutiny is the norm in such cases, even when the government asserts content-neutral justifications. "The vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny—is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes." *Madsen*, 512 U.S. at 794 (Scalia, J., concurring in the judgment in part and dissenting in part). The *City of Renton* exception should not be expanded to erode or swallow up that rule.

CONCLUSION

For these reasons, petitioner requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE SUPREME COURT OF GEORGIA, DECIDED OCTOBER 31, 2024

SUPREME COURT OF GEORGIA

Case No. S24A0726, S24A0772

GEORGIA ASSOCIATION OF CLUB EXECUTIVES, INC.

v.

STATE OF GEORGIA.

GEORGIA ASSOCIATION OF CLUB EXECUTIVES, INC.

v.

FRANK O'CONNELL, COMMISSIONER

Decided October 31, 2024

Upon consideration, the deadline for a motion for reconsideration in this case has been revised. It is ordered that a motion for reconsideration, if any, must be filed no later than **4:30 pm on Wednesday, November 6, 2024**.

PETERSON, Presiding Justice.

Georgia local governments have often imposed total bans on adult entertainment establishments offering the combination of nude dancing and serving alcohol. We have often upheld those bans against First Amendment

challenges. See *Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 193-194 (III) (816 SE2d 31) (2018); *Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 525 (3) (c) (1) (773 SE2d 728) (2015); *Trop, Inc. v. City of Brookhaven*, 296 Ga. 85, 88 (1) (764 SE2d 398) (2014); *Chambers v. Peach County*, 268 Ga. 672, 674 (2) (492 SE2d 191) (1997); *Goldrush II v. City of Marietta*, 267 Ga. 683, 692-693 (5) (482 SE2d 347) (1997); *Gravely v. Bacon*, 263 Ga. 203, 207 (2) (429 SE2d 663) (1993). In this case, the State stopped short of a total ban, imposing instead a one percent tax on gross revenue on adult entertainment establishments that choose to offer the combination of nude dancing and serving alcohol. The adult entertainment establishments raised a First Amendment challenge against the tax, and the trial court upheld it. So do we.

The Georgia Association of Club Executives ("GACE"), a self-described "organization of adult entertainment clubs in Georgia," challenges the constitutionality of a "state operating assessment" imposed by OCGA § 15-21-209 (the "Assessment" or "Tax") on "adult entertainment establishments" as defined by OCGA § 15-21-201 (1) (A). The General Assembly passed the Assessment to create and fund the Safe Harbor for Sexually Exploited Children Fund, see OCGA § 15-21-209 (c), with the purpose of helping child victims of sexual exploitation, finding that adult entertainment establishments were a "point of access" by which individuals seeking to sexually exploit children use such establishments as a means of "locating children" to sexually exploit. Ga. L. 2015, p. 675, § 1-2.

GACE makes two main arguments on appeal. First, GACE argues that the tax seeks to regulate content, is

therefore content-based, and fails to meet strict scrutiny; GACE also argues alternatively that, if intermediate scrutiny applies, the tax fails the tailoring prong of that test. Second, GACE argues that the definition of "adult entertainment establishments" relating to nude dancing is overbroad.

We reject GACE's argument that strict scrutiny applies. We assume without deciding that the Assessment is subject to intermediate scrutiny. We hold that it is content-neutral and satisfies intermediate scrutiny. We also conclude that GACE's overbreadth challenge fails. We therefore affirm.

1. Background

GACE describes itself as an "organization of adult entertainment clubs in Georgia" and asserts that its members are subject to the "state operating assessment" imposed by OCGA § 15-21-209 (a) because they are "adult entertainment establishments" as defined by OCGA § 15-21-201 (1) (A).[1]

1. No individual member joined the suit, so GACE's only basis for standing is under the doctrine of "associational standing." See *Sawnee Elec. Membership Corp. v. Ga. Dept. of Revenue*, 279 Ga. 22, 24 (3) (608 SE2d 611) (2005) ("Associational standing permits an association that has suffered no injury to sue on behalf of its members when the members would otherwise have standing to sue in their own right; the interests the association seeks to protect are germane to the association's purpose; and neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members."). We adopted this federal doctrine in *Aldridge v. Ga. Hospitality & Travel Assn.*, 251 Ga. 234 (304 SE2d 708) (1983), without any analysis, see id. at 236 (1),

Appendix A

(a) The Assessment

OCGA § 15-21-209 (a)[2] says:

> By April 30 of each calendar year, each adult entertainment establishment shall pay to the commissioner of revenue a state operation assessment equal to the greater of 1 percent of the previous calendar year's gross revenue or $5,000.00. This state assessment shall be in addition to any other fees and assessments required by the county or municipality authorizing the operation of an adult entertainment business.

The funds collected by the Assessment are deposited into the Safe Harbor for Sexually Exploited Children Fund.

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and have since noted that we have never meaningfully addressed whether this doctrine is viable under Georgia law. See *Sons of Confederate Veterans v. Henry County Bd. of Commrs.*, 315 Ga. 39, 66 (2) (d) (ii) n.24 (880 SE2d 168) (2022). The viability of that doctrine has not been raised by the parties, and we decline to reconsider sua sponte the doctrine in this case.

2. OCGA § 15-21-209 was passed in 2015. In November 2016, Georgia voters voted to amend the Georgia Constitution to allow for the Assessment. See Ga. Const. of 1983, Art. III, Sec. IX, Par. VI (o) ("The General Assembly . . . may impose assessments on adult entertainment establishments as defined by law; and . . . may provide by general law for the allocation of such assessments . . . to the Safe Harbor for Sexually Exploited Children Fund for the specified purpose of meeting any and all costs, or any portion of the costs, of providing care and rehabilitative and social services to individuals in this state who have been or may be sexually exploited."). The Assessment went into effect on January 1, 2017.

See OCGA § 15-21-209 (c). The money in the fund may be used "for purposes of providing care, rehabilitative services, residential housing, health services, and social services . . . to sexually exploited children" and to fund "a person, entity, or program devoted to awareness and prevention of becoming a sexually exploited child." OCGA § 15-21-202 (c).[3]

Under OCGA § 15-21-201 (1) (A),[4] an "adult entertainment establishment" is defined as

> any place of business or commercial establishment where alcoholic beverages of any kind are sold, possessed, or consumed wherein . . . [t]he entertainment or activity therein consists of nude or substantially nude persons[5] dancing with or without music or engaged in movements of a sexual nature or movements

3. The money may also be used for "the actual and necessary operating expenses" of the commission charged with disbursing money from the fund, but the "primary purpose of the fund . . . is to disburse money to provide care and rehabilitative and social services for sexually exploited children." OCGA § 15-21-202 (c).

4. Although GACE raised a constitutional overbreadth argument relating to the definition of "adult entertainment establishment" under OCGA § 15-21-201 (1) (B), it does not challenge the trial court's rulings on that issue. Instead, the focus of GACE's arguments on appeal relate to an "adult entertainment establishment" under OCGA § 15-21-201 (1) (A), so our analysis here is limited to that subparagraph.

5. "Substantially nude" is defined as "dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus, cleft of the buttocks, vulva, or genitals." OCGA § 15-21-201 (7).

> simulating sexual intercourse, oral copulation, sodomy, or masturbation[.]

In the bill codifying the Code provisions related to the Assessment, the General Assembly made specific findings, including:

> [I]t is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

Ga. L. 2015, p. 675, § 1-2. The Act also stated:

> The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state.

Id.

(b) Procedural History of GACE's Challenges

In November 2017, GACE filed a lawsuit challenging the constitutionality of the Assessment and naming the Department of Revenue Commissioner Lynnette Riley in her individual capacity as the defendant.[6]

In its initial complaint, GACE argued that the Assessment is a "content-based tax" that is "contrary to

6. GACE also named the Attorney General Christopher Carr in his individual capacity as a defendant. In July 2018, the trial court dismissed the action with respect to Carr, concluding that he was not a proper defendant because he was not the state officer charged with administering the tax and revenue statutes. GACE did not challenge that dismissal.

the First Amendment of the United States Constitution." GACE sought a declaratory judgment declaring that "the tax is an unconstitutional restriction on free speech" and unconstitutionally vague and also requested injunctive relief.[7] The trial court entered orders in 2020 concluding that part of OCGA § 15-21-201 was void for vagueness, that part was subject to severance, and all other portions of the Assessment were constitutional and enforceable. Riley and GACE each filed notices of appeal to this Court.

On appeal, this Court vacated the trial court's orders and remanded with direction to dismiss Riley from the case on the ground that the action against Riley was moot because Riley, who had been sued in her individual capacity and was no longer the State Revenue Commissioner, "could not give GACE the relief it seeks." *Riley v. Ga. Assn. of Club Executives*, 313 Ga. 364, 367 (870 SE2d 405) (2022). On remand, GACE amended its complaint to substitute Robyn Crittenden, in her individual capacity as the then-current Revenue Commissioner, as the defendant in place of Riley, and to add a claim that OCGA § 15-21-201 (1) (A) was unconstitutionally overbroad. When Frank O'Connell replaced Crittenden as Revenue Commissioner, GACE filed a third amended complaint naming O'Connell as a defendant in place of Crittenden. Both GACE and O'Connell filed motions for summary judgment based on the third amended complaint.

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7. The complaint also alleged that the Act creating the Assessment impermissibly pertained to multiple, unrelated subject matters in violation of the Georgia Constitution's single-subject rule. In July 2018, the trial court dismissed that count for failure to state a claim. GACE did not appeal that ruling.

While this litigation against the Revenue Commissioner was pending, GACE filed a separate case against the State of Georgia, in March 2022, raising the same arguments challenging the Assessment as raised in the case against the Revenue Commissioner and also asserting that the recent constitutional amendment in Article I, Section II, Paragraph V of the Georgia Constitution waived the State's sovereign immunity "at least to all efforts to collect the [Assessment] based on [GACE]'s member clubs' activities that occurred on or after January 1, 2021 or that will occur in the future."[8] Both parties filed motions for summary judgment in this second case.

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8. In November 2020, the people of Georgia ratified Act 596 (H.R. No. 1023) to add to Georgia's Constitution a waiver of sovereign immunity applicable in circumstances like those presented here. This waiver is codified in Article I, Section II, Paragraph V of Georgia's Constitution and says:

> (b) (1) Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment. Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.

In December 2023, the trial court decided both cases, granting O'Connell's and the State's motions for summary judgment and denying GACE's motions. Adopting the same reasoning in both cases, the court explained that the Assessment was used to create a fund to combat sex trafficking and help victims and that "there is a well-established link between adult-entertainment establishments and prostitution." The court concluded that intermediate scrutiny applied to its analysis of the Assessment, which "has only an incidental impact on protected expression" and is targeted at negative secondary effects of that protected expression. The court held that OCGA § 15-21-209 (a) and the Assessment passed intermediate scrutiny because "[t]hey further an important governmental interest in reducing sex trafficking and the exploitation of minors; their express purpose is unrelated to the suppression of speech; and any incidental restriction of the expressive 'speech' of nude dancing is no greater than essential to further the important governmental interest." The court also concluded that OCGA § 15-21-201 (1) (A) is not overbroad. GACE filed a notice of appeal in both cases.

2. The Assessment does not impermissibly burden GACE's speech.

GACE argues that the Assessment violates the First Amendment of the United States Constitution because it impermissibly burdens the protected expression of nude dancing. We hold that the Assessment is not subject to strict scrutiny because it is content-neutral and not the kind of tax to which the Supreme Court has applied strict

scrutiny. We assume without deciding that the Assessment is subject to intermediate scrutiny. We hold that the Assessment satisfies intermediate scrutiny. Thus, the Assessment does not impermissibly burden speech.[9]

(a) GACE bears the burden of showing that the Assessment's alleged constitutional infirmities are "clear and palpable."

We begin by noting the heavy burden that GACE bears in asserting in Georgia courts a challenge to a state statute as unconstitutional.

> We presume that statutes are constitutional, and before an act of the General Assembly can be declared unconstitutional, the conflict between it and the fundamental law must be clear and palpable and this Court must be clearly satisfied of its unconstitutionality. Because all presumptions are in favor of the constitutionality of a statute, the burden is on the party claiming that the law is unconstitutional to prove it.

Session v. State, 316 Ga. 179, 191 (4) (887 SE2d 317) (2023) (punctuation omitted) (quoting *Ammons v. State*, 315 Ga. 149, 163 (3) (880 SE2d 544) (2022)). This burden applies to challenges under the United States

9. The First Amendment of the United States Constitution prohibits the government from making a law "abridging the freedom of speech, or of the press." U.S. Constitution, Amendment I.

and Georgia Constitutions alike. See *Session*, 316 Ga. at 191 (4) (evaluating challenge to statute under Georgia Constitution); *S&S Towing & Recovery, Ltd. v. Charnota*, 309 Ga. 117, 118 (1) (844 SE2d 730) (2020) (evaluating challenge to statute under Fourteenth Amendment of United States Constitution and stating that the statute could be held unconstitutional only if "the conflict between it and the fundamental law" was "clear and palpable") (citation and punctuation omitted).

(b) Because the Assessment is aimed at addressing negative "secondary effects" of establishments featuring nude dancing, rather than the content of the expression, the Assessment is content-neutral.

We begin our consideration of the applicable standard under the First Amendment by noting the absence of precedent providing on-point guidance. The parties do not cite, and we have not found, any federal appellate decision (much less from the Supreme Court) considering a First Amendment challenge to a tax on adult entertainment establishments like the one at issue here. Most cases addressing regulations of sexually oriented business, such as zoning and licensing requirements, involve complete prohibitions on the combination of nudity (or semi-nudity) and alcohol. See, e.g., *Oasis Goodtime Emporium I*, 297 Ga. at 525 (3) (b); *Maxim Cabaret*, 304 Ga. at 193-194 (III); *Trop*, 296 Ga. at 88 (1); *Chambers*, 268 Ga. at 674 (2); *Goldrush II*, 267 Ga. at 692-693 (5); *Gravely*, 263 Ga. at 207 (2). And the cases addressing the First Amendment limitations on taxation since the Supreme Court's adoption

of intermediate scrutiny in *United States v. O'Brien*, 391 U.S. 367 (88 SCt 1673, 20 LE2d 672) (1968), primarily relate to taxes levied against the press. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (107 SCt 1722, 95 LE2d 209) (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue*, 460 U.S. 575 (103 SCt 1365, 75 LE2d 295) (1983). And the handful of our sister courts to address similar taxation schemes have arrived at different conclusions regarding the applicable legal framework. See *Bushco v. Utah State Tax Comm.*, 2009 UT 73, 225 P3d 153, 163-164 (Utah 2009) (analyzing constitutionality of tax under intermediate scrutiny as articulated in *O'Brien*); *Combs v. Texas Ent. Assn., Inc.*, 347 SW3d 277, 288 (Tex. 2011) (same); *Deja Vu Showgirls of Las Vegas, LLC v. Nevada Dept. of Taxation*, 130 Nev. 719, 334 P3d 392, 401-402 (Nev. 2014) (analyzing constitutionality of tax under rational basis review). At least some of the disagreement between us and the dissent is a natural byproduct of this lack of clear precedent.

As relevant to this appeal, the Assessment applies to establishments where alcohol is sold and where "[t]he entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation." OCGA § 15-21-201 (1) (A). The nude dancing referenced in OCGA § 15-21-201 (1) (A) is a form of expressive conduct that is protected by the First Amendment of the United States Constitution, although only barely. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (111 SCt 2456, 115 LE2d 504) (1991)

("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (120 SCt 1382, 146 LE2d 265) (2000) ("[N]ude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.").

GACE argues that the Assessment is content-based because it applies only to clubs that feature nude dancing conveying an erotic message. Specifically, GACE notes that the Assessment applies when the nude dancing is provided as "entertainment" and when nude performers are "engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation." OCGA § 15-21-201 (1) (A). GACE argues that because the Assessment is content-based, it is subject to a strict scrutiny test, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (135 SCt 2218, 192 LE2d 236) (2015) (citation and punctuation omitted). We disagree and conclude that the Assessment is content-neutral.

> The principal inquiry in determining whether a legislative act is content-neutral is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an

> incidental effect on some speakers or messages but not others.

Oasis Goodtime Emporium I, 297 Ga. at 521 (3) (a) (punctuation omitted). The United States Supreme Court has explained that when an ordinance "is aimed not at the *content*" of adult entertainment, but "rather at the *secondary effects*" of establishments that feature adult entertainment, the "ordinance is completely consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (106 SCt 925, 89 LE2d 29) (1986) (emphasis in original); see also *Oasis Goodtime Emporium I*, 297 Ga. at 521 (3) (a) ("An ordinance designed to combat the undesirable secondary effects of sexually explicit businesses is content-neutral.") (punctuation omitted).

Here, the Assessment clearly fits within the category of laws that are aimed at the "secondary effects" of adult establishments featuring certain protected expression rather than at the content of the expression itself. First, the General Assembly made clear that it did not intend to regulate expression protected by the First Amendment: "The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state." Ga. L. 2015, p. 675, § 1-2.

Instead, the General Assembly explained in its legislative findings that the Assessment's objective is to "address the deleterious secondary effects . . . associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol" by funding a "protective response" through assessments imposed on the industry responsible for those secondary effects. Id.; see also OCGA § 15-21-209 (c). Thus, because the purpose of the Assessment is to address the undesirable secondary effects of adult entertainment establishments, we assume without deciding that intermediate scrutiny applies. See, e.g., *Maxim Cabaret*, 304 Ga. at 192 (III) (concluding that the regulation designed to combat the secondary effects caused by the combination of alcohol and live nudity was subject to intermediate scrutiny).

GACE contends that the secondary effects doctrine has "been applied exclusively in regulatory contexts, often related to land use or licensing." Thus, GACE argues, because the Assessment is a tax and because the Supreme Court "has taken a negative, bright-line attitude toward taxation that discriminates based on protected expression," the Assessment must satisfy strict scrutiny. But the United States Supreme Court has held that a tax "discriminat[ing] among speakers is constitutionally suspect only in certain circumstances": (1) if it "single[s] out the press[,]" (2) "if it targets a small group of speakers[,]" or (3) "if it discriminates on the basis of the content of taxpayer speech." *Leathers v. Medlock*, 499 U.S. 439, 444-447 (111 SCt 1438, 113 LE2d 494) (1991). GACE does not argue that the adult entertainment establishments subject to the Assessment are part of the

press, and we have already concluded that the Assessment is content-neutral. As to whether the Assessment targets a small group of speakers, it is true that the Assessment applies only to certain establishments, but it applies to a significant percentage of establishments within the category of adult live entertainment establishments as a whole, not a small, select few. See *Turner Broadcasting System, Inc. v. Fed. Communications Comm.*, 512 U.S. 622, 661 (114 SCt 2445, 129 LE2d 497) (1994) (describing regulations as "broad-based, applying to almost all cable systems in the country, rather than just a select few" in concluding that strict scrutiny did not apply); see also *Nat. Amusements, Inc. v. Town of Dedham*, 43 F3d 731, 740 (1st Cir. 1995) ("Under appellant's formulation, any regulation that has an effect on fewer than all First Amendment speakers or messages could be deemed to be a form of targeting and thus subjected to strict scrutiny. Yet the Supreme Court has recognized that a municipality lawfully may enact a regulation that 'serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others.'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (109 SCt 2746, 105 LE2d 661) (1989))). Thus, the Assessment does not fall within the three categories of taxes identified in *Leathers* as "constitutionally suspect," and strict scrutiny does not apply.

The Defendants, on the other hand, cite *Leathers* to support their contention that the Assessment does not implicate the First Amendment at all. Because we conclude that the Assessment satisfies intermediate scrutiny, we do not reach the question of whether the

Assessment need satisfy only a less-exacting test. We do note, however, that at least one court to consider a similar tax held that the tax it was reviewing was subject only to rational basis review. *Deja Vu Showgirls of Las Vegas, LLC*, 334 P3d at 399-402 (upholding under rational basis review a tax on live entertainment with many exemptions for "family-oriented" entertainment).

(c) The intermediate scrutiny test.

Where "the governmental purpose in enacting the [speech-burdening] regulation is unrelated to the suppression of expression," the regulation needs to satisfy the intermediate scrutiny test articulated in *O'Brien*. *City of Erie*, 529 U.S. at 289; see also *Turner Broadcasting System, Inc. v. Fed. Communications Comm.*, 520 U.S. 180, 189 (117 SCt 1174, 137 LE2d 369) (1997) (describing *O'Brien* test as "intermediate scrutiny"); *Maxim Cabaret*, 304 Ga. at 192 (III) (citing *O'Brien* when describing intermediate scrutiny). Under *O'Brien*, a content-neutral law may be constitutional under the First Amendment: "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.[10]

10. In *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (297 SE2d 250) (1982), a case that dealt with claims based only on the Georgia Constitution, this Court cited *O'Brien* when holding that "content-neutral legislation" is constitutional "if it

i. The Assessment is within the General Assembly's Constitutional power.

As to the first prong, there is no dispute that it is "within the constitutional power" of the General Assembly to impose taxes. See Ga. Const. of 1983, Art. VII, Sec. I, Par. I ("Except as otherwise provided in this Constitution,

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furthers an important government interest; if the government interest is unrelated to the suppression of speech; and if the incidental restriction of speech is no greater than is essential to the furtherance of that interest." *Paramount Pictures*, 250 Ga. at 255-256 (1). While at first blush this articulation of the test appears to miss the first prong, that is only because no party contended that the regulation at issue there was beyond the constitutional power of the government to impose. See generally id. This Court has cited both *O'Brien* and *Paramount Pictures* in addressing free speech challenges brought under the United States and Georgia Constitutions. And although the test this Court laid out in *Paramount Pictures* and later cases applying intermediate scrutiny does not expressly recite *O'Brien*'s first prong, our Court has treated the *Paramount Pictures* test as consistent and coextensive with the *O'Brien* test. See *Goldrush II*, 267 Ga. at 690 (3) (explaining, before applying the *Paramount Pictures* test to a challenge under both the United States and Georgia Constitutions, that the "application of our tripartite *Paramount Pictures* test or the First Amendment analytical framework from which it is derived remains appropriate for content-neutral legislation"); see also id. at 690 (3) n.8 ("The *Paramount Pictures* three-pronged study of statutes and ordinances to determine whether the free expression guaranty of the Georgia Constitution has been violated is derived from the analytical framework applied by federal courts when measuring legislative enactments against the First Amendment of the U.S. Constitution."); *Maxim Cabaret*, 304 Ga. at 192 (III) (citing *O'Brien* when describing intermediate scrutiny).

the right of taxation shall always be under the complete control of the state.").

ii. The Assessment furthers an important government interest.

As to the second prong, the State has an important interest in remedying the secondary effects caused by adult entertainment establishments, and it furthered that interest by creating a fund to support sexually exploited children. But the State's interest is not, as the dissent would have it, merely a general interest in raising revenue to combat these secondary effects. Rather, implicit within the State's interest is an element of seeking not to burden taxpayers in general with the costs of remedying the harm that the adult entertainment industry causes. This element strikes us as clearly implicit within the structure of the challenged statute (imposing the Assessment on the adult entertainment industry) viewed in the light of the State's findings that the secondary effects are caused by that industry. And, indeed, it appears to have struck the trial court similarly. See MSJ Order at 3130-31 ("In other words, GACE is essentially asking the state to subsidize them by covering the costs of mitigating the secondary effects of their own operations.").[11]

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11. Furthermore, contrary to the dissent's assertion, the State's interest in "regulating adult businesses" by reducing the secondary effects of adult entertainment establishments that serve alcohol is clear from the legislative findings. Ga. L. 2015, pp. 675-677, § 1-2 ("The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation

Although GACE acknowledges that providing resources for sexually exploited children is an "important

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of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. . . . The General Assembly acknowledges that many local governments in this state and in other states *found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol* in such establishments." (emphasis added)). The dissent's contention that this interest would run afoul of *O'Brien*'s third prong is contrary to the relevant caselaw. See *Combs*, 347 SW3d at 288 (concluding that the State's interest in "reducing the secondary effects of adult businesses" by creating a "disincentive" on the combination of nude dancing and alcohol was "unrelated to the suppression of free expression"); *Oasis Goodtime Emporium I*, 297 Ga. at 525 (3) (c) (1) (concluding that an ordinance prohibiting the combination of even semi-nude dancing and alcohol satisfied the second and third prongs of the *Paramount Pictures* test).

In fact, recognizing that "[s]erving alcohol is not itself protected expression," this Court has repeatedly upheld more restrictive regulations on adult entertainment establishments—including complete bans on the combination of nudity (even semi-nudity) and alcohol. *Oasis Goodtime Emporium I*, 297 Ga. at 525 (3) (c) (1); see also, e.g., *Maxim Cabaret*, 304 Ga. at 193-194 (III); *Trop*, 296 Ga. at 88 (1); *Chambers*, 268 Ga. at 674 (2); *Goldrush II*, 267 Ga. at 692-693 (5); *Gravely*, 263 Ga. at 207 (2). Conspicuously absent from the dissent is any explanation (beyond its disagreement on what state interests are properly considered) of how a tax on the combination of alcohol and nude dancing is more offensive to the First Amendment than the multitude of regulations and ordinances imposing outright bans on the combination of alcohol and nude dancing that we have previously upheld.

or substantial government interest,"[12] it contends that the Assessment fails the *O'Brien* test because the legislature did not reasonably rely on evidence connecting adult entertainment establishments with child exploitation.

