NO. 09-0481

IN THE
SUPREME COURT OF TEXAS

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Petitioners,

VS.

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC.,
Respondents.

On Petition for Review from the
Third Court of Appeals at Austin

BRIEF OF *AMICI CURIAE* REPRESENTATIVE ELLEN COHEN AND TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT AND TEXAS LEGAL SERVICES CENTER

Christopher D. Kratovil
State Bar No. 24027427

Danny S. Ashby
State Bar No. 01370960

David S. Coale
State Bar No. 00787255

Stephen Dacus
State Bar No. 24059642

K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-5849 (fax)

ATTORNEYS FOR *AMICI CURIAE*

IDENTITY OF PARTIES AND COUNSEL

PETITIONERS/APPELLANTS/DEFENDANTS:

Susan Combs, Comptroller of Public Accounts of the State of Texas;
Greg Abbott, Attorney General of the State of Texas

Counsel for Petitioners:

At Trial:

JAMES C. TODD
Assistant Attorney General
State Bar No. 20094700
CHRISTINE MONZINGO
Former Assistant Attorney General
State Bar No. 02004700
MISHELL KNEELAND
Assistant Attorney General
State Bar No. 24038256
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 019)
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 (fax)

On Appeal:

JAMES C. HO
Solicitor General
State Bar No. 24052766
DANICA MILIOS
Deputy Solicitor General
State Bar No. 00791261
PETER CARL HANSEN
Assistant Attorney General
State Bar No. 24066668
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
(512) 474-2697 (fax)

RESPONDENTS/APPELLEES/PLAINTIFFS:

Texas Entertainment Association, Inc.;
Karpod, Inc.

Counsel for Respondents:

CRAIG T. ENOCH
State Bar No. 00000026
G. STEWART WHITEHEAD
State Bar No. 00789725
ELLIOT CLARK
State Bar No. 24012428
KELLY H. WINSHIP
State Bar No. 24063071
WINSTEAD PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 370-2854
(512) 370-2850 (fax)

DOUGLAS M. BECKER
State Bar No. 02012900
ANTOINETTE D. "TONI" HUNTER
State Bar No. 10295900
GRAY & BECKER P.C.
900 West Avenue
Austin, Texas 78701
(512) 482-0061
(512) 482-0924 (fax)

***AMICI CURIAE*:**

Representative Ellen Cohen
Texas Association Against Sexual Assault ("TAASA")
Texas Legal Services Center ("TLSC")

Counsel for *Amici*:

CHRISTOPHER D. KRATOVIL
State Bar No. 24027427
DANNY S. ASHBY
State Bar No. 01370960
DAVID S. COALE
State Bar No. 00787255
STEPHEN DACUS
State Bar No. 24059642
K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-5849 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

SECONDARY MATERIALS

Representative Ellen Cohen, the Texas Association Against Sexual Assault, and the Texas Legal Services Center, as *amici curiae*, respectfully submit this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae jointly submit this brief to support the position of Petitioners Susan Combs, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas (collectively the "Petitioners"). Each *amicus* has a substantial interest in this case, as follows:

Representative Ellen Cohen represents District 134 in the Texas House of Representatives. District 134 is located in Houston and includes the Bellaire, West University, and River Oaks sections of the city, plus parts of Meyerland and Montrose. Representative Cohen has long been a vocal advocate for women's rights and a champion in the fight against sexual assault. For 18 years, Representative Cohen served as President and CEO of the Houston Area Women's Center, an organization dedicated to eliminating sexual violence. In her leadership role with the Houston Area Women's Center, Representative Cohen led a 120-person staff working to prevent both sexual assault and domestic violence. Representative Cohen was elected to the Texas Legislature in November 2006 and brought her strong convictions against sexual violence to Austin. Indeed, as one of her very first legislative efforts, Representative Cohen sponsored legislation designed to comprehensively combat sexual violence and offer treatment and hope to sexual assault victims across Texas. Representative Cohen's

efforts culminated in the Texas Legislature overwhelmingly passing House Bill 1751[1]—now codified as TEX. BUS & COM. CODE §§ 102.051-.056—which, consistent with her long-running efforts, was designed to reduce sexual assault and the other harmful secondary effects that occur when alcohol is combined with live nude entertainment.

