IN THE UTAH SUPREME COURT

STATE OF UTAH

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| BUSHCO, d.b.a Babydolls Escorts, et al., | : | |
| Plaintiffs, | : | |
| | : | Appeal No. 20070559-SC |
| vs. | : | |
| UTAH STATE TAX COMMISSION, et al., | : | |
| Defendants. | : | |

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APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. TYRONE MEDLEY

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# BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2 (j).

ISSUES PRESENTED FOR REVIEW

1. Is Utah Code Ann. Title 59 Chapter 27 a content- based regulation which violates the rights of Defendants to free speech under The First Amendment to the U.S. Constitution?

This issue was preserved for appeal by Plaintiff's Motion for summary

Judgment herein. R. 738-786. Review of summary Judgment is a review of legal conclusions; and the review is for correctness. Schurtz v. BMW of North America, Inc., 814 P.2d 1108 (Utah 1991).

2. What standard of Review is correct, in determining the constitutionality of this act?

This issue was preserved for appeal by Plaintiff's Motion for summary Judgment herein. R. 738-786. Review of Summary Judgment is a review of legal conclusions; and the review is for correctness. Schurtz v. BMW of North America, Inc., 814 P.2d 1108 (Utah 1991).

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

Pertinent Constitutional and statutory provisions, including the First and Fourteenth Amendments to the U.S. Constitution, and Utah Code Ann. Title 59 Chapter 27, and the Utah Declaratory Judgment Act, Title 78 Chapter 33 are included in the Appendix hereto.

## STATEMENT OF CASE

### Nature of Case

This is a facial challenge to Utah Code Ann. Title 59 chapter 27, which levies

a 10% "gross receipts tax" on "sexually explicit businesses and escort services". Plaintiffs are businesses which feature nude or semi-nude dancers, or which provide escort services, and which either are, or might become, subject to the tax. Plaintiffs contend that the tax is a content-based "burden" on their rights to free expression under the First Amendment of the U.S. Constitution. This action is brought under the Utah Declaratory Judgment Act, § 78-33-2 U.C.A. The trial court originally ruled that it had no jurisdiction to hear this matter, as Plaintiffs had not exhausted their administrative remedies before the Utah State Tax Commission. That ruling was reversed by the Court of Appeals in TDM, Inc. v. Tax Commission 2004 UT App 433, 103 P.3d 190 (Utah App. 2004); Cert. Denied 109 P.3d 804 (Utah 2005), which remanded this case for a decision on the merits. The District Court then granted Defendants' Motion for Summary Judgment, ruling that the statute is not content based, but is a proper response to the problem of "negative secondary effects".

## STATEMENT OF FACTS

In 2004, the Utah Legislature passed HB 239 entitled "Sexually Explicit Business and Escort Service Tax", and enacting Utah Code Ann. Title 59 Chapter 27. R. 16-23. Utah Code Ann. § 59-27-102 defines an "escort" as "any individual who is available to the public for the purpose of accompanying another individual for

companionship" and obtains a fee for such service. An "escort service" is defined as "any person who furnishes or arranges for an escort to accompany another individual for companionship" for a fee. R. 17-18. The same section defines a "nude or partially denuded individual" as someone "with any of the following less than completely and opaquely covered: (a) genitals; (b) the pubic region; or (c) a female breast below a point immediately from the top of areola." A "sexually explicit business" is defined as "a business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, provides any service" for a fee, and for at least 30 days during a calendar year." Id.

§ 59-27-103 enacts a tax "equal to 10% of amounts paid to, or charged by, sexually explicit businesses as defined therein. § 59-27-104 of the Act enacts a similar tax for escort agencies. The tax is to be a "gross receipts tax" on all income for the businesses defined in the Act. R. 18-20. § 59-27-106 requires businesses subject to the tax to maintain adequate books and records to enable Defendants to levy and collect the taxes. R.21. Pursuant to § 59-27-105, certain portions of the money raised are earmarked for investigation or treatment of sex offenses or offenders. R. 20-21.

At the House Committee hearing, held on February 3, 2004, the bill's sponsor, Rep. Duane Bordeaux, was joined by Kathy Okey, an employee of the Department of Corrections. While Ms. Okey appeared to testify as an expert on sex offenders, she was not introduced as such, and presented no credentials which would lead an average person ro bleive she had such expertise. Rep. Bordeaux spoke of a need for more therapy resources for sex offenders, and said: "A special tax for a special purpose is not a regressive tax, nor does it place a burden on disadvantaged populations." R. 130. Ms. Okey spoke of the number of offenders and the need in the correction system for more funding for therapy. She stated, concerning convicted sex offenders: "Without additional funding for treatment, it makes it an increased danger to the community." R. 131. Ms. Okey also said:

> I also think it important to point out that there is a cause and effect here. While most people who utilize sexually explicit businesses don't commit sex offenses, the vast majority of sex offenders utilize these kinds of services. So there is a cause and effect there that perhaps they should pay some of that burden. There was an analysis done by Hanson and Busia [apparently should be "Hanson and Bussiere"] of sex offenders in the United States, Canada and Great Britain. The third top factor that indicates a sex offender's risk is paraphilias. Utilizing these types of services in one example of paraphilias. R.133-134.

In answer to a question about the term she used, she defined the term "paraphilia" as follows:

> A paraphilia is an unusual sexual interest that you really have an obsession with. The ones that most people joke about is like women's shoes or feathers or those kinds of things would be examples. But it is an unusual interest in something. It's not necessarily illegal but generally people [who] have one type of that kind of interest also have others. With sex offenders, it's one of the things that it's a huge risk factor for them. R. 134.

In answer to a question as to whether there was evidence that sex offenders used escort services, Ms. Okey stated further:

> Accessing escort services or stripper bars is a type of paraphilia and they didn't divide at this percentage. It's just that paraphilia is one of the top contributors when you are looking if someone is going to re-offend. If they have paraphilia, this, it's one of the top things that you look at. T. 138.

Upon passage, and at the request of the sponsor, the House added intent language to buttress that position after the bill had passed the Utah House of Representatives:

> It is the intent of this act to tax sexually explicit businesses and escort services to provide a revenue for treating individuals who have been convicted of sex offenses. The provisions of this act have neither the intent nor the effect of imposing a limitation or restriction on the content of any communicative material, including sexually oriented materials. Similarly it is not the intent nor the effect of the act to restrict or deny access by adults to sexually oriented materials protected by the First Amendment. Or to deny access by the distributers and exhibitor of sexually oriented entertainment to their intended market. Neither is the intent nor the effect of this act to condone or legitimize the distribution of obscene material.
>
> For the legislature finds the Supreme Court of the United State has upheld the

> regulation of sexually oriented businesses because of the deleterious effect they have on the community. Sexually oriented business, it is in the best interest of the citizens of this state to provide counseling to individuals who have committed a sex offense. Most sex offenders continue to commit sex offenses if they do not receive treatment. Sex offender treatment is expensive. If an offender has to pay for treatment, restitution and normal living expenses, they generally cannot afford treatment. It is reasonable to tax sexually explicit businesses and escort services in order to provide counseling for individuals who have committed a sex offense. R. 126-127.