To demonstrate "a connection between speech and a substantial, independent government interest," the government "may rely on any evidence that is 'reasonably believed to be relevant[.]'"[13] *City of Los*

12. See *City of Erie*, 529 U.S. at 296 ("The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important."); see also *Maxim Cabaret*, 304 Ga. at 193 (III) (explaining that "attempting to preserve the quality of urban life and reducing criminal activity and preventing the deterioration of neighborhoods" are "important government interests") (cleaned up).

13. It may not be necessary for the State to point to evidentiary support demonstrating a connection between adult entertainment establishments and child sexual exploitation to satisfy the second prong of the *O'Brien* test. See *City of Erie*, 529 U.S. at 298-299 (noting that the *O'Brien* Court "did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards"); *Bushco*, 225 P3d at 165-166 (Although "the Supreme Court, in construing the 'substantial state interest' prong under *Renton* and its other secondary effects cases, has required parties seeking to justify a regulation of speech under the secondary effects doctrine to establish some level of evidentiary connection between the secondary effects a regulation targets and the speech it regulates, no similar burden of proof exists under the *O'Brien* test."). But because the Defendants have proffered sufficient evidence to satisfy *City of Renton*, it is unnecessary to decide whether the *O'Brien* test permits a lesser evidentiary showing.

Angeles v. Alameda Books, Inc., 535 U.S. 425, 438-439 (122 SCt 1728, 152 LE2d 670) (2002) (plurality opinion) (quoting *City of Renton*, 475 U.S. at 50-52).[14] Although the government cannot "get away with shoddy data or reasoning," *Alameda Books*, 535 U.S. at 438, it is not required "to prove the efficacy of the studies" it relies on. See *Parker v. Whitfield County*, 265 Ga. 829, 829 (1) (463 SE2d 116) (1995) (citation and punctuation omitted). "The First Amendment does not require" the State "to conduct new studies or produce evidence independent of that already generated by other" jurisdictions, as long as the evidence relied upon "is reasonably believed to be relevant to the problem that" the State seeks to address. *City of Renton*, 475 U.S. at 51-52. In short, "very little evidence is required" to satisfy this standard. *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring).

To successfully challenge the State's evidence, GACE must either demonstrate that the State's "evidence does

14. The lead opinion in *Alameda Books* was a four-justice plurality opinion, with Justice Kennedy providing a fifth vote for the judgment upholding the challenged regulation but articulating a different test. Notably, however, "Justice Kennedy concurred with the *Alameda Books* plurality opinion penned by Justice O'Connor because he agreed about the quantum of evidence necessary for the government to prove that a challenged law was motivated by a desire to counteract adverse secondary effects." *Flanigan's Enterprises, Inc. of Ga. v. City of Sandy Springs, Ga.*, 703 Fed. Appx. 929, 936 (11th Cir. 2017) (concluding that Justice Kennedy's concurrence was not controlling opinion). This evidentiary standard on which the plurality and Justice Kennedy agreed, which was necessary to the holding and did enjoy the concurrence of five justices, is the only point for which we cite *Alameda Books*.

not support its rationale" or "furnish[] evidence that disputes the [State's] factual findings." *Alameda Books*, 535 U.S. at 438-439. "If [GACE] succeed[s] in casting doubt on [the State's] rationale in either manner, the burden shifts back to the [State] to supplement the record with evidence renewing support for a theory that justifies its [statute]." Id. at 439.

The studies and evidence relied upon by the General Assembly to demonstrate a connection between adult entertainment establishments and child sexual exploitation are more than sufficient to satisfy the standard articulated in *City of Renton* and *Alameda Books*. For example, the study Hidden in Plain View: The Commercial Sexual Exploitation of Girls in Atlanta, Atlanta Women's Agenda (2005) found "a strong spatial correlation between areas of adult prostitution activities and juvenile prostitution-related activities," that "[j]uvenile truants and runaways are often found in areas with heavy adult prostitution activities," and most notably, "a spatial association between prostitution-related activities and legal adult sex venues."[15] In the light of these findings, the General Assembly's Commercial Sexual Exploitation of Minors Joint Study Commission concluded in its final report that because of the "frequent proximity between adult entertainment venues and prostitution activity . . . employment in such businesses frequently serve[s] as a stepping stone to prostitution," and that "these businesses often serve as the very location for such illicit

15. The "legal adult sex venues" analyzed in the study included "strip clubs, lingerie modeling venues[,] and sex shops."

transactions." Furthermore, the Commission noted that "there is a strong need for additional in-patient, as well as out-patient, services tailored to the unique needs of [child sexual exploitation] survivors," and proposed that a "way to raise funds for additional resources would be to place a modest surcharge on patrons to adult entertainment venues, which would be specifically directed toward increased services for victims." Thus, the evidence before the General Assembly demonstrating a connection between child sexual exploitation and adult entertainment establishments "fairly support[ed] the [State's] rationale for [the Assessment]." *Alameda Books*, 535 U.S. at 438.

In response, GACE argues that these studies are flawed and do not in fact establish such a connection. Specifically, GACE contends that "[s]ome studies do not analyze adult entertainment establishments at all; some do not discuss child sex trafficking; [and] some rely on the mere rough spatial proximity between juvenile prostitution arrests and 'adult sex venues[.]'" But as discussed above, Hidden in Plain View explicitly analyzed the link between child sexual exploitation and adult entertainment establishments. This alone would be enough to satisfy the State's evidentiary burden. But the General Assembly also relied upon other studies that arrived at similar conclusions. See Deconstructing the Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex, Chicago Alliance Against Sexual Exploitation (2008) (finding that 46 percent of men who purchased sex "indoors" did so at "strip clubs"); Adolescent Girls in Georgia's Sex Trade: An In-Depth Tracking Study, Juvenile Justice Group

(2008) (noting that researchers found that "[t]here are several small hotels and motels—typically located near strip clubs—where on any weekend night you will find the same group of 10-15 prostitutes, many of whom are young"). Nevertheless, GACE contends that any "spatial association" between adult entertainment establishments and child sexual exploitation may be the result of "past zoning" rather than any "connection to child sex trafficking." But even if the evidence was consistent with both GACE's zoning theory and the General Assembly's "gateway" theory, the General Assembly was not required "to prove that its theory is the only one that can plausibly explain the data[.]" *Alameda Books*, 535 U.S. at 437-438. In other words, although the State "bears the burden of providing evidence that supports a link between" adult entertainment establishments and child sexual exploitation, "it does not bear the burden of providing evidence that rules out every theory for the link . . . that is inconsistent with its own." Id. at 437.

GACE also cites two studies that purport to refute any connection between child sexual exploitation and adult entertainment establishments. We doubt that either study *directly* refutes the General Assembly's gateway and proximity theories derived from the evidence discussed above. But even if GACE "succeed[ed] in casting doubt on [the State's] rationale," the burden would merely shift back to the State "to supplement the record with evidence renewing support for a theory that justifies" the Assessment. *Alameda Books*, 535 U.S. at 439. The live testimony heard by the General Assembly easily satisfies the State's burden. See *City of Erie*, 529 U.S. at 300

(criticizing the dissent for "ignor[ing] Erie's actual experience and instead requir[ing] . . . an empirical analysis"). The General Assembly heard from multiple witnesses who testified that they or victims they knew were initially trafficked through establishments like strip clubs. In response, GACE contends that the testimony "is out of date or anecdotal." But GACE misconstrues the State's evidentiary burden. See *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F3d 860, 881 (11th Cir. 2007) ("Lollipop's argument that the City's evidence is flawed because it consists of 'anecdotal' accounts rather than 'empirical' studies essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is unreasonable. This was not the law before *Alameda Books*, and it is not the law now."); see also *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 630 F3d 1346, 1358 (11th Cir. 2011) ("There is no precedent that bars a county from relying on studies that are not empirical in nature."). As the trial court correctly stated, the State is not required to "prove without question that the tax will prevent sexual exploitation. Instead, the evidence need only support a *reasonable belief* that this modest tax will advance the State's interests in protecting victims of child sex exploitation." See *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring) ("As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners."). The evidence relied upon by the General Assembly clearly meets this evidentiary standard. Accordingly, the Assessment satisfies the second prong of the *O'Brien* test.

iii. The State's interest is unrelated to suppressing free expression.

As to the third prong, the State's interest in "combating the negative secondary effects associated with adult entertainment establishments" is "unrelated to the suppression of free expression." *City of Erie*, 529 U.S. at 296, 301.

iv. The Assessment's incidental burden on expression promotes the State's interest in a way that would be achieved less effectively absent the Assessment.

We begin our analysis of the fourth prong by articulating the difference in our understanding of its requirements from that of the dissent. The dissent interprets the language *O'Brien* used to describe its fourth prong as similar to the least-restrictive-means test of strict scrutiny: "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

But more recent decisions of the United States Supreme Court have made clear that reading of *O'Brien* is mistaken. Instead, a burden on expression subject to intermediate scrutiny satisfies the fourth prong if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*,

491 U.S. at 799 (citation and punctuation omitted).[16] As the *Ward* Court explained, the fourth prong of the *O'Brien* test does not require that the challenged law be "the least restrictive or least intrusive means" of "serv[ing] the government's legitimate, content-neutral interests[.]" Id. at 798; see also *City of Erie*, 529 U.S. at 301-302 (explaining that under the intermediate scrutiny test, a "least restrictive means analysis is not required"). Indeed, the *Ward* Court was considering a lower court's decision that had understood *O'Brien* as the dissent does, and had invalidated a speech restriction under intermediate scrutiny because there were alternative ways to serve the same government interest with less burden on speech. See *Ward*, 491 U.S. at 798. In reversing that lower court, the *Ward* Court made clear that the presence of a less-restrictive way of serving the government interest was not fatal to intermediate scrutiny; "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served

16. *Ward* considered a time, place, or manner restriction on speech, but explained, when considering the tailoring requirement, that the requirements for a time, place, or manner restriction that burdens speech are equivalent to that in *O'Brien*: "[W]e have held that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Ward*, 491 U.S. at 798 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (104 SCt 3065, 82 LE2d 221) (1984)).

by some less-speech-restrictive alternative."[17] Id. at 800. This is a key distinction between strict and intermediate scrutiny. See *McCullen v. Coakley*, 573 U.S. 464, 478 (134 SCt 2518, 189 LE2d 502) (2014) (explaining that an act that "must satisfy strict scrutiny . . . must be the least restrictive means of achieving a compelling state interest").

A review of the application of *O'Brien*'s fourth prong in other cases from the United States Supreme Court and this Court illustrates what kinds of incidental restrictions on expression are permissible. For example, in *City of Erie*, the United States Supreme Court upheld an ordinance prohibiting nudity in public places, concluding that the requirement burdening speech—i.e., "[t]he requirement that dancers wear pasties and G-strings"—was "a minimal restriction in furtherance of the asserted

17. The dissent suggests that we may read *Ward* as articulating a test that differs from *O'Brien*'s fourth prong. We do not. *Ward* did not change anything about *O'Brien*, it simply clarified how its fourth prong was to be applied and reversed a lower court that misread *O'Brien* in the same way that the dissent does. See *Ward*, 491 U.S. at 798-799; see also *City of Erie*, 529 U.S. at 301-302 ("In any event, since this is a content-neutral restriction, least restrictive means analysis is not required." (citing *Ward*, 491 U.S. at 798-799, n.6.)); *Turner Broadcasting System*, 512 U.S. at 662 ("'To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. 'Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."'") (quoting *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (105 SCt 2897, 86 LE2d 536) (1985))).

government interests" and left "ample capacity to convey the dancer's erotic message." 529 U.S. at 301. Although there were "alternative means," such as zoning restrictions, to address the secondary effects caused by nude dancing, the Court reiterated that the consideration of these alternatives was unnecessary because the "least restrictive means analysis [was] not required." Id. at 301-302.

Similarly, in *Ward*, the Court upheld a requirement that performers in a public concert venue use sound equipment provided and controlled by the city because "the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances." 491 U.S. at 800. Thus, because the "alternative regulatory methods hypothesized by the Court of Appeals reflect[ed] nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved . . . [t]he Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by" the regulation. Id.

This Court has also applied the *O'Brien* test to evaluate whether prohibitions on the combination of nude dancing and alcohol were sufficiently tailored to further the government's stated interest without unnecessarily burdening protected expression. See, e.g., *Gravely*, 263 Ga. at 207 (2); *Goldrush II*, 267 Ga. at 692-693 (5); *Maxim*

Cabaret, 304 Ga. at 193-194 (III). For example, in *Gravely*, we upheld an ordinance banning the sale of alcohol at erotic dance establishments because it "impact[ed] only those modes of expression which, in the experience of local governments, tend to be the focal points of negative effects such as increased crime[.]" 263 Ga. at 205 (1) (citation and punctuation omitted). Since *Gravely*, this Court has "repeatedly upheld bans on liquor sales in sexually oriented businesses as a method of decreasing the undesirable secondary effects of such businesses with minimal incidental effects on free expression." *Maxim Cabaret*, 304 Ga. at 193 (III); see also *Goldrush II*, 267 Ga. at 692-693 (5) ("[T]he ordinance's application is sufficiently narrowly tailored because it is limited to the modes of expression implicated in the production of negative secondary effects—those establishments that provide alcohol and entertainment requiring an adult entertainment license—thereby exempting mainstream performance houses, museums, or theaters."). In short, when the restriction on protected expression is directly linked to the government's objective to mitigate negative secondary effects, the *O'Brien* test is satisfied, even if an alternative method of accomplishing the government's interest is available. See *Oasis Goodtime Emporium I*, 297 Ga. at 526 (3) (c) (2) (concluding that the ordinance prohibiting employees of sexually oriented businesses from appearing fully nude struck "a constitutionally permissible fit between the objective of reducing undesirable secondary effects and the need to protect free speech," even though the requirement that dancers "wear at least *some* minimal kind of costume" while dancing

imposed "more of a restriction on protected expression than prohibiting alcohol in the vicinity").[18]

Against this backdrop of binding precedent, we conclude that the Assessment complies with the fourth prong of the *O'Brien* test. As the General Assembly's legislative findings and statutory scheme show, the Assessment's objective is to "address the deleterious secondary effects . . . associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol" by imposing an assessment on the industry responsible for those secondary effects to fund a "child protective response[.]" Ga. L. 2015, pp. 675-677, § 1-2. The State's interest—which includes requiring the industry that "tend[s] to be the focal point[] of negative effects" to fund the remedy for the harm it creates—is thus principally served by a targeted tax. See *Gravely*, 263 Ga. at 205 (1) (citation and punctuation omitted); see also *Bushco*, 225 P3d at 168 ("In this case, the Tax promotes the interest in providing treatment for sex offenders by raising revenue and directing that revenue towards treatment programs."); *Combs*, 347 SW3d at 288 (concluding that a fee on adult entertainment establishments that serve alcohol survived intermediate scrutiny). Like the regulations at issue in *City of Erie* and *Ward*, the Assessment serves the State's interest "in

18. Although *Oasis Goodtime Emporium I* addressed a claim under the Georgia Constitution, our Court analyzed the ordinance at issue under the *Paramount Pictures* test. See *Oasis Goodtime Emporium I*, 297 Ga. at 520 (3) n.11, 523 (3) (b). As noted above, that test is identical, in all material respects, to the *O'Brien* test. See, e.g., *Goldrush II*, 267 Ga. at 690 (3) n.8.

a direct and effective way," satisfying the fourth prong of the *O'Brien* test. See *Ward*, 491 U.S. at 800; *City of Erie*, 529 U.S. at 300-301; see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297 (104 SCt 3065, 82 LE2d 221) (1984) ("None of [the] provisions [of regulation prohibiting camping in certain parks] appears unrelated to the ends that it was designed to serve.").

Moreover, it is not disputed that 100 percent of the Assessment goes to fund the response to the secondary effects. As *Ward* explained, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. No portion of the burden on speech that the Assessment imposes does not serve to advance the State's goals.

GACE argues that the Assessment fails this prong because there are less burdensome ways of accomplishing the State's interest. Specifically, GACE contends that the State's only interest is "raising revenue to combat a particular social problem" and that "[a] broad-based tax raising the same revenue" would further that interest "without burdening expression." But as we have already explained, GACE mischaracterizes the requirements of intermediate scrutiny and takes too narrow a view of the State's interest.

GACE's argument that the Assessment fails this prong "because there are less burdensome ways of addressing the [S]tate's interest" and thus "the First Amendment requires that these methods, rather than the

[Assessment], be used" is simply an effort to smuggle the least restrictive means requirement from strict scrutiny into intermediate scrutiny. See *Bushco*, 225 P3d at 168. But as we have already explained, the United States Supreme Court has repeatedly stated that *O'Brien* does *not* require the State to adopt the least restrictive means available to serve its asserted interest to satisfy intermediate scrutiny. See *City of Erie*, 529 U.S. at 301-302 ("In any event, since this is a content-neutral restriction, least restrictive means analysis is not required.").[19] Accordingly, the availability of alternative methods for accomplishing the State's purpose is not indicative of a poor fit between the burden on expression and the State's interest.

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19. See also, e.g., *McCullen*, 573 U.S. at 486 ("Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests." (citation and punctuation omitted)); *Hill v. Colorado*, 530 U.S. 703, 726 (120 SCt 2480, 147 LE2d 597) (2000) ("As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."); *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478 (109 SCt 3028, 106 LE2d 388) (1989) ("We uphold such restrictions so long as they are narrowly tailored to serve a significant governmental interest, a standard that we have not interpreted to require elimination of all less restrictive alternatives." (citations and punctuation omitted)); *Intl. Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 707 (112 SCt 2711, 120 LE2d 541) (1992) (Kennedy, J., concurring) ("[W]e have held that to be narrowly tailored a regulation need not be the least restrictive or least intrusive means of achieving an end.").

Furthermore, GACE's contention that a general tax—which "would no doubt inflict burdens on a greater variety of protected expression" than the targeted tax scheme at issue here—would be less restrictive highlights its misunderstanding of the State's interest.[20] *Bushco*, 225 P3d at 168. The State's interest is *not* merely a general interest in raising revenue to combat a particular harm, i.e., the sexual exploitation of children; the Assessment also furthers the State's interest in ensuring that the industry responsible for that harm, i.e., adult entertainment establishments that serve alcohol, rather than the general public, pays for the remedy.[21] Any other interpretation of the State's interest would render the General Assembly's specific findings that adult entertainment establishments are responsible for this particular harm meaningless. When the State's interest is properly framed—as an effort to reduce the harm caused by the secondary effects of adult entertainment establishments and requiring the responsible industry to bear the cost—the close fit between the burdening of expression and the State's interest is apparent.

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20. GACE cites *Minneapolis Star & Tribune Co.*, 460 U.S. at 588-589, and *Arkansas Writers' Project*, 481 U.S. at 229-233, for its assertion that a general tax is a less restrictive alternative and thus evidence that the Assessment is not narrowly tailored. But, as explained above, these cases do not apply here because they involved strict scrutiny rather than *O'Brien*'s intermediate scrutiny test.

21. As the Defendants stated during oral argument before this Court, "the State is trying to mitigate the negative social effects caused by these businesses. The narrow tailoring is that it is taxing the businesses that are associated with that negative social impact."

And, in any event, any burdens on protected expression are relatively de minimis. The Assessment does not prohibit nude dancing, regulate the content of nude dancing, restrict the time, place, or manner of nude dancing, or prohibit the combination of nude dancing and alcohol. Thus, the Assessment is *less* burdensome than the ordinance upheld in *City of Erie*, which imposed a blanket ban on public nudity.[22] See *Bushco*, 225 P3d at 169 ("Since the Tax's impact on protected expression is even less burdensome than the impact of the public nudity ordinance upheld in *Erie*, we determine that the Tax satisfies the 'narrow tailoring' prong of the *O'Brien* test.").

The Assessment requires adult entertainment establishments that serve alcohol and operate for a profit to pay the greater of one percent of the previous year's gross revenue or $5,000. See OCGA § 15-21-209 (a). This tax is significantly less burdensome than similar

22. Despite this, the dissent predicts that our decision today somehow can lead to the "circumvention of the constitutional protections *O'Brien* attempted to safeguard." But notably absent from the caselaw the dissent cites is a single case from this Court or the United States Supreme Court applying intermediate scrutiny to invalidate a regulation on adult entertainment establishments, much less such a case considering a regulation like the one at issue here; all of the cases it cites involving constitutional challenges to regulations affecting adult entertainment upheld those regulations. See, e.g., *Maxim Cabaret*, 304 Ga. at 193-194 (III); *Oasis Goodtime Emporium I*, 297 Ga. at 525-526 (3) (c) (1); *Trop*, 296 Ga. at 88 (1); *Chambers*, 268 Ga. at 674 (2); *Goldrush II*, 267 Ga. at 692-693 (5); *Gravely*, 263 Ga. at 207 (2); see also *Alameda Books*, 535 U.S. at 430; *City of Erie*, 529 U.S. at 296-297; *Barnes*, 501 U.S. at 571-572; *City of Renton*, 475 U.S. at 50-52.

taxes upheld by other courts.[23] See, e.g., *Bushco*, 225 P3d at 158 (largely upholding a ten percent tax on gross revenue). And it can be avoided entirely by not serving alcohol or not performing substantially nude. See *Oasis Goodtime Emporium I, Inc.*, 297 Ga. at 525 (3) (c) (1) ("Serving alcohol is not itself protected expression."); *Maxim Cabaret*, 304 Ga. at 193 (III) ("[C]onstitutional protections are extended to speech and expression, not to profits."); *Bushco*, 225 P3d at 168 ("Plaintiffs can avoid the Tax, just like the businesses in *Erie* could avoid the ordinance, simply by having their erotic dancers use G-strings and pasties."); see also *Sensations, Inc. v. City of Grand Rapids*, 526 F3d 291, 299 (6th Cir. 2008) ("The prohibition of full nudity has been viewed as having only a de minimis effect on the expressive character of erotic dancing."). Thus, the Assessment "leaves ample capacity to convey [a] dancer's erotic message," *City of Erie*, 529 U.S. at 301, and leaves GACE's members "free to express themselves as they wish through dance or otherwise."[24] *Oasis Goodtime Emporium I*, 297 Ga. at 525 (3) (c) (1).

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23. Notably, GACE does not argue that the tax's size impacts the Court's analysis, instead arguing that "a *de minimis* tax is subject to the same analysis as a larger tax." Given our conclusion that the Assessment is clearly de minimis, we need not establish a precise threshold at which a tax would constitute an unconstitutional burden on protected expression.

24. Our analysis assumes that GACE's members are themselves engaged in protected expression. That assumption strikes some of us as dubious. Although the individuals performing nude dance are clearly engaging in protected expression, the record contains no explanation of how the entities that operate these establishments engage in expressive conduct. But because this issue is not before the Court and because we hold that the Assessment is constitutional, we need not address this issue.

In short, like the dozens of other laws, regulations, and ordinances restricting the combination of nudity and alcohol upheld by this Court and the United States Supreme Court, the Assessment satisfies intermediate scrutiny.[25]

3. GACE's overbreadth claim fails.

GACE concludes with a brief argument that the Assessment is overbroad because the definition of "adult entertainment establishment" under OCGA § 15-21-201 (1) (A) contains several vague terms. GACE argues that even though it is not specifically raising a vagueness challenge (the statute is not vague as to GACE's members), an overbreadth challenge may nevertheless use the vagueness of statutory terms in arguing that a statute reaches a substantial amount of protected activity by third parties. GACE argues that the Assessment could apply to venues that feature traditional shows with risqué content or host entertainers known for wearing revealing attire

25. Our holding today is consistent with the holdings of every appellate court decision we have found addressing similar claims about similar assessments. See, e.g., *Bushco*, 225 P3d at 171-172; *Combs*, 347 SW3d at 288; *Deja Vu Showgirls*, 334 P3d at 399-402. GACE points us to one unreported decision of a Texas federal district court arriving at the opposite conclusion regarding the Texas assessment previously upheld by the Texas Supreme Court. See *9000 Airport LLC v. Hegar*, No. 4:23-CV-03131, 2023 U.S. Dist. LEXIS 201337, 2023 WL 7414581 (S.D. Tex. Nov. 9, 2023). That district court decision is presently on appeal to the Fifth Circuit, we find its reasoning generally unpersuasive, and (unlike here) that court found that the record did not support a conclusion that the assessment was aimed at secondary effects.

that would qualify as "substantially nude" under OCGA § 15-21-201 (1) (A), as well as hotels or movie theaters (those that serve alcohol) where movies with sexual content is available. We conclude that GACE has not met its burden of establishing that the statute is overbroad.

Under the United States Supreme Court's First Amendment overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech," *United States v. Williams*, 553 U.S. 285, 292 (128 SCt 1830, 170 LE2d 650) (2008), even if it may constitutionally be enforced against the plaintiff. The doctrine "seeks to strike a balance between" "the threat of enforcement of an overbroad law [that] deters people from engaging in constitutionally protected speech" and the concern that "invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects." Id. Application of the overbreadth is "strong medicine" that should be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (93 SCt 2908, 37 LE2d 830) (1973). Because the doctrine is not to be "casually employed," a challenger must show that a statute's overbreadth is "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292-293. Thus, to succeed on an overbreadth challenge, a challenger "bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (123 SCt 2191, 156 LE2d 148) (2003) (citation and punctuation omitted).

As an initial point, as we have concluded above, the Assessment has a plainly legitimate sweep (its

application to GACE's members). And GACE makes no argument relative to establishments that "consist of" nude dancing, which are those businesses that make up GACE's organization. All that is at issue here, then, is their argument that the definitions of "consists of" and "substantially nude" are overbroad. Although these terms may be imprecise, GACE has not shown that any overbreadth is "substantial" relative to the statute's plainly legitimate sweep.