In addition to her long-held goal of reducing sexual violence, Representative Cohen has a more fundamental interest in this litigation. Both the Respondents and Chief Justice Jones in his concurring opinion below have questioned whether the Texas Legislature's purpose and intent in passing House Bill 1751 was to combat the secondary effects of combining nude dancing and alcohol.[2] Representative Cohen—as the primary sponsor and author of House Bill 1751—therefore has a direct interest in demonstrating that the legislation she authored and sponsored was intended to combat the grave problem of sexual assault in Texas. And, to the extent this Court is inclined to look beyond the text of House Bill 1751 for further evidence of the legislature's purpose, Representative Cohen's statements in this brief are relevant to establishing that the Texas Legislature's intent in passing House Bill 1751 was valid and constitutionally-sound. Indeed, the United States Supreme Court has previously evaluated a state legislature's purposes and justifications for an adult business regulation by examining the state's assertion—contained in the state's post-enactment briefing to the U.S. Supreme Court—that the legislation was intended, in part, to reduce sexual assault. *Barnes v. Glen Theatre, Inc.*,

---

[1] Tex. H.B. 1751, 80th Leg., R.S. (2007).

[2] *Combs v. Texas Entm't Ass'n, Inc.*, 287 S.W.3d 852, 866-70 (Tex. App.—Austin 2009, pet. filed) (Jones, C.J., concurring); Resp. Br., 22-27.

501 U.S. 560, 582-83 (1991) (Souter, J., concurring). Against the backdrop of *Barnes* and its progeny, Representative Cohen has a particularly strong interest in this case because her assertions in this brief help to demonstrate that House Bill 1751 was enacted for a valid and constitutional purpose.

The Texas Legal Services Center ("TLSC") is a non-profit legal aid program that provides civil legal services to low-income Texans, including to victims of sexual violence in need of legal representation. As a longstanding grantee of the Texas Access to Justice Foundation, TLSC receives both public and private funds to provide civil legal aid. Though TLSC receives funds from numerous sources, the funding authorized by House Bill 1751 would allow TLSC to continue advancing the causes of sexual assault victims across Texas.

The Texas Association Against Sexual Assault ("TAASA") is a 27-year-old non-profit organization committed to ending sexual violence in Texas. Focused on education, prevention, and advocacy on behalf of victims, TAASA strives to reduce sexual assault. Since its founding in 1982, TAASA has worked to bring hope, healing, and justice to the victims of sexual violence. Though TAASA is funded by a number of independent sources, the fee created by House Bill 1751 would provide TAASA funds to expand its fight against sexual violence in Texas. The Texas Legislature specified that the fees collected from sexually oriented businesses that combine live nude dancing with alcohol must be substantially spent on programs—such as TAASA—that combat sexual assault and provide services and support to victims. TAASA's primary goal in working for the passage of House Bill 1751 was to reduce sexual assault in Texas, and reducing sexual

violence is also TAASA's goal in fighting to uphold the constitutionality of this legislation. TAASA's efforts to prevent sexual violence and provide hope and healing for its victims will be materially impaired if House Bill 1751 is struck down.

Pursuant to Texas Rule of Appellate Procedure 11, Representative Cohen, TAASA, and TLSC certify that no fee was paid or received for the preparation of this brief.

STATEMENT OF THE CASE AND STATEMENT OF JURISDICTION

As *amici curiae*, Representative Cohen, TAASA, and TLSC adopt the Petitioners' Statement of the Case and the Statement of Jurisdiction.

SUMMARY OF ARGUMENT

Sexual assault and rape are among the greatest evils threatening Texans. Through the efforts of groups like TAASA and TLSC, and dedicated public servants such as Representative Cohen, Texas has taken great strides to reduce sexual assault and offer support to its victims. The complex social problem of sexual violence, however, has no simple solution. The battle to eliminate sexual assault requires an incremental approach – identifying one cause at a time; attacking one issue at a time; and taking one step at a time. To that end, Representative Cohen identified one situation that indisputably creates an increased tendency for sexual violence—the dangerous combination of alcohol and live nude entertainment—and took legislative action to mitigate it.

