No. 09-_____

In The

Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

W. ANDREW MCCULLOUGH
Counsel of Record
6885 South State St.
Suite 200
Midvale, UT 84047
(801) 565-0894
wandrew48@qwestoffice.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

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

2. Does the tax pass intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968)?

LIST OF ALL PARTIES

Current (Designated below as Plaintiffs and Appellants in Intervention):

Denali, L.L.C.
American Bush, Inc.

Former Plaintiffs, who have been dismissed from this action:

Bushco, Inc.
Companions Escorts, L.L.C.
TDM, Inc.
Valley Recreation, Inc.
D House, L.L.C.
RBD, Inc.
Wall St. Enterprises, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Denali, L.L.C. is a Utah Limited Liability Company, with no ties to any publicly held corporation. Petitioner American Bush, Inc., is a closely held Utah corporation with no ties to any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS AND ORDERS BELOW

There is no published opinion from the District Court in this matter. The Memorandum Decision of the District Court is included in the Appendix hereto. The decision of the Utah Supreme Court was entered on November 20, 2009, and is published as *Bushco v. Utah State Tax Commission,* 2009 UT 73, 225 P.3d 153 (Utah 2009). Rehearing was denied on February 2, 2010. A prior appeal was heard by the Utah Court of Appeals on the Tax Commission's contention that this case could not be brought directly to the District Court on a Declaratory Judgment action, and was published as *TDM v. Utah State Tax Commission,* 2004 UT App 433, 103 P.3d 190 (Utah App. 2004), *cert. denied*, 109 P.3d 804 (Utah 2005).

STATEMENT OF JURISDICTION

The decision of the Utah Supreme Court was entered on November 20, 2009, and is published. Rehearing was denied on February 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment I

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. §§ 59-27-101 to 108 (2008)

Sexually Explicit Business and Escort Service Tax

(See Appendix for text of Act)

———♦———

STATEMENT OF THE CASE

Petitioners are two exotic dancing establishments in Utah which feature, or would like to feature, nudity as part of their performances. Pursuant to the "Sexually Explicit Business and Escort Service Tax", Utah Code Ann. Title 59 Chapter 27, such performances are subject to a special tax. (App. 65-72). Utah Code Ann. § 59-27-102 defines a "sexually explicit business" 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. (App. 66). Petitioners herein intervened in the original legal action seeking to invalidate the tax, which had been brought by several escort agencies, also the subject of the tax. The tax on escort agencies was invalidated as unconstitutionally vague by the Utah Supreme Court; and those former Plaintiffs do not participate in this Petition. Petitioners herein were designated as Plaintiffs in Intervention, and Appellants in Intervention, in the action below, and participated fully in all aspects of the legal process.

§ 59-27-103 enacts a tax "equal to 10% of amounts paid to, or charged by the sexually explicit business" as defined therein. Pursuant to § 59-27-105, certain portions of the money raised are earmarked for investigation or treatment of sex offenses or offenders. (App. 67, 69-70).

At a Utah House committee hearing, Kathy Okey, an employee of the Department of Corrections, testified regarding sex offenders. She was not introduced as an expert and presented no credentials for such expertise. Ms. Okey spoke of the number of offenders and the need in the correction system for more funding for therapy. 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 ["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.
>
> 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.

> 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. R. 138.

The House added intent language to buttress that position after the bill had passed the Utah House of Representatives:

> For the legislature finds the Supreme Court of the United States has upheld the regulation of sexually oriented businesses *because of the deleterious effect they have on the community*. Sexually oriented business, [sic] 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. (Emphasis added).

Petitioner Denali, L.L.C. presents a dance show in Salt Lake City featuring full nudity. As such, it is the only establishment of which Petitioners are aware in the State of Utah which is subject to the "sexually explicit business" tax, based solely on the lack of

adequate attire on its dancers. Petitioner American Bush, Inc. does not serve alcoholic beverages, and is subject to a City ordinance of the City of South Salt Lake. That ordinance is less restrictive than that required of establishments which serve alcohol. American Bush now complies with costume requirements which would be required of establishments which sell alcoholic beverages. A change in the attire would trigger the tax. American Bush, Inc. desires to include nudity in its performances, but fears the effects of the tax on its operations.

Plaintiffs filed an action seeking declaratory judgment, under the Utah Declaratory Judgment Act, Utah Code Ann. § 78-33-2, that the entire act was unconstitutional under the First Amendment to the U.S. Constitution. The district Court held that the tax was on nudity rather than expression and that it was valid under *United States v. O'Brien,* 391 U.S. 367 (1968).

The Utah Supreme Court upheld the law relating to nude dancing, against a First Amendment challenge. The Court ruled:

> ¶10 The similarities between this case and *Erie* are substantial and important. Like the Erie ordinance, the Tax is both generally applicable and neutral as to message. Also like the Erie ordinance, the Tax was enacted, according to the record before us, with the predominant purpose of serving an important state interest unrelated to the substantive content of protected expression. The

Tax is also similar to the ordinance in Erie in that it places only de minimis burdens on erotic nude dancing, a type of expression lying "only within the outer ambit of the First Amendment's protection" and "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." The Tax is distinguishable from the ordinance upheld in *Erie* only in its form and in the fact that the Tax is, in all respects, less broad and less burdensome than the Erie ordinance. (App. 7-8).

¶25 As a threshold matter, it is important to differentiate between the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects. Although both tests can be employed in situations that are factually similar, they are two distinct tests directed at two different inquiries. The *O'Brien* incidental burdens test applies to regulations of conduct that are content neutral both on their face and as to purpose. The *Renton* secondary effects analysis applies to regulations of speech that are content based on their face but are asserted to be content neutral as to purpose. And, in a case like this one, where the parties' arguments