Ordinarily, the first step in assessing an overbreadth claim is to construe the challenged statute to understand the full extent of its effect on protected expression. See *Scott v. State*, 299 Ga. 568, 570 (1) (788 SE2d 468) (2016). But we need not do so comprehensively here. GACE's overbreadth argument focuses exclusively on a single aspect of the definition of "adult entertainment establishment" contained in OCGA § 15-21-201 (1).

The challenged part of the definition provides that an establishment qualifies (and thus other provisions of the Act then subject it to the Assessment) if "[t]he entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation[.]" OCGA § 15-21-201 (1) (A). GACE argues that "substantially nude" is very broad, that "consists of" and "movements of a sexual nature" are vague, and together those result in a statutory scope that reaches far more constitutionally protected speech than is permissible. In other words, because "consists

of" is undefined, it could reach any entertainment that includes any portion of substantial nudity (e.g., a hotel where a customer can purchase alcohol and rent a movie that includes some nudity). But in context, "consists of" is not nearly as vague as GACE argues, and this dooms the entirety of GACE's argument.

An adult entertainment establishment is subject to the Assessment if its entertainment "consists of" nudity or substantial nudity. "Consists of" generally means "to be composed, made up, or formed [of]." See Webster's Deluxe Unabridged Dictionary, 389 (2d ed. 1983); *Camp v. Williams*, 314 Ga. 699, 702 (2) (a) (879 SE2d 88) (2022) (the ordinary meaning of statutory text can be determined from a review of dictionary definitions as well as "a broader consideration of context and history"). When used in a statute like this one, "consists of" describes an exhaustive list of essential components. In this sense, "consists of" is very limiting. See *Berryhill v. Ga. Community Support and Solutions*, 281 Ga. 439, 441 (638 SE2d 278) (2006) (noting that the word "include," when used in statutes, had traditionally introduced a nonexhaustive list, but is "now widely used for *consists of*," which when "[u]sed in this limiting sense," introduces "an exhaustive list of all of the components or members that make up the whole" (citation and punctuation omitted)). Thus, for the definition to apply, the entertainment or activity must be composed substantially of "nude or substantially nude persons" doing very specific things. The statute is not triggered by entertainment or activity that *could* include some amount of nudity or substantial nudity. Instead, it applies only to establishments where a material or essential part of the

entertainment or activity offered therein is made up of nude or substantially nude activity.

We need not decide precisely how much nude or substantially nude activity be present for entertainment to qualify; the statute makes clear enough that it must be *the* essential component of the entertainment offered by an establishment, and not merely an ancillary component or one of many options. This commonsense understanding of the term necessarily excludes virtually all of GACE's examples, because where the activity is not a material part of the establishment's business, some marginal activity of "substantial nudity" would not trigger the statute. Because the nude or substantially nude activity must be the essential component of the entertainment offered, GACE cannot show that the text of OCGA § 15-21-201 (1) (A) is substantially overbroad.

Nor can it show "from actual fact" that the statutory definition is substantially broad. GACE has raised many hypothetical situations of impermissible applications of the Assessment, but that is, by itself, insufficient to render a statute overbroad. See *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (104 SCt 2118, 80 LE2d 772) (1984) ("It is clear . . . that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). GACE points to no evidence in the record showing that the Assessment has been applied to mainstream venues or establishments. Significantly, as noted by the trial court, the definition of "adult entertainment establishments,"

including the definition of "substantially nude," is very similar to definitions used by, among others, the City of Atlanta, Fulton County, DeKalb County, and Cobb County.[26] There is no indication that these definitions have ever been applied in an overbroad manner. See *Cheshire Bridge Holdings v. City of Atlanta, Ga.*, 15 F4th 1362, 1375, 1377-1378 (11th Cir. 2021) (the risk that the definition of "adult entertainment establishment" was overbroad was not substantial relative to the statute's plainly legitimate

26. See, e.g., Atlanta Code of Ordinances § 16-29.001 (3) (e) (defining "substantially nude" as "dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus, cleft of the buttocks, vulva or genitals"); Fulton County Code of Ordinances § 18-78 (defining "adult entertainment" in part as "displaying of any portion of the areola of the female breast or any portion of his or her pubic hair, cleft of the buttocks, anus, vulva, or genitals"); DeKalb County Code of Ordinances § 15-401 (g) (defining nudity based on "specified anatomical areas," which are "[l]ess than completely and opaquely covered human genitals or pubic region, buttocks, or female breasts below a point immediately above the top of the areola"); Cobb County Code of Ordinances § 78-321 (defining "[s]emi-nude or semi-nudity" as "the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks"); see also Gwinnett County Code of Ordinances § 18-447 (defining "[s]emi-nude or semi-nudity" as "the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks"); Sandy Springs Code of Ordinances § 26-22 (defining nudity based, in part, on "[s]pecified anatomical areas" including "[h]uman genitals or pubic region, buttock, or female breast below a point immediately above the top of the areola").

sweep, especially where there was no evidence that the statute had been applied impermissibly as suggested by the plaintiffs). As a result, GACE has not met its burden of showing "from actual fact, that substantial overbreadth exists."

*

Because the Assessment imposed on "adult entertainment establishments" as defined in OCGA § 15-21-201 (1) (A) satisfies intermediate scrutiny under *O'Brien* and is not overbroad, GACE's First Amendment claims fail. We therefore affirm the trial court's order denying summary judgment to GACE and granting summary judgment to Defendants.

Judgments affirmed. All the Justices concur, except Warren, J., who dissents, and Pinson, J., disqualified.

WARREN, Justice.

The sexual exploitation and trafficking of children is a scourge on society. It is appropriate for the General Assembly to address such harms by exercising its lawful authority, and I am glad it has sought to do so. But the question this Court is faced with today is not whether these harms exist; they undoubtedly do. The question we must decide is whether the General Assembly's chosen method of addressing these harms is a lawful exercise of its authority—and in particular, whether it violates the First Amendment of the United States Constitution. Because I would conclude that it does, I respectfully dissent.

1. The State's asserted interest in passing the Assessment is to provide services to child victims of sexual exploitation—not to financially burden a particular industry in service of that policy objective—and the Assessment must pass intermediate scrutiny based on that interest.

(a) I disagree with the majority opinion's characterization of the State's interest in this case. And because assessing whether a regulation furthers a government entity's "important or substantial" interest is an integral part of the *O'Brien* intermediate-scrutiny test that I believe applies (and the majority opinion only assumes applies), it is no surprise that we reach different conclusions about the constitutionality of the Assessment.

As relevant to this appeal, the Assessment applies to a limited group of establishments that are defined in part

by the expression they showcase: establishments where "[t]he entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in" particular movements, OCGA § 15-21-201 (1) (A), and in which alcohol is sold.

The nude dancing performed in the clubs that are members of GACE and that is referenced in OCGA § 15-21-201 (1) (A) has been held by the United States Supreme Court to be a form of expressive conduct protected by the First Amendment of the United States Constitution. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (111 SCt 2456, 115 LE2d 504) (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (120 SCt 1382, 146 LE2d 265) (2000) ("[N]ude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."). See also *Gravely v. Bacon*, 263 Ga. 203, 205 (429 SE2d 663) (1993) ("Nude dancing is protected expression under the free speech clause[] of . . . the United States . . . Constitution[]."). It follows that by imposing a "special" financial burden based on the showcasing of nude dancing, the State, via the Assessment, imposes a burden on expression that is protected by the First Amendment. The Assessment is therefore subject to some level of judicial scrutiny under the First Amendment. See *Turner Broadcasting System, Inc. v. Fed. Communications Comm.*, 512 U.S. 622, 641 (114 SCt 2445, 129 LE2d 497)

(1994) ("Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded.").

I agree with the majority opinion that the Assessment is content-neutral and that the secondary-effects doctrine—a doctrine the United States Supreme Court created to assess laws and ordinances that are "aimed not at the *content*" of adult entertainment, but "rather at the *secondary effects*" of establishments that feature adult entertainment, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (106 SCt 925, 89 LE2d 29) (1986) (emphasis in original)—controls the First Amendment constitutional analysis here.[27] But I part ways with the majority opinion

27. "Secondary effects" refers to consequences of expression that "happen to be associated" with a certain type of expression. *Boos v. Barry*, 485 U.S. 312, 321 (108 SCt 1157, 99 LE2d 333) (1988) (plurality opinion) (explaining that a "secondary effect" is "a secondary feature that happens to be associated with that type of speech," and distinguishing "secondary effects" from "the direct impact of a particular category of speech," such as "[l]isteners' reactions to speech"). See also *R. A. V. v. City of St. Paul*, 505 U.S. 377, 394 (112 SCt 2538, 120 LE2d 305) (1992) ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. The emotive impact of speech on its audience is not a 'secondary effect.'") (citations and punctuation omitted); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (122 SCt 1728, 152 LE2d 670) (2002) (Kennedy, J., concurring) (explaining that "secondary effects" are "unrelated to the impact of the speech on its audience," such as pollution caused by a newspaper factory or an obstructed view caused by a billboard).

insofar as it assumes, without deciding,[28] that intermediate scrutiny applies.[29] See Maj. Op. at 19. In light of the Assessment's content neutrality and aim at secondary effects, I conclude that the intermediate scrutiny test articulated in *United States v. O'Brien*, 391 U.S. 367 (88 SCt 1673, 20 LE2d 672) (1968), applies. See *City of Erie*, 529 U.S. at 289 (explaining that if "the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech"); *Maxim Cabaret, Inc. v. City of Sandy Springs*, 304 Ga. 187, 191-192 (816 SE2d 31) (2018) ("This Court and the U.S. Supreme Court have held repeatedly that ordinances designed to combat the negative effects of sexually oriented businesses on the

28. Although I have my own concerns about pitfalls of the intermediate scrutiny test—including, as noted below, its sometimes blurry connection to strict scrutiny—this Court has applied intermediate scrutiny in similar cases involving adult entertainment establishments, see, e.g., *Maxim Cabaret*, 304 Ga. at 192, and United States Supreme Court precedent points to applying intermediate scrutiny here. See *Green v. State*, 318 Ga. 610, 611 (898 SE2d 500) (2024) ("United States Supreme Court precedent . . . binds our Court as to questions of federal law.").

29. Beyond that threshold disagreement, I agree with some other conclusions reached by the majority opinion. Specifically, I agree that GACE bears the burden of showing that the Assessment is unlawful and that it must do so by showing that the Assessment's constitutional infirmities are clear and palpable. And I agree that the nude dancing referenced in OCGA § 15-21-201 (1) (A) is a form of expressive conduct protected by the First Amendment, however minimally the United States Supreme Court has characterized that protection. See, e.g., *Barnes*, 501 U.S. at 565-566.

surrounding community are to be evaluated as 'content-neutral' regulations, which are subject to intermediate scrutiny.").[30]

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30. As the majority opinion notes, the State Defendants contend that the Assessment is a tax rather than a regulation and is content-neutral rather than content-based, such that the Assessment is not subject to *any* restriction under the First Amendment. See Maj. Op. at 21. Because I conclude that the Assessment fails intermediate scrutiny, I will explain why I reject the Defendants' argument. (The majority opinion is able to avoid this explanation by only assuming that intermediate scrutiny applies.) In making their argument, the Defendants rely on *Leathers v. Medlock*, 499 U.S. 439 (111 SCt 1438, 113 LE2d 494) (1991), which held that a state's decision to extend its generally applicable sales tax to certain members of the press (cable and satellite television providers) while exempting another (print media), did not violate the First Amendment. See id. at 453 ("The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment."). Based on *Leathers*, Defendants argue that a tax will run afoul of the First Amendment only if it (1) singles out the press, (2) targets only a small group of speakers, or (3) discriminates based on the content of taxpayer speech. See id. at 447 (discussing *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (107 SCt 1722, 95 LE2d 209) (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue*, 460 U.S. 575 (103 SCt 1365, 75 LE2d 295) (1983); and *Grosjean v. American Press Co.*, 297 U.S. 233 (56 SCt 444, 80 LE 660) (1936)). Defendants

argue that because the Assessment does not fit within any of these categories, it is not subject to any scrutiny under the First Amendment. However, the categories *Leathers* outlined required the application of *strict* scrutiny, and it does not follow that the failure to fit in one of those three categories means that a regulation is subject to no scrutiny at all.

The United States Supreme Court's analysis in *Turner Broadcasting System* illustrates this point. There, the Court considered a law that regulated the businesses of cable operators, which are "members of the press," by requiring them to carry certain stations. See 512 U.S. at 630, 659. The Court first considered whether this law was similar to the unconstitutional taxes imposed on the press in *Arkansas Writers' Project*, *Minneapolis Star & Tribune*, and *Grosjean*. Id. at 659-662. The Court held that the regulation, which was content-neutral, was not similar to the unconstitutional laws in those cases. See 512 U.S. at 661. Rather than conclude that the First Amendment did not apply, however, the Court concluded that the law was subject to intermediate scrutiny: [T]he must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny. We agree with the District Court that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. Id. at 661-662.

Although *Turner Broadcasting System* dealt with a regulation of the cable providers' businesses, rather than the imposition of a direct tax, it illustrates that the United States Supreme Court has not treated the cases applying strict scrutiny for certain taxes on the press as a per se displacement of the intermediate scrutiny analysis it articulated in *O'Brien*. And although the Supreme Court has said, in the context of an equal-protection challenge, that "[l]egislatures have especially broad latitude in creating

Where the majority opinion and I veer even further apart is in the application of the *O'Brien* test. In particular, I disagree with the majority opinion's characterization of the State's interest in enacting the Assessment—especially because that characterization disregards that the State has made clear in numerous ways exactly what its interest is. Moreover, by recasting the State Defendants' stated interest in this case, the majority opinion has not given full effect to the test the United States Supreme Court has said must be applied in cases like this. And the majority opinion has instead endorsed an intermediate-scrutiny analysis that legitimizes governmental interests—even unstated governmental interests—that come perilously close to targeting protected expression.

(b) Under *O'Brien*'s intermediate-scrutiny test, a regulation is constitutional under the First Amendment if, among other things, it "furthers an important or substantial governmental interest" and the restriction

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classifications and distinctions in tax statutes," *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (103 SCt 1997, 76 LE2d 129) (1983), I am not convinced that this statement means that a legislature's discretion is so broad that taxes that expressly impose burdens on expression but are not subject to strict scrutiny because they are content-neutral somehow evade judicial scrutiny under the First Amendment altogether and are therefore automatically constitutional. To reach such a conclusion would contravene the cases from the United States Supreme Court and this Court directing us to apply intermediate scrutiny to laws like this Assessment—content-neutral laws that are aimed at addressing negative secondary effects and that incidentally burden expression. See, e.g., *City of Erie*, 529 U.S. at 289; *Maxim Cabaret*, 304 Ga. at 191-192.

on expression is "no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The majority opinion describes the State's interest in enacting the Assessment as twofold. First, the majority opinion cites the text of the Act enacting the Assessment to show that the State has evinced an interest in "'address[ing] the deleterious secondary effects . . . associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol'" and in funding "'a child protective response.'" Maj. Op. at 41 (citing Ga. L. 2015, pp. 675-677, § 1-2). I readily agree that the State has expressed an interest in addressing the sexual exploitation of children and that this interest is "important or substantial." See Ga. L. 2015, pp. 675-677, § 1-2 ("[I]t is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity."); id. ("The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state."). And to serve that interest, the State created the Safe Harbor for Sexually Exploited Children Fund, which may be used "for purposes of providing care, rehabilitative services, residential housing, health services, and social services . . . to sexually exploited children" and to fund "a person, entity, or program devoted to awareness and prevention

of becoming a sexually exploited child." OCGA § 15-21-202 (c). All of this is clear from the Act and statute creating the Assessment.

But the majority opinion goes on to infer a second State interest. It does so in a way that I do not view as supported by the General Assembly's stated purpose or by United States Supreme Court precedent performing intermediate scrutiny analysis under *O'Brien*. In this regard, the majority opinion asserts that the State has an unsaid "important or substantial" interest in "imposing an assessment on the industry responsible for those secondary effects." Maj. Op. at 41. See also id. at 24 ("[I]mplicit within the State's interest is an element of seeking not to burden taxpayers in general with the costs of remedying the harm that the adult entertainment industry causes."); id. ("This element strikes us as clearly implicit within the structure of the challenged statute."); id. at 41 ("The State's interest . . . includes requiring the industry that 'tend[s] to be the focal point[] of negative effects' to fund the remedy for the harm it creates[.]"); id. at 45 (characterizing this second interest as "ensuring that the industry responsible for that harm, i.e., adult entertainment establishments that serve alcohol, rather than the general public, pays for the remedy"). In so doing, the majority opinion has imputed on the State an interest that it has not itself asserted, in a way that is both novel and troubling.

(c) The record shows that the State has not asserted the second interest the majority opinion infers. The State has not asserted an interest in "ensuring that the industry

responsible for that harm, i.e., adult entertainment establishments that serve alcohol, rather than the general public, pays for the remedy"—not in the Act, not in its appellate briefs, and not at oral argument before this Court. Instead, the Act expressly states: "The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state." Ga. L. 2015, p. 675.[31] See also OCGA § 15-21-202 (c) (explaining that the money raised by the Assessment may be used "for purposes of providing care, rehabilitative services, residential housing, health services, and social services . . . to sexually exploited children" and to fund "a person, entity, or program devoted to awareness and prevention of becoming a sexually exploited child"). Thus, in the one place where the General Assembly expressed its purpose in enacting the Assessment, it stated that it *did* have an interest in "protect[ing] a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state"—and it did *not* state that it had an interest in either directing the financial burden of its goals to the industry it determined was associated with child sexual exploitation or in shielding other taxpayers from the financial burden of funding the Safe Harbor Fund.

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31. It further says that "[t]he purpose and intended effect" is not "to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

The majority opinion asserts that it can infer this secondary purpose of "ensuring that the industry responsible . . . pays for the remedy" and "seeking not to burden taxpayers in general" from the "structure" of the Assessment itself, given that the General Assembly designed the Assessment to apply to adult entertainment establishments and—at least according to the majority opinion—made findings in the Act creating the Assessment "that adult entertainment establishments are responsible for this particular harm." Maj. Op. at 24, 45-46. But see Ga. L. 2015, p. 675, § 1-2 ("The General Assembly finds that a *correlation* exists between adult live entertainment establishments and the sexual exploitation of children.") (emphasis added).[32] And the majority opinion asserts

32. The evidence appears to support association or correlation, and does not speak in terms of causation. For example, the evidence included a study finding a "spatial correlation" between adult prostitution and juvenile prostitution as well as a "spatial association" between "prostitution-related activities and legal adult sex venues" and a study indicating that adult entertainment venues "frequently serve as a stepping stone to prostitution." See also Ga. L. 2015, p. 675, § 1-2 (finding that "adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation."). But I need not decide whether I agree with the majority opinion's conclusion that this evidence is sufficient to meet the (admittedly low) standard of "very little evidence" that is required to support the General Assembly's findings, because I would conclude that the Assessment is unconstitutional under *O'Brien*. I am nonetheless troubled by the low quantum of circumstantial evidence that the majority concludes is sufficient to meet the evidentiary standard here.

that failing to infer such an interest would render the General Assembly's findings "meaningless." Maj. Op. at 45-46. However, we need not glean from these findings an unstated governmental purpose to give them meaning: the General Assembly's findings serve the important purpose of showing that the Assessment is intended to address negative secondary effects of adult entertainment establishments featuring certain protected expression, rather than aimed at suppressing the protected expression itself. And indeed, the majority opinion underscores this point in its discussion of *O'Brien*'s second prong, in which it considers the evidence presented to the General Assembly to support its specific findings that there is a connection between adult entertainment establishments and child sexual exploitation. Maj. Op. at 26-34. These findings demonstrate that although the Assessment pertains to a specific type of expression (nude dancing), the General Assembly's reason for this targeting was not a desire to suppress the expression, but rather a desire to address negative secondary effects that result from it. And in any event, these findings do not override the General Assembly's stated purpose in enacting the Assessment: to provide services to children who have been sexually exploited and to prevent further sexual exploitation of children.

Likewise, the State Defendants[33] have never asserted on appeal that holding adult entertainment establishments—and only such establishments—

33. As explained in the majority opinion, the defendants here are the State of Georgia and the State Revenue Commissioner, in his individual capacity.

financially responsible for sexually exploited children was itself an "important or substantial" government interest. Instead, in their brief to this Court, the State Defendants describe the State's interest as "combatting child sex trafficking," "combatting the sexual exploitation of children," and "protecting victims of child sex exploitation."

It is true—as the majority opinion points out—that in oral argument before this Court, an attorney for the State Defendants stated that "the State is trying to mitigate the negative social effects caused by these businesses. *The narrow tailoring* is that it is taxing the businesses that are associated with that negative social impact." Maj. Op. at 45 n.21 (emphasis added). The majority opinion errs, however, by recasting this statement as the State's interest (the second prong of the *O'Brien* test), when the State's own lawyer made clear that it pertained to efforts the State made to tailor the restriction on expression caused by the Assessment (the fourth prong of the *O'Brien* test). And that latter explanation—that the statement pertains to narrow tailoring—makes good sense; after confirming the State's interest in "mitigat[ing] the negative social effects" of child sexual exploitation, the State's lawyer had to then go on to explain just how the restriction on expression was narrowly tailored to serve that State interest. Indeed, one of the State Defendants' main arguments on appeal—both in appellate briefing and in oral argument—is that the Assessment is narrowly tailored to serve the State's interest of protecting victims of child sexual exploitation because the Assessment affects only the businesses associated with the negative

secondary effects. The State Defendants do not argue—as the majority opinion concludes—that the State has an "important or substantial" interest in taxing a particular industry or a defined subset of businesses.

Additionally, the interest asserted by the majority opinion is novel to the parties in this case, and it is notable that the trial court did not conclude that the State had such an interest.[34] Instead, the trial court, pointing to the expressed interest of the General Assembly and the characterizations of that State interest made by the State Defendants, concluded that the Assessment "further[s] an important governmental interest in reducing sex trafficking and the exploitation of minors," "promote[s] the important governmental interest in providing protection and rehabilitation of victims of child sex trafficking and child sexual exploitation by raising revenue and directing that revenue towards such programs," and "advances

34. The majority opinion asserts that the trial court validated the State's implicit interest in "seeking not to burden taxpayers in general with the costs of remedying the harm that the adult entertainment industry causes" because the court said: "In other words, GACE is essentially asking the state to subsidize them by covering the costs of mitigating the secondary effects of their own operations." Maj. Op. at 25. Unlike the majority opinion, I view that statement as the trial court's characterization and not as a summary of the State's asserted interest. And in any event, the trial court does not indicate at any place in its order that the State's interest includes shielding taxpayers from financial burdens associated with the State's interest in providing services to child victims of sexual exploitation.

Georgia's interest in combatting the sexual exploitation of children with the proceeds of the Safe Harbor Fund."[35]

In sum, I do not agree that the State has proffered "imposing an assessment on the industry responsible for those secondary effects" as the substantial interest the Assessment serves, and I do not think it is legally supported to infer or otherwise supply for the State a substantial interest in this context, where we are applying *O'Brien* and the State has expressly offered a substantial interest that satisfies the second prong of that test. See, e.g., *City of Erie*, 529 U.S. at 289 (considering "the governmental purpose in enacting the regulation"); *Goldrush II v. City of Marietta*, 267 Ga. 683, 692 (482 SE2d 347) (1997) (considering "the stated purpose of the ordinance amendment").[36]

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35. It is also important to point out that the majority opinion does not conclude that the Assessment passes intermediate scrutiny, and is thus constitutional, on the basis of the State's expressly stated (or "first") interest alone. In other words, the majority opinion does not conclude that an interest in combatting sexual exploitation of children or protecting children from sexual exploitation passes muster under *O'Brien*. It is only when that interest is coupled with shouldering a particular industry with the financial obligations that result from the State's policy goals that the State interest passes *O'Brien*'s intermediate-scrutiny test.

36. It appears that in *Goldrush II*, this Court considered challenges raised under both the Georgia and United States Constitutions. See *Goldrush II*, 267 Ga. at 689-690 (applying both State and federal precedents to determine whether "a statute or ordinance which allegedly impinges upon the constitutionally-guaranteed right of free speech and expression").

2. In determining whether a regulation passes intermediate scrutiny, the majority opinion points to no other court that has characterized an "important or substantial" governmental interest in the way the majority opinion has.