In House Bill 1751—now TEX. BUS & COM. CODE §§ 102.051-.056—the Texas Legislature took two steps to combat the undesirable secondary effects from the combustible combination of alcohol and live nude entertainment. ***First***, the legislature

sought to unravel this dangerous combination by giving sexually oriented businesses three choices: (1) provide live nude entertainment, but not alcohol; (2) provide alcohol, but require entertainers to wear minimal clothing; or (3) provide alcohol ***and*** live nude entertainment, but collect a $5 per-patron fee. Common sense and basic market forces dictate—and undisputed evidence in the trial court showed—that this fee will reduce the harmful secondary effects, including increased sexual assault, that are universally recognized to result when alcohol and nude dancing combine. Because of the Texas fee, some potential patrons will forego the combination of alcohol and nude dancing altogether, opting instead to patronize sexually oriented businesses that offer nude dancing but not alcohol. Other patrons will avoid the fee by going to establishments that serve alcohol but do not offer fully-nude dancing. Still other patrons will pay the fee and go to sexually oriented businesses offering both alcohol and nude entertainment but, as the Respondents concede, will "likely buy one less drink." Pet. Br. at 32.

In any of these three scenarios, the fee set by House Bill 1751 successfully mitigates the undesirable secondary effects that follow when alcohol and nude dancing are offered together. The fee focuses on the fusion of alcohol and nude dancing, not erotic expression altogether. Consistent with basic economic principles, the fee shepherds patrons away from the volatile combination of nude dancing and alcohol, but it does not go so far as to ban this combination – despite the fact that such a prohibition would be perfectly permissible. The Texas fee permits more speech—and gives sexually oriented businesses more options—than would an outright ban on all alcohol at any establishment offering nude dancing.

Second, by collecting a $5 per-patron fee from establishments that combine alcohol and live nude entertainment, the Texas Legislature funds programs—such as TAASA and TLSC—that combat the well-established and harmful secondary effects flowing from the fusion of alcohol and nude dancing. While the primary purpose of House Bill 1751 was to reduce patronage at establishments that combine alcohol and nude dancing and curb the secondary effects that result from this combination of activities, House Bill 1751 also allocates substantial revenue generated by the fee to fund TAASA and similar programs that are committed to reducing sexual assault. The legislature's allocation of funds from this fee further confirms that the legislature's overall intent was to combat sexual assault – and not, as Respondents insist, to merely raise revenue.[3]

The Respondents contend that in passing House Bill 1751 the legislature was primarily concerned not with combating sexual violence but rather with raising revenue. Moreover, the Respondents are dissatisfied with the legislative history of House Bill 1751 and claim that it does not show a sufficiently clear intent to combat sexual assault and other harmful secondary effects. *Amici curiae* respectfully submit this brief to make

---

[3] The Respondents rely on the Comptroller's initial projections that the fee created by House Bill 1751 would raise $87 million over a two-year period, but these estimates turned out to be overly optimistic. Indeed, a recent academic study indicates that the fee created by House Bill 1751 raised only $11.25 million during 2008. BUREAU OF BUSINESS RESEARCH & THE INSTITUTE ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT AT THE UNIVERSITY OF TEXAS AT AUSTIN, AN ASSESSMENT OF THE ADULT ENTERTAINMENT INDUSTRY IN TEXAS 12 (2009), www.ic2.utexas.edu/sob2. Under the clear terms of House Bill 1751, every penny of this $11.25 million will be allocated to the Sexual Assault Program Fund and spent only on programs and initiatives designed to reduce sexual assault and provide hope and healing to victims of sexual violence.

clear that the primary motivation behind this legislation was to combat the harmful secondary effects that inherently flow from the fusion of live nude entertainment and alcohol. Indeed, a review of the text of House Bill 1751 makes it abundantly clear that the legislature's focus was on reducing the negative secondary effects—including and especially sexual assault—that result when alcohol is combined with live nudity. More importantly, to the extent there is any lingering question about the legislature's purpose in enacting House Bill 1751, Representative Cohen—the bill's primary sponsor and a long-time leader in the battle against sexual assault—submits this brief to make clear that the legislation she championed was intended to combat sexual assault and rape. Representative Cohen avers, without equivocation or ambiguity, that her purpose in sponsoring and fighting for the passage of House Bill 1751 was to combat sexual assault in Texas.

Representative Cohen and TAASA have worked for decades to reduce sexual violence, and House Bill 1751 was an integral part of their ongoing work. Given Representative Cohen's background and demonstrated passion for combating sexual assault, it borders on the absurd to suggest that she intended House Bill 1751 as a generic revenue-raising measure. The primary purpose of this legislation was to combat the negative secondary effects flowing from the fusion of nude dancing and alcohol, and it should be deemed constitutional.