Plaintiffs in this action originally included three semi-nude dancing establishments licensed by the State of Utah to present such entertainment in conjunction with the sale of alcoholic beverages, as they were among businesses which received notices that they were likely to be subject to the tax, and should commence paying the tax with their sales tax payments. Defendants later conceded that Plaintiffs who had valid liquor licenses from the State, and who were in compliance with the "dress requirements" set by the State, should not be subject to the tax. R. 601. These requirements include that the nipple and areole be opaquely covered, as well as a prohibition on the displaying of the " genitals, pubic area and anus." Utah Code Ann. § 32A-1-602. The Tax Commission made a similar determination concerning American Bush, Inc., which does not deal in alcoholic beverages, but observes similar rules regarding the dress of performers. According to correspondence from Defendant's counsel, the decisions of the Tax Commission

not to impose the tax on these Plaintiffs and former Plaintiffs "was not based on the type of dancing but rather on the amount of dress." R.602-603.

American Bush, Inc. previously featured full nudity in its dancing, but was required to restrict its dancers to semi-nude under an ordinance passed in 2001. American Bush now complies with costume requirements which would be required of establishments which sell alcoholic beverages. This party, however, seeks to comply only with the less restrictive Ordinance requirements, without being subject to this additional tax. R. 1080-1083. Defendants have made it clear that a change in the attire would trigger the tax. Plaintiff Denali, L.L.C. does present a dance show in Salt Lake City featuring full nudity. As such, it is the only establishment of which Plaintiffs are aware, in the State of Utah, subject to the "sexually explicit business" tax based solely on the lack of adequate attire on its dancers. R. 1177-1180.

Plaintiffs Bushco, Inc., and Valley Recreation, Inc., provide services, on an individual basis, of entertainers and escorts as defined by the Salt Lake City "Sexually Oriented Business "SOB" ordinance, Title 5, Chapter 60 of the Salt Lake City Code. (Bush and Reynolds Aff's.) Plaintiff D. House, L.L.C., at the time this action was filed, provided services, on an individual basis, of entertainers and escorts as licensed by the City of Park City. (Curtis Aff.) This Plaintiff has now relocated to Midvale,

in Salt Lake County, and is licensed by that City under its SOB Ordinance. These Plaintiffs filed affidavits which stated that their services were similar to those of the other establishments. Joe Bush, in behalf of Plaintiff Bushco, stated:

> 4. That he also supplies entertainers for bachelor parties and other events, and this constitutes a substantial part of his business. This entertainment is primarily dancing entertainment similar to that provided by other Plaintiffs in their establishments.
>
> 5. That he believes his business contains expressive elements protected by the First Amendment to the United States Constitution, as well as elements of free association, also protected by the Constitution. R. 320.

Based on the affidavits, the trial Court ruled that:

> The escort service Plaintiffs are entitled to First Amendment protection because they incorporate dancing services; thus for purposes of these cross-motions all the Plaintiffs will be treated as if they are entitled to the same First Amendment protection. R. 1207.

The trial Court nevertheless ruled in favor of Defendants; as it found the law not to infringe on those First Amendment rights.

## SUMMARY OF ARGUMENTS

This an action seeking to declare the "Sexually Explicit Business and Escort Service Tax unconstitutional as a violation of the First Amendment. Nude and semi-nude dancing has constitutional protection from "content based" regulation. Further,

this act is overbroad as it taxes the right to free expression and includes much constitutionally protected activity.

The "Power to tax is the power to destroy" and this act is unlawful censorship. The U.S. Supreme Court has repeatedly ruled that a content based tax violates the First Amendment and cannot be sustained.

Because this is a content based tax, it is to be reviewed by the Courts using strict scrutiny. Such strict scrutiny allows the tax to be sustained only if it is necessary to serve a compelling state interest, and is narrowly drawn to achieve that interest. This tax does not meet that high standard as the target of the tax is not necessary to, or reasonably related to, the goal of raising revenue.

The tax is not aimed at "negative secondary effects" and is not designed to eliminate or lessen those effects. Therefore, it does not meet the requirements of "intermediate scrutiny", and cannot be upheld on that basis.

## ARGUMENT

### POINT I

### NUDE AND SEMI-NUDE DANCING IS PROTECTED UNDER THE UNITED STATES CONSTITUTION.

This Court refused to recognize nude dancing as expression for purposes of

State Constitutional protections under Article I § 15, in American Bush v. City of South Salt Lake, 2006 UT 40, 140 P.3d 1235 (Utah 2006). Inexplicably, this Court seemed to repudiate a long line of cases where the Court invited litigants to argue the merits of their claims under the Constitution of Utah, and in which the Court previously stated that the protection of Article I § 15 is "by its terms somewhat broader than the federal clause". Provo City v. Willden, 768 P.2d 455, 456 (Utah 1989). Nevertheless, in West v. Thomson Newspapers, 872 P.2d 999, 1005-1006 (Utah 1994), this Court recognized the "primacy model" in which Federal constitutional protections form a "broad uniform 'floor' or uniform level of protection that State law must respect." Therefore, whatever personal opinions are held by members of this Court regarding the merits of nude dancing as artistic expression, it must be recognized as subject to First Amendment protection. Furthermore, this case can be distinguished from American Bush v. South Salt Lake as this law is aimed at all nudity in entertainment, and is much wider in its application. As will be shown, this Court should have little trouble holding that the instant statute is unconstitutionally overbroad without revisiting its previous ruling. The South Salt Lake "Sexually Oriented Business" Ordinance at issue there surely was content-based. But it was directed only at adult businesses which were claimed to cause or

exacerbate the dreaded"secondary effects".

The U.S. Supreme Court has ruled on a number of occasions that speech need not be political to be protected by the First Amendment. See Winters v. New York, 333 U.S. 507 (1948) (fiction in magazines) and Burstyn v. Wilson, 343 U.S. 495 (1952) (movies). And expression is protected even when not verbal. See Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) and Texas v. Johnson, 491 U.S. 367 (1989). The Court, in California v. LaRue, 409 U.S. 109 (1972) ruled that dancing, like theatrical productions, might be entitled to First Amendment protection. In that case, however, the Court upheld an ordinance regulating dancing or performances in an establishment licensed to sell alcoholic beverages, under the Twenty-first Amendment, which gives State the power to regulate alcoholic beverages. In the case of Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the Court recognized First Amendment protection for topless dancing in places not selling alcohol. The Court, however, indicated that there are limited protections for such types of dancing. The Court said:

> Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed. 2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.