In crafting the State interest in this case, the majority opinion has cited no binding authority from the United States Supreme Court (or persuasive authority from other courts) that either provides a governmental interest different from the one asserted by the government when applying the *O'Brien* test or characterizes a State's interest in the way the majority opinion does here. To that end, the majority opinion asserts that the State has an "important or substantial" governmental interest in "ensuring that the industry responsible for that harm, i.e., adult entertainment establishments that serve alcohol, rather than the general public, pays for the remedy." But as far as I can tell, no other state or court has framed a state's interest this way. To the contrary, the "important or substantial" governmental interests discussed in United States Supreme Court precedents applying *O'Brien* generally are framed in terms of alleviating or mitigating a problem, including mitigating secondary effects of certain protected expression—but not in terms of financially targeting a particular industry, even to serve an otherwise legitimate policy goal. See, e.g., *City of Erie*, 529 U.S. at 296 ("The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important."); *City of Renton*, 475 U.S. at 50, 52 (describing the substantial governmental interest

served by the zoning ordinance as "preserv[ing] the quality of urban life"); *Ward v. Rock Against Racism*, 491 U.S. 781, 796-797 (109 SCt 2746, 105 LE2d 661) (1989) ("We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an adverse effect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation."); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (104 SCt 3065, 82 LE2d 221) (1984) ("It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 67 (126 SCt 1297, 164 LE2d 156) (2006) ("Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces."); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816-817 (104 SCt 2118, 80 LE2d 772) (1984) (noting the city's "esthetic interest in avoiding 'visual clutter' "); *McCullen v. Coakley*, 573 U.S. 464, 486-487 (134 SCt 2518, 189 LE2d 502) (2014) ("[R]espondents claim that the Act promotes public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways. Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the

legitimacy of the government's interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services.") (citations and punctuation omitted). See also, e.g., *Maxim Cabaret*, 304 Ga. at 193 (addressing a challenge under the United States and Georgia Constitutions and explaining that "attempting to preserve the quality of urban life and reducing criminal activity and preventing the deterioration of neighborhoods" are "important government interests") (cleaned up); *Gravely*, 263 Ga. at 205 (addressing the United States and Georgia Constitutions and explaining: "Gravely does not dispute that the Smyrna ordinance furthers the important government interests in reducing criminal activity and protecting the deterioration of neighborhoods engendered by adult entertainment establishments").

Even the two state supreme courts that have upheld under intermediate scrutiny taxes or fees similar to the Assessment (and which the majority opinion cites as persuasive authority) do not characterize the state's interest in the way the majority opinion does here. See *Bushco v. Utah State Tax Comm.*, 2009 UT 73, 225 P3d 153, 167 (Utah 2009) ("[T]he record supports the conclusion that the Tax is directed toward the substantial state interest of providing treatment for sex offenders, with the twin goals of rehabilitation and prevention of future offenses. It is also clear that the Tax furthers that interest by raising revenue that is specifically directed toward sex offender treatment programs."); id. at 168 ("In this case, the Tax promotes the interest in providing treatment

for sex offenders by raising revenue and directing that revenue towards treatment programs."); *Combs v. Texas Entertainment Assn., Inc.*, 347 SW3d 277, 288 (Tex. 2011) ("The State has an important interest in reducing the secondary effects of adult businesses.").[37]

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37. The majority opinion notes that its "holding . . . is consistent with the holdings of every appellate court decision [it has] found addressing similar claims about similar assessments." Maj. Op. at 49 n.25. It is true that the majority opinion's bottom line—that is, upholding a government tax or assessment directed at adult entertainment establishments—is the same bottom line reached by the Utah and Texas Supreme Courts in *Bushco* and *Combs*. But the *reasoning* of the Utah and Texas courts was materially different, in large part because those courts identified state interests unlike the one the majority opinion has identified here. See, e.g., *Bushco*, 225 P3d at 168-169 (concluding that a tax on receipts of businesses whose employees performed services while fully or partially nude passed the *O'Brien* intermediate-scrutiny test because, among other reasons, "the Tax promotes the interest in providing treatment for sex offenders by raising revenue and directing that revenue towards treatment programs" and "the Tax places less of a burden on protected expression than the ordinance upheld in *Erie*"); *Combs*, 347 SW3d at 288 (concluding that a $5 fee for each customer of an establishment that allowed the consumption of alcohol and also offered live nude entertainment served the state's interest in reducing secondary effects such as "rape, sexual assault, prostitution, disorderly conduct, and a variety of other crimes and social ills" because it "provides some disincentive to present live nude entertainment where alcohol is consumed" and the restriction on speech passed *O'Brien*'s intermediate scrutiny test because the fee "is a minimal restriction on the businesses, . . . [a]nd the business that seeks to avoid the fee need only offer nude entertainment without allowing alcohol to be consumed"). Given that the legal reasoning contained in the majority opinion does not mirror the legal reasoning in

Bushco and *Combs*, citing those two cases to bolster the majority opinion is unpersuasive, to say the least.

The majority opinion also asserts that its holding is consistent with the holding reached by the Nevada Supreme Court in dealing with a broad tax on live entertainment. See *Deja Vu Showgirls of Las Vegas, LLC v. Nevada Dept. of Taxation*, 130 Nev. 719, 334 P3d 392, 399-402 (Nev. 2014) (explaining that "over 90 live-entertainment facilities were subject to" the tax, "including raceways, nightclubs, performing arts centers, gentlemen's clubs, and facilities hosting sporting and one-time events"). The outcome of that case is indeed the same as the one in this case, insofar as the Nevada tax was held to be constitutional. But the reasoning employed by the Nevada court was very different, including because the court applied only rational-basis review:

> Because [the tax] does not discriminate on the basis of the content of taxpayer speech, target a small group of speakers, or otherwise threaten to suppress ideas or viewpoints, we determine that heightened scrutiny does not apply. Instead, rational basis review applies, and the statute is presumed to be constitutional. We conclude that [the tax] is constitutional on its face because appellants have failed to demonstrate that [the tax] is not rationally related to a legitimate government purpose.

Id. at 401. The majority opinion's legal reasoning does not rely on this case for guidance, and I likewise view its reasoning as inapplicable. See id. at 400 (concluding, among other things, that the exceptions to the tax did not discriminate based on content, because the exemptions applied not only to "family-oriented" performances, but also "adult-oriented live entertainment, such as boxing and charity events," and the tax did apply to "[m]any facilities providing what appellants would classify as family-oriented live entertainment, . . . including concert venues, circuses, and fashion shows").

3. The majority opinion's characterization of the State's interest undermines *O'Brien*'s four-prong test and creates potential work-arounds for government entities to target protected expression.

As discussed above, the *O'Brien*'s test includes four prongs: [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. Importantly, the second prong asks *what* that government's interest is, and the fourth prong asks the distinct question of *how* the State achieves that interest. By concluding that the government has a "substantial or important" interest in ensuring that a negative secondary effect is mitigated *in a certain way*, the majority opinion collapses these distinct inquiries, merging the "what" question in the second prong with the "how" question of the fourth. And by treating the targeting of the establishments that are engaging in protected expression as an "important or substantial" governmental interest, the majority opinion also fails to give full consideration to *O'Brien*'s third prong.

My concern about the majority opinion's failure to give meaning to all parts of the test is not merely formalistic; the separate parts of the test each serve an important function in the test the United States Supreme Court has articulated to ensure that the protections enshrined in the First Amendment are safeguarded in contexts

like these. To illustrate why this is important, consider the governmental interest asserted in this case by the General Assembly and the State Defendants—which is also the governmental interest the trial court validated below. There is no dispute that the State has a legitimate interest in "protect[ing] a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state," in "protecting victims of child sex exploitation," and in "providing protection and rehabilitation of victims of child sex trafficking and child sexual exploitation by raising revenue and directing that revenue towards such programs." In fact, like the parties challenging regulations in many of the cases cited above, GACE has not disputed that the interest offered by the State is "important or substantial."

But it seems more likely that GACE would dispute that the State has an "important or substantial" interest in protecting children from sexual exploitation and providing them services *by levying taxes against adult entertainment establishments*.[38] Whatever legitimate interest the State has in helping child victims of sexual exploitation (an interest no one disputes), I cannot say that interest necessarily remains "important or substantial" when extended to "ensuring that the industry responsible for that harm, i.e., adult entertainment establishments

38. Of course, GACE has not had an opportunity to respond to a governmental interest couched in these terms, given that it is only the majority opinion that has articulated the State's interest in this way. Likewise, the trial court did not make findings on a governmental interest of this type. See also footnote 34.

that serve alcohol, rather than the general public, pays for the remedy."[39] Maj. Op. at 45. Indeed, that version of a governmental interest sounds alarmingly close to a State asserting that it has an interest in *targeting expression* that is the cause of the secondary effect (here, nude dancing)—an interest that the General Assembly and the State Defendants have (wisely) disclaimed here.[40]

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39. A noted above in footnote 32, the majority opinion has not pointed to any record evidence that supports the assertion that adult entertainment establishments cause sexual exploitation of children.

40. At oral argument before this Court, the Defendants expressly rejected the notion that the Assessment was designed to discourage nude dancing or to discourage people from visiting adult entertainment establishments featuring nude dancing and alcohol. And if the Defendants had made such an argument, it would further imperil the validity of the Assessment by conceding that the State's interest was in burdening expression (and not merely addressing secondary effects of expression) engaged in by adult entertainment establishments selling alcohol. To that end, such an argument—that the government interest is regulating establishments that feature certain expression and allow or sell alcohol—would place the Assessment in danger of failing *O'Brien*'s third prong: if the interest is to discourage the performance or viewing of nude dancing (i.e., protected expression) at such establishments, then the interest is not "unrelated to the suppression of free expression." See *O'Brien*, 391 U.S. at 377. Compare *Goldrush II*, 267 Ga. at 692-693 (concluding that an ordinance prohibiting adult entertainment establishments from selling alcohol was targeted at the secondary effects of adult entertainment establishments and passed intermediate scrutiny because it was aimed at serving the government interest of "control[ling] criminal behavior and prevent[ing] undesirable community conditions").

By clouding the question of what the State's interest is with how the State effectuates that interest, the majority opinion does not fully grapple with whether the government interest at issue in this case is truly an "important or substantial" governmental interest that is "unrelated to the suppression of free expression." See *O'Brien*, 391 U.S. at 377.[41]

That is why the governmental interest question should remain separate from the question of whether the restriction on speech is narrowly tailored here. If we conclude that the State has an interest in accomplishing a policy objective (such as providing services to child victims of sexual exploitation) in a *certain manner* (such as by taxing adult entertainment establishments), then of course the tailoring requirement is met: the only way to serve the specific interest of taxing clubs featuring nude dancing is to tax those clubs. Allowing this maneuvering in determining the State's interest thus renders the tailoring question essentially nugatory: if the governmental interest includes not only addressing a societal ill, but also addressing it in a specific way, a court can always shape the governmental interest in a way that ensures the regulation is narrowly tailored—even when the government entity has not couched its interest in this way, and even when the governmental interest, if couched in that way, would veer toward targeting expression or speech. I see no

41. As explained more below, this also highlights why the majority opinion's tailoring argument is problematic: focusing on tailoring, while at the same time ignoring the potential targeting of protected expression, can lead to circumvention of the constitutional protections *O'Brien* attempted to safeguard.

evidence in *O'Brien*, or in the precedents from the United States Supreme Court and this Court applying *O'Brien*, that casting or re-casting a State's interest in this way is permissible.

This concern is exacerbated where, as here, "'very little evidence is required'" for a state legislature to connect protected expression and a negative secondary effect. See Maj. Op. at 28 (quoting *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 451 (122 SCt 1728, 152 LE2d 670) (2002) (Kennedy, J., concurring)). This low evidentiary standard, coupled with the majority opinion's conclusion that the government can have a "substantial or important" interest in imposing financial burdens on a particular industry—even an industry that involves protected expression—could lead to government entities levying taxes so severe that it could eliminate a disfavored industry (and its protected expression) altogether. On this point, the majority opinion articulates no limiting principle that would prohibit a tax or assessment far greater than the one at issue in this case; that would prevent a government entity from targeting for complete elimination protected expression through a tax or assessment of the type in this case; or that would prevent government entities from taxing other businesses, groups, or individuals who engage in disfavored—but protected—expression in an effort to eliminate that speech or expression altogether. And the government would be permitted to do so based solely on the type of anecdotal testimony and attenuated findings the majority opinion acknowledges meet the

bare-minimum evidentiary standard in this case.[42] By framing the State's interest in enacting the Assessment in this way, the majority opinion paves the way for a work-around of the *O'Brien* test that would allow state legislatures and other government entities to target protected expression by framing their interest in enacting a tax as including the government's chosen method of targeting certain businesses with that tax. This cuts at the very core of the First Amendment's protection to prevent the government from suppressing or eliminating disfavored expression and speech.

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42. The majority opinion concludes as part of its analysis of *O'Brien*'s fourth prong that "any burdens on protected expression are relatively de minimis" in part because the Assessment "is significantly less burdensome than similar taxes upheld by other courts." Maj. Op. at 46-47. But if the State has an interest in "ensuring that the industry responsible for that harm, i.e., adult entertainment establishments that serve alcohol, rather than the general public, pays for the remedy," then requiring adult entertainment establishments to pay an even more substantial percentage of their profits would still be narrowly tailored to serve that interest—at least according to the *O'Brien* analysis the majority opinion articulates here.

The majority opinion also notes that all of the money gained from the Assessment is directed to the Safe Harbor Fund to contend that "[n]o portion of the burden on speech that the Assessment imposes does not serve to advance the State's goals." Maj. Op. at 42-43. But whether the funds raised by the Assessment are directed to the Safe Harbor Fund, as opposed to the State's General Fund, does not answer whether it is proper in the first place to define the State's substantial interest as "ensuring that the industry responsible for that harm, i.e., adult entertainment establishments that serve alcohol, rather than the general public, pays for the remedy."

4. The State's interest in passing the Assessment, when properly viewed, fails *O'Brien*'s fourth prong.

(a) Rather than blazing the trail that the majority opinion does, I would conclude that the "important or substantial" governmental interest in passing the Assessment is what the General Assembly says it was: to "protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state." Ga. L. 2015, p. 675, § 1-2. See also OCGA § 15-21-202 (c) (establishing a fund created by the Assessment to be used "for purposes of providing care, rehabilitative services, residential housing, health services, and social services . . . to sexually exploited children" and to fund "a person, entity, or program devoted to awareness and prevention of becoming a sexually exploited child"). And when the State's interest is viewed in this way, the Assessment fails the fourth prong of *O'Brien*'s intermediate-scrutiny test because it is not narrowly tailored to serve the asserted government interest.

(b) I begin my analysis of the fourth prong by following United States Supreme Court precedent and articulating the final prong of *O'Brien*'s intermediate scrutiny test as the United States Supreme Court articulated it in *O'Brien* and later cases following *O'Brien*: a regulation does not violate the First Amendment "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. See also, e.g., *City of Erie*, 529 U.S. at 301 (describing "[t]he fourth and final *O'Brien*

factor" as "that the restriction is no greater than is essential to the furtherance of the government interest"); *Turner Broadcasting System*, 512 U.S. at 662 (same).[43] This means that there must be a "close fit" between the burdening of expression and the government purpose, *McCullen*, 573 U.S. at 464, and that a "substantial portion of the burden" on expression must serve to advance the government's goals, *Ward*, 491 U.S. at 798-799. In other words, expression cannot constitutionally be burdened if

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43. I disagree with the majority opinion's apparent assertion that by applying the language *O'Brien* used to describe the fourth prong, I am misinterpreting the test. See Maj. Op. at 36-37. I also disagree that I am applying a "least restrictive or least intrusive means" requirement, as I explain below.

Moreover, to the extent the majority opinion sees a difference between the fourth prong articulated in *O'Brien* and the test articulated in *Ward*, see Maj. Op. at 35-36, the Eleventh Circuit has opined that the requirement that regulation of expressive conduct may be "'no greater than is essential to the furtherance of [the government's] interest'" in *O'Brien* and the requirement that a time, place, manner restriction on speech is "'not substantially broader than necessary to achieve the government's interest'" in *Ward* are "*generally* the same," but "in the occasional case, there may be a difference between 'not substantially broader' and 'no greater than is essential.'" *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F3d 1358, 1364 (11th Cir. 1999) (emphasis in original). Even assuming that is true, the majority opinion has not explained why this case is that rare case in which such a difference has materialized, nor does it explain why—if there is a difference—we should apply the test applicable to time, place, manner restriction discussed in *Ward* rather than the test applicable to content-neutral regulations on conduct discussed in *O'Brien*.

that burden is not furthering the government interest. This test allows some burden on expression (i.e., an incidental effect) as long as the burden itself serves the government's important, non-expression-related purpose.

(c) Cases engaging in an analysis of *O'Brien*'s fourth prong show that the burden on expression must serve the important or substantial governmental interest asserted. In *O'Brien*, the Court held that a law prohibiting the destruction of draft cards was constitutional, holding as to the tailoring question: "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." 391 U.S. at 381. Similarly, in *Ward*, the Court held constitutional a requirement that performers in a certain public concert venue use sound equipment provided and controlled by the city because "the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well." 491 U.S. at 800.

In *Members of City Council of City of Los Angeles*, the United States Supreme Court examined whether and how burdens on expression imposed by an anti-billboard ordinance and an anti-leaflet ordinance served the governmental interests in explaining why the anti-billboard ordinance was constitutional but the anti-leaflet ordinance was not. See 466 U.S. at 810. The Court explained that the anti-billboard ordinance was

sufficiently tailored to serve the government interest in "avoiding visual clutter" because "it is the tangible medium of expressing the message [i.e., the billboards] that has the adverse impact on the appearance of the landscape," so an ordinance prohibiting billboards "responds precisely to the substantive problems which legitimately concern[] the City" and "curtails no more speech than is necessary to accomplish its purpose." 466 U.S. at 806, 810. By contrast, the anti-leaflet ordinance meant to address littering was unconstitutional because "an antilittering statute could have addressed the substantive evil without prohibiting expressive activity," and the anti-leaflet rule "gratuitously infringed upon the right of an individual to communicate with a willing listener." Id. at 810. Likewise, in *McCullen v. Coakley*, the United States Supreme Court held that a law creating a buffer zone around abortion clinics to "ensur[e] public safety outside abortion clinics, prevent[] harassment and intimidation of patients and clinic staff, and combat[] deliberate obstruction of clinic entrances" was unconstitutional because it "burden[ed] substantially more speech than necessary to achieve the Commonwealth's asserted interests." 573 U.S. at 490-491. The Court explained that Massachusetts had "available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate," such as providing for criminal punishment of "any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." Id. at 491, 494 (citation and punctuation omitted).

(d) Against this backdrop of binding precedent, I conclude that the Assessment fails the fourth prong of

O'Brien's test because the burden on protected expression does not serve the interest of providing services to child victims of sexual exploitation. In particular, I cannot say that the element of the Assessment that burdens expression—that is, its specific application to adult entertainment establishments showcasing the protected expression of nude dancing—serves the stated government interest of providing services to help sexually exploited children.

Unlike in *O'Brien*, where prohibiting the expressive activity of destroying a draft certificate "precisely and narrowly assure[d] the continuing availability" of the certificates, 391 U.S. at 381, or in *Ward*, where mandating the use of certain sound equipment served the city's interest in limiting sound volume "in a direct and effective way," 491 U.S. at 800, there is no "precise" or "direct" connection between burdening protected speech (i.e., nude dancing) and providing "care, rehabilitative services, residential housing, health services, and social services" for "sexually exploited children." See OCGA § 15-21-202 (c).

Moreover, there is no indication that the State would provide services to sexually exploited children or engage in preventative efforts less effectively if those services and prevention programs were funded by a generally applicable tax, rather than one directed at establishments featuring certain types of protected expression. Compare *Rumsfeld*, 547 U.S. at 67 (holding that the State's interest in raising and supporting the armed forces would be served "less effectively" without a law requiring that

they be given equal access to campus recruiting). And the United States Supreme Court has explained that general revenue taxes do not raise the same kind of First Amendment concerns as those raised by taxes that, by definition or in practice, burden a specific kind of expression. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Commr. of Revenue*, 460 U.S. 575, 586 (103 SCt 1365, 75 LE2d 295) (1983) (explaining that the interest of "the raising of revenue," "[s]tanding alone, . . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press") (citation omitted).[44]

The majority opinion asserts that considering whether the State could serve its interest without burdening expression at all "is simply an effort to smuggle the least restrictive means requirement from strict scrutiny into intermediate scrutiny." Maj. Op. at 43. And it is, of course, true that the intermediate-scrutiny requirements for tailoring (i.e., "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to

44. As explained in the majority opinion, *Minneapolis Star & Tribune* applied a form of strict scrutiny rather than *O'Brien*'s intermediate scrutiny test. See *Minneapolis Star & Tribune*, 460 U.S. at 585. However, the United States Supreme Court's determination that general revenue taxes generally do not burden expression as protected by the First Amendment was not dependent on the application of strict (rather than intermediate) scrutiny.

the furtherance of [the governmental] interest," *O'Brien*, 391 U.S. at 377), at least partially resemble the more stringent strict-scrutiny requirements (i.e., whether "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest," *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (135 SCt 2218, 192 LE2d 236) (2015) (citation and punctuation omitted)). But any complaint about the similarities (or perhaps lack of dissimilarities) between those two tests should be directed at the United States Supreme Court, and not at applications of the intermediate-scrutiny test as that Court articulated it with respect to questions of federal constitutional law. And it is that intermediate scrutiny test that I apply here, evaluating whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the governmental] interest," *O'Brien*, 391 U.S. at 377, not whether the Assessment is "the least restrictive or least intrusive means" of "serv[ing] the government's legitimate, content-neutral interests," *Ward*, 491 U.S. at 799.

In service of that analysis, I note that the State could serve its interests without burdening any expression to illustrate that the Assessment's restriction on protected expression, even if it seems minimal at first blush, is "greater than is essential to the furtherance of" the State's interest. See *O'Brien*, 391 U.S. at 377. See also id. at 381 ("We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction."); *McCullen*, 573 U.S. at 490-494 (concluding that the regulation failed the final prong of intermediate scrutiny because the state had "available to it a variety of

approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate"). That is the question that *O'Brien* articulates, and it is the question I have asked in conducting an intermediate-scrutiny analysis under *O'Brien* here.[45]

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45. The majority opinion muses that I have failed to explain "how [the Assessment] is more offensive to the First Amendment than the multitude of regulations and ordinances imposing outright bans on the combination of alcohol and nude dancing that we have previously upheld." Maj. Op. at 26 n.11. I agree with the majority opinion that "[s]erving alcohol is not itself protected expression," *Oasis Goodtime Emporium, I, Inc. v. City of Doraville*, 297 Ga. 513, 525 (773 SE2d 728) (2015), and nothing I have said in this dissenting opinion asserts or implies otherwise. I strongly disagree, however, that the Assessment should be upheld simply because it is purportedly less severe than other government regulations on adult entertainment establishments that serve alcohol, and the majority opinion offers no legal analysis for why that must be so.

And the cases from this Court that the majority opinion cites on this point do not advance its argument: the government regulations at issue in those cases were designed to serve the important or substantial government purpose of decreasing the presence of negative secondary effects of the combination of alcohol and nude dancing—not to serve the important or substantial government purpose of providing services to victims of child sexual exploitation. See *Gravely*, 263 Ga. at 205 (concluding that an ordinance prohibiting the sale of alcohol at "erotic dance establishments" served the government interest of "reducing criminal activity and protecting the deterioration of neighborhoods engendered by adult entertainment establishments"); *Goldrush II*, 267 Ga. at 692-693 (holding that the ordinance prohibiting adult entertainment establishments from selling alcohol served the government interest of "control[ling] criminal behavior

and prevent[ing] undesirable community conditions"). See also *Maxim Cabaret*, 304 Ga. at 193 ("The City's prohibition of alcohol in nude dancing establishments thus meets the first prong of the *Paramount Pictures* test because it furthers the important government interests of attempting to preserve the quality of urban life, and reduc[ing] criminal activity and prevent[ing] the deterioration of neighborhoods.") (citation and punctuation omitted); *Oasis Goodtime Emporium I*, 297 Ga. at 522, 525 (addressing a challenge under the Georgia Constitution to a regulation prohibiting alcohol in sexually oriented businesses which the City enacted "minimize and control" the "deleterious secondary effects" of sexually oriented businesses that "are often associated with crime and adverse effects on surrounding properties"); *Trop, Inc. v. City of Brookhaven*, 296 Ga. 85, 86, 88 (764 SE2d 398) (2014) (applying the *Paramount Pictures* test to conclude that the ordinance "prohibit[ing] the sale of alcohol in sexually-oriented businesses and allow[ing] only semi-nudity" served the government purpose of attempting to preserve the quality of urban life and "reduc[ing] criminal activity and prevent[ing] the deterioration of neighborhoods") (citation and punctuation omitted); *Chambers v. Peach County*, 268 Ga. 672, 674 (492 SE2d 191) (1997) ("The ordinance [prohibiting the sale or consumption of alcohol at adult entertainment establishments] meets the *Paramount* [*Pictures*] criteria in that it furthers important governmental interests (the reduction of crime and the protection of property values).")

Moreover, in all of those cases, the burden on expression caused by the law or ordinance was, in fact, necessary to serve the governmental purpose because the government interest of reducing the crime that was a negative secondary effect of the combination of nude dancing and alcohol was directly served by eliminating that combination. See, e.g., *Gravely*, 263 Ga. at 205; *Goldrush II*, 267 Ga. at 692-693. And the effect on expression

Like the government entities imposing the anti-leaflet tax discussed in *Members of City Council of City of Los Angeles*, see 466 U.S. at 810, and the buffer zone in *McCullen*, see 573 U.S. at 490-494, the governmental entity here (the State) has available to it another way to serve its interest of providing services to child victims of sexual exploitation without imposing any burden on protected expression. And that leads me to the conclusion that the Assessment imposes an "incidental restriction" on "First Amendment freedoms" that is "greater than is essential to the furtherance of" the State's interest of providing services for sexually exploited children, and that the Assessment fails the fourth prong of the *O'Brien* intermediate-scrutiny test. See 391 U.S. at 377.