ARGUMENT

A. The Plain Language of this Legislation Clearly Demonstrates that the Texas Legislature was Concerned with Combating Sexual Assault.

This Court need look no further than the text of House Bill 1751 to determine that the Texas Legislature was concerned with reducing sexual assault and rape, not raising general revenue. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (determining—based on the language and terms of an ordinance—that the city's predominant intent in regulating adult theaters was to combat secondary effects). Indeed, the very first sentence of H.B. 1751 makes its purpose clear: "An Act relating to the imposition and use of a fee on certain sexually oriented businesses and certain programs ***for the prevention of sexual assault***." But the Texas Legislature did not stop there. In section after section, provision after provision, the bill outlines a framework for battling sexual assault in Texas. Consider the following provisions in House Bill 1751:

- H.B. 1751, Section 3 allocates the first $25 million in revenues received from the new fee to the "sexual assault program fund."
- H.B. 1751, Section 5 specifies the purposes for which this sexual assault program fund may be allocated. The legislature can only allocate money deposited in this fund for certain specific purposes, such as funding sexual violence awareness and prevention campaigns; supporting programs for the prevention of sexual assault; providing equipment and training to health care professionals who treat sexual assault victims; providing service and support to victims of sexual assault; and supporting organizations whose primary purpose is to prevent sexual violence in Texas.
- H.B. 1751, Section 5 provides that the funds deposited in the sexual assault program fund can be allocated to various government offices and agencies in order to research and study all aspects of sexual assault; to provide education and training designed to reduce sexual violence; to support the prosecution of sex offenders and treat convicted sex offenders; and to provide legal assistance to sexual assault victims.

- H.B. 1751, Section 7 establishes the "Sexual Assault Advisory Council," an organization designed to coordinate and increase the effectiveness of the State's efforts to end all forms of sexual violence.

House Bill 1751 was enacted "for the prevention of sexual assault," and against the backdrop of this plain language it borders on the absurd to say that this legislation was designed as a general revenue measure. Taking the legislature at its words, House Bill 1751 was intended to combat the harmful secondary effects—including and especially an increased rate of sexual assault—that are known to increase when alcohol and live nudity are combined. The legislation speaks for itself, and this Court does not have to undertake an elaborate review of the legislative history in order to determine that this bill's purpose was to combat sexual assault.

B. Representative Cohen—the Legislation's Sponsor and a Champion in the Battle Against Sexual Assault—Unequivocally Intended this Legislation as a Measure to Combat Sexual Assault and Other Harmful Secondary Effects.

To the extent this Court looks for further evidence of the legislature's purpose, Representative Cohen—the primary sponsor of this legislation and a long-time advocate against sexual assault—unequivocally states and confirms that she intended this legislation to combat sexual assault and the other harmful secondary effects that tend to increase when alcohol is combined with live nude entertainment. Representative Cohen also declares that House Bill 1751 was not designed or intended as a generic "revenue raising" measure. Representative Cohen avers that her purpose in sponsoring House Bill 1751 was to combat sexual assault by at least partially unraveling the dangerous linkage between sales of alcohol and nude dancing.

The Respondents are dissatisfied with the pre-enactment legislative history and contend that it does not reveal a sufficiently clear legislative intent to reduce sexual assault. Even assuming, *arguendo* and without concession, that the pre-enactment legislative history lacks sufficient clarity on this point, this Court may also look to post-enactment evidence to determine the legislative purpose behind this bill. And, because numerous cases and studies have already recognized the clear link between alcohol, live nude entertainment, and sexual assault, the Texas Legislature did not need to conduct a new study to re-establish that well-recognized link. That the combination of alcohol and nude dancing leads to an increased rate of sexual assault is beyond dispute, and the legislature was entitled to take notice of this well-established fact. Thus, even if this Court looks beyond the text of House Bill 1751, there is substantial evidence—including, now, Representative Cohen's post-enactment declaration in this brief—that this legislation was intended to combat sexual assault.[4]

