No. _____

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,

v.

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

On Petition for Review from the
Third Court of Appeals at Austin
Cause No. 03-08-00213-CV

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	This is a suit for declaratory and injunctive relief under the Texas Tax Code and the Texas Uniform Declaratory Judgments Act (UDJA) in which Plaintiffs assert that Texas Business and Commerce Code Chapter 47, Subchapter B violates the U.S. and Texas Constitutions. 1.CR.2.[1] Defendants filed a plea to the jurisdiction, 1.CR.137, 153, which the trial court denied, 1.CR.171; App. C. The case was tried to the bench.
Trial Court:	The Honorable Scott H. Jenkins, Presiding Judge for the 345th Judicial District, Travis County.
Trial Court Disposition:	The court held the provision unconstitutional under the First Amendment of the U.S. Constitution, granted declaratory and injunctive relief, 2.CR.384; App. A, and issued Findings of Fact and Conclusions of Law, SCR.57, 89; App. D, E. The court also awarded attorneys' fees. 2.CR.421; App. B.
Parties in the Court of Appeals:	Appellants—Susan Combs, Comptroller of Public Accounts of the State of Texas; Greg Abbott, Attorney General of the State of Texas. Appellees—Texas Entertainment Association, Inc.; Karpod, Inc.
Court of Appeals:	Third Court of Appeals at Austin, Texas.
Court of Appeals's Disposition:	The court of appeals, in an opinion by Justice Henson, affirmed the trial court's judgment. *Combs v. Tex. Entertainment Ass'n*, No. 03-08-00213-CV, 2009 WL 1563549 (Tex. App.—Austin, June 5, 2009, pet. filed); App. F. Justice Jones concurred in a separate opinion. App. G. Justice Puryear dissented. App. H.

1. Clerk's record cites will be designated __.CR.__, with the first number indicating the volume, and the second indicating the page number. Reporter's record cites will similarly be designated __.RR.__. Cites to the supplemental clerk's record will be designated SCR.__.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal from a final judgment because the justices on the court of appeals disagree on a question of law that is material to the decision, TEX. GOV'T CODE § 22.001(1), the case involves the validity of a statute, *id.* § 22.001(3), and state revenue, *id.* § 22.001(4), and the court of appeals committed an error of great importance to the jurisprudence of the state, *id.* §22.001(6).

ISSUES PRESENTED

Chapter 47, Subchapter B of the Texas Business and Commerce Code imposes a $5 per patron fee on any business that allows the consumption of alcohol on its premises while offering live nude entertainment. Any business can avoid the fee by prohibiting alcohol or by offering sexually oriented entertainment without full live nudity as defined in the statute.

1. Is Subchapter B permissible under the First Amendment, given that the U.S. Supreme Court has repeatedly upheld categorical prohibitions on public nudity altogether, as well as more targeted bans on public nudity where alcohol is consumed—whereas Subchapter B merely imposes a per patron fee on businesses that wish to combine alcohol consumption with live nude entertainment?

2. Is Subchapter B subject to the same intermediate scrutiny that is applied to any "time, place, or manner" regulation under the First Amendment? And does it survive intermediate scrutiny, given: (i) it is content neutral because it targets the negative secondary effects—namely, increased rates of sexual assault and other crimes—that result from combining alcohol with nude dancing and does not target any expressive content, (ii) the substantial government interest in reducing those secondary effects, and (iii) the fact that the fee does not close any avenue for expressive conduct?

3. Did the court of appeals erroneously apply strict scrutiny to invalidate the fee?

4. Does sovereign immunity bar Plaintiff Texas Entertainment Association (which is not subject to the Subchapter B fee) from prosecuting this suit at all? [unbriefed]

5. Is Plaintiff Karpod, Inc.'s suit barred for failure to exhaust administrative remedies? [unbriefed]

6. Does sovereign immunity, as well as the doctrine against redundant remedies, bar Karpod, Inc. from recovering attorneys' fees? [unbriefed]

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Founding Fathers did not remotely intend for the First Amendment to prevent state and local governments from combating rape and other crimes by regulating the sale and consumption of alcohol in certain adult establishments. They could not have fathomed that the Constitution would someday be used to establish a right to consume alcohol while watching live nude entertainment in public. Yet that is precisely what a majority of the court below did late last week, when it struck down a Texas law imposing a $5 per patron fee on nude dancing establishments that allow the consumption of alcohol on their premises.