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was not greater than necessary because the law did not impose limitations on other kinds of expression not associated with the crime the governments sought to reduce. See *Gravely*, 263 Ga. at 205 (explaining that the ordinance "impacts only those modes of expression which, in the experience of local governments, tend to be the focal points of negative effects such as increased crime") (citation and punctuation omitted); *Goldrush II*, 267 Ga. at 692-693 (explaining that the ordinance was "limited to the modes of expression implicated in the production of negative secondary effects—those establishments that provide alcohol and . . . adult entertainment[]—thereby exempting mainstream performance houses, museums, or theaters"). That reasoning does not apply in this case, where the Assessment is designed to serve the government interest of providing services to victims of child sexual exploitation.

Because the Assessment as imposed on "adult entertainment establishments" defined in OCGA § 15-21-201 (1) (A) does not survive intermediate scrutiny under *O'Brien*, I would conclude that it violates the First Amendment of the United States Constitution. I would therefore reverse the trial court's order denying summary judgment to GACE and granting summary judgment to the Defendants.

APPENDIX B — FINAL ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT OF THE SUPERIOR COURT OF FULTON COUNTY, STATE OF GEORGIA, FILED DECEMBER 4, 2023

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action No. 2017CV297874

GEORGIA ASSOCIATION OF
CLUB EXECUTIVES, INC.,

Plaintiff,

v.

DEPARTMENT OF REVENUE COMMISSIONER
FRANK M. O'CONNELL, INDIVIDUALLY,

Defendant.

Filed December 4, 2023

FINAL ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment, filed pursuant to this Court's Scheduling Order dated May 17, 2022. The Court having read and considered the briefing and argument of the parties, for the reasons set forth below and for good cause found, this Court grants Defendant's motion for summary judgment and denies Plaintiffs amended motion for summary judgment.

Appendix B

BACKGROUND

1. Factual Background

a. The Safe Harbor/Rachel's Law Act (SB 8)

This case concerns the "Safe Harbor/Rachel's Law Act", or SB 8. SB 8 was passed by the General Assembly on April 2, 2015 and signed by the Governor on May 5, 2015. *See* Ga. L. 2015, p. 675, attached as Exhibit A to Defendant's Statement of Material Facts ("SMF"). SB 8 contains both new provisions and changes to existing laws with the goal of protecting children from sex trafficking and sexual exploitation. These laws include: (1) expanding the statute of limitations on child sex abuse crimes, SB 8 at § 2; (2) creating additional fines and penalties for child sex abuse, *id.* at § 3; (3) expanding the type of offenses which are subject to the State Sexual Offender Registry, *id.* at § 4; (4) expanding criminal forfeitures for those convicted of sex abuse crimes against children, *id.* at §§ 5A and 5B; (5) creating the "Safe Harbor for Sexually Exploited Children Fund" (hereinafter "the Fund") and a governing Commission, *id.* at § 3; and (6) creating a new annual "State Operation Assessment" (SOA) on "Adult Entertainment Establishments" the proceeds of which go directly into the Fund. *Id.* at § 3.

Section 1-2 of SB 8 includes a detailed preamble which outlines the reasons for its creation and states in part:

> The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable

assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. **The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation.** The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in

> place in this state. **The purpose and intended effect of this Act** in **imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article** I, **Section** I, **Paragraph V of the Constitution of this state.**

Id. at § 1-2(a) and (b) (emphasis added).

In enacting SB 8, the General Assembly also formed multiple study commissions, and considered and relied upon reports prepared by these commissions. These included: (1) Report of the Commercial Sexual Exploitation of Minors Joint Study Commission; and (2) Report of the Joint Human Trafficking Study Commission. *See* SMF ¶ 4, Exhibits B and C. These reports in tum relied on several studies that analyzed the prevalence of child sex trafficking and child sexual exploitation in Georgia and elsewhere in the United States. *See Commercial Sexual Exploitation of Children in Georgia,* Barton Child Law and Policy Clinic (2008); *Hidden in Plain View: The Commercial Sexual Exploitation of Girls in Atlanta,* Atlanta Women's Agenda (2005); *Deconstructing the Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex,* Chicago Alliance Against Sexual Exploitation (2008); *Adolescent Girls in Georgia's Sex Trade: An In-Depth Tracking Study,* Juvenile Justice Group (2008); *Men Who Buy Sex With Adolescent Girls: A Scientific Research*

Study, Schapiro Group (2010); *Adolescent Girls in the United States Sex Trade: Tracking Study Results for May 2010,* Schapiro Group (2010). *See* SMF ¶¶ 4-8, Exhibits D, E, F, G, H, and I. In addition to the reports and studies, the General Assembly heard first-hand accounts from individuals with knowledge of child sex trafficking and child sexual exploitation. *See* SMF ¶¶ 9-12, Exhibit J.[1] These individuals testified that adult entertainment establishments not only provide a point of access for the sexual exploitation of minors, but that minors are enticed to work for the establishments themselves. *See id.*

Most sections of SB 8 became effective on July 1, 2015. *Id.* at § 6-1(a). However, because the Fund receives direct earmarked funding and not from the State's general budget, Section 3 of SB 8 required a constitutional amendment to Ga. Const. Art. III, Sec. IX, Para. VI. This amendment was authorized by Senate Resolution 7, was submitted to the voters in the November 8, 2016 general election, and passed with a 83.3% "yes" vote. *See* Senate Resolution 7. Thus, a new subparagraph (o) was added to Ga. Const. Art. III, Sec. IX, Para. VI and SB 8 became fully effective on January 1, 2017. SB 8 at § 6-1(b). This new paragraph states:

> (o) The General Assembly may provide by general law for additional penalties in any case in any court in this state in which a person is

1. The transcript at SMF, Exhibit J, was prepared from a video recording of the Juvenile Justice Committee of the Georgia House of Representatives which is available online at https://www.youtube.com/watch?v=ZpJRQl7ToY4.

> adjudged guilty of keeping a place of prostitution, pimping, pandering, pandering by compulsion, solicitation of sodomy, masturbation for hire, trafficking of persons for sexual servitude, or sexual exploitation of children and **may impose assessments on adult entertainment establishments as defined by law**; and such appropriated amount shall not lapse as required by Article III, Section IX, Paragraph IV(c) and shall not be subject to the limitations of subparagraph (a) of this Paragraph, Article III, Section V, Paragraph II, Article VII, Section III, Paragraph II(a), or Article VII, Section III, Paragraph IV. **The General Assembly may provide by general law for the allocation of such assessments and additional penalties to the Safe Harbor for Sexually Exploited Children Fund for the specified purpose of meeting any and all costs, or any portion of the costs, of providing care and rehabilitative and social services to individuals in this state who have been or may be sexually exploited.** The General Assembly may provide by general law for the administration of such fund by such authority as the General Assembly shall determine.

Ga. Const. Art. III, Sec. IX, Para. VI(o) (emphasis added).

b. The Safe Harbor for Sexually Exploited Children Fund and Commission

Section 3 of SB 8 creates the Fund and its governing Commission. The Fund operates as separate fund in

the state treasury and its purpose is to disburse money for "providing care, rehabilitative services, residential housing, health services, and social services . . . to sexually exploited children." O.C.G.A. § 15-21-202(c). The Fund is also authorized to disburse money "to a person, entity, or program devoted to awareness and prevention of becoming a sexually exploited child." *Id.*

The Commission is charged with several duties, which include: (1) developing a state-wide protocol for helping to coordinate the delivery of services to sexually exploited children; (2) providing oversight for any program that receives funding; (3) recommending changes in state programs, laws, policies, budgets, and standards relating to care of sexually exploited children; and (4) soliciting federal funds and donations from private organizations to aid in the Commission's purpose and goals. *See* O.C.G.A. §§ 15-21-205 through 15-21-207.

c. The State Operation Assessment for Adult Entertainment Establishments

One source of funding for the Fund is the SOA on Adult Entertainment Establishments in O.C.G.A. § 15-21-209. According to that statute, each "Adult Entertainment Establishment" must, by April 30th of each calendar year, "pay to the commissioner of revenue a state operation assessment equal to the greater of 1 percent of the previous calendar year's gross revenue or $5,000.00." O.C.G.A. § 15-21-209(a). The SOA is "in addition to any other fees and assessments required by county or municipality authorizing the operation of an adult entertainment

business." *Id.* "Gross revenue" is determined "based upon tax returns filed with the Department of Revenue," but the State Revenue Commissioner is also authorized by regulation to "require other reports or returns to be filed by an adult entertainment establishment as [the commissioner] deems appropriate." *Id.* § 15-21-209(b). The SOA "shall be assessed and collected in the same manner as taxes due the state in Title 48 and appeals of such assessments shall be within the jurisdiction of the Georgia Tax Tribunal." *Id.* § 15-21-209(d).

"Adult Entertainment Establishment" is defined in O.C.G.A. § 15-21-201(1) as:

> (1) "Adult entertainment establishment" means any place of business or commercial establishment where alcoholic beverages of any kind are sold, possessed, or consumed wherein:
>
> > (A) The entertainment or activity therein consists of nude or substantially nude persons dancing with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy, or masturbation;
> >
> > (B) The patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments; or

> (C) The patron directly or indirectly is charged a fee to engage in personal contact by employees, devices, or equipment, or by personnel provided by the establishment.
>
> Such term shall include, but shall not be limited to, bathhouses, lingerie modeling studios, and related or similar activities. Such term shall not include businesses or commercial establishments which have as their sole purpose the improvement of health and physical fitness through special equipment and facilities, rather than entertainment.

O.C.G.A. § 15-21-201(1). In addition, "substantially nude" is defined as "dressed in any manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's public hair, anus, cleft of the buttocks, vulva, or genitals." *Id.* § 15-21-201(7).

Pursuant to his regulatory authority, the State Revenue Commissioner promulgated a rule to govern and administer the SOA. *See* Revenue Regulation 560-2-20-.01. Regulation 560-2-20-.01(3) defines "required return" as:

> (a) By April 30 of each calendar year and using Form AE-SOA, each adult entertainment establishment shall pay to the Department a state operation assessment equal to the greater of 1 percent of the previous calendar

> year's Georgia gross revenue or $5,000.00. The previous year's Georgia gross revenue of an adult entertainment establishment shall be determined in the same manner as Georgia gross receipts are determined pursuant to O.C.G.A. § 48-7-31 but shall always be determined on a calendar year basis regardless of the tax year of the adult entertainment establishment.
>
> (b) The adult entertainment establishment shall use the Georgia Tax Center to file Form AE-SOA and pay the tax. No other filing or payment method shall be permitted. No extension to file or pay shall be granted by the Department.

Revenue Regulation 560-2-20-.01(3) (effective Nov. 20, 2017).

2. Procedural Background

Plaintiff Georgia Association of Club Executives (herein, "GACE") is an association of adult entertainment establishments. GACE initially filed suit on November 13, 2017 and thereafter filed an Amended Complaint on December 26, 2017. The initial lawsuit named then-Revenue Commissioner Lynette Riley as Defendant[2].

2. Attorney General Christopher Carr was also named a defendant in the original and first Amended Complaints but has since been dismissed from this lawsuit. Former Commissioner Riley was succeeded by now-former Revenue Commissioner Robyn Crittenden, who has now been succeeded by the current Revenue Commissioner, Frank O'Connell.

Appendix B

The parties filed several dispositive motions, ending with cross-motions for summary judgment. This Court granted partial summary judgment to both parties, who then filed direct and cross-appeals of those rulings in the Supreme Court of Georgia. The Supreme Court issued its opinion in 2022, ruling that Defendant Riley, by that time the former Revenue Commissioner, was no longer the proper party Defendant. The Court vacated all dispositive rulings and remanded with instruction that Defendant Riley be dismissed. On remand, by consent of the parties, then-current Revenue Commissioner Robyn Crittenden was substituted as Defendant and a Second Amended Complaint was filed, followed by an additional consent motion and Third Amended Complaint substituting the current Revenue Commissioner, Frank O'Connell.

Like the first and Second Amended Complaints, the Third Amended Complaint attaches its own study entitled *Adult Dance Entertainment Clubs and Sex Trafficking: Is There a Strong Relationship?* (Joshua Fink and Kenneth Land, 2015). GACE alleges in its Third Amended Complaint that it has 14 members "each of which is a licensed club" and that "each of ACE's members is an 'adult entertainment establishment' as defined by either O.C.G.A. § 15-21-201(1)(A) or § 15-21-201(1)(B)." Third Amended Complaint ¶¶ 1-6. There is no evidence of record, however, demonstrating that GACE's members are comprised of anything other than nude dancing establishments, rather than other types of adult entertainment establishments such as lingerie modeling studios or massage parlors subject to the regulation of

Section 15-21-201(1)(B).[3] SMF ¶ 21 and Exhibit L. GACE alleges in its Third Amended Complaint that child sex trafficking or child sexual exploitation does not occur at its members' establishments because members are already subject to strict regulations which mandate that entertainers be at least 18 years old, that entertainers do not have drug convictions, and that all patrons must be 21 years old. Third Amended Complaint at ¶¶ 29-39.

In its Third Amended Complaint, GACE asserts three claims for relief, as follows: In Count I, GACE requests declaratory relief that SB 8 is unconstitutional based on the First Amendment to the U.S. Constitution and Ga. Const. Art. I, Sec. I, Para. V, Georgia's Free Speech Clause. GACE claims that SB 8 violates these provisions because it: (1) is a content-based tax and is subject to strict scrutiny; and (2) also fails intermediate scrutiny because the General Assembly "has not and cannot show a causal nexus between licensed Clubs and the sexual exploitation of minors or human sex trafficking." *Id.* at ¶¶ 62-71.

In Count II, GACE also requests declaratory relief that SB 8 is unconstitutionally overbroad. *Id.* at ¶¶ 72-76. Specifically, GACE alleges that SB 8 is overbroad because it would "cover a substantial amount of protected expression" such as "traditional plays and musicals with

3. Based on unrebutted prior information on GACE's website, these live nude dancing establishments included: Oasis Goodtime Emporium, Shooter's Alley, Blue Flame Lounge, Stroker's, Pin-Ups, Pink Pony, Onyx, Goldrush, Rumors, Club Blaze, Magic City, Cheetah, Mardi Gras Fannie's Cabaret, Peaches of Atlanta, Club Wax, Scores Savannah, and Tattletale.

risque content, or musical performances by singers who often perform in lingerie, at venues where alcohol is served." *Id.* at ¶ 75.

Finally, in Count III, GACE requests "preliminary and permanent" injunctive relief because "the balance of equities weigh[] in [GACE's] favor [and] [t]he [SOA] will cost [GACE's] members millions of dollars and suppress the Clubs' constitutionally protected free-speech, causing immediate and irreparable harm." *Id.* at ¶ 85. After remand from the Supreme Court of Georgia and initial amendment of the Complaints, cross-motions for summary judgment were filed and argued before this Court. The Court now rules on those motions.

LEGAL ANALYSIS

I. SB 8 is Not Subject to Strict Scrutiny Under the First Amendment.

To determine whether SB 8 violates the First Amendment, the Court must first determine what level of scrutiny to apply to the law. Even if a law targets protected expression, the level of scrutiny depends on the law's scope and context. A law is generally subject to strict scrutiny when it restricts speech solely because of its content or message. *See State v. Cafe Erotica, Inc.,* 269 Ga. 486, 489 (1998) (subjecting regulation to strict scrutiny because it was "predicated on the content of the regulated speech"). By contrast, content-neutral time, place, or manner restrictions, for instance, are subject to lesser scrutiny. *See Clark v. Cmty. for Creative Non-Violence,* 468 U.S.

288, 293 (1984) (explaining that such restrictions must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information). Thus, a content-neutral law that imposes only incidental burdens on protected expression is subject only to so-called intermediate scrutiny. *Id.*; *Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke Cty.,* 217 F.3d 1360, 1363 (11th Cir. 2000) (discussing *U.S. v. O'Brien,* 391 U.S. 367 (1968)). Such a law will be upheld if it "furthers an important governmental interest that is unrelated to the suppression of speech, and its incidental restriction of protected speech is no greater than is necessary to further the important governmental interest." *Maxim Cabaret, Inc. City of Sandy Springs,* 304 Ga. 187, 192 (2018) (citing *O'Brien,* 391 U.S. at 377).

A. SB 8 is Content-Neutral.

Here, Defendant contends that SB 8 and the SOA are not subject to First Amendment strict scrutiny because: (1) they are facially content-neutral; and (2) the predominant intent of SB 8 and the SOA is not to ban or burden any expressive conduct but to raise funds to address the secondaryeffects of adult entertainment establishments which allow alcohol consumption. GACE, relying primarily upon *Reed v. Town of Gilbert,* 576 U.S. 155 (2015), argues that because SB 8 and the SOA reference the expressive conduct of nude dancing, they *automatically* constitute a "content-based" tax and are subject to strict scrutiny. In GACE's view, if SB 8 does not concern zoning-related time, manner, and place restrictions, it is content-based and automatically subject to strict scrutiny, citing *Holder*

v. Humanitarian Law Project, 535 U.S. 1, 27 (2010). For the following reasons, the Court agrees with Defendant.

As a law aimed at commercial conduct that only incidentally burdens protected expression, SB 8 is not "content specific" in any real sense. On its face, SB 8 does not regulate speech at all. Instead, it taxes a commercial enterprise: "adult entertainment establishments." O.C.G.A. § 15-21-201. GACE argues that this is irrelevant —that commercial enterprises are equally protected by the First Amendment and that the sale of alcohol is immaterial if the tax itself is not content-neutral. But this misstates the issue. Rather, 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. O.C.G.A. § 15-21-201(1)(A). In that regard, this case differs from the examples of "contentbased" regulation GACE cites in its briefing, which involve targeted, content-based taxation or regulation *of speech alone* falling within the core of First Amendment protection. Under the cases cited by GACE, *every* incidence of protected expression—such as cable TV programming, books, newspapers, or magazines—is impacted by the subject regulations based on only one criterion: the content of the expression. Thus, business owners can only avoid application of the law or tax by altering or eliminating protected expression.[4] Such is

4. *See, e.g., Barr v. Am. Ass'n of Political Consultants. Inc.,* 140 S. Ct. 2335 (2020) (restriction of telephone solicitations based solely upon the political content of the communication); *United States v. Playboy Ent. Group,* 529 U.S. 803 (2000) (federal

not the case with SB 8, where strip clubs could avoid the SOA entirely by altering their business model to exclude alcohol with no impact on the protected expression of nude dancing. *See Combs v. Texas Ent. Ass'n,* 347 S.W.3d 277, 286-88 (Tex. 2011) (rejecting the argument that adult businesses remit a fee of $5 per customer was content based even though it "single[d] out nude dancing" because "the fee does not apply to nude dancing where alcohol is not served"). This is the key distinction GACE fails to recognize.

Unlike the cases cited by GACE, SB 8 does not regulate speech alone. Two of the three categories of entertainment or activity covered by SB 8's definition—Subparts B and C—do not involve any inherently expressive activity at all. See *id.* at (1)(B) ("exhibiting lingerie"); *Id.* at (1)(C) (charging a fee "to engage in personal contact by employees"). Subpart A, which covers nude dancing establishments, still has only an incidental impact on protected expression. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."). Nude dancing, as GACE

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regulation requiring cable TV channels to be encrypted based solely on adult content of programming); *Simon & Schuster. Inc. v. Members of N.Y. State Crimes Victims Bd.,* 502 U.S. 105 (1991) (state law requiring forfeiture of profits from written works based solely on the content of those works); *Minn. Star & Tribune Co. v. Minn. Comm'r of Rev.,* 460 U.S. 575 (1983) (tax limited to a particular group of large newspapers); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (tax distinguished between general interest and publications covering religion or sports).

recognizes, "falls only within the outer ambit of the First Amendment's protection" in the first place. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289 (2000); *cf. Maxim Cabaret*, 304 Ga. at 195-98 (Peterson, J, concurring) (questioning whether the Georgia Constitution's Speech Clause protects nude dancing); *Pap's A.M.,* 529 U.S. at 310 (Thomas, J., concurring) (asking "what (if anything) nude dancing communicates"). And this particular tax is triggered only when a business both offers nude dancing *and* serves or allows the consumption of alcohol. O.C.G.A. § 15-21-201(1)(A). In other words, the tax does not target nude dancing alone but only a particular business model that combines alcohol service and nude dancing for a charge.[5] The tax, in short, addresses conduct—the commercial operation of adult entertainment establishments that serve alcohol—and any burden on protected expression is incidental. State supreme courts considering taxes in *these precise* circumstances have applied intermediate scrutiny. *Combs v. Texas Ent. Assn.,* 347 S.W.3d 277, 286-88 (Texas 2011) (rejecting the argument that adult business remit a fee of $5 per customer was content based even though it "single[d] out nude dancing" because "the fee does not

5. GACE cites *Harris v. Entertainment Sys., Inc.,* 259 Ga. 701 (1989) as Georgia authority for the proposition that whether an establishment serves alcohol or not is immaterial in strict scrutiny review. However, the holding in *Harris* was essentially overruled by the later adoption of GA. CONST. Art. III, Sec. VI, Par. VII. *See Goldrush II,* 267 Ga. at 684 ("The constitutional amendment's . . . delegation of regulatory authority to local governments to regulate, restrict, or prohibit nudity, partial nudity, or depictions of nudity, without regard to whether the activity limited or the nudity proscribed is constitutionally protected, nm counter to the holdings in *Harris*").

apply to nude dancing where alcohol is not consumed"); *Bushco v. Utah State Tax Comm'n,* 225 P.3d 153, 158-59 (Utah 2009) (upholding tax on sexually explicit businesses used to fund sex offender treatment and investigations of internet crimes against children).

If there was any remaining doubt on this point, the U.S. Supreme Court's recent decision in *City of Austin v. Reagan National Advertising,* __ U.S. __, 142 S. Ct. 1464 (2022), expressly rejected GACE's bight-line "need-to-read" interpretation of SB 8. The Court made clear in *City of Austin* that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473-74. So, while "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result . . . [t]hat does not mean that any classification that considers function or purpose is always content based." *Id.* at 1474. In sum, the Court instructs that a law is "agnostic as to content" if it "requires an examination of speech only in service of drawing neutral lines." *Id.* at 1471. SB 8 presents one such sort of neutral line drawing, as it is an ordinary time, place, or manner regulation. As noted above, SB 8 governs nude dancing *only in the presence of alcohol.* Moreover, as discussed in detail below, the U.S. Supreme Court has never suggested that GACE's primary authority, *Reed,* displaced its line of secondary-effects cases and as also discussed below, Georgia's Supreme Court has expressly made clear that it does not. Intermediate scrutiny applies on this basis alone and Defendant is entitled to summary judgment on that issue.

B. Even Assuming SB 8 Regulates Expressive conduct, it is Subject to Intermediate Scrutiny under the Secondary-Effects Doctrine.

As set forth *supra,* SB 8 is facially content-neutral. But even assuming SB 8 was not and regulated expressive conduct in the maimer suggested by GACE, intermediate scrutiny is appropriate under the "secondary-effects doctrine". "[The Supreme Court of Georgia] and the U.S. Supreme Court have held repeatedly that ordinances ***designed to*** combat the negative effects of sexually oriented businesses on the surrounding community are to be evaluated as 'contentneutral' regulations, which are subject to intermediate scrutiny." *Maxim Cabaret, Inc.,* 304 Ga. at 191-92 (emphasis added); *see also Renton v. Playtime Theatres,* 475 U.S. 41, 47-50 (1986) (describing secondary-effects doctrine). SB 8 would fall squarely within the secondary-effects doctrine. Its express purpose is to:

> protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state . . . [and] not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution.

2015 Georgia Laws Act 95, Section 1-2(b). There is no dispute the Fund is used to combat the sex trafficking of children and provide services to its victims. *See* O.C.G.A.

§ 15-21-202(c). Finally, as discussed below, there is a well-established link between adult-entertainment establishments and prostitution, *see California v. Larue,* 409 U.S. 109, 111 (1972), and the General Assembly considered extensive evidence showing the connection between such establishments and child prostitution, *see infra.* Thus, even assuming this tax is in part directed at expressive conduct, it falls squarely within the secondary-effects doctrine and intermediate scrutiny still applies. *See Maxim Cabaret,* 304 Ga. at 191-92; *Pap's A.M.,* 529 U.S. at 296; *Combs,* 347 S.W.3d at 287 (applying intermediate scrutiny after recognizing the "persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects associated with sexual abuse").[6]

In *Renton,* for example, the Court acknowledged that "the ordinance treat[ed] theaters that specialize in adult films differently from other kinds of theaters," but because "the ordinance [was] aimed not at the *content* of the films shown . . . but rather at the secondary effects of such theaters on the surrounding community," the Court

6. It is also notable that multiple other states have enacted taxes and fees on adult businesses to ameliorate the secondary-effects of these businesses. *See* Ill. Code Ann. § 175/1 *et seq.* (imposing the equivalent of $3 entry fee on all "live adult entertainment facilities" or a yearly surcharge on a facility ranging from $5,000 to $25,000 depending on gross revenues to fund the Sexual Assault Services and Prevention Fund); Tenn. Code Ann.§ 67-4-1201 *et seq.* (imposing $2 entry fee on "adult performance businesses" to fund programs for victims of sex trafficking).

held that the ordinance "[should] be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." 475 U.S. at 47-49; *see also Pap's A.M.,* 529 U.S. at 294 (explaining that the "justification for the government regulation [in this line of cases] prevents harmful 'secondary effects' that are unrelated to the suppression of expression"). The Supreme Court of Georgia has routinely applied the secondary effects doctrine to subject regulations of sexually oriented businesses to intermediate scrutiny, even when the laws on their face single out categories of protected expression. *See, e.g., Maxim Cabaret,* 304 Ga. at 192; *Oasis Goodtime Emporium I, Inc. v. City of Doraville,* 297 Ga. 513, 525 (2015); *Great Am. Dream, Inc. v. DeKalb Cty.,* 290 Ga. 749, 752, (2012).