---

[4] Respondents argue that Representative Cohen disclaimed any link between sexually oriented businesses and increased sexual assault. Resp. Br. at 5-6, 23. This argument is misguided. First of all, the statement Respondents rely upon was made in reference to a materially different and earlier version of the bill that applied to ***all*** sexually oriented businesses, without regard to whether they offered alcohol. In sharp contrast, TEX. BUS & COM. CODE §§ 102.051-.056 applies only to sexually oriented businesses that combine nude dancing and alcohol. Moreover, regardless of any single statement Representative Cohen may have offered in response to a spontaneous question about a different bill, scores of cases and studies have consistently confirmed that alcohol and live nudity form a combustible combination that leads to increased incidents of sexual assault. *See infra* pp. 15-17 and n.7. Nothing Representative Cohen could have said in committee or in floor debate could undermine the firmly-established link between alcohol, live nudity, and increased sexual assault. Finally, other portions of the pre-enactment legislative history confirm Representative Cohen's concern with the link between nude dancing and alcohol and increased incidents of sexual violence. Pet. Br. at 42-43.

1. *The State may rely on post-enactment evidence to demonstrate that House Bill 1751 was enacted for a proper purpose – to combat sexual assault in Texas.*

The United States Supreme Court has recognized that a court can look to post-enactment evidence to determine the purpose of legislation. As Justice Souter discussed in his controlling concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582-83 (1991),[5] states are entitled to leeway in justifying the purposes for a regulation or the state's interest in combating secondary effects. In *Barnes,* Justice Souter recognized that the state had a substantial interest in combating the secondary effects of adult entertainment establishments. *Id.* at 582. Justice Souter noted, however, that this justification had not been adequately articulated by either the legislature or the state's courts. Nonetheless, Justice Souter determined the purposes and justification for the regulation by considering the state's assertion—found in its briefing to the United States Supreme Court—that the statute applied to nude dancing because such entertainment "'encourag[es] prostitution, increase[es] sexual assaults, and attract[s] other criminal activity.'" *Id.* In other words, the United States Supreme Court has looked to post-enactment evidence in order to determine a regulation's purposes and justifications, and

[5] Although *Barnes* is a plurality opinion, Justice Souter's concurring opinion has been recognized as the controlling opinion in that case. *E.g. J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998) (agreeing with other circuits that Justice Souter's concurrence in *Barnes* is the narrowest opinion and, therefore, is the controlling opinion in that case).

has relied upon that post-enactment evidence in holding that the regulation was intended to combat the harmful secondary effects of adult entertainment establishments.[6]

Federal appellate courts—including the Fifth Circuit—have applied *Barnes* and have looked to post-enactment evidence to determine that the purpose of legislation was to combat harmful secondary effects. Notably, the Fifth Circuit has recognized that courts may look to post-enactment evidence to determine that a regulation was passed for the predominant purpose of combating secondary effects, holding that "the City need not demonstrate that the City Council actually relied upon evidence of negative secondary effects when it enacted [an ordinance regulating sexually oriented businesses]. A local government can justify a challenged ordinance based both on evidence developed prior to the ordinance's enactment and that adduced at trial." *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 175 (5th Cir. 2003). The Fifth Circuit permits the examination of post-enactment evidence "because the 'appropriate focus is ***not*** an empirical inquiry into the ***actual intent of the enacting legislature***, but rather the existence or not of a ***current governmental interest*** in the service of which the challenged application of the statute may be constitutional." *Id.* (quoting *Barnes*, 501 U.S. at 582 (Souter, J., concurring) (emphasis added)).

---

[6] The Respondents make much of the fact that in a subsequent dissent Justice Souter was critical of his controlling plurality opinion in *Barnes*. Resp. Br. at pp. 25-26 (discussing and quoting Justice Souter's dissent in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316 (2000) (Souter, J., dissenting)). Self-evidently, however, a justice cannot reverse a controlling opinion—such as *Barnes*—with an individual dissent in a later case.

Under *Barnes* and its progeny, this Court is not confined to the record that the Texas Legislature created before it passed House Bill 1751, but instead can look to post-enactment evidence—including Representative Cohen's averment in this brief—to determine the purposes for which this legislation was enacted. Indeed, the Fifth Circuit has relied upon post-enactment evidence from persons "intimately involved in the drafting and enactment process" to determine that a regulation was enacted out of concern for the harmful secondary effects of sexually oriented businesses. *BGHA, LLC v. City of Universal City*, 340 F.3d 295, 299 (5th Cir. 2003) ("***the affidavits of those intimately involved in the drafting and enactment process of the Ordinance are clear that the Ordinance was enacted out of concern about the adverse secondary effects*** of [sexually oriented businesses] in the city and surrounding communities") (emphasis added).