The judgment below is not just wrong—it is unprecedented. It contradicts nearly 40 years of First Amendment case law and U.S. Supreme Court precedent affirming the power

of state and local governments to ban alcohol in adult establishments in order to prevent rape and other crimes. *See, e.g.*, *California v. LaRue*, 409 U.S. 109, 114-19 (1972) (upholding ban on sexually explicit films and live entertainment in establishments licensed to sell alcohol); *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715 n.1, 716-18 (1981) (per curiam) (upholding ban on alcohol where dancers expose "any portion" of their "genitals" or the female "breast below the top of the areola"); *City of Newport v. Iacobucci*, 479 U.S. 92, 93 n.1, 94-97 (1986) (per curiam) (upholding ban on "nude or nearly nude activity" in establishments where alcohol may be consumed); *see also City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973) (dicta); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975) (dicta).

The Texas fee is even easier to uphold. If the State can prohibit the consumption of alcohol in nude dancing establishments, surely it can impose a fee to merely discourage this same combination of activities. Yet the majority below did not even mention any of these Supreme Court rulings—let alone justify its interference with the will of an overwhelming majority of legislators in light of this extensive (and in recent years, unanimous) precedent.

The judgment of the majority below is also unsettling because it tramples upon (again, without mentioning) repeated admonitions by the U.S. Supreme Court that any doubts in this area must be construed in favor of deference to policymakers and the democratic process. State and local governments are entitled to a "reasonable opportunity to experiment with solutions" to redress the negative secondary effects of adult businesses, including rape and other crimes. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality). *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986); *City of Erie v. Pap's A.M.*,

529 U.S. 277, 301 (2000) (plurality); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality); *id.* at 451 (Kennedy, J., concurring).

In a careful and well-reasoned dissent, Justice Puryear surveyed the relevant Supreme Court precedents and issued a strong endorsement of Texas law accordingly. He observed that, under established First Amendment case law:

> [A] state may, in an effort to combat secondary effects associated with sexually oriented businesses, entirely prohibit the consumption of alcohol within sexually oriented businesses. If a state may completely prohibit the consumption of alcohol within sexually oriented businesses, it seems logical to assume that a state may also impose less exacting alcohol restrictions on sexually oriented businesses provided that the restriction is also designed to combat negative secondary effects. . . . There can be little doubt that a fee is less restrictive than an absolute ban, and [that] the statute was designed to address potential negative secondary effects arising from the pairing of erotic entertainment and alcohol consumption . . . . Consequently, I fail to see how the majority can conclude that the statute at issue violates the First Amendment.

Slip op. at 3-5 (citations omitted). The logic of Justice Puryear's comprehensive opinion is unimpeachable. The judgment of the majority below demands this Court's review.

STATEMENT OF FACTS

In 2007, an overwhelming majority of legislators enacted a $5 per patron fee on adult businesses that combine alcohol consumption and live nude dancing. *See* TEX. BUS. & COM. CODE §§ 47.051-.0551. As the district court found, "the stated purpose" of the fee was "to support sexual abuse prevention and survivor support programs." SCR.61.

The fee combats rape in two distinct ways. First, it discourages a combination of adult activities—alcohol consumption and live nude dancing—that has been linked to rape and other crimes in numerous past U.S. Supreme Court decisions, as well as by the district court

below. SCR.62. Second, proceeds from any business that continues to combine alcohol consumption with nude dancing shall be substantially spent on programs to combat sexual assault and provide services to rape victims. SCR.60. A portion of the proceeds is also earmarked for indigent health care. *Id.*

Plaintiffs represent the interests of nude dancing establishments that wish to sell alcohol. They challenged the fee as unconstitutional under, *inter alia*, the First Amendment. 1.CR.2. The district court granted relief on that basis, 2.CR.384, and the State appealed, 2.CR.403; SCR.24. (Plaintiffs also sought injunctive relief against collection of the fee pending appeal, SCR.3, but both this Court and the courts below denied relief, *see* SCR.22).

Last Friday, the Third Court of Appeals affirmed the district court. App. F-H. But the two judges who voted to affirm did so on different grounds. The principal opinion of Justice Henson struck down the fee as inherently unconstitutional. The concurring opinion of Chief Justice Jones rejected certain elements of the principal opinion and indicated that the fee would be valid, provided that the Legislature clearly identify the purpose of the fee. But he concluded that the legislative history in this case was inadequate in this regard.

Justice Puryear dissented. He rejected the First Amendment claim in its entirety and held that the fee was validly and clearly designed to combat sexual assault.

SUMMARY OF ARGUMENT

Under the First Amendment, state and local governments may ban nude dancing establishments from serving alcohol, because that combination of activities has been linked with rape and other crimes. In addition, state and local governments may experiment with

other policies to achieve the same goals. The purpose of the Texas fee—combating rape—is both valid and plain from the face of the statute, as well as the legislative history. Accordingly, the fee must be upheld under established First Amendment principles.

ARGUMENT

I. THE DECISION BELOW CONSTITUTES AN UNPRECEDENTED INTERFERENCE WITH GOVERNMENT EFFORTS TO REGULATE ALCOHOL AND COMBAT RAPE—IN DIRECT CONFLICT WITH NUMEROUS U.S. SUPREME COURT PRECEDENTS THAT THE MAJORITY BELOW DID NOT EVEN MENTION, LET ALONE DISTINGUISH.

The case for upholding Texas law is straightforward. Over the past four decades, the U.S. Supreme Court has repeatedly—and in recent years, unanimously—upheld the power of state and local governments to ban the consumption of alcohol in nude dancing establishments. *See supra* at 1-2 (discussing *LaRue*, *Bellanca*, *Iacobucci*, *Bruno*, and *Doran*); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515-16 (1996); *id.* at 533-34 (O'Connor, J., concurring). *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 594 (1991) (White, J., dissenting) (suggesting that public nudity ban upheld by majority would be constitutional if it applied only to establishments where alcohol is consumed).

Such bans are valid because pairing alcohol consumption with nude dancing is a combustible combination. The Supreme Court has linked this combination of adult activities to "rape," *LaRue*, 409 U.S. at 111; "crime, disorderly conduct, and juvenile delinquency," *Iacobucci*, 479 U.S. at 96-97; and "prostitution" and "sexual assault," *Barnes*, 501 U.S. at 582, 586 (Souter, J., concurring). The district court reached the same conclusion. SCR.62.

If an outright ban is permitted, then surely a fee designed to serve precisely the same purposes through more modest deterrence is likewise valid. *See 44 Liquormart*, 517 U.S. at

511 ("greater powers include lesser ones"). Put another way, if the State can give nude dancing establishments one of just *two* options—either (1) put on minimal clothing (*see, e.g.*, *Barnes*, 501 U.S. at 587 (Souter, J., concurring) ("[p]asties and a G-string"); *Pap's A.M.*, 529 U.S. at 301 (plurality) (same)), or (2) remove alcohol from the premises—then surely the State can offer those businesses *three* options instead: (1) don minimal clothing, (2) remove alcohol, or (3) pay a fee. *See also* slip op. at 12 (Puryear, J., dissenting) (upholding Texas law because businesses can pay fee, remove alcohol, or require minimal clothing).

Whereas the case for upholding Texas law is simple, logical, and commanded by established precedent—if you can ban it, then you can discourage it—the arguments for invalidating Texas law are an entirely different matter. Both the principal and concurring opinions below commit a number of legal errors. Both opinions repeatedly neglect to mention (let alone address) various Supreme Court and other rulings cited by the State that bear directly upon the validity of Texas law. In addition, the concurring opinion finds ambiguity where there is none—the purpose of the fee is plainly to combat sexual assault.

A. The Principal Opinion Conflicts With Nearly 40 Years of First Amendment Jurisprudence and U.S. Supreme Court Precedent.

The principal opinion below commits a number of errors, but perhaps the most fundamental one is this: It expressly rejects the contention that the State has "the power to ban alcohol in the presence of nude dancing." Slip op. at 10. It does so by relying exclusively on *44 Liquormart*. That is puzzling. Every justice in *44 Liquormart* expressly endorsed such governmental authority—a fact that the opinion does not address. *See* 517 U.S. at 515-16; *id.* at 533-34 (O'Connor, J., concurring). Nor does the opinion mention the

numerous U.S. Supreme Court precedents that likewise endorse such authority, including *LaRue*, *Bellanca*, *Iacobucci*, *Bruno*, and *Doran*, *see supra* at 1-2, as well as rulings from other courts cited by the State below. *See, e.g.*, *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 708 (7th Cir. 2003) (upholding complete ban on alcohol in establishments where dancers expose their "buttocks" or the female "breast below a horizontal line across the top of the areola at its highest point"). These omissions are not just wrong—they are devastating: If an outright ban is allowed, then a modest regulation is likewise valid.[2]

In addition, the principal opinion relies heavily on the fact that Texas law "is not a zoning restriction" on certain adult businesses that serve alcohol. Slip op. at 5. That much is true—the law challenged here only imposes a fee on such businesses, and does not ban their existence outright from certain locations. But that makes the fee *easier*, not harder, to defend. Indeed, even the concurring opinion below rejects the principal opinion in this

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2. The principal opinion also errs when it disputes the State's distinct authority to ban nude dancing, separate and apart from its power to regulate alcohol. It is not necessary to correct this error in this case, because the Texas fee applies only to establishments where alcohol is consumed. But the error is nevertheless real. The U.S. Supreme Court has repeatedly affirmed the power of state and local governments to ban nudity—including specific bans on nude dancing. *See, e.g.*, *Pap's A.M.*, 529 U.S. at 296 (plurality) ("Even if the city thought that nude dancing . . . constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing."); *Barnes*, 501 U.S. at 586 (Souter, J., concurring) ("Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, . . . the interest is unrelated to the suppression of free expression."). The principal opinion fails to mention any of these passages; it observes only that the statutes actually upheld in those cases were general bans on public nudity. Slip op. at 6-7, 10. Yet it does not cite a single legal authority invalidating a specific ban on nude dancing. Nor does the principal opinion mention various cases cited by the State that uphold specific bans on nude dancing. *See, e.g.*, *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1306 (11th Cir. 2003) (upholding local ordinance that "prohibits nudity only in adult entertainment establishments"); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998) ("Justice Souter's formulation in *Barnes* was not predicated on the general nature of the Indiana statute. He found that the general prohibition on nudity was constitutionally sound as it applied to the specific venue of adult entertainment establishments.").

regard. *See* slip op. at 3 (Jones, C.J., concurring) ("To the extent that Justice Henson's opinion suggests that secondary-effects analysis is or should be confined strictly to cases involving zoning regulations, I do not adopt that view. . . . I see no reason to analyze and decide cases in which protected speech is regulated through imposition of a tax any differently from cases in which it is regulated by a zoning restriction or other means."). As the concurring opinion notes, "the parties agree" that the Texas law at issue here is a "time, place, and manner" regulation and accordingly should be reviewed on that basis. *Id.* at 1.

Having established a false dichotomy between zoning laws and fees, the principal opinion compounds its error by invoking various First Amendment tax cases that involve core political speech. Slip op. at 7-8. It even reaches back to *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819), to remind readers that "the power to tax involves the power to destroy." Slip op. at 7. But that principle is obvious—and unremarkable. This case does not involve core political speech that cannot be banned; it involves the public consumption of alcohol in the presence of live nude dancing, which can be banned under 40 years of established precedent. The principal opinion thus fails under its own logic: The "power to destroy" includes "the power to tax." *Id.*

The principal opinion also errs when it characterizes Texas law as "content-based" rather than content-neutral. To justify this erroneous conclusion, the opinion seems to rely heavily on the fact that regulators are "required to examine the content of the expressive conduct" in order to determine whether a particular business is required to pay the fee. *Id.* at 8-9. But the same could be said about the laws upheld in the numerous U.S. Supreme

Court cases (including *LaRue*, *Bellanca*, and *Iacobucci*) ignored by the principal opinion. As here, the only way to determine whether a complete ban on alcohol in certain adult establishments applies to a particular business is for regulators "to examine the content of the expressive conduct." *Id.* at 8. The only way to support the principal opinion on this point, then, is to ignore binding U.S. Supreme Court precedent. The reality is this: Neither the categorical bans upheld in *LaRue* and its progeny, nor the fee at issue in this case, are content based, for one simple reason: All of these laws are designed to combat rape and other crimes—not to suppress expression. It would make no sense to condemn these laws just because, as a matter of administrative necessity, regulators must look at the underlying content to determine whether a particular law apples in the first place.[3]

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3. *See also Young*, 427 U.S. at 70 (plurality) ("[A]ny such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area. Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication."); *Renton*, 475 U.S. at 47-48 ("To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, . . . the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community. . . . In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'") (emphasis in original); *Pap's A.M.*, 529 U.S. at 296 (plurality) ("Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.").

The principal opinion also notes testimony by Texas regulators that they would not apply the fee to plays, concerts, and other artistic activities that include nudity. Slip op. at 9. The existence of such regulatory discretion presents no constitutional problems—and the principal opinion does not appear to contend otherwise. The Supreme Court has already refused to invalidate regulations of adult business based on hypothetical concerns about artistic activities. *Compare LaRue*, 409 U.S. 109 (upholding a general ban on alcohol in sexually oriented businesses), *with id.* at 121 (Douglas, J., dissenting) (objecting to absence of explicit exception for art); *id.* at 125-28 (Marshall, J., dissenting) (same).

Finally, the principal opinion attempts to argue—counter-intuitively—that a fee is somehow *worse* than a ban. Tellingly, the opinion relies exclusively on a single case not cited by any party in this litigation (*Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)). Justice Puryear easily dispenses with this effort: "The fee at issue in this case is unlike the one described [in *Nollan*] because the fee in this case is designed to further the *same interest* that a total ban on erotic entertainment and alcohol consumption would accomplish: minimizing potential negative secondary effects resulting from the consumption of alcohol and the viewing of erotic entertainment." Slip op. at 4-5 n.3 (emphasis added).

The counter intuition employed by the principal opinion is easy to rebut. To say that a ban is constitutional, but that a fee is somehow unconstitutional, defies all logic—as detailed above, and as Justice Puryear observes. *See supra* at 3 (quoting slip op. at 3-5). Moreover, this counter intuition contradicts the Supreme Court's repeated admonitions that courts should defer to policymakers in this difficult area of regulation. Legislators are entitled to a "reasonable opportunity to experiment with solutions" to redress the negative secondary effects of adult businesses, including rape and other crimes. *Young*, 427 U.S. at 71 (plurality). *See also Renton*, 475 U.S. at 52; *Pap's A.M.*, 529 U.S. at 301 (plurality); *Alameda Books, Inc.*, 535 U.S. at 439 (plurality); *id.* at 451 (Kennedy, J., concurring).

B. The Concurring Opinion Conflicts With Established Law Because the Purpose of the Fee—Combating Rape—Is Both Valid and Clear.

The concurring opinion suffers from its own set of flaws. To its credit, the opinion indicates that the fee would be constitutional so long as the Legislature identifies with sufficient clarity and specificity a valid purpose for the fee—such as combating sexual

assault or other secondary effects. Slip op. at 3. But the concurring opinion nevertheless strikes down current law on the ground that the purpose of *this* fee is unclear.

The alleged ambiguity is greatly overstated. To begin with, the purpose of the fee—combating sexual assault—is apparent on the face of the statute, as Justice Puryear notes. *See, e.g.*, TEX. BUS. & COM. CODE § 47.054; slip op. at 6-7, 9-10 (Puryear, J., dissenting). Even the district court below found that "the stated purpose" of the fee was "to support sexual abuse prevention and survivor support programs," SCR.61—a fact the concurring opinion fails to mention.

Moreover, the purpose of the fee was clear to the numerous legislators and citizens who testified in support of the legislation—including, most notably, a number of sexual assault victims and advocates—as well as the sole industry representative who spoke against the measure. *See* PEx.6. The concurring opinion avoids this conclusion only by engaging in a highly selective review of the legislative history. In fact, the opinion relies exclusively on Plaintiffs' presentation of the legislative history—without once even mentioning that the State offered a very different (and at a minimum, more complete) account.[4]

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4. Plaintiffs focus on a single statement by Representative Cohen that appears to deny a link between the businesses that would pay the fee and sexual assault. PEx.6 at 13-14. Yet the concurring opinion never discloses a critical fact about this statement: At the time the statement was made, the bill applied to *all* sexually oriented businesses. Only later was the legislation limited to nude dancing establishments where alcohol is consumed. In failing to disclose this critical fact, the concurring opinion distorts the record.

In addition, the concurring opinion completely ignores the State's presentation of other parts of the record. The legislative history includes various statements that reinforce what the face of the statute already makes clear—that the purpose of the fee is to combat sexual assault. For example, at that same hearing, Representative Cohen stated that "[s]exually oriented businesses employ women and funds generated there should be spent to address sexually oriented crimes that largely affect women." *Id.* at 48. Other witnesses echoed those sentiments. In fact, an industry representative *opposed* the bill precisely because it "does create the impression that somehow sexually oriented businesses are linked to sexual violence. And there obviously

The concurring opinion also commits a fatal legal error. By striking down the fee based on nothing more than stray comments in the legislative history, the concurring opinion violates an established First Amendment principle. In repeated rulings, the U.S. Supreme Court has made clear that, in First Amendment freedom of speech cases, courts may not invalidate an otherwise valid statute based on subjective legislative intent. In *United States v. O'Brien*, 391 U.S. 367 (1968)—a landmark First Amendment ruling not mentioned by the concurring opinion—the Court observed that "[i]nquiries into congressional motives" are "a hazardous matter," especially when "we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id.* at 383-84. Yet that is precisely the error committed by the concurring opinion.

O'Brien involved core political expression (specifically, expression in protest of the Vietnam War); this case is even easier. The U.S. Supreme Court has repeatedly invoked this very same principle in cases involving regulations of adult businesses. For example, as Justice Souter explained in his controlling opinion in *Barnes*, "[o]ur appropriate focus is not

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is not justification for that, and the author said she's not contending it. But *when it comes out in a bill, it certainly looks like it.*" *Id.* at 34 (emphasis added). Another witness who supported the bill specifically identified herself as both "a sexual assault survivor and . . . a former dancer of the adult entertainment industry." *Id.* at 28. And Dr. Noel Busch of the University of Texas testified about studies (not in the record below) indicating that 46% of rape victims report that their perpetrator was under the influence of alcohol or drugs at the time of the rape. *Id.* at 22. All of this reinforces what is already clear on the face of the law—that the purpose of the fee is to combat rape—yet none of it is mentioned in the concurring opinion.

an empirical enquiry 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. . . . '[W]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] 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.'" 501 U.S. at 582-83 (quoting *O'Brien*, 391 U.S. at 384). Yet this is precisely the thrust of the concurring opinion—that the fee would be valid but for certain "unwise" statements in the legislative history.[5]

But perhaps the most fatal flaw of the entire concurring opinion is what it does *not* say. It does not claim that anyone actually intended the fee to censor speech or to further any other invalid purpose. Instead, the opinion complains only that the Legislature neglected to articulate its valid purpose with sufficient specificity. *See, e.g.*, slip op. at 4 (alleging only "the absence of evidence" of valid purpose); *id.* at 7 (same). Put simply, the charge is negligence—not malice. Yet the concurring opinion does not identify a single case in which a court struck down a regulation of adult businesses based on nothing more than stray

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5. *See also, e.g.*, *Renton*, 475 U.S. at 48 ("'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute [regulating adult businesses] on the basis of an alleged illicit legislative motive.'") (quoting *O'Brien*, 391 U.S. at 383); *LaRue*, 409 U.S. at 126 n.3 (Marshall, J., dissenting) ("a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute").

The concurring opinion also launches into an extended (yet completely unnecessary) discussion about the inadmissibility of post-enactment (as opposed to pre-enactment) evidence to determine the legislative purpose of a statute. This discussion is legally wrong under *O'Brien* and *Barnes* as previously noted—and irrelevant in any event. As the opinion itself acknowledges, the discussion is irrelevant because the purpose of the fee can be determined on the face of the statute alone. Slip op. at 7. True enough: The statute can and should be upheld based on its text alone, as well as legislative history, as noted above.

comments in the legislative record—let alone entirely innocent comments. In striking down the fee on such meager grounds, the opinion constitutes a particularly unprecedented and aggressive act of judicial interference with the legislative process.

II. THE DECISION BELOW WARRANTS THIS COURT'S IMMEDIATE ATTENTION

Until this Court takes action, many nude dancing establishments will continue to refuse to pay the fee—thereby depriving Texans of an important deterrent effect on sexual assault (as the trial testimony confirms, nude dancing establishments that pay the fee will naturally see substantial reductions in business, and thus substantial reductions in negative secondary effects as a result, 2.RR.89, 117-37, 144-51). Moreover, until this Court takes action, sexual assault victims will be deprived of millions of dollars in sorely needed services.

The law at issue in this case was strongly supported by an overwhelming majority of legislators—as well as a broad coalition of advocates devoted to combating sexual assault and offering services to rape victims. Of course, no law deserves enforcement, no matter how popular, if it interferes with constitutional rights. But this case is not about constitutional rights. It is about the sale and consumption of alcohol. A federal court of appeals put the matter plainly, in a widely cited ruling not mentioned in either the principal or concurring opinions below: "[W]e do not doubt . . . that [a business's] profit margin will suffer if it is unable to serve alcohol to its patrons." *Ben's Bar*, 316 F.3d at 728. But "the First Amendment [is] not offended when the show goes on without liquor." *Id.*

* * *

In the court below, Plaintiffs cited only a single case—an intermediate state court ruling in Illinois, *Pooh-Bah Enterprises, Inc. v. Cook County*, 881 N.E.2d 552 (Ill. App. Ct. 2007)—which, as the State noted and Plaintiffs did not dispute, was the *only* decision involving an adult business that Plaintiffs were able to identify to support their claim of content discrimination and strict scrutiny. That was telling, as the regulation at issue in *Pooh-Bah* did not involve alcohol—and contradicted established precedent in any event.

The Illinois Supreme Court has now reversed the judgment of the intermediate court of appeals in *Pooh-Bah*. 905 N.E.2d 781 (Ill. 2009). The divided ruling of the court below cries out for similar treatment by this Court.

CONCLUSION

The Court should grant the Petition for Review and reverse the judgment below.

Respectfully submitted,

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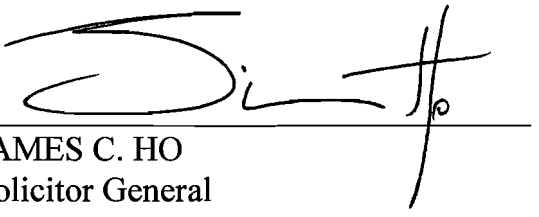

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I certify that on June 11, 2009, a true and correct copy of this Petition for Review was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

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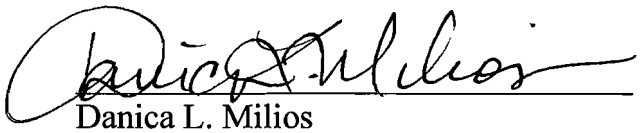

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