Neither *Reed v. Town of Gilbert,* 576 U.S. 155 (2015) nor its progeny, *AAPC,* silently overrules the secondary-effects doctrine with the facial approach, as GACE argues. In fact, our Supreme Court has expressly rejected that argument. *Maxim Cabaret* explained that *Reed* did not "mention, much less overrule," the secondary-effects doctrine, and the Court concluded that "even if we found [the *Reed* argument] persuasive (which we do not), we would continue to follow the Supreme Court's directly applicable prior precedent." *Maxim Cabaret,* 304 Ga. at 192. GACE cites no contrary authority, and other courts appear to have uniformly rejected similar arguments. *See, e.g., Flanigan's Enter., Inc. v. City of Sandy Springs,* 703 Fed. App'x 929, 935 (11th Cir. 2017); *HDV Cleveland, LLC v. Ohio Liquor Control Comm'n,* 101 N.E. 3d 1025, 1035-36 (Ohio Ct. App. 2017); *BBL, Inc. v. City of Angola,* 809 F.3d 317, 326 n.1 (7th Cir. 2015).

Recognizing this, GACE argues that the secondary-effects doctrine cannot apply here because it ratchets down the scrutiny level only for zoning regulations. But the U.S. Supreme Court has expressly rejected the idea that *Renton* applies only to zoning. *See Pap's AM*, 529 U.S. at 295 (plurality opinion) ("Our reliance on *Renton* to justify other [non-zoning] restrictions is not new"). Moreover, the Supreme Court of Georgia applies its own secondary-effects standard as pronounced in *Paramount Pictures Corp. v. Busbee,* 250 Ga. 252, 252 (1982). The *Paramount Pictures* test is derived from both *O'Brien* and *Renton,* was announced in a case that had nothing to do with zoning or adult entertainment, and has been applied in a variety of non-zoning contexts. *Paramount Pictures,* 250 Ga. at 252. *See, e.g., Maxim Cabaret, Inc. v. City of Sandy Springs,* 304 Ga. 187, 192 (2018) (adult-entertainment ordinance); *Oasis Goodtime Emporium I, Inc. v. City of Doraville,* 297 Ga. 513, 525 (2015) (full-nudity and alcohol ban for sexually oriented businesses); *Great Am. Dream, Inc. v. DeKalb County,* 290 Ga. 749, 752 (2012) (hours of operation for adult establishments); *Goldrush II v. City of Marietta,* 267 Ga. 683, 686 (1997) (liquor licenses for adult entertainment establishments).

Therefore, any assertion that *Renton*'s secondary-effects test does not apply outside the zoning context is not only inaccurate but beside the point, as the Supreme Court of Georgia's own test applies in this case. The *Paramount Pictures* test holds that SB 8 is constitutionally permissible if: (1) it furthers an important governmental interest; (2) it is unrelated to the suppression of speech; and (3) its incidental restriction of speech is no greater than essential

to further the important governmental interest. *See Oasis Goodtime Emporium,* 297 Ga. at 523. Here, *Maxim Cabaret, Oasis Goodtime Emporium,* and *Goldrush II v. City of Marietta, supra,* are the binding authority that guide the Court's analysis, and they mandate a finding of constitutionality. First, those cases plainly hold that laws with the "predominant intent" of regulating adult businesses based on their secondary-effects (particularly ones allowing alcohol consumption) are content-neutral, and such regulations are not necessarily limited to just zoning restrictions. *See Maxim Cabaret,* 304 Ga. at 191-192 ("[L]imitation on the time, place, or manner of such expression is constitutionally permissible, *as are appropriately limited regulations targeting the negative secondary effects of adult entertainment establishments*." (emphasis added)); *Oasis Goodtime Emporium*, 297 Ga. at 521 ("[A law] designed to combat the undesirable secondary effects of sexually explicit businesses is content-neutral."); *Goldrush II,* 267 Ga. at 690 ("*The government's purpose is the controlling consideration.* A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (citations omitted)).

As noted in Section I(A) of this Order, the only state courts that have considered the constitutionality of taxes and fees imposed to address the secondary-effects of adult businesses have concluded that such taxes and fees are content-neutral and not subject to strict scrutiny. *See Combs v. Texas Entertainment Ass'n, Inc.*, 347 S.W.3d 277, 287-288 (Texas 2011) (upholding $5.00 entry fee to all "sexually oriented businesses": "The fee in this case is

clearly directed, not at expression in nude dancing, but at the secondary effects of nude dancing when alcohol is being consumed."); *Bushco v. Utah State Tax Comm'n*, 225 P.3d 153, 162 (Utah 2009) (upholding 10% gross receipts tax on all "sexually explicit businesses": "The legislative record before us supports the conclusion that the predominant reason the Tax was enacted was to provide treatment for sex offenders, not to suppress protected expression.").[7] GACE argues that *Bushco* is distinguishable because the Utah law encompassed both nude dancing and general "non-expressive" nudity. *Bushco,* 225 P.3d at 164. But this distinction is irrelevant for the purposes of this case. While the *Bushco* court did note the law's impact on both nude dancing and general nudity, its holding turned specifically on whether the tax it imposed—which was functionally identical to SB 8—met intermediate scrutiny under the secondary effects doctrine. *Id.* at 162-64. It held that it did because "there is nothing in the text or structure of the Tax itself establishing that the legislature's predominant purpose in enacting the Tax was to suppress erotic nude dancing." *Id.* at 162. Thus, the court in *Bushco* found that the tax was content-neutral not because it was triggered by mere nudity, but because it was enacted to provide

7. It is also notable that multiple other states have now enacted taxes and fees on adult businesses to address the secondary effects of these businesses. *See* ILL. CODE ANN. § 175/1 *et seq.* (imposing the equivalent of $3 entry fee on all "live adult entertainment facilities" or a yearly surcharge on a facility ranging from $5,000 to $25,000 depending on gross revenues to fund the Sexual Assault Services and Prevention Fund); TENN. CODE ANN. § 67-4-1201 *et seq.* (imposing $2 entry fee on "adult performance businesses" to fund programs for victims of sex trafficking).

treatment for sex offenders and not to suppress speech. *Id.* ("The legislative record before us supports the conclusion that the predominant reason the Tax was enacted was to provide treatment for sex offenders, not to suppress protected expression").

A detailed comparison of the laws upheld in *Maxim Cabaret, Oasis Goodtime Emporium,* and *Trop, Inc. v. City of Brookhaven,* 296 Ga. 85 (2014) with SB 8 show that SB 8 and the SOA do not target speech, are minimally invasive, and are not subject to strict scrutiny. In *Trop*, the Georgia Supreme Court upheld the newly formed City of Brookhaven's "sexually oriented business" code against a First Amendment challenge. That code bans any employee of a "sexually oriented business" from being "in a state of nudity" or from engaging in "specified sexual activity." Brookhaven Ord. § 15-511(a).[8] The code also bans any "semi-nude" employee from being within six feet of a patron and prohibits all physical contact between employees and patrons. *Id.* § 15-511(b). The code further states that "[n]o person shall possess, use, or consume alcoholic beverages on the premises of sexually oriented business." *Id.* § 15-511(d). Hence, the Brookhaven Ordinance completely bans full nudity and sexual activity, strictly limits physical proximity between patrons and semi-nude employees, and bans alcohol consumption completely. Despite these substantial restrictions, the Supreme Court upheld the ordinance and found that it

8. The relevant parts of the adult business ordinances of the cities of Brookhaven, Doraville, and Sandy Springs, of which the Court can take judicial notice, were attached to Defendant's summary briefing in this matter.

was not subject to strict scrutiny. *Trop, Inc.*, 296 Ga. at 88 (2014) ("[G]iven the long history of sexually oriented business ordinances, ample precedent, and the established record regarding the deleterious effects of alcohol coupled with nude dancing, the trial court did not err by finding that, as a matter of law, Brookhaven's sexually-oriented business ordinance does not unconstitutionally infringe upon Pink Pony's free speech rights").

Similarly, in *Oasis Goodtime Emporium,* the Supreme Court of Georgia upheld the City of Doraville's "sexually oriented business" code against a First Amendment challenge. The Doraville code specifically bans employees from "appear[ing] in a state of nudity or engaging in a specified sexual activity." Doraville Ord. § 6-416(a). The code also bans "semi-nude" employees from being less than six feet from patrons and prohibits all touching between employees and patrons. *Id.* § 6-416(b). The Doraville code also bans all alcohol consumption "on the premises of a sexually oriented business." *Id.* § 6-416(c). Again, despite these substantial restrictions, the Court upheld the Doraville Ordinance and found the ordinance not to be subject to strict scrutiny. *Oasis Goodtime Emporium,* 297 Ga. at 523 ("We therefore conclude that the trial court correctly found the [sexually oriented business] code to be content-neutral").

Finally, in *Maxim Cabaret,* the Supreme Court of Georgia upheld the City of Sandy Springs' adult business code against a First Amendment challenge. That code specifically bans employees from "engaging in specified sexual activities" and "public indecency"

which includes "[a] lewd appearance in a state of partial or complete nudity." Sandy Springs Ord. § 26-29(b) and (c) (referencing offense of "public indecency" in O.C.G.A. § 16-6-8). The code also prohibits the "[sale], distribut[ion] . . . or possession of any intoxicating liquor, beer, or wine . . . upon the premises of the adult establishment." *Id.* at § 26-38. Once again, the Court upheld the ordinance and found the ordinance was not subject to strict scrutiny. *Maxim Cabaret,* 304 Ga. at 191-192. ("This Court and the U.S. Supreme Court have held repeatedly that ordinances designed to combat the negative effects of sexually oriented businesses on the surrounding community are to be evaluated as 'content-neutral' regulations . . . "). Hence, the ordinances upheld by all the recent Supreme Court cases banned full nudity, placed significant restriction on partial nudity performances, and completely banned alcohol consumption at all adult businesses (whether partially nude or not).

Here, in contrast, SB 8 and the SOA do not ban any form of nudity, do not ban the sale or consumption of alcohol, and only impose an assessment on live adult establishments that allow alcohol consumption. Therefore, SB 8 and the SOA are less restrictive than the regulations upheld in the cases of *Maxim Cabaret, Oasis Goodtime Emporium,* and *Trop.* Moreover, there is no question of material fact that the "predominant intent" of SB 8 is to protect children against sex trafficking and sexual exploitation, and the SOA is specifically directed to this purpose by funding a program to "provid[e] care, rehabilitative services, residential housing, health services, and social services . . . to sexually exploited children." O.C.G.A. § 15-21-202(c).

Accordingly, because the "predominate intent" of SB 8 is to combat or avoid pernicious secondary-effects of adult entertainment establishments that permit alcohol consumption, the legislation is content-neutral and is not subject to strict scrutiny. *See Maxim Cabaret,* 304 Ga. at 191-192; *Oasis Goodtime Emporium,* 297 Ga. at 522-523; *Goldrush II,* 267 Ga. at 690-692.

Again, looking to courts that have upheld similar taxes on adult businesses, the court in *Bushco* found that the third *Paramount Pictures* prong was met because the tax was much less restrictive than the ordinance upheld by the U.S. Supreme Court in *City of Erie*:

> In this case, the Tax promotes the interest in providing treatment for sex offenders by raising revenue and directing that revenue towards treatment programs. While there may be other, less speech-restrictive means of accomplishing the interest, the Tax is not invalid simply because there is some imaginable alternative that might be less burdensome on speech. . .
>
> Additionally, any burdens the Tax imposes on protected expression are *de minimis*. Indeed, the Tax burdens protected expression substantially less than the public nudity ordinance upheld by the Supreme Court in *Erie*. The *Erie* ordinance imposed a blanket ban on nudity in public. . .
>
> . . . [I]n contrast to the *Erie* ordinance, which banned all public nudity under threat of

> criminal sanctions, the Tax neither prohibits public nudity nor imposes criminal penalties—it simply imposes an additional cost on the commercial use of nudity as a method of expression.

Bushco, 225 P.3d at 168 (internal quotes and footnotes omitted). Similarly, the court in *Combs* found that the surcharge was *de minimis* as any adult business could avoid the charge by simply not allowing alcohol consumption:

> With respect to the fourth factor—that the restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest—we reiterate two things. The $5 fee is a minimal restriction on the businesses, so small that respondents argue it is ineffective. And the business that seeks to avoid the fee need only offer nude entertainment without allowing alcohol to be consumed.

Combs, 347 S.W.3d at 288. Hence, GACE is simply incorrect and there is no question of material fact that SB 8 and the SOA are content-neutral and not subject to strict scrutiny.

GACE's position is also squarely negated by decades of secondary-effects cases, which make clear that a law's reference to content does not necessarily equate to *targeting* speech *because of* its content. *Ranch House, Inc. v. Amerson,* 238 F.3d 1273, 1280 (11th Cir. 2001).

Because of the well-known link between sexually oriented businesses and various antisocial secondary effects, including prostitution and other crimes, *California v. Larue*, 409 U.S. 109, 111 (1972), even a facially content-based speech regulation is treated as content-neutral if it is meant to address these secondary effects. *Renton*, 475 U.S. at 52. The logic of this "settled position," *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425,439 (2002), is that such laws are meant to control non-communicative secondary effects connected with sexually oriented businesses, independent of any message that the entertainment at issue might communicate. *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 71 n.34 (1976). In other words, secondary-effects regulation "is completely consistent with [the] definition of content-neutral speech regulations as those that are *justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 50 (quotation marks omitted). Because these secondary-effects regulations are deemed contentneutral, they need only pass intermediate scrutiny. *Id.*; *Maxim Cabaret,* 304 Ga. at 191-92.

For these reasons and all the reasons above, GACE's motion seeking summary judgment as to the imposition of strict scrutiny fails and is denied, and Defendant's Motion for Summary Judgment seeking to impose intermediate scrutiny is granted.

II. SB 8 Passes Intermediate Scrutiny Under the First Amendment.

The Court next turns to the question of whether SB 8 meets the intermediate scrutiny standard. The undisputed

material facts show that it does. GACE claims that SB 8 and the SOA fail intermediate scrutiny because: (a) The SOA cannot be narrowly tailored where the same programs could have been funded by the Legislature out of general revenues, rather than via a targeted tax; (b) SB 8 cannot be narrowly tailored where it is unconstitutionally overbroad; and (c) The Legislature did not reasonably rely on pre-enactment evidence connecting adult entertainment establishments with sex trafficking or the sexual exploitation of children. The Court finds that all these arguments fail. Rather, SB 8 and the SOA pass intermediate scrutiny because they meet Georgia's *Paramount Pictures* test: They further an important governmental interest in reducing sex trafficking and the exploitation of minors; their express purpose is unrelated to the suppression of speech; and any incidental restriction of the expressive "speech" of nude dancing is no greater than essential to further the important governmental interest.

A. A Targeted Tax Easily Passes Narrow Tailoring.

Under Georgia's application of intermediate scrutiny, a law "is constitutionally permissible if [1] it furthers an important governmental interest [2] that is unrelated to the suppression of speech, and [3] its incidental restriction of protected speech is no greater than is necessary to further the important governmental interest." *Maxim Cabaret,* 304 Ga. at 192 (citing *Paramount Pictures,* 250 Ga. at 255-56). SB 8 passes this test. The Act advances Georgia's interest in combatting the sexual exploitation

of children with the proceeds of the Safe Harbor Fund. This is a compelling governmental interest unrelated to the suppression of speech, and any incidental burden on protected expression is minimal at best. GACE attacks the evidence in the legislative record that supports these conclusions, but they are wrong about the required evidentiary burden. At most, the legislative evidence must fairly support the law, and it does. GACE's own proffered studies do not change that.

Funding the Safe Harbor Act's programs out of general state revenues, rather than a targeted tax, is an argument that fails under both the law governing "narrowly tailored" and basic logical coherence. It essentially invokes the third prong of the *Paramount Pictures* test. The Supreme Court has made clear that this prong does not require the State to show that its chosen means for advancing the substantial state interest is the ***least*** restrictive means available. *See City of Erie,* 529 U.S. at 301 ("In any event, since this is a content-neutral restriction, least restrictive means analysis is not required."); *Ward v. Rock Against Racism,* 491 U.S. 781, 798 n.6 (1989) (stating that "least-restrictive-alternative analysis is wholly out of place" when evaluating contentneutral regulations of speech). Instead, the regulation must be tailored in the sense that it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini,* 472 U.S. 675, 689 (1985); *Bushco,* 225 P.3d at 167-168. Hence, *de minimis* impacts on protected speech are permissible and a law is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini,* 472 U.S. at

689. Looking to courts that have upheld similar taxes on adult businesses, the court in *Bushco* found that the third *Paramount Pictures* prong was met because the tax was much less restrictive than the ordinance upheld by the U.S. Supreme Court in *City of Erie*: "in contrast to the *Erie* ordinance, which banned all public nudity under threat of criminal sanctions, the Tax neither prohibits public nudity nor imposes criminal penalties-it simply imposes an additional cost on the commercial use of nudity as a method of expression." *Bushco,* 225 P.3d at 168 (internal quotes and footnotes omitted). Similarly, the court in *Combs* found that the tax was acceptable because any adult business could avoid the charge by simply not allowing alcohol consumption. *Combs,* 347 S.W.3d at 288.

Here, SB 8 and the SOA promote the important governmental interest in providing protection and rehabilitation of victims of child sex trafficking and child sexual exploitation by raising revenue and directing that revenue towards such programs. While funding the Safe Harbor Fund out of general state revenues may be less burdensome to the strip clubs, SB 8 is tailored in such a way wherein the government interest would be achieved less effectively absent the regulation. GACE fails to provide any legal precedent or support for an argument that public funds, as opposed to a targeted tax, is required under narrow tailoring. Such an argument fails under the law.

It also fails under logic, as taking the money from the State's general fund would require either raising taxes or cutting funding to other state programs. In

other words, GACE is essentially asking the state to subsidize them by covering the costs of mitigating the secondary effects of their own operations. The logical fallacy of such an argument is easily seen in the zoning context. It would certainly be less burdensome on strip clubs for the government to directly cover the costs of combatting secondary effects rather than restricting where adult businesses can open in the first place, but no court has ever hinted that means zoning—which is a much more impactful restriction—is a "greater restriction than necessary to further the important governmental interest." In any event, it is beyond dispute that the State of Georgia could prohibit the combination of nude dancing and alcohol altogether. Thus, GACE cannot seriously argue that while the State could do that, it cannot assess a small tax on that combination without running afoul of intermediate scrutiny.

B. The Legislature Properly Relied Upon Evidence Establishing Secondary Effects.

GACE contends that "Defendant has failed to sufficiently substantiate the relationship between the adult entertainment establishments and the secondary effects (as required under *Renton*)." Even assuming an evidentiary showing is required,[9] GACE has neither

9. Whether an evidentiary showing is required is subject to question. Although Georgia's Supreme Court has historically considered all manner of adult-entertainment regulations under the *Paramount Pictures* test, *see supra* at 16-17, other courts have held that the *Renton* and *O'Brien* tests apply different versions of intermediate scrutiny. *See, Bushco,* 225 P.3d at

shown that the legislative record is insufficient nor introduced evidence to contradict it. A state "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial government interest." *Alameda Books,* 535 U.S. at 438. The burden of proving such a connection is not high—indeed, "very little evidence is required." *Id.* at 451 (Kennedy, J., concurring). Nor is the state required to "prove the efficacy" of the data it relies upon. *Parker v. Whitfield,* 265 Ga. 829, 829-30 (1995); *see also World Famous Dudley's Food & Spirits, Inc. v. City of Coll. Park*, 265 Ga. 618, 620 (1995). Thus, while the State cannot "get away with shoddy data or reasoning," the evidence need only "fairly support the [State's] rationale for its ordinance." *Alameda Books,* 535 U.S. at 438; *see also Daytona Grand, Inc. v. City of Daytona Beach, Fla.,* 490 F.3d 860, 881 (11th Cir. 2007) ("[T]his is simply another way of saying that the City's reliance on [the] evidence supporting its rationale must be reasonable.").

165-66; *Combs,* 347 S.W.3d at 287; *see also Wall Distributors, Inc. v. City of Newport News, Va.,* 782 F.2d 1165, 1169 (4th Cir. 1986). These courts hold that, unlike *Renton, O'Brien* does not require an evidentiary showing. *See Bushco,* 225 P.3d at 165-66 ("the second prong of the *O'Brien* test does not require that the state provide evidentiary proof of the connection between the speech it regulates and secondary effects"); *see also Pap's A.M.,* 529 U.S. at 299; *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569 (1991) (plurality opinion) (upholding a prohibition on public nudity, as applied to nude dancing, with no empirical evidence about secondary effects). On that view, GACE's evidentiary argument fails at the outset, because, as discussed above, SB 8 qualifies for intermediate scrutiny under *O'Brien. See, Buscho,* 225 P.3d at 166. But this Court need not grapple with this threshold question here because the evidence here is enough even under *Renton*'s version of intermediate scrutiny.

Here, the rationale for SB 8 is that adult entertainment venues may serve as an entry point into the world of sex exploitation and trafficking, so it is fair to ask adult entertainment establishments to pay a modest tax designed to fund efforts to fight that problem. 2015 Ga. Laws 675 at § 1-2. To cast doubt on the State's evidence, GACE must "either demonstrat[e] that the [legislature's] evidence does not support its rationale," or "furnish[] evidence that dispute's the [legislature's] factual findings." *Alameda, Books,* 535 U.S. at 438-39. If GACE succeeds, the law may still be justified if the State "supplement[s] the record with evidence renewing support for [the] theory that justifies" the Act. *Id.* at 439. In all events, SB 8 finds more than enough evidentiary support.

First, GACE is incorrect that the documentary evidence submitted by the State is inapplicable because certain studies either do not mention adult entertainment clubs or child sex trafficking. This is because SB 8 was designed to stop and treat victims of child sex trafficking *and* child sexual exploitation. *See* SB 8 at § 1-2(a) and (b) ("to help address the deleterious secondary effects, including but not limited to, ***prostitution and sexual exploitation of children***") (emphasis added). Hence, any study which shows the prevalence of child sexual exploitation (i.e., child prostitution, etc.) would be relevant to support SB 8, and all the studies relied upon and cited in Defendant's briefing concern child sexual exploitation, child sex trafficking, or both.[10]

10. Indeed, the very titles of the studies themselves show that they involve the sexual exploitation of children and are thus relevant here. *See Commercial Sexual Exploitation of Children*

Second, the studies show that there is a connection between adult entertainment businesses and child sexual exploitation. For example, the "Final Report of the Commercial Sexual Exploitation of Minors" of the Joint Commercial Sexual Exploitation of Minor Study Commission (SMF, Ex. B) specifically states on pages 9-10 that "there is a strong need for additional in-patient, as well as out-patient, services tailored to the unique needs of [child sexual exploitation) survivors," and that a "way to raise funds for additional resources would be to place a modest surcharge on patrons to adult entertainment venues which would be specifically directed toward increased services for victims." SMF, Ex. B, at pp. 9-10. The Final Report then states that reports "demonstrate the frequent proximity between adult entertainment venues and prostitution activity. Not only does employment in such businesses frequently serve as a stepping stone to prostitution, reports from law enforcement and researchers indicate that these businesses often serve as the very location for such illicit transactions." *Id.* at p. 10. The Final Report itself relied on multiple other reports,

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in Georgia, Barton Child Law and Policy Clinic (2008); *Hidden in Plain View: The Commercial Sexual Exploitation of Girls in Atlanta,* Atlanta Women's Agenda (2005); *Deconstructing the Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex,* Chicago Alliance Against Sexual Exploitation (2008); *Adolescent Girls in Georgia's Sex Trade: An In-Depth Tracking Study,* Juvenile Justice Group (2008); *Men Who Buy Sex With Adolescent Girls: A Scientific Research Study,* Schapiro Group (2010); *Adolescent Girls in the United States Sex Trade: Tracking Study Results for May 2010,* Schapiro Group (2010).

and the Commission held at least five public hearings and took the testimony of law enforcement officials, judges, child advocates, faith-based groups, other charitable groups, and researchers. *See id.* at p. 2. Hence, even if the Final Report was the ***only*** report that the General Assembly relied upon, this would be sufficient to meet the "important governmental interest" test as it shows the General Assembly reasonably relied upon other reports and the Commission heard substantial public testimony to reach its conclusions. *See, e.g., Oasis Goodtime Emporium,* 297 Ga. at 523; *Goldrush II,* 267 Ga. at 692 ("The city substantiated its declaration that the amended ordinance was necessary to curb the unwanted secondary effects of mixing alcohol and adult entertainment through the experiences of other cities that the council members reasonably believed to be relevant to the problems faced by Marietta."); *Club Southern Burlesque, Inc. v. City of Carrollton,* 265 Ga. 528, 531 (1995); *Peek-a-Boo Lounge of Bradenton,* 630 F.3d at 1355.[11]

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11. As the Eleventh Circuit noted in *Peek-a-Boo Lounge*:

> Here, the County relied on a vast legislative record that included judicial opinions, reports and studies that had been prepared for other municipalities, testimony from expert witnesses, affidavits from a private investigator who visited sexually oriented businesses in Manatee County, and newspaper articles. **It is undeniable that the County has made a substantial showing, relying on as thorough a record as we have seen in these cases, and far more than the "very little evidence" required under *Alameda Books,* 535 U.S. at 451 (Kennedy, J., concurring in the judgment).**

Peek-a-Boo Lounge of Bradenton, 630 F.3d at 1355 (emphasis added).