Representative Cohen was "intimately involved in the drafting and enactment process" of House Bill 1751, and, as such, this Court may consider her post-enactment explanation of intent. *BGHA*, 340 F.3d at 299. Representative Cohen—who was the primary sponsor and author of House Bill 1751 and has a long track record as a champion in the fight against sexual assault—intended this legislation as a way to reduce sexual assault, rape, and other secondary effects that tend to increase when alcohol and live nude dancing are combined. Consistent with her long history of work to reduce and eliminate sexual assault, Representative Cohen introduced House Bill 1751 to further that long-held goal. To the extent there can be any question of intent, Representative Cohen hereby confirms that this legislation was part of her ongoing efforts to combat sexual violence.

2. *Legislative intent is a poor barometer for constitutionality.*

To be sure, any explanation of legislative intent—whether pre-enactment or post-enactment—is, to some degree, self-serving. The inherently political and self-serving nature of declarations of legislative intent underlies the U.S. Supreme Court's warning that "[i]nquiries into congressional motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Declarations of legislative intent are a poor barometer for constitutionality, as "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . ." *Id.* at 384. Members of the legislature—who are, after all, elected officials—will offer floor speeches and public statements for a wide variety of purposes and targeted at different audiences. No such floor speech or public statement should distract from the true gauge of constitutionality—the legitimacy of the government's interest and the effect of the restrictive law. Indeed, it would be futile to strike down an otherwise constitutional law based upon an "inadequate" legislative history, and to thereby compel the legislature to reenact the identical law with a "better" explanation of its intent. *Id.*

In his concurring opinion below, Chief Justice Jones left open the possibility that the Texas fee would be constitutional if the legislative history more clearly showed "that the legislature's predominant purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing." *Combs*, 287 S.W.3d at 870 (Jones, C.J., concurring). Given the inherent unreliability of efforts to divine legislative intent, Chief Justice Jones should have focused on the fee's objective ***effect***—mitigation of the secondary effects flowing from the combination of alcohol and nude

dancing—rather than on any individual legislator's subjective ***intent***. In so heavily emphasizing the legislative history, Chief Justice Jones neglected the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383.

However, even if Chief Justice Jones' concerns were well-founded, and exploration of Representative Cohen's intent in sponsoring House Bill 1751 was somehow determinative of its constitutionality, her foregoing averment should end this issue. More specifically, Chief Justice Jones concurred that the Texas fee was unconstitutional because "the record in this case does not contain evidence—either pre- or post-enactment—that the legislature's predominant purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing." *Combs*, 287 S.W.3d at 870 (Jones, C.J., concurring). Against the backdrop of *Barnes* and *N.W. Enterprises*, Representative Cohen's unambiguous post-enactment declaration that the "predominant purpose in enacting the statute was to combat perceived negative secondary effects of combining alcohol and nude dancing" (*id.*) cures Chief Justice Jones' concern.

3. *The Texas Legislature was justified in enacting House Bill 1751—even without conducting independent research or making new legislative findings—because the United States Supreme Court, numerous lower courts, and countless studies have already established the link between live nude entertainment, alcohol, and sexual violence.*

Contrary to the Respondent's argument, the Texas Legislature was not required to perform a new, independent study to only confirm what has been widely known for decades—combining alcohol and live nude entertainment tends to increase sexual

violence. This link has been repeatedly established in numerous cases and studies. The Texas Legislature is entitled to enact legislation—such as House Bill 1751—to combat the negative secondary effects of alcohol and live nude entertainment and does not need to perform an unnecessary new study before doing so.