In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well. The District Court observed, we believe correctly:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place" it could include the theatre, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, the ordinance would prohibit the performance of the "Ballet Africans'" and a number of other works of unquestionable artistic and socially redeeming significance. 364 F.Supp. at 483. 422 U.S. at 931.

The Court invalidated the ordinance prohibiting nude dancing without alcohol, as overbroad as it would also apply to more "artistic" productions. This is exactly the case this Court is faced with here. The statute at issue is not directed at the "customary 'bar room' type of nude dancing [that] may involve only the barest minimum of protected expression". Instead, it is directed at any production which may involve nudity, as will be explored more fully below.

In the case of 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996), the Supreme Court explicitly overruled California v. LaRue, and stated:

> Without questioning the holding in LaRue, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. As we explained in a case decided more than a decade after LaRue, although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's

> regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." 116 S.Ct. at 1514.

The question of nude dancing as protected expression was again addressed by the Supreme Court in Schad v. Mount Ephraim, 452 U.S. 61 (1981). In this case, an adult bookstore expanded its facility to include live nude dancing. The Borough of Mount Ephraim, New Jersey outlawed any such entertainment. The Supreme Court found the ordinance overbroad in that it would prohibit much constitutionally protected expression, as would the instant law. The Doran and Schad decisions continue to be quoted with approval, through the most recent nude dancing cases.

Federal courts have allowed "reasonable time, place and manner restrictions" on businesses featuring nude dancing. See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)and City of Erie v. Pap's A.M., 529 U.S. 277 (2000). Once again, both the plurality and the dissent cited approvingly both Doran and Schad. The plurality opinion of Justice O'Connor stated:

> As we explained in Barnes, however, nude 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 Barnes v. Glen Theater, Inc., 501 U.S. at 565-566 (plurality opinion); Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981).
>
> To determine what level of scrutiny applies to the ordinance at issue here, we

must decide "whether the State's regulation is related to the suppression of expression." Texas v. Johnson, 491 U.S. 397, 403 (1989); See also United States v. O'Brien, 391 U.S. at 377. 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. Texas v. Johnson, Supra, at 403; United States v. O'Brien, Supra, at 377. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the O'Brien test and must be justified under a more demanding standard. Texas v. Johnson, Supra, at 403. 529 U.S. at 289.

The Court then went on to look at the ordinance of the City of Erie. In doing so, the Court noted:

> The ordinance here, like the statute in Barnes, is on its face a general prohibition on public nudity. 553 Pa., at 354, 719 A.2d, at 277. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in Barnes, the Erie ordinance replaces and updates provisions of an "Indecency and Immorality" ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland. Id. at 290. (Emphasis added).

The statute at issue here is directed at nudity that is "accompanied by expressive activity"; and it does not apply only to adult businesses featuring nude or semi-nude dancing. It does not purport to affect public nudity. The Seventh Circuit Court, in Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000), a case involving fully nude dancing, decided after City of Erie, said:

> Although once furiously debated, it is now well-established that erotic dancing of the sort practiced at the Island Bar enjoys constitutional protection as expressive conduct. See City of Erie v. Pap's A.M., ___ U.S. ___, 120 S.Ct. 1382, 1385 (2000); Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990), rev'd sub nom. on other grounds, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). Of course, no one argues that erotic dancing at the Island Bar represents high artistic expression, but "[n]ude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree nonetheless." Miller, 904 F.2d at 1087. The Supreme Court has agreed, explaining that "nude dancing of the type at issue here is expressive conduct, although . . . it falls only within the outer ambit of the First Amendment's protection." Erie, 120 S.Ct. at 1391 (addressing nude barroom dancing); see also Barnes, 501 U.S. at 566 ("[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."). Moreover, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). Entertainment may not be prohibited "solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (citations omitted). 228 F.3d at 839.

Despite challenging some of the assertions by the City concerning an ordinance targeted at nude dancing, the Court approved the "de minimus" requirement that dancers wear pasties and g-strings. See, however, Nakatomi Investments, Inc. v. City of Schenectady, 949 F.Supp. 988 (N.D.N.Y. 1997) which discusses at length the "content-based" censorship efforts which attempt to differentiate between "barroom-type" nude dancing and "real" art, such as ballet, and which invalidated an ordinance

designed to prohibit fully nude dancing in adult establishments. The recent Eleventh Circuit case of Peek-A-Boo Lounge of Bradenton v. Manatee County, 337 F.3d 1251 (11th Cir. 2003) gave thorough treatment to the legal history, and constitutional protection, of exotic dancing. Litigation continues over whether the specter of "secondary effects" may restrict dance establishments from full nudity in their presentation, but the question does seem settled that there are First Amendment implications which will affect the ability of the State to directly tax the message.

## POINT II

## THE TAX IS A VIOLATION OF THE FIRST AMENDMENT. IT IS A CONTENT BASED BURDEN ON FIRST AMENDMENT RIGHTS TO FREE EXPRESSION; AND IT IS CONSTITUTIONALLY OVERBROAD.

This Court has supported a broad use of the Utah Declaratory Judgment Act to "determine a question of construction or validity arising under, *inter alia* 'a statute [or a] municipal ordinance.'" Utah Rest. Ass'n v. Davis Cty. Bd. Of Health, 709 P.2d 1159, 1161 (Utah 1985). In order for a declaratory judgment to be granted, there must be "a justiciable controversy based upon an accrued set of facts, an actual conflict, adverse parties, a legally protectable interest on the plaintiff's part, and an issue ripe for judicial resolution." Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993). Certainly this dispute meets all of those specifications.

This is a facial attack on the tax statute in its entirety on the grounds that the tax violates the rights of Plaintiffs and others under the First Amendment to the United States Constitution. This Court has the power to review the acts of the Utah Legislature and to determine whether those acts are within the constitutional power of the legislature to enact. State v. Green, 2004 UT 76, 99 P.3d 820 (Utah 2004). Plaintiffs ask this Court to declare Title 59 Chapter 27 U.C. A. as enacted by the 2004 Utah Legislature, unconstitutional in its entirety, and therefore null and void.

Further, Plaintiffs are entitled to assert the rights of those not before the Court under Provo City v. Willden, 768 P.2d 455 (Utah 1989). There, this Court dealt with a facial challenge to a City ordinance, based on First Amendment violations. § 12.45.010 of the Revised Ordinances of Provo City provided:

> UNLAWFUL SEX ACTS.(a) it shall be unlawful for any person in public or in a public place, to exhibit or expose his or her genitals, or to engage in, or to solicit another to engage in, any sexual conduct as defined herein. Id. at 456, fn.1.