Third, GACE's criticisms of the methodology or reliability of some of the studies, particularly *Hidden in Plain View: The Commercial Sexual Exploitation of Girls in Atlanta,* Atlanta Women's Agenda (2005) (SMF, Ex. E), is irrelevant. That study concludes that arrests for child prostitution and truancy occur in spatial proximity to adult businesses. *See* SMF, Ex. E, pp. 21-27, 60-67; *id.* at p. 22. Other studies proffered by Defendant made similar conclusions. *See* SMF, Ex. F at p. 10 (finding that 46% of men who purchased sex "indoors" did so at "strip clubs"); SMF, Ex. G at p. 12 (stating that "[t]here are several small hotels and motels—typically located near strip clubs—where on any weekend night you will find the same group of 10-15 prostitutes, many of whom are young."). GACE's criticisms ignore the relatively low bar of "reasonable reliance". It requires only that there be reasonable evidence of secondary effects, which "derives its value solely from the credit of the [State's] representation that it had relied upon the named studies and the relevance thereof." *Club S. Burlesque, Inc. v. City of Carrollton,* 265 Ga. 528, 530 (1995). There is no requirement that the studies be beyond criticism, only that they bear some relevance to the conclusions reached.

Fourth, even assuming that the *Hidden in Plain View* study (or any of the other studies) is somehow flawed, the live testimony of victims easily meets the State's burden to supplement the record with evidence supporting the law. *See* SMF ¶¶ 9-12, Ex. J at pp. 10-21; *Alameda Books*, 535 U.S. at 439. These witnesses told the Committee that they or victims they knew were initially trafficked through establishments like strip clubs. GACE's only argument to

invalidate this testimony is that it was "anecdotal" and "out of date." GACE Brief, p. 28. GACE cites no legal authority that would permit the discounting of witness testimony due to its age, just its own conclusion that it precludes a "reasonable belief" in its accuracy. Moreover, there is no law that precludes the Legislature from reasonably relying upon anecdotal testimony. *See Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, 881 (11th Cir. 2007) (holding "[a]necdotal evidence is not 'shoddy' *per se*" and rejecting the argument that the city's evidence was flawed "because it consists of 'anecdotal' accounts rather than 'empirical' studies."). The State need not, as GACE implies, authoritatively prove without question that the tax will prevent sexual exploitation. Instead, the evidence need only support a *reasonable belief* that this modest tax will advance the State's interests in protecting victims of child sex exploitation. It does, so SB 8 passes intermediate scrutiny.

D. GACE's Own Evidence Does Not Rebut that of the Legislature.

As for GACE's own evidence, it falls well short of showing that the Legislature could not "reasonably believe" its own evidence showed the requisite connection. *See Oasis Goodtime*. 297 Ga. at 524. GACE attempts to rebut Defendant's evidence showing an important governmental interest with two studies: (1) *Adult Dance Entertainment Clubs and Sex Trafficking: Is There A Strong Relationship?* (Joshua Fink and Kenneth Land, 2015); and (2) *Strip Clubs & Sex Trafficking: Show Us Your Data* (Angelina Spencer, 2018). However, neither

study rebuts Defendant's evidence because they are either flawed or do not address Defendant's evidence at all. Defendant's briefing proffered a chart comparing Plaintiffs and Defendant's studies. The Court finds that this chart persuasively summarizes the fact that GACE's studies simply do not rebut the studies relied upon by the General Assembly.

1. Fink Study

The study *Adult Dance Entertainment Clubs and Sex Trafficking: Is There A Strong Relationship?* (hereinafter "Fink Study") is flawed and does not rebut Defendant's evidence. First, the hypotheses raised in the study do not even address the concerns and subjects analyzed in Defendant's proffered studies. The Fink Study only addresses: (1) whether individuals (not even limited to minors) are trafficked to work in "adult dance/strip clubs" more so than for domestic services and agricultural work and (2) whether "forced performance in adult dance/strip clubs is relatively less frequent than forced prostitution and pornographic performances." Fink Study, p. 14. However, this has nothing to do with Defendant's proffered studies, particularly *Hidden In Plain View,* which shows a spatial relationship between adult businesses and arrests for child prostitution, truancy, and runaways. *See* SMF, Ex. E, pp. 21-27, 60-67. Also, none of that has anything to do with the proximity and entry-point theory supported by the General Assembly's evidence. *See* 2015 Ga. Laws 675 at 1-2(a) ("The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children.").

Second, the data analyzed by the Fink Study only involves "human trafficking court cases," not limited to or controlled for minors, and only analyzes a tiny data set. *See* Fink Study at Tables 1-3. Further, the study does not distinguish whether the trafficking cases involved sex trafficking or other types of trafficking and does not include other sexual exploitation crimes (such as child prostitution) at all. *Id.* Moreover, the study does not include at all a spatial analysis of where these cases occurred. In short, the data analyzed and the conclusions reached in the Fink Study do not rebut, and indeed do not even address, the conclusions reached in Defendant's proffered studies.

Third, the Fink Study opines at length (usually with no supporting data) that "adult dance/strip clubs" now have better infrastructures and preventative measures to guard against crime and have a good relationship with the surrounding communities. Fink Study, pp. 9-12. However, the focus of the study was *all* crime, particularly property crimes, and not sexual crimes against children. *See id.* at p. 10 ("[T]hese clubs do not appear to be locations where potential offenders gather to prey on desirable targets for *property* crimes." (emphasis added)). Further, the Fink Study does not rebut the theory that "adult dance/strip clubs" and surrounding areas do not serve as a point of access for individuals seeking to sexually exploit children.

Finally, there are notable differences in the studies' credentials when comparing the Fink Study with *Hidden In Plain View* in particular. The Fink Study appears to be an unpublished draft study prepared by a graduate student for his university thesis. *See id.* at p. 1. In contrast,

Hidden In Plain View is a published report prepared by a research team and assisted by a multitude of professionals from the FBI, Atlanta Police Department, Juvenile Courts, Atlanta Mayor's Office, and charitable groups. *See* SMF, Ex. E, pp. 2-3. Moreover, unlike the Fink Study, *Hidden In Plain View* studies child sexual exploitation in metro Atlanta specifically. Therefore, in sum, because the Fink Study does not address the topics and focuses of Defendant's studies and analyzes different and spurious data, it does not rebut Defendant's proffered studies as a matter of law.

2. Spencer Study

Similarly, GACE's additional proffered study, *Strip Clubs & Sex Trafficking: Show Us Your Data* (hereinafter "Spencer Study"), is also deeply flawed and does not rebut Defendant's evidence. First, the Spencer Study appears to have been written by the Association of Club Executive's ("ACE") Executive Director Angelina Spencer via Ms. Spencer's lobbying firm, Empowerment Enterprises, and touts at length ACE's founding of "COAST" to combat sex trafficking. *See* Spencer Study, pp. 9-11.[12] The Spencer Study then attempts to show that sex trafficking occurring at nude dancing establishments only constitute 1.8% of total sex trafficking cases, *id.* at pp. 15-16, and that "there have been an estimated 68 cases of minors working in strip clubs in the past five years." *Id.* at p. 8. However,

12. The link to the website showing Angelina Spencer as Executive Director of ACE is at: http://www.acenational.org/ace-contacts. ACE is a national organization which represents adult clubs. GACE is the Georgia chapter of ACE.

like the Fink Study, the Spencer Study has nothing to do with Defendant's proffered studies, particularly *Hidden In Plain View,* which shows a spatial relationship between adult businesses and arrests for child prostitution, truancy, and runaways. *See* SMF, Ex. E, pp. 21-27, 60-67. Again, the focus of SB 8 is that individuals frequenting adult businesses often seek to sexually exploit minors and these businesses serve as a point of contact with minors who are then sexually exploited. *See* SB 8 at § 1-2(a). Hence, because the topics analyzed in the Spencer Study do not even analyze the primary problem addressed by SB 8, the study is not relevant and does not rebut Defendant's studies or evidence.

Second, it is entirely unclear how the Spencer Study arrived at its conclusions, what data sets that it used, and the Spencer Study even admits repeatedly that the data it used was flawed. For example, the Spencer Study notes that "[t]here is a serious lack of data both in the scope and in quality on the extent of the human trafficking problem in the United States, at the federal, state, and local levels," Spencer Study p. 5, and "[h]uman trafficking data is unreliable, inconsistent, and poorly obtained, making it mostly worthless." *Id.* at p. 6. Moreover, the Spencer Study claims that its "sources" vaguely include "official records, state and federal agency reports, federal and state crime statistics, declassified intelligence data from law enforcement, NGO reports, federal, state, and local law enforcement expertise used to gauge sex trafficking in strip clubs, and other policy resources." *Id.* at p. 13. Notably, the Spencer Study's conclusion of only 68 cases of minors working in nude dancing establishments

is purportedly supported by data from the National Human Trafficking Hotline which is itself qualified with the statement that the "National Hotline cannot verify the accuracy of information reported. This is not a comprehensive report on the scale or scope of human trafficking within an area." *Id.* at p. 8 n. 7. Yet, using this supposedly flawed data, the Spencer Study somehow makes its conclusion that nude dancing establishments are only responsible for a small number of sex trafficking cases nationwide. Regardless, even if the data used in the Spencer Study was accurate and its conclusions were reached through proper statistical analysis, the study simply does not even address the topics of the studies relied upon by the General Assembly in passing SB 8. Thus, there is no question of material fact that the Spencer Study does not rebut Defendant's proffered evidence.

Finally, neither the Fink Study nor the Spencer Study rebut the direct testimonial evidence received by the General Assembly in passing SB 8. That testimony included multiple witnesses who were either themselves enticed to work in the adult entertainment industry as minors or who had family members or patients who worked in the adult entertainment industry as minors. *See* SMF ¶¶ 9-12, Ex. J at pp. 10-21. Caselaw fully supports the propriety of reliance upon testimony from victims and their advocates about common paths into sex trafficking here in Georgia. *See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cty.,* 630 F.3d 1346, 1357-60 (11th Cir. 2011) (finding that the plaintiffs studies "neither invalidate[] [the county's evidence] nor render[] the County's reliance on [it] unreasonable"); *Daytona Grand*. 490 F.3d at 881 ("At

most, Lollipop's experts' studies suggest that the City *could* have reached a different conclusion.").

In sum, there is no question of material fact that GACE's studies do not rebut Defendant's evidence. Accordingly, because there is no question of material fact that the General Assembly "considered specific evidence of the pernicious secondary effects of adult entertainment establishments which it reasonably believed to be relevant to the problems addressed [by the law]," *Oasis Goodtime Emporium,* 297 Ga. at 523, summary judgment in favor of Defendant is proper.

Given all the foregoing, the Court finds that SB 8 should be evaluated under intermediate scrutiny, that it passes the intermediate scrutiny test, and that the Legislature properly relied upon evidence showing a connection between adult entertainment clubs and the secondary effects SB 8 was designed to combat. Defendant's motion for summary judgment is therefore granted on those issues and GACE's is denied.

III. SB 8 Is Not Unconstitutionally Overbroad.

GACE's Complaint also contends that SB 8 is unconstitutionally overbroad because several of its terms are too vague and would lead to impermissibly overbroad application. These terms include "substantially nude," "movements of a sexual nature," and "consists of." It further argues that Georgia overbreadth law is more stringent than federal law and that the Eleventh Circuit's most relevant 2021 decision in this area, *Cheshire*

Bridge Holdings, should be ignored. This Court finds that GACE lacks standing to challenge Subpart B of SB 8 on overbreadth grounds and, even if it did not, each of these arguments fails. Therefore, Defendant is entitled to summary judgment on these issues and GACE's cross-motion is denied.

A. Georgia's Overbreadth Jurisprudence Follows Federal Law

Citing only one case, *Pel Asso v. Joseph,* 262 Ga. 904 (1993), GACE argues that Georgia's law of First Amendment overbreadth "can extend beyond the free speech context" and, evidently, is more stringent than federal law. *Pel Asso* allows no such inference. It is a decision applying the *Paramount Pictures* test to a nude dancing ordinance but, in so doing, conflates the third prong of the *Paramount Pictures* analysis, whether an incidental restriction of speech is no greater than essential to further the important governmental interest, with the distinct concept of First Amendment overbreadth. *See Pel Asso,* 297 Ga. at 906; *Oasis Goodtime Emporium,* 297 Ga. at 513. Thus, *Pel Asso's* decision was not directly rendered in the context of First Amendment overbreadth.

Even setting that aside, only the first set of hypotheticals in that decision concern overbreadth of the statute at all, as opposed to vagueness. *Pel Asso,* 297 Ga. at 906-07. As explained below, vagueness is a separate constitutional challenge that GACE chose not to make in this lawsuit. Moreover, of the overbreadth examples in *Pel Asso,* only a single example does not involve protected

expression, that of a child in a diaper. *Id.* at 907. This single example does not implicate First Amendment overbreadth at all. In sum, nothing about *Pel Asso* suggests that overbreadth is stricter under the Georgia constitution or Georgia law.

B. GACE Cannot Raise a Vagueness Challenge

In several places in its briefing, such as pages 35 to 37 of its summary judgment brief, GACE invokes the concept of vagueness. Specifically, it argues that "there are . . . numerous sources of vagueness in [SB 8], so the sweep of the statute . . . is extremely broad." It then argues that the definition of certain terms, including "substantially nude," "movements of a sexual nature," and "consists of" are so vague that SB 8 can be read to reach protected conduct. In so doing, GACE impermissibly conflates a First Amendment overbreadth challenge with a Fifth Amendment vagueness challenge, a claim GACE has not brought because, as discussed *supra,* GACE lacks standing to challenge Subpart B of SB 8. The vagueness doctrine tests the sufficiency of notice to the affected parties, while overbreadth addresses excessive chilling of protected speech. *Holder v. Humanitarian Law Project,* 561 U.S. 10, 18-20 (2010).

Thus, allowing GACE to assert an overbreadth challenge based upon purportedly vague definitions would be error and *Holder* explains why. The court of appeals in *Holder* had relied on its own hypotheticals to declare portions of a statute unconstitutionally vague because they applied to protected speech. 561 U.S. at 19.2 The Supreme

Court reversed, noting that this sort of hypothetical-based analysis wrongly "incorporate[d] elements of First Amendment overbreadth doctrine." *Id.* By focusing on the scope of the statute's potential applications, the court failed to perform the necessary examination of "whether those applications were clear." *Id.* This analysis was inappropriate because "a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression." *Id.* at 20 (emphasis added) (citing *U.S. v. Williams*, 553 U.S. 285 (2007), and *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 494-95 (1981)). "Otherwise," the Court reasoned, "the [overbreadth and vagueness] doctrines would be substantially redundant." *Id.*

Holder's observations apply with equal force here. The vagueness questions posited by GACE cannot apply to the Third Amended Complaint as pled. *See Freeman v. State,* 302 Ga. 181, 183 (2017). Whether or not the "substantially nude," "movements of a sexual nature," or "consists of" are categories so ill-defined that they do not provide adequate notice to affected parties is an entirely separate question relevant only to a different constitutional claim. To permit such claims to move forward, where they have not been formally pied and GACE lacks standing to assert some of them[13], would be error and GACE's summary judgment

13. GACE is barred from asserting a vagueness challenge to Subpart B of SB 8. "[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And [it] certainly cannot do so based on the speech of others." *Holder,* 561 U.S. at 20 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455

motion as to any such "vagueness" is thus denied. *See Steiner,* 303 Ga. at 894-95.

C. Any Overbreadth Challenge to SB 8 Must Fail.

Irrespective of the above, GACE's Third Amended Complaint, read broadly and consistently with its earlier Complaints, asserts that SB 8 is overbroad primarily due to the alleged sweep of the term "consists of" within the definition of "adult entertainment establishment". For the reasons set forth below, any such claim fails as a matter of law.

1. GACE Lacks Standing to Challenge Subpart B.

At the outset, GACE's contention that it has standing to make an overbreadth challenge to the entirety of SB 8 is incorrect. SB 8 identifies *separate* definitions of "adult entertainment establishments," laid out respectively

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U.S. 489, 499 (1982)). Yet here, GACE admits that it is subject to the tax. Third Amended Complaint, 16 (stating that its members are "adult entertainment establishments as defined by the Act). The record also reflects that GACE's members are all strip clubs that fall squarely under subpart A's nude-dancing definition, and not lingerie-modeling studios covered by subpart B. SMF ¶ 122. GACE therefore "cannot complain of the vagueness of [subpart B] as applied to the conduct of others," *Holder*, 561 U.S. at 19. *See also Catoosa Cty. v. R.N. Talley Properties,* LLC, 282 Ga. 373, 375 (2007) ("[O]ne whose own conduct is clearly proscribed cannot complain of the vagueness of a law because it may conceivably be applied unconstitutionally to others."); *United States v. Di Pietro,* 615 F.3d 1369, 1373 (11th Cir. 2010) (same)

(and independently) in Subparts (A), (B), and (C). *See* O.C.G.A. § 15-21-201(1)(A), (B), (C). Each Subpart functions independently, sweeping in different types of adult entertainment establishments. It defines "adult entertainment establishments" to include strip clubs under Subpart A, and adult establishments other than strip clubs such as "lingerie modeling studios" under Subpart B. Here, GACE specifically admits that it is "a non-professional organization of *adult entertainment clubs* . . . [with] 14 members, each of which is a licensed club and active business," Third Amended Complaint, ¶ 1 (emphasis added). It further alleges that its members are "'adult entertainment establishments[s]' as defined by O.C.G.A. § 15-21-201(1)(A) or § 15-21-201(1)(B)." *Id.* ¶ 6. But the undisputed facts show that GACE's members are all strip clubs—i.e., its members are all covered by Subpart (A), not (B). [*See* Defendant's SMF para 21, Exhibit L].[14]

To establish standing, a plaintiff must demonstrate that (1) the plaintiff has personally suffered some actual or threatened injury (an "injury in fact"); (2) the injury

14. GACE points to allegations in its Third Amended Complaint that "some of" its members are subject to Subpart B. However, "unverified allegations in a complaint are generally not evidence for purposes of defeating summary judgment." *Union Carbide Corp. v. Fields,* 315 Ga. App. 554, 562 (2012) (citing *Jones v. City of Willacoochee,* 299 Ga. App. 741, 742 (2009)). Thus, this mere allegation is not evidence sufficient to carry GACE's burden on summary judgment. Rather, the undisputed evidence of record currently demonstrates that GACE's members are nude dancing establishments subject to Subpart A of SB 8, and not "lingerie modeling" establishments subject to Subpart B.

can fairly be traced to the challenged wrong; and (3) a favorable decision is likely to redress the injury. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992); *Granite State Outdoor Advert., Inc. v. City of Roswell,* 283 Ga. 417, 419-20 (2008) (explaining that federal Article III standing cases are consistent with Georgia standing requirements); *New Cingular Wireless PCS, LLC v. Dep't of Revenue,* 308 Ga. 729, 732 (2020) (noting three-part standing test).

"The requirement that a plaintiff have standing applies to 'each claim [it] seeks to press.'" *Parker v. Leeuwenburg,* 300 Ga. 789, 794 (2017) (quoting *DaimlerChrysler Corp v. Cuno,* 547 U.S. 332, 352 (2006)). This means that when a plaintiff challenges multiple provisions of state law, it must establish standing for each provision it challenges. Most relevant here, if a plaintiff cannot show that a particular challenged provision "caused [its alleged] injury," it "lack[s] standing to challenge" that provision, and the court lacks jurisdiction to address the challenge. *Granite State,* 283 Ga. at 421-22; *see, e.g., Tanner Advertising Group v. Fayette County,* 451 F.3d 777, 791 (11th Cir.2006) (en banc) (no standing to challenge sign ordinance's "Attention-getting devices" provision because "[t]he record is devoid of any evidence that [the plaintiff] ever intended to use 'Attention-getting devices'").

This need to establish a causal link between enforcement of the challenged provision and the asserted injury creates GACE's standing defect here. GACE has asserted an injury in fact-its members will be assessed the tax in question. But GACE has not alleged, much less established through evidence, that it will be subject to that

tax because of application or enforcement of *the lingerie-modeling provision. See Lujan,* 504 U.S. at 561 (plaintiff "must set forth by affidavit or other evidence specific facts" to prove standing "at the final stage" of litigation). GACE's members are strip clubs that provide nude dancing, which falls within *that* category of adult entertainment establishments (Subpart A). GACE has not established that any of its members are lingerie modeling studios or that they host the activities covered by the lingerie-modeling provision. So GACE cannot show that their injury is traceable to application of that provision, which means it lacks standing for its constitutional challenge as to Subpart B, and Defendant is granted summary judgment as to any such challenge. *See Granite State,* 283 Ga. at 421-22 (outdoor billboard company could only challenge the provisions of the ordinance that had been applied to it, and not the entire sign ordinance).

The same problem means GACE also cannot establish redressability. "The element of redressability requires that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Ctr. for a Sustainable Coast, Inc. v. Turner,* 324 Ga. App. 762, 767 (2013). If GACE is not subject to the tax because of the lingerie-modeling provision, then enjoining Subpart B could not possibly relieve them of that tax burden. In other words, any favorable order by this Court on Subpart B would not and could not redress their injury. GACE therefore lacks standing on this basis, too. *See, e.g., Coral Springs St. Sys., Inc. v. City of Sunrise,* 371 F.3d 1320, 1347 (11th Cir. 2004) (declining to "evaluate the validity of certain provisions of" a sign code because doing so

would have "no effect on the result in this case" and any such "pronouncements would be essentially advisory in nature"); *Granite State Outdoor Advert., Inc. v. Cobb Cty., GA,* 193 F. App'x 900, 906 (11th Cir. 2006) (no redressability where sign ordinance would continue to prohibit plaintiffs intended advertising regardless of whether challenged provisions were declared unconstitutional).

Next, GACE makes the speculative argument that a failure to challenge Subpart B might somehow imperil its standing on a challenge to Subpart A. This assertion is speculative because Defendant never argued it until late in the summary judgment briefing. The reason Defendant has never argued it is that the "lingerie-modeling" provision of Subpart B, read in context, clearly addresses an entirely different category of establishments from those that include GACE's establishments. Subpart B describes a known and distinct category of adult entertainment establishments in Georgia and elsewhere: lingerie-modeling studios. *See For Your Eyes Alone, Inc. v. City of Columbus, Ga.,* 281 F.3d 1209, 1211 (11th Cir. 2002) (challenge to city ordinance by owners of a "lingerie modeling studio" and "lingerie models"); *Quetgles v. City of Columbus,* 268 Ga. 619, 619 (1997) (upholding ordinance targeting "one-on-one lingerie modeling" against challenge that it discriminated against "lingerie modeling studios"); *Secret Desires Lingerie, Inc. v. City of Atlanta,* 266 Ga. 760, 760 (1996) (reviewing Atlanta ordinance regulating "lingerie modeling studios," which vice squad officers testified were associated with prostitution). And if Subpart B was not clear enough in its reference to these types of businesses, the catch-all portion of SB 8's overall

"adult entertainment establishment" makes it explicit by referring specifically to "lingerie modeling studios." O.C.G.A. § 15-21-201(1), which are those that feature "one-on-one" lingerie modeling. GACE's members are subject to Subpart A, not Subpart B. There is no danger of GACE getting whipsawed between the two definitions on standing because its members are clearly subject to Subpart A, not Subpart B, and there has been no argument by any party to the contrary. Because GACE cannot show that application of the lingerie-modeling category would cause its injury, or that enjoining that provision would redress its injury, GACE lacks standing to challenge it. Defendant is therefore granted summary judgment as to that challenge, and GACE's related cross-motion is denied.

2. Neither Subpart A nor Subpart B is Overbroad.

Even assuming GACE had standing to assert overbreadth against both Subparts of SB 8, its claims still fail. First, it is important to note that the definition of "adult entertainment establishment", including the term "consists of", is identical to the definition already in effect and used by the City of Atlanta in its Code of Ordinances since at least 1989.[15] Hence, Code Section 15-21-201 is not

15. Code Section 16-29.001(3) (e) of the City of Atlanta's Code of Ordinances states:

> Adult entertainment establishment: Any place of business or commercial establishment wherein the entertainment or activity therein **consists of nude or substantially nude persons dancing**

new or novel and identical terms have already been used by the largest city in the State for thirty years. Moreover, the Eleventh Circuit rejected overbreadth challenges to this same ordinance in 2021. *See* Section III(c)(3), *infra.* This

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> **with or without music or engaged in movements of a sexual nature or movements simulating sexual intercourse, oral copulation, sodomy or masturbation, or wherein the patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments,** or where the patron directly or indirectly is charged a fee to engage in personal contact by employees, devices or equipment, or by personnel provided by the establishment. **"Substantially nude" as used in this subsection shall mean dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus, cleft of the buttocks, vulva or genitals.** The definition of "adult entertainment establishment" is to include, but not be limited to, bathhouses, massage parlors, lingerie modeling studios and related or similar activities. Establishments which have as their sole purpose the improvement of health and physical fitness through special equipment and facilities, rather than entertainment, as herein above described, are specifically excluded.

City of Atlanta Ordinance § 16-29.001(3)(e) (emphasis added). Hence, the only difference between the Atlanta Ordinance and O.C.G.A. § 15-21-201(1) is that the SOA definition is broken down into subparagraphs and "substantially nude" is in a different subsection, but the content of the definitions is exactly the same.

factor alone weighs heavily in favor of rejecting GACE's challenge. Additionally, however, GACE's overbreadth challenge must fail as a matter of law.