The United States Supreme Court and numerous lower courts have repeatedly confirmed the link between alcohol and live nude entertainment and harmful secondary effects, such as sexual assault.[7] Case after case, and study after study, recognizes that

---

[7] *See e.g. California v. LaRue*, 409 U.S. 109, 111 (1972) (upholding a California ban on live nude entertainment in establishments licensed to sell liquor by the drink, and deferring to the state's evidence that "[p]rostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises"); *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981) (upholding regulations banning the sale of liquor on premises which featured live nudity, and noting the regulation's purpose, which included a statement that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand"); *City of Newport v. Iacobucci*, 479 U.S. 92, 96-97 (1986) (upholding ban on nude dancing in establishments that sold liquor for on-premises consumption, and noting the city's determination that "nude dancing in establishments serving liquor was 'injurious to the citizens' of the city," and that the ordinance is "necessary to a range of purposes, including 'prevent[ing] blight and the deterioration of the City's neighborhoods' and 'decreas[ing] the incidence of crime, disorderly conduct and juvenile delinquency'"); *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 705 (7th Cir. 2003) (holding that ordinance banning the sale or consumption of alcohol in sexually oriented businesses did not violate the First Amendment, and noting the legislative findings that "all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located. . . . *The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community*") (emphasis in original); *cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000) (noting city's findings that live nude entertainment "adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects," and noting the "impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' [adult entertainment] establishment") (quoting *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48, 50 (1986)).

"[l]iquor and sex are an explosive combination." *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001) (Posner, J.). Indeed, the Texas Legislature has previously enacted a statute to codify its legislative findings that sexually oriented businesses cause harmful secondary effects. *See* TEX. LOC. GOV'T CODE ANN. § 243.001(a) ("The legislature finds that the unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to the decline of residential and business neighborhoods and the growth of criminal activity").

These precedents and authorities are particularly relevant here, as the United States Supreme Court has upheld adult business regulations even where the legislature did not conduct an independent study to re-confirm the link between adult businesses and harmful secondary effects. *See Renton*, 475 U.S. at 51-52 (holding that a city could rely on studies and experiences of other cities in passing regulations on adult entertainment establishments, and holding that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities"); *see also Barnes*, 501 U.S. at 584-85 (Souter, J. concurring) ("the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered . . . furthers its interest in preventing prostitution, sexual assault, and associated crimes. Given our recognition that 'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate,' I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case") (internal citations omitted).

In other words, it is utterly irrelevant whether the Texas Legislature created a lengthy paper trail (re)establishing that combining alcohol and live nude entertainment tends to increase sexual assault and other harmful secondary effects. Nor does it matter whether individual legislators gave detailed floor speeches to condemn the harmful secondary effects of combining alcohol and live nudity. Speeches by legislators simply cannot be the benchmark for constitutionality. *Cf. United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("[w]e decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it"). What matters is that clear and undisputed evidence shows that sexual assaults and other harmful secondary effects tend to increase when alcohol is mixed with live nude entertainment, and the Texas Legislature enacted House Bill 1751 to combat these harmful secondary effects.

CONCLUSION AND PRAYER

House Bill 1751 is the culmination of tireless efforts by those—including Representative Cohen and TAASA—who have seen firsthand the devastating effects of sexual assault on Texans. Representative Cohen has dedicated much of her adult life to ending the evil of sexual assault, and she introduced and sponsored House Bill 1751 in order to continue that fight. Because reducing the harmful secondary effects that flow from the fusion of alcohol and nude dancing is a legitimate and permissible legislative goal, this Court should uphold the constitutionality of TEX. BUS & COM. CODE §§ 102.051-056.

Respectfully submitted,

Christopher D. Kratovil
State Bar No. 24027427
Danny S. Ashby
State Bar No. 01370960
David S. Coale
State Bar No. 00787255
Stephen Dacus
State Bar No. 24059642
K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-5849 (fax)

ATTORNEYS FOR *AMICI CURIAE* REPRESENTATIVE ELLEN COHEN, TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT, and TEXAS LEGAL SERVICES CENTER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded on this 20th day of November, 2009, to the following counsel of record by regular U.S. mail.

James C. Ho
Danica Milios
Peter Carl Hansen
James C. Todd
Christine Monzingo
Mishell Kneeland
Office of the Attorney General
P.O. Box 12548 (MC 019)
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 (fax)

Craig T. Enoch
G. Stewart Whitehead
Elliot Clark
Kelly H. Winship
Winstead PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 370-2854
(512) 370-2850 (fax)

Douglas M. Becker
Antoinette D. "Toni" Hunter
Gray & Becker P.C.
900 West Avenue
Austin, Texas 78701
(512) 482-0061
(512) 482-0924 (fax)

Stephen Dacus