The Court discussed the issue of standing to make a facial challenge:

> One aspect of general standing doctrine we share with the federal courts is the basic requirement that the complainant show 'some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute.'" There is no question that Willden meets this standing test. He has been convicted and sentenced under the ordinance he challenges. He indisputably has standing to challenge the ordinance, at least as it has been

applied to him.

However, Willden's challenge is more sweeping. He contends that the ordinance as written sweeps so broadly in its prohibitions that it criminalizes behavior protected by the first amendment and, therefore, should be struck down as being invalid on its face, even if his particular conduct could properly be criminalized. In support of his claim of standing to challenge the ordinance on its face – in effect, to assert the first amendment rights of others not before the court whose conduct could not be criminalized consistent with the first amendment Willden relies on the federal first amendment "overbreadth" standing doctrine, designed to give standing to anyone who is subject to an overbroad statute that chills the exercise of first amendment rights of others. The rational for granting such standing is that the constitutionally protected interests infringed by such statutes are so important that their protection need not await the perfect plaintiff. (Internal Citations omitted) 768 P.2d at 457.

The overbreadth doctrine in First Amendment cases was explained in

Broadrick v. Oklahoma, 413 U.S. 601, 609(1973):

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First "Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to together compelling needs of society. Herndon v. Lowry, 301 U.S. 242, 258 (9137); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Grayned v. City of Rockford, 408 U.S., at 116-117. As a corollary, the Court has altered its traditional rules of standing to permit - in the First Amendment area - "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Dombrowski v. Pfister, 380 U.S., at 486. Litigants, therefore, are permitted to challenge a statute because their own right of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

(Emphasis Added).

Appellant American Bush, Inc. challenges the tax that would be imposed if it reduced the amount of attire worn by its dancers. as it is allowed to do under the controlling Ordinance in South Salt Lake. It has been exempted from the tax by Defendants, based on the attire being worn at the present time. The tax is, by definition, content-based. The First Amendment rights of the escort agency Appellants have been recognized by the District Court in its ruling above, and by the cities under which they are licensed to provide services. The Salt Lake City "Sexually Oriented Business (SOB) Ordinance provides:

> **5.61.085 LEGITIMATE ARTISTIC MODELING**:
>
> A. The city does not intend to unreasonably or improperly prohibit legitimate modeling which may occur in a state of nudity for purposes protected by the first amendment or similar state protections. The city does intend to prohibit prostitution and related offenses occurring under the guise of nude modeling. Notwithstanding the provisions of subsection 5.61.210K of this chapter, a licensed outcall employee may appear in a state of nudity before a customer or patron providing that a written contract for such appearance was entered into between the customer or patron and the employee and signed at least twenty four (24) hours before the nude appearance. All of the other applicable provisions of this chapter shall still apply to such nude appearances.
>
> B. In the event of a contract for nude modeling or appearance signed more than forty eight (48) hours in advance of the modeling or appearance, the individual to appear nude shall not be required to obtain a license pursuant to this chapter.

The performance restrictions legitimatize a performance by a fully nude model, dancer or performer, under certain circumstances. The City has thus recognized First Amendment protections for even sexually-charged performances involving full nudity. See the similar provisions of §5.56.060 of the Midvale City Code; §28A-8 of the Murray City Code, §4-9-8 of the Park City Code and §5.136.085 of the Salt Lake County Code.

The challenge to this statute is based on the fact that it is targeted towards protected First Amendment activity; and it is done so in a cynical attempt to impose censorship on activity of which a majority of the legislature disapproves. A more general tax used to raise the money sought for therapy and for other purposes of rehabilitation and public safety, would be constitutionally sound; but one which is directed narrowly at disapproved content violates the constitution. Certainly, an earmarked tax such as the Zoo, Arts and Parks tax (ZAP) is a valid use of the taxing power. The ZAP tax, of course, is aimed evenly at <u>all</u> similar businesses. It does not allow the Tax Commission to single out only the businesses where "decent people" would not go. It does not punish people on the basis of a perceived propensity to do evil. If a reasonably calculated tax were levied on all personal services and/or all entertainment in the State, Plaintiffs would feel vindicated. Until then, they urge this

Court to declare the law at issue an unconstitutional invasion of their rights and an unconstitutional deprivation of property without due process of law, in violation of the Fifth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of Utah. Plaintiffs also seek a refund of all amounts paid by any Plaintiff herein to the Tax Commission pursuant to the terms of the Act. The U. S. Supreme Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod vs. Burns, 427 U.S. 347, 377 (1976). This Court must determine that the statute is an unconstitutional burden on Plaintiffs' free speech rights, and that it subjects the free speech of the public at large to a constitutionally impermissible "chill".

The Tax Commission has so far only attempted to apply this tax to "adult businesses. "Legitimate" artists may feel safe from this tax. The Tax Commission might not pursue an art school or a "legitimate theater" to pay this tax, because their clientele are a "better class of people". Such assumptions are constitutionally infirm and there is no support in the statutory language for making such distinctions.[1]

[1] The Republican Caucus in the Utah House of Representatives announced in late 2005, a paid "speed dating" event in which lobbyists would pay for "face time" with individual legislators. Deseret News, Dec. 2, 2005. Some have suggested that this amounts to an unlicensed escort service.

Because the tax is thus clearly aimed at the message, and not at "secondary effects", the law is subject to strict scrutiny.

During hearings before the Utah House Committee on Revenue and Taxation, a question was asked as to whether the tax would be applied to a theater that might feature nudity in one of its plays. The sponsor, of course, indicated that was not likely R. 135-136. He gave no basis for his opinion; and the "plain language" of the Statute is to the contrary. If a commercial theatrical production features nudity for more than 30 days, the tax measure by its terms applies to the theater, on a permanent basis, whether or not the nudity is featured in another play during that year. Likewise, if two theatrical releases had some nudity in them, and each only lasted 15 days, the theater would be branded, at least for the entire tax year, and quite possibly on a permanent basis. Counsel for Plaintiffs has attended at least one play at the Salt Lake Acting Company where there was brief nudity. The Capitol Theater hosted a production of the well known Broadway play, "Oh Calcutta" which featured an abundance of nudity. While the theater itself is owned by the County and may be exempt from the tax, the company that produced the musical was privately owned. If a play similar to "Oh Calcutta" stayed for at least a month, the company that presented it would be subject to the tax, by its terms. Likewise, Kingsbury Hall at the University of Utah

played host to a revival of the irreverent 60's musical "Hair" which has a nude scene. The play was privately produced, although the theater belongs to the State. Once again, the tax would apply by its terms if the play stayed for a month, or two such separate productions were held within a calendar year.

While there are no "landed clubs" affiliated with the American Association of Nude Recreation (formerly American Sunbathing Association) in Utah at this time, the tax obviously would affect such old line "nudist camps" if one attempted to open in Utah. A friend of counsel's recently agreed to do occasional nude modeling for a private art school in the Salt Lake Valley for serious art students. The tax clearly applies if such modeling is done for more than 30 days during a calendar year.

The Tax Commission may not to attempt to tax these entities, as it has only sent notices to those who it has determined are in the "adult entertainment" business. That is despite the fact that the law imposes the tax on all those who perform an service while in a State of nudity, for 30 days out of the year. Seemingly, the only basis for such a decision would be the value judgment that nudity at an art school is "good" and nudity (or semi-nudity) at a bar or other adult entertainment facility is "bad". See again Nakatomi Investments. The tax is constitutionally overbroad, as it covers much constitutionally protected behavior. As in Doran, the act "would prohibit [tax]

the performance of the "Ballet Africans'" and a number of other works of unquestionable artistic and socially redeeming significance." Courts that have upheld prohibitions on nude dancing have clearly focused on "the customary 'bar room" type of nude dancing" (Doran); " erotic dancing of the sort practiced at the Island Bar" (Schultz); " nude dancing of the type at issue here" (City of Erie). This statute does not confine itself to such venues. It aims directly at nudity, in whatever form it may appear; and as such it is in violation of the First Amendment.

Perhaps the most insidious thing about the tax is the cavalier attitude the Defendants are allowed take. They will tax who they please; and they will change their minds about who is included whenever it pleases them. The Supreme Court has rejected regulations where "unbridled discretion" to issue a business license has been left to the licensing authority. In FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) the Court said:

> It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon on the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. 493 U.S. at 226.

See also Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) and Lakewood v.

Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988) where the Court said:

> Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or view point of speech by suppressing disfavored speech or disliked speakers.

Because the tax obviously gives the State Tax Commission leeway to decide between the "good guys" and the "bad guys", it is censorship, viewpoint discrimination and prior restraint in its worst form. Clearly this statute is overbroad by its terms. And just as clearly, Defendants will apply it as they seem fit, from time to time. If a "legitimate" theatre features nudity in a production, maybe they will be taxed; and maybe they won't. There appears to be no way to tell; and this fact constitutes a substantial "chill" on First Amendment rights. The tax should be stricken in its entirety as wholly inconsistent with First Amendment principles.

## POINT III

## THIS COURT SHOULD USE A STRICT SCRUTINY STANDARD TO REVIEW THIS STATUTE.

The Office of Legislative Research and General Counsel, attached a note to the bill as introduced, dated December 22, 2003:

> This bill imposes a tax on sexually explicit businesses and escort services, and might be challenged as violating the First Amendment of the United States Constitution. The U.S. Supreme Court has not decided a case addressing taxation of sexually explicit businesses or escort services, but has decided

> cases involving a tax on other activities protected by the First Amendment. Under those rulings, if this bill is challenged, a court would first determine whether sexually explicit businesses and escort services are obscene, and not protected by the First Amendment. If a court decides they are not obscene, and are therefore protected by the First Amendment, the court could uphold the bill if the court determined that the tax is necessary to serve a compelling state interest, and is narrowly drawn to achieve that interest. (Emphasis added). R.83.

Semi-nude dancing in bars has long been approved by statute; and establishments featuring such dancing have been determined by Defendants not to be subject to this tax. Plaintiffs know of no attempt anywhere to determine that such dancing, or nude dancing, which is, or has been, specifically licensed by the State or its subdivisions, is obscene. The legislature's own attorneys agree that this law deals with expressive conduct which is protected by the First Amendment. According to them, it is thus subject to strict scrutiny, and will not be upheld without a showing of a compelling State interest . The legislature struggled to show such an interest by inserting intent language. This language does nothing to save this bill from itself. There is no explanation of the statement that it "is reasonable to tax sexually explicit businesses. . . in order to provide counseling". There is no attempt to explain the definition of "sexually explicit entertainment", which includes much constitutionally protected material. The burden to the State to sustain such a statement is very high;

and the State has made no real attempt to meet it.

The U.S. Supreme Court, back in 1819, stated: "That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 427 (1819). From that, we get the oft repeated statement that "the power to tax is the power to destroy." Since then, the Supreme Court has stricken several attempts to tax speech, as a violation of the First Amendment. In Murdock v. Pennsylvania, 319 U.S. 105 (1943) the Court invalidated a license law which required members of the Jehovah's Witnesses to obtain a license before distribution pamphlets from door to door. While the Witnesses asked for a set contribution for the pamphlets, they often gave them away to interested persons. The Court said :

> The First Amendment, which the Fourteenth makes applicable to the states, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . ." It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this Ordinance is in substance just that. 319 U.S. at 108.

In Minneapolis Star v. Minnesota Comm'r of Rev.,460 U.S. 575, 586 (1983), the Supreme Court invalidated a "use tax" on paper and ink used by newspapers. In doing so, the Court said:

> Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to the suppression of expression and such a goal is presumptively unconstitutional. See, e.g., Police Department of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972); cf. Brown v. Hartlage, 456 U.S. 45 (1982) (First Amendment has its "fullest and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. (Emphasis added).
>
> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it 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.

The Supreme Court, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), invalidated a discriminatory tax on certain magazines, in the State of Arkansas. There, the Court held:

> As we stated in that case, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." 481 U.S. at 230.

The Court reiterated that such a tax must pass strict scrutiny:

> ...the State must show that its regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end. Id. at 231.

The Supreme Court, in Simon & Schuster v. Crime Victims Bd., 502 U.S. 105 (1991), stated that:

> A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. As we emphasized in invalidating a content-based magazine tax, "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."
>
> This is a notion so ingrained in our First Amendment jurisprudence that last Term, we found it so "obvious" as to not require explanation. It is but one manifestation of a far broader principle: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." 502 U.S. at 115-116. (Emphasis added).

The Court there found the New York State "Son of Sam" law to be a content-based statute, because "it singles out income derived from expressive activity for a burden the State places on no other income, and is directed only at works with a specified content." Id. at 116. The expressive activity in this case is dancing, and the discrimination is against the forum used, that of an establishment which features nudity "during at least 30 consecutive or nonconsecutive [sic] days during a calendar year". The burden is not restricted to the nude dancing itself, as the tax continues even if the venue changes its fare after 30 days. The Supreme Court, in Simon & Schuster, imposed the compelling interest test on the State, and found it lacking.

Such a test should also be imposed here, and such an interest has not been shown.

In the more recent case of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 445 (2002) Justice Kennedy, concurring in the result and providing the fifth vote to support the plurality, cited Arkansas Writers, and applied the principles to a zoning ordinance affecting adult businesses:

> On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content based fee or tax. This is true even if the government purports to justify the fee by reference to the secondary effects. Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.(Internal citations omitted) (Emphasis added).

Under the rule of Marks v. United States, 430 U.S. 188 (1977), the opinion of Justice Kennedy is effectively the opinion of the Court; and this statement is fully supported by the numerous decisions of the Court cited above.

Licensing fees for adult businesses have been upheld when those fees have some relationship to the cost of regulating the businesses. The concerns expressed by the legislature here certainly do not directly relate to the cost of such regulation. In TK's Video, Inc. v. Denton County, 24 F.3d 705, 710 (5th Cir. 1994) the Court upheld licensing fees for adult businesses and their employees but made it clear that

it would not sustain a tax such as this one:

> Government cannot tax First Amendment rights, but it can exact narrowly tailored fees to defray administrative costs of regulation. Cox v. New Hampshire, 312 U.S. 569, 576-77, 85 L.Ed. 1049, 61 S.Ct. 762 (1941). Denton County requires each business and individual requesting a license to pay annual fees of $500 and $50 respectively. The district court found these amounts tied to the cost of investigating applicants and processing licenses. We agree. (Emphasis added).

See also Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989), also invalidating a discriminatory license tax involving adult businesses where the tax was not proved to be related to the costs of regulating those businesses. These rulings should not be a surprise in light of early American history, which tells us that the United States declared its Independence in part in rebellion over the hated "Stamp Act", which included a tax on newspapers, in a transparent attempt by the government to control the press.[2]

The Court, in Boos v. Barry, 485 U.S. 312, 320 (1988) distinguished between laws aimed at "secondary effects" and those which are content based and require strict scrutiny:

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of

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[2] See The First Freedom: A History of Free Speech by Robert Hargreaves. Sutton Publishing (London 2002) pp. 114-115; 206-207.

> "secondary effects" we referred to in Renton. To take an example factually close to Renton, if the Ordinance there was justified by the City's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

The Supreme Court again, in United States v. Playboy Entertainment Group, 529 U.S. 803 (2000) reviewed a censorship measure using strict scrutiny. The Court struck down a Federal statute which required cable systems to fully scramble or block channels "primarily dedicated to sexually-oriented programming" for a substantial part of each day, to avoid it being seen by children. The Court held:

> It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.
>
> Since § 505 is content based, it can stand only if it satisfies strict scrutiny. E.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. 529 U.S. at 812- 813. (Emphasis added).

In the recent case of Ashcroft vs. Free Speech Coalition, 535 U.S. 234, 253-254,152 L.Ed.2d 403 (2002), the Court reviewed a Federal statute aimed at preventing child pornography and stated:

> The mere tendency of speech to encourage unlawful acts is not a sufficient

> reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Stanley v. Georgia, 294 U.S. 557, 566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
>
> The government may not prohibit speech because it increases the chances an unlawful act will be committed "at some indefinite future time." Hess v. Indiana, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (per curiam).
>
> The government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger , more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

As with the law stricken by the Court in the Free Speech Coalition case, the tax at issue here singles out speech for burden because of the supposed possibility that lawful speech may tend to influence the listener into inappropriate conduct; and this is an impermissible basis for banning (or taxing) that speech. See also Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) holding that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Surely the State cannot justify this tax on the basis of any compelling State interest. Nor can it show that the statute is narrowly drawn to achieve that end, and not to unnecessarily interfere with

expression.

The Supreme Court differentiated between secondary effects regulations, which require only "intermediate scrutiny", and "primary effects" regulations, which are subject to strict scrutiny, in Reno v. American Civil Liberties Union, 521 U.S. 844, 867-868:

> In Renton, we upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects" -- such as crime and deteriorating property values -- that these theaters fostered: "`It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.'" According to the government, the CDA is constitutional because it constitutes a sort of "cyberzoning" on the internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any secondary effects of such speech. Thus the CDA is a content-based blanket restriction on speech and, as such, cannot be "properly analyzed as a form of time, place and manner regulation." (Emphasis added).

In U.S. Sound and Service, Inc. v. Township of Brick, 126 F.3d 555 (3rd Cir. 1997), the Court, relying in part on Reno, struck down a zoning law aimed at a video store which would admittedly be selling or renting adult-oriented tapes. The trial court had used "intermediate scrutiny" under Renton, and upheld the restriction. The Court of Appeals found that analysis to be incorrect:

> The Township and the Board persuaded the district court that although the regulation imposed by the Board's resolution singles out adult entertainment

> for special treatment, it is content-neutral because it is aimed not at the sexually explicit content but rather at the "secondary effect" of that entertainment on children. Accordingly, the court applied the intermediate scrutiny test of Renton. Intermediate scrutiny was not appropriate, however, because "[l]isteners' reactions to speech are not the type of "secondary effects" referred to in Renton". (Emphasis added).
>
> The impact of protected speech on minors is a direct, rather than a secondary, effect, and a regulation that singles out non-obscene sexually explicit material because of its impact on minors is not content-neutral.
>
> Because the Township and the Board seek to justify the Board's resolution on the sole basis of a desire to protect minors from exposure to adult entertainment, Reno requires that we subject that resolution to strict scrutiny. The conclusion would not be different, however, if we were persuaded that Renton supplies the appropriate test. While protecting minors from exposure to adult entertainment can accurately be characterized as a compelling and substantial governmental interest, the regulation imposed by the Board's resolution is neither the least restrictive means of furthering that interest nor narrowly tailored to serve that interest. Accordingly, we conclude that the Board's resolution restricts protected speech in violation of U.S. Sound's right to free expression under the First Amendment. 126 F.3d at 558-9.

On October 23, 2007, the Sixth Circuit, in Connection Distributing Co. v. Keisler, ___ F.3d. ___ , Case No. 06-3822 (6th Cir. October 23, 2007) facially invalidated 18 U.S.C. § 2257, which requires all producers of sexually explicit images to maintain records regarding the individuals depicted in the images, and to allow the Government to inspect those records without warning, during regular business hours. Like this tax, the regulation at issue there did not ban the speech; but the Court held it was a substantial burden on the speech, and not justified by the "compelling

government interest of fighting the scourge of child pornography":

> While the government is indeed aiming at conduct, child abuse, it is regulating protected speech, sexually explicit images of adults, to get at that conduct. To the extent the government is claiming that a law is considered a conduct regulation as long as the government claims an interest in conduct and not speech, the Supreme Court has rejected that argument. See, e.g., Schneider v. State, 308 U.S. 147, 150 (1939) (holding that the government cannot ban handbills, speech, to vindicate its interest in preventing littering, conduct). The expression here is not conduct, it is speech. Images, including photographs, are protected by the first Amendment as speech as much as "words in books" and "oral utterance[s]." Kaplan v. California, 413 U.S. 147, 119-20 (1973). P.8.

The Court held that the law imposed substantial burdens on speech, including the right to be anonymous in a sexually explicit photograph; and that the burden was not justified by reference to the crime of child abuse that it aimed to prevent. Likewise, the regulation (tax) at issue here (and the record keeping requirements which go with it) burdens and regulates a substantial amount of constitutionally protected speech without directly affecting its stated objective – to reduce the problems of sexual offenders. Likewise, the burden on speech is not justified by reference to the conduct. Even assuming that the State's rationale had some basis (see below), that kind of targeting is exactly what the courts have forbidden. Under "strict scrutiny", a law is valid only if it imposes the least possible burden on expression. See Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

In religious exercise cases, the U.S. Supreme Court previously has used a strict

scrutiny test to review local laws which infringe on religious freedoms. That test was abandoned in Employment Division v. Smith, 494 U.S. 872 (1990), which allowed a less stringent test to be used in such cases. Utah courts have apparently retained the strict scrutiny test, as enunciated in Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998). Since the free exercise of religion is constitutionally intertwined with free expression, Plaintiffs believe that the same test will necessarily be applied in cases such as this. Defendant is attempting to impose censorship; and its assertion that its governmental interest is unrelated to the suppression of free expression is subterfuge.

## POINT IV

## THE ORDINANCE IS UNCONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY TEST OF O'BRIEN.

The seminal authority for the application of intermediate scrutiny is United States. v. O'Brien, 391 U.S. 367 (1968). In that case, which dealt with the illegal destruction of a draft card in an act of civil disobedience, the U.S. Supreme Court determined that a general statute regulating behavior may incidentally burden expression:

> if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if governmental interest interest is unrelated to the suppression of expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

The trial Court held that the tax statute at issue here is a proper response to the problem of "negative secondary effects" associated by some with adult entertainment. The legislature, however, did not aim at such secondary effects; but attempted to tie such businesses in with general sexual misconduct in society, with no evidence of such a connection.

The legal concept of "secondary effects" was enunciated in Young v. American Mini Theatres, Inc., 427 U.S. 73 (1976):

> The 1972 ordinances were amendments to an "Anti-Skid Row Ordinance" which had been adopted ten years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas. The decision to add adult Motion picture theaters and adult book stores to a list of businesses which apart from a special waiver, could not be located within 1,000 feet of two other "regulated uses," was, in part, a response to the significant growth in the number os such establishments. In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere. 427 U.S. at 54-55.

The Supreme Court reaffirmed its ruling, and also ruled that one City could rely on the experiences of another in fighting such urban blight, in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), which is the most frequently cited "secondary

effects" case:

> The District Court's finding as to the "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The Ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. 475 U.S. at 48.

The Tenth Circuit Court recently, in Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003) discussed the necessary record which must accompany an ordinance directed at "secondary effects":

> Around 1999, the City Council became concerned about what are called 'negative secondary effects' – such as crime, prostitution, and lowered property values – thought to be associated with sexually oriented businesses. For approximately a year, City officials gathered police reports and studies from around the country regarding the connection between sexually oriented commercial business and these secondary effects. Id. at 1185.

The Court, in Heideman cited the Supreme Court case of City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002) which held that the City's claim of regulating secondary effects must have a valid basis: "the City certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects". Id. at 437. And it allowed an affected business to show a lack of such a link:

> This is not to say that the municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. Id. at 438-39.

In order to meet this burden, a City enacting a "Sexually Oriented Business" (SOB) Ordinance almost universally includes a preamble referring to the secondary effects it claims to be battling; and also a list of "studies" and other authorities it relies upon in its claim that the Ordinance is a fair attempt to address those effects. The Utah legislature made no claim that it was dealing with such secondary effects in its proceedings to pass this bill. No references were made to studies, or other authority; and no attempt was made to describe the secondary effects or even to refer to them. Plaintiffs previously submitted to the District Court, one of those "studies" written by one of the most implacable foes of adult businesses in this country: Dr. Richard McCleary, a professor of Criminology and Social Ecology at University of California-Irvine. R. 1127-1139. Dr. McCleary has been presented as an expert witness by cities across the country to prove that secondary effects exist, and that they must be

dealt with. His work has been cited by several courts, for good and ill.[3] His writing frequently refers to the term "ambient crime risk", the term "ambient" meaning "surrounding, encircling". American Heritage Dictionary, Houghton Mifflin, New York, 1991. Dr. McCleary opines that the secondary effects of an adult business are readily apparent for approximately 500 feet, and then rapidly fall off:

> To measure crime risk per unit of time and area, crime incidents reported within 500 feet of an SOB (or control) address during a fixed period of time are counted. Crime rates calculated this way can be interpreted as crime victimization risks.(i.e., as the probabilities of victimization) in a circle centered on an SOB or control.
>
> > 1. While smaller circular areas (e.g., a 250-foot radius around an SOB and/or control) are acceptable in principle, smaller circles often exceed the precision for the UCR coding system.
> >
> > 2. Larger circular areas (e.g., a 1500-foot radius around an SOB) suffer from detectability" problems and tend to "dilute" the estimated effect, biasing it towards zero. R. 1130-1131.

This is not the same phenomenon preached by Defendants. The theory of "secondary effects" as accepted by many Federal Courts is confined to a measurable area, and has nothing in common with the theory propounded by our legislature. Businesses which

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[3] See Doctor John's', Inc. v. City of Sioux City, Iowa, 438 F.Supp.2d 1005 (N.D. Iowa 2006); Abilene Retail #30, Inc. v. Board of Com'rs of Dickinson County, Kan., 492 F.3d. 1164 ___ (10th Cir. 2007) and Daytona Grand, Inc. v. City of Daytona Beach, Florida, 490 F.3d 860(11th Cir. 2007).

do not cater to customers on site (escort services where the client meets the escort elsewhere) do not have secondary effects. See Voyeur Dorm L.C. v. City of Tampa, 265 F.3d 1232 (11th Cir. 2001). There is no authority whatsoever for regulating adult businesses because of the alleged need for sex therapy for some of their customers or potential customers.

Instead, the legislature heard briefly from Ms. Okey and her references to "paraphilias". While the bill's sponsor and his cohorts acknowledge that the vast majority of people who enjoy adult entertainment are not sex offenders, they made totally unsubstantiated claims that a high percentage of sex offenders have some history of attending adult entertainment or using the services of escort agencies. The Supreme Court, in City of Erie, subjected an anti-nudity ordinance to intermediate scrutiny, based on its conclusion that the ordinance was targeted at the "secondary effects" associated with nude dancing, and not the message itself: "Put another way, the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing,. . . ." (Emphasis added) 529 U.S. at 291. Plaintiffs here are subjected to a substantial tax based on the unsupported allegation that some of those who view nude dancing there might be exhibiting a "paraphilia". Ms. Okey seemed pretty sure of herself on this point: " The

third top factor that indicates a sex offender's risk is paraphilias. Utilizing these types of services in one example of paraphilias. R.133-134." Her testimony, however, was patently false. The authoritative source on such things is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, American Psychiatric Association, 2000; known in the profession as DSM-IV-TR. This publication defines the term thusly:

> The essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons". (Id., "Sexual and Gender Identity Disorders.")

Thus while that definition would include Ms. Okey's "anecdotes" involving feathers or women's shoes, it would not include "utilizing these type of services." Specific types of paraphilias identified in the DSM-IV-TR include "exhibitionism" and "voyeurism". Voyeurism is defined in § 302.82 as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity." (Emphasis added). "Accessing stripper bars" simply does not fit into the description of a paraphilia, which by its nature involves "sexual urges or fantasies [which] cause marked distress or interpersonal difficulty." Id.

At the Committee hearing on the bill, Ms. Okey did say that there was some

"anecdotal information" that sex offenders tended to use escort services and "stripper bars" more often than others (R. 138). In a battle of anecdotes, many observations and accusations can be made. There is recent "anecdotal information" that Catholic priests have a particular problem with the youth of their parishes; and the Provo Herald, June 13, 2004, reported that an Episcopal Bishop had just resigned over a sex abuse scandal in his diocese. A few years ago, several newspapers reported that an attorney working for a law firm which regularly represented the Church of Jesus Christ of Latter-day Saints was arrested for soliciting sex from a decoy prostitute in South Salt Lake. Recently, the pastor of a large Christian church in Montgomery , Alabama apparently asphyxiated himself while attempting to sexually gratify himself .[4] If the Utah legislature reacted to all this bad news with a tax on churches (or only those churches where there was recent news of such events), the Courts would quickly stop it. Constitutionally, there is no difference between that situation and this one. The need for more funds for sex offender therapy does not justify using such a wholly unrelated problem as an excuse for censorship. If the State cannot clearly and convincingly link the problem and the solution, the tax is unconstitutional.

The State cannot show any reasonable relationship between the evil sought to

[4] Montgomery (Ala.) Advertiser, June 2007.

be ameliorated (sex offenses) and the discriminatory tax that it has imposed on protected expression. If common paraphilias include collecting women's shoes or feathers (R. 134), neither of which implicates the First Amendment, why does not the legislature tax those activities? If the State is claiming a link between the expressive activities of Plaintiffs and sex offenses, that is not a "secondary effect". It is not a time, place and manner regulation, but a blanket burden or "abridgment" of protected speech, and it is aimed at the content of the speech. The sponsor and his witnesses cited the need for more treatment; but failed in their attempt to show "cause and effect" .

The challenged tax provisions fail to comport with these requirements in several respects. Certainly the State has the power to tax and raise revenue. The need for therapy for those who have been convicted of sexual offenses is not in controversy. The statute, however, fails both the third and fourth parts of the O'Brien test. Suppression of expression is a primary reason for drafting of the law in this manner. It is not mainly a revenue raising measure and is not likely to raise very much revenue. Instead, it places a severe burden on one form of protected expression. Obviously a broader tax was an option to raise needed treatment funds, but the focus of this bill was animus towards a form of entertainment some find

distasteful. See the comments of Rep. Philpot (Comm. Tr. p 12-13) on the option of just banning "pornography, obscenity, these types of things". The Ninth Circuit, in Tollis v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987) outlined the test:

> The district court provided no express finding on the County's predominant purpose in passing the ordinance. In the particular case before us, however, we need not decide whether the ordinance is content-neutral because we conclude that, even if the county's predominant motive was the amelioration of secondary effects, the ordinance fails to meet the third prong of the Renton test.
>
> To be acceptable as a content-neutral time, place, and manner regulation, an ordinance must be "designed to serve a substantial government interest and allow for reasonable alternative avenues of communication." We agree that the County has a substantial interest in preventing the deleterious secondary effects often associated with adult theaters. At a minimum, however, there must be a logical relationship between the evil feared and the method selected to combat it. 827 F.2d at 1332, 1333.

Under "intermediate scrutiny", the State would be required to show some clear relationship between this tax and proven harms; and that the measure deals with such proven harms to a material degree. Since a more general tax would more easily deal with the need for the additional revenue, there was a political decision that "sinners" should shoulder the burden. Comments were made on the House floor that this is similar to taxes on beer and cigarettes, which merely pay for the damages done by these evil, but legal, materials. R. 120. Unpopular speech is an easy political target; but the Constitution does not allow it to be burdened in this manner. The legislature

may not , for instance, tax publishers over newspaper stories of poor working conditions which may precede labor unrest. It would seem to be easy enough to say that the press contributed to the cost to taxpayers for police overtime needed to deal with the unrest; but such a tax is not permissible. Free expression is not always without its social cost; but that cost must be borne by the citizens at large. A tax on a point of view is not an option. More direct means are available to deal with the need for sex therapy; and O'Brien scrutiny requires them to be used.

A censorial regulation is not essential if other effective means of control exist. In 44 Liquormart, the Supreme Court struck down a ban on liquor advertising because other methods of directly controlling the adverse effects of increased liquor consumption (such as education and market regulation), were plainly known. In just such fashion, if the alleged objective is that of providing a needed service to those who might otherwise cause societal problems, there is a simple and easily available remedy. See also Utah Licensed Beverage Ass'n. v. Leavitt, 256 F.3d 1061 (10th Cir. 2001) enjoining Utah's advertising restrictions on alcoholic beverages as a violation of the First Amendment.

Certainly the regulation does not pass the test of "reasonable belief" imposed by Renton and City of Erie. Under Renton v. Playtime Theatres, the challenged

provisions must be justified as a time, place or manner restriction. In order to fully meet the narrow tailoring required by the fourth prong of intermediate scrutiny under O'Brien, the incidental restriction must be no greater than is essential and it must actually be linked to the achievement of the permitted goal. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (n. 20) (1983): "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." See also City of Cincinnati v. Discovery Networks, Inc., 507 U.S. 410, 113 S.Ct. 1792, 1800 (1993): "It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of news racks as the means chosen to serve those interests."

## CONCLUSION

Plaintiffs urge the Court to determine that there are no material facts in dispute and that the tax levied against these businesses by Title 59, Chapter 27 of the Utah Code is an unlawful prior restraint and a violation of Plaintiff's rights to free expression under the First Amendment. Plaintiffs are entitled to a Declaratory Judgment in their favor.

DATED this ___ day of November, 2007.

W. ANDREW MCCULLOUGH, L.L.C.

_____
W. Andrew McCullough
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of November, 2007, I did hand deliver two true and correct copies of the foregoing Brief of Appellants to Nancy Kemp, Assistant Utah Attorney General, 160 East 300 South, Salt Lake City, Utah.

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