Overbreadth doctrine is demanding. *United States v. Williams,* 553 U.S. 285, 292 (2008) ("[I]nvalidation for overbreadth is strong medicine that is not to be casually employed.") (quotation marks omitted). As noted by the Eleventh Circuit in *Cheshire Bridge Holdings, infra,* it requires a finding that a "substantial" amount of protected speech is implicated, "not only in an absolute sense, but also relative to its plainly legitimate sweep." *Scott v. State,* 299 Ga. 568, 570 (2016) (quoting *Williams,* 553 U.S. at 292). And a statute should not be invalidated "unless it is not readily subject to a narrowing construction . . . and its deterrent effect on legitimate expression is both real and substantial." *Final Exit Network, Inc. v. State,* 290 Ga. 508, 511 (2012) (quoting *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975)). This high bar for invalidation is not met here for several reasons.

First, taxes are rarely unconstitutionally overbroad. The overbreadth doctrine grew out of concern about government action that chills speech. *Virginia v. Hicks,* 539 U.S. 113, 119 (2003). But taxes generally pose a lower risk of chilling speech because they do not flatly prohibit or restrict speech in any way. Thus, "[i]n the First Amendment context, there is a 'strong presumption in favor of duly enacted taxation schemes.'" *Deja Vu Showgirls v. State, Dep't of Tax.*, 334 P.3d 392, 398 (Nev. 2014) (quoting *Leathers v. Medlock,* 499 U.S. 439, 451 (1991)). And a statute's "presumption of constitutionality can be

overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Medlock,* 499 U.S. at 451-52. Simply put, states have broad latitude to enact tax schemes. So, while courts have considered adult-entertainment taxes for overbreadth, *see Bushco v. Utah State Tax Comm'n,* 225 P.3d 153, 171 (Utah 2009), they have rarely—if ever—found a tax unconstitutionally overbroad. *See id*; *Freedom Path, Inc. v. Internal Revenue Serv.,* No. 3:14-CV-1537-D, 2017 WL 2902626, at *7 (N.D. Tex. July 7, 2017), *vacated on other grounds,* 913 F.3d 503 (5th Cir. 2019) (explaining that "no cited authority holds that an over-inclusive tax rule affecting speech equates to an overbroad restriction on speech"); *Deja Vu Showgirls of Las Vegas, L.L.C. v. Nevada Dep't of Taxation,* No. 06A533273, 2011 WL 7416930, at *7 (Nev.Dist.Ct. Dec. 16, 2011) (finding live entertainment tax was not overly broad); *Scott & Scott, Inc. v. City of Mountain Brook,* 844 So. 2d 577 (Ala. 2002) (holding that business license tax was not overbroad).

The tax here warrants the same treatment. For one thing, the tax is imposed on conduct, not "pure speech." *Hicks,* 539 U.S. at 124 (noting "the overbreadth doctrine's concern with 'chilling' protected speech 'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct.'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *Bushco,* 225 P.3d at 171 (finding a ten-percent gross receipts tax on "sexually explicit businesses . . . regulated conduct rather than expression" because "it does not prohibit the expression of any message; it simply

imposes a cost on using a particular means of expressing a viewpoint—whatever the viewpoint may be."); *see also Briggs v. State,* 281 Ga. 329, 331 (2006) (declining to apply strict scrutiny because statute "regulates a combination of commercial conduct and speech" and not "pure speech"). And the tax is minimally intrusive. Rather than *preventing speech* absent payment, it only imposes a cost on conduct. In fact, adult businesses can avoid the tax altogether if they simply do not serve or allow the consumption of alcohol. O.C.G.A. § 15-21-201(1). Any possible chilling effect is also diminished by the lack of criminal penalties of the sort that typically trigger application of the overbreadth doctrine. *See Hicks,* 539 U.S. at 119; *Hoffman Estates,* 455 U.S. at 498. Finally, the tax implicates only commercial enterprises that are well equipped to determine their legal rights and so carries significantly less risk of chilling speech than if the tax was directed at individuals. *See id.* at 119. In short, this statute, a minimally intrusive revenue tax, is not the type of law that warrants the "strong medicine" of overbreadth invalidation.

Those issues aside, GACE's overbreadth argument misreads the statute. "To assess the extent of a statute's effect on protected expression, a court must determine what the statute actually covers," so "the first step in any overbreadth analysis is to construe the statute in question." *Scott,* 299 Ga. at 570. And even then, a statute should not be invalidated "unless it is not readily subject to a narrowing construction." *Final Exit Network, Inc. v. State,* 290 Ga. 508, 511 (2012) (quoting *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975)). Read naturally and

according to its plain terms, the tax here does not sweep near so broadly as GACE's Complaint suggests, *see* Third Amended Complaint, ¶ 75 and the alleged overbreadth disappears.

The definition of "adult entertainment establishment" covers businesses where alcohol is served and "the entertainment or activity consists of" the activities described in Subparts A through C. GACE alleges the term "consists of" is "vague and undefined" and, thus, a reasonable person would "not know whether a single such performance would be enough to make a business have to pay" the SOA. Setting aside the fact that this is an impermissible vagueness argument not pied in their Second Amended Complaint, the term is not vague or undefined. Its plain meaning is clear and unambiguous. The term "consists of" is commonly defined to mean "made up of." Black's Law Dictionary (5th ed. 1979); Webster's Third New International Dictionary (3rd ed. 2002)[16]. So,

16. Absent some contrary indication, "[a] word or phrase is presumed to bear the same meaning throughout a text," including "when different sections of an act or code are at issue." *Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* (1st Ed. 2012). In Georgia, when the General Assembly uses the term "consists of," the context generally indicates that the subject term must be "made up of" the components. *See, e.g.* O.C.G.A. § 10-1-441 (a trademark or service mark is entitled to registration unless it "consists of" things like "immoral, deceptive, or scandalous matter," "falsely suggests a connection with persons," etc.); O.C.G.A. § 14-2-824 ("a quorum of a board of directors consists of: (1) a majority of the fixed number of directors . . . or (2) a majority of the number of directors prescribed"); O.C.G.A. § 30-3-2 ("'Covered multifamily dwelling' means a

Subpart A, for example, covers an establishment only when its business predominantly features nude dancing for entertainment-not any establishment that happens to host such an activity at any isolated time. *Cheshire Bridge Holdings, LLC, et al. v. City of Atlanta,* No. 1:15-CV-3148-TWT, at *28 (N.D. Ga. Mar. 6, 2020). Thus, even assuming some "mainstream" venues—such as the Fox Theatre, hotels, or mainstream movie theatres—occasionally

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building which . . . consists of four or more units and has an elevator"); O.C.G.A. § 36-36-114 ("The Department of Community Affairs shall develop three pools of arbitrators, one pool which consists of persons who are . . . municipal elected officials, one pool which consists of persons who are . . . county elected officials, and one which consists of persons with a master's degree or higher in public administration"); O.C.G.A. § 40-5-83 ("The commissioner may issue a special license to the instructor of any licensed driver training school . . . if such instructor is qualified to teach a teen-age driver education course which consists of" 30 hours of classroom time, 6 hours behind-the-wheel training); O.C.G.A. § 42-1-12 ("'Criminal offense against a victim who is a minor' . . . means any criminal offense . . . which consists of" kidnapping, false imprisonment, solicitation, etc.); O.C.G.A. § 48-8-50(d) (discussing "a dealer which consists of only a single sales location or which consists of a group of fewer than four sales locaitons or affiliated entities"); O.C.G.A. § 51-1-22 (an owner of a vessel is liable for injury caused by negligent operation, "whether the negligence consists of a violation of [a statute] or of neglecting to observe . . . ordinary care"). Conversely, when "consists of" is used to refer to isolated subparts, the text usually says so explicitly. *See, e.g.,* O.C.G.A. § 33-63-9 ("[T]he Commissioner may . . . impose a penalty of not more than $500.00 per violation . . . if the violation consists of the same or similar course of conduct . . . irrespective of the number of times the conduct . . . occurred").

offered featured shows or movies that would sometimes fall under the definition due to "risque content", those venues would not be covered because their entertainment cannot "consist of" an isolated performance nor can their business model, in the case of hotels, "consist of" the offering of adult movies. *Id.*

GACE argues that even this concept is impermissibly vague where SB 8 does not provide a definition of when an establishment crosses the threshold of consisting primarily of adult entertainment. But the term "consists of" need not be defined by SB 8 with mathematical precision. It is instead GACE's burden to demonstrate that defining "consists of" as 100% adult entertainment, versus 90%, or 80%, and so on, will not just lead to overbreadth, but overbreadth that intrudes on protected activity in an objectively substantial way. GACE must also show not just that such overbreadth is theoretically possible, but that it actually exists. *Final Exit Network, Inc v. State,* 290 Ga. 508, 511 (2012). In this case, it does neither. GACE points to no evidence demonstrating a wide spectrum of establishments that feature "adult entertainment" in enough varying percentages that a lack of a precise percentage definition in SB 8 would lead, in reality, to substantial intrusion on protected expression. Instead, the plain meaning of "consists of" clearly excludes the only type of venues GACE mentions, such as the Fox Theatre or other local performing arts centers, where those venues come nowhere close to offering adult entertainment as a business model. If there are venues that are somehow in the middle of the spectrum, GACE fails to even theorize of them, let alone meet the evidentiary burden required

to show actual unconstitutional overbreadth as applied to those venues. In fact, the evidence of record in this case shows only that SB 8's plainly legitimate sweep encompasses the member clubs of GACE, which falls woefully short of the evidentiary showing necessary to support an overbreadth challenge. Given the plain definition of "consists of," GACE cannot counter with any realistic scenario of overbreadth, let alone objectively "substantial" overbreadth.

Moreover, the overbreadth standard requires the Court to consider whether the statute at issue has actually been applied in an overbroad manner. *Final Exit Network, Inc,* 290 Ga. at 511. GACE cannot make that showing regarding SB 8. The definition of "substantially nude" attacked by GACE—"dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus cleft of the buttocks, vulva, or genitals"—is nearly identical to definitions that already exist in adult entertainment ordinances in the City of Atlanta,[17]

17. Section 16-29.001(3)(e) of the City of Atlanta's Code of Ordinances defines "substantial nudity" as "dressed in a manner so as to display any portion of the female breast below the top of the areola or displaying any portion of any person's pubic hair, anus, cleft of the buttocks, vulva or genitals."

Fulton County,[18] DeKalb County,[19] Cobb County,[20] Gwinnett County,[21] and the City of Sandy Springs.[22] *See* O.C.G.A. § 15-21-201(7). None of these ordinances have been declared vague or overbroad, and the City of Sandy Springs ordinance was upheld in *Maxim Cabaret,* 304 Ga. at 190-194. *See, e.g., Combs,* 347 S.W.3d at 278 n.4

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18. Section 18-78 of the Fulton County Adult Entertainment Ordinance defines "adult entertainment" as, in part, "displaying of any portion of the areola of the female breast or any portion of his or her pubic hair, cleft of the buttocks, anus, vulva, or genitals."

19. Section 15-401(g) of DeKalb County's Adult Entertainment Ordinance defines nudity based on "specified anatomical areas," which are "[l]ess than completely and opaquely covered human genitals or pubic region, buttocks, or female breasts below a point immediately above the top of the areola."

20. Section 78-321 of Cobb County's Adult Entertainment Ordinance uses the terms "seminude," which is defined as "the exposure of one or more, but not all, of the following: human genitals or pubic region, buttocks, or female breasts below a point immediately above the top of the areola, and "specified anatomical areas," which is defined as "[l]ess than completely and opaquely covered human genitals or pubic region, buttock or female breast below a point immediately above the top of the areola."

21. Section 18-447 of Gwinnett County's Adult Business Ordinance defines "[s]emi-nude or seminudity" as "the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks."

22. Section 26-22 of the City of Sandy Springs Code of Ordinances defines nudity based on "specified anatomical areas," which are the "[h]uman genitals or pubic region, buttock, or female breast below a point immediately above the top of the areola."

(upholding TEX. BUS. & COM. CODE § 102.051(2) which defines "nude" as "(A) entirely unclothed; or (B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts . . . or any portion of the genitals or buttocks."); *Bushco,* 225 P.3d at 158 (upholding UTAH CODE ANN. § 59-27-102(3) which defines "nude or partially denuded" as "any of the following [is] less than completely and opaquely covered: (a) genitals; (b) the pubic region; or (c) a female breast below a point immediately above the top of the areola."). The courtroom success of these ordinances is a legitimate factor that the Court must consider in evaluating GACE's overbreadth challenge in this case.

Similarly, GACE's assertion that "revealing costumery" of musical performances by mainstream artists is drawn in by SB S's definition is easy to dismiss. Subpart B covers businesses where alcohol is served and "[t]he patron directly or indirectly is charged a fee or required to make a purchase in order to view entertainment or activity which consists of persons exhibiting or modeling lingerie or similar undergarments." O.C.G.A. § 15-21-201(1)(B). The term "consists of" is commonly defined to mean "made up of." *See* Black's Law Dictionary (5th ed. 1979); Webster's Third New International Dictionary (3rd Ed. 2002)). So, read naturally, the provision covers an establishment only when its business is *made up of* women providing amusement or diversion in lingerie-not when that activity happens to occur at some particular time. So, it cannot be said that buying a concert ticket is a charge required to "view . . . persons exhibiting or modeling

lingerie" where the performance actually "consists of" music and the wearing of lingerie is simply incidental to that performance. O.C.G.A. § 15-21-201(1)(B).

Given the above, this record does not show that the tax covers a "substantial amount of protected speech" beyond its legitimate sweep. *See Williams,* 553 U.S. at 292. That is a high bar. Because of the harmful effects of "invalidating a law that in some of its applications is perfectly constitutional," the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.*; *compare, e.g., Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574-75 (1987) (airport ban of all "First Amendment activities" with no limiting interpretation was overbroad) *with Hicks,* 539 U.S. at 113, 123 (housing policy that restricted property access to individuals with a "legitimate business or social purpose" was not overbroad because its legitimate application to strollers, loiterers, bird watchers, etc., "would seemingly far outnumber First Amendment speakers"). Accordingly, because there is no question of material fact that GACE's overbreadth claim fails as a matter law, GACE's motion for summary judgment in that respect is denied and Defendant's is granted.

D. *Cheshire Bridge Holdings,* and not *Purple Onion,* Governs this Case.

In determining overbreadth, GACE argues that this Court should not follow the persuasive precedent of the

Eleventh Circuit in *Cheshire Bridge Holdings, LLC v. City of Atlanta,* 15 F.4th 1362 (11th Cir. 2021), but rather *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981). GACE is incorrect on both counts. As for the Eleventh Circuit's decision in *Cheshire Bridge Holdings*[23], GACE argues it should be disregarded. GACE claims first that the Eleventh Circuit's decision was based upon an "[un]acceptable narrowing construction" of the statute that applied the "nude or substantially nude" provision to the "lingerie modeling" provision of Subpart B. Setting aside the fact that, as explained above, GACE lacks standing to challenge Subpart B, its contention that the Eleventh Circuit's reading in this fashion is somehow "unacceptable" is nothing more than a bare assertion lacking legal support or even any explanation. Rather, the Eleventh Circuit's reading—which was explained at length in its opinion—was, albeit grammatically awkward, a textually accurate and reasonable attempt to impart a narrowing construction of Subpart B, which is a required step where a law is ostensibly overbroad. 15 F.4th at 1375-1376. The Court noted that such a "less grammatical" narrowing construction was consistent with that employed by sister circuits in similar cases construing adult entertainment ordinances. *Id.,* citing *Ent. Prods., Inc. v. Shelby County, Tenn.,* 588 F.3d 372, 383-89 (6th Cir. 2009).

More importantly, though, that narrowing construction was not the basis of the Eleventh Circuit's ruling in

23. *Cheshire Bridge Holdings* upheld a City of Atlanta adult entertainment ordinance with essentially identical definitions as SB 8 against an overbreadth challenge.

Cheshire Bridge. Instead, it held that "[w]e need not choose between these two possible readings of 'adult entertainment establishment'" because the district court properly held "the risk of overbreadth to mainstream establishments was 'marginal when judged against the [provisions'] plainly legitimate scope.'" *Id.* at 1376. The *Cheshire Bridge* holding was instead based upon a fundamental overbreadth concept that GACE generally ignores—that overbreadth, to be unconstitutional, must be "substantial." Thus, in the words of the Eleventh Circuit:

> Even if we assume that some or all of the challenged provisions may be subject to an overbreadth analysis, the Cheshire plaintiffs' claims fall short. Though certain provisions may be possibly overbroad and reach too far (e.g., [Subpart B, the "lingerie modeling" provision]), the overbreadth is not, to use the Supreme Court's terminology, "***substantial . . . in relation to the [provisions'] plainly legitimate sweep***. The Cheshire plaintiffs have "conceive[d] of some impermissible applications," but that alone is insufficient to render the provisions substantially over-broad and therefore facially invalid under the First Amendment.

Cheshire Bridge, 15 F.4th at 1377 (cites omitted, emphasis added). So, taken against a background where the Supreme Court of Georgia clearly instructs that "provisions that regulate adult businesses and impact the First Amendment will be read narrowly to not reach

mainstream venues, exhibitions, shows, and productions," the Eleventh Circuit was correct to hold that "any potential overreach in the challenged provisions can be handled on a case-by-case basis." *Id.*, citing *Young*, 427 U.S. at 60-61; *Gravely v. Bacon,* 263 Ga. 203, 204 (1993).

GACE also argues that differences in the wording of SB 8 and the ordinances in *Cheshire Bridge* and *Gravely,* such as the Gravely statute's inclusion of "an emphasis on sexual activities or anatomical areas" to the definition of nude dancing, negates any such narrow construction. But any such argument, again, ignores the plain import of the requirement that overbreadth be substantial in relation to the law's plainly limited sweep. As such, no single term, definition, or limitation is fatal so long as there is a reasonable narrowing construction consistent with the general Georgia law that seeks to prevent the application of adult entertainment ordinances to mainstream venues. The Court further notes that during the eight years that SB 8 has been in effect, GACE cannot point to any caselaw alleging an overbroad application of the SOA to "mainstream" entertainment venues such as the Fox Theatre. *See Cheshire Bridge,* 15 F.4th at 1377-78 (such factors may be considered). As the *Cheshire Bridge* Court concluded, "'[p]erfection is not required to survive an overbreadth challenge—a [law] that shields 'most protected activity' is permissible.'" *Id.* at 1378, citing *Imaginary Images, Inc. v. Evans,* 612 F.3d 736, 751 (4th Cir. 2010). *Cheshire Bridge* is directly applicable to this case and should be considered as persuasive authority.

GACE urges this Court to look instead to *Purple Onion, Inc. v. Jackson,* 511 F. Supp. 1207 (N.D. Ga. 1981)

for the proposition that an Atlanta ordinance similar to SB 8 has been struck down on overbreadth grounds previously. In that case, several adult businesses challenged Atlanta's adult business ordinances on multiple grounds, including vagueness and overbreadth. The U.S. District Court struck down several of Atlanta's adult business ordinances on overbreadth grounds and found that because the harsh zoning restrictions resulted in adult businesses being forced into a small area of the city, the ordinances unconstitutionally restricted speech. However, this case is not only distinguishable but supports Defendant. First, *Purple Onion* is a 1981 decision which preceded not only Atlanta's current adult business ordinance but also multiple U.S. Supreme Court precedents. For example, the definition of "adult entertainment establishment" at issue in *Purple Onion* was materially different from Atlanta's current ordinance and SB 8 in that it covered "personal contact . . . [and] dance routines, strip performances or other gyrational choreography . . . which appeals to the *prurient interest* of the patron." *Id.* at 1211 (emphasis added). Hence, the ordinance at issue *Purple Onion* was much broader than SB 8 and the SOA. *Id.* at 1221 (finding that "the definition also includes the Atlanta Civic Center . . . *depending on how easily the patrons' prurient interests are appealed to*" (emphasis added)). Moreover, the court in *Purple Onion* relied heavily on the plurality opinion in *Young v. American Mini Theatres,* 427 U.S. 50 (1976) which preceded the later U.S. Supreme Court cases of *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000) and *City of Renton v. Playtime Theatres,* 475 U.S. 41 (1986) which allowed greater restrictions on adult businesses.

Second, the principal issue in *Purple Onion* was that the zoning ordinances in effect zoned adult businesses out of existence and thus constituted a blanket restriction on speech. *See Purple Onion,* 511 F. Supp. at 1224 ("The effect of the ordinance challenged here on adult entertainment establishments in Atlanta is to squeeze them out of their present, desirable locations and to force them into spaces where they won't fit. . . . Public access to live, sexually-oriented entertainment under the ordinance will be reduced dramatically or eliminated altogether."). Here, in contrast, SB 8 and the SOA do not prohibit or restrict adult entertainment at all but only imposes a tax on adult entertainment establishments that allow alcohol consumption for the express purpose of ameliorating child sex trafficking and child sexual exploitation. Hence, GACE's reliance on *Purple Onion* is simply misplaced and a careful reading of that case shows that it supports Defendant. Accordingly, because GACE has cited no authority that SB 8 and the SOA are unconstitutionally overbroad and there is no question of material fact that GACE's overbreadth challenge fails, GACE's Motion for Summary as to overbreadth Judgment is denied and Defendant's is granted.

IV. GACE Is Not Entitled to Interlocutory Or Permanent Injunctive Relief As A Matter Of Law.

Finally, because GACE's substantive claims all fail as a matter of law on the merits, GACE's claims for injunctive relief should also be denied. *Slone v. Myers,* 288 Ga. App. 8, 14 (2007) ("[I]n order to have standing to seek [injunctive] relief, a party must have a legally protected

interest that will be affected by the action sought to be enjoined."); *Hopkins v. Virginia Highland Assoc., L.P.*, 247 Ga. App. 243, 249 (2000) ("[T]he first maxim of equity is that equity follows the law."). Accordingly, GACE's Motion for Summary Judgment on this claim is denied and Defendant's is granted.

V. Conclusion.

For the reasons set forth herein, GACE's amended motion for summary judgment is hereby denied and Defendant's motion for summary judgment is granted. This is the final judgment in this matter.

So ordered this 4th day of December, 2023.

Belinda E. Edwards
Honorable Belinda E. Edwards
Superior Court of Fulton County

ORDER PREPARED BY:

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APPENDIX C — FINAL ORDER OF THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA, FILED DECEMBER 4, 2023

IN THE SUPERIOR COURT OF FULTON
COUNTY STATE OF GEORGIA

Civil Action No. 2022CV362896

GEORGIA ASSOCIATION OF
CLUB EXECUTIVES, INC.,

Plaintiff,

v.

THE STATE OF GEORGIA,

Defendant.

FINAL ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment, filed pursuant to this Court's Scheduling Order dated May 17, 2022. This matter is a companion lawsuit to a previously-filed action before this Court, captioned *Georgia Assn. of Club Executives v. O'Connell*, Civil Action No. 2017CV297874 (the "Companion Action"). The factual allegations and claims for relief in both complaints are essentially identical. Plaintiff filed this lawsuit upon remand of the Companion Action from the Supreme Court of Georgia in 2022 not because it contains different facts or claims for relief but, according to the relevant allegations

in Plaintiff's Complaint, because of an intervening change in the law regarding waiver of the State's sovereign immunity:

> Under the recent constitutional amendment codified at Article I, Section II, Paragraph V (partially waiving the state's sovereign immunity), the State of Georgia has waived its sovereign immunity for its acts or those of its agencies or employees, occurring on or after January 1, 2021, that are alleged to be unconstitutional.
>
> This waiver of sovereign immunity applies *at least* to all efforts to collect the Tax based on Plaintiffs member clubs' activities that occurred on or after January 1, 2021 or that will occur in the future.

Plaintiff's Complaint, ¶¶8, 9 (emphasis in original). Therefore, as both the Complaint in this action and the Third Amended Complaint in the Companion Action are identical in all material respects, considering that the cross-motions for summary judgment in both cases were briefed and argued at the same time, and considering that the parties did not distinguish their summary judgment arguments on the merits between the two cases, the Court hereby incorporates by reference its *Order on Cross-Motions for Summary Judgment* entered in the Companion Action on December __, 2023 (the "Order").

Having so incorporated the background facts and legal analysis in the Order, the Court having read and considered the briefing and argument of the parties, for the reasons set forth in the Order, and for good cause found, GACE's motion for summary judgment is hereby denied and Defendant's motion for summary judgment is granted. This is the final judgment in this matter.

So ordered this 4th day of December, 2023.

/s/_____
Honorable Belinda E. Edwards
Superior Court of Fulton County

APPENDIX D — ORDER DENYING REHEARING OF THE SUPREME COURT OF GEORGIA, FILED NOVEMBER 14, 2024

SUPREME COURT OF THE STATE OF GEORGIA

Case No. S24A0772

GEORGIA ASSOCIATION
OF CLUB EXECUTIVES, INC.,

v.

FRANK O'CONNELL, COMMISSIONER.

Filed November 14, 2024

ORDER

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Warren, J., who dissents, and Pinson, J., disqualified.

SUPREME COURT 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.

/s/_____
Clerk

APPENDIX E — ORDER DENYING REHEARING OF THE SUPREME COURT OF GEORGIA, FILED NOVEMBER 14, 2024

SUPREME COURT OF THE STATE OF GEORGIA

Case No. S24A0726

GEORGIA ASSOCIATION
OF CLUB EXECUTIVES, INC.,

v.

STATE OF GEORGIA.

Filed November 14, 2024

ORDER

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Warren, J., who dissents, and Pinson, J., disqualified.

SUPREME COURT 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.

/s/_____
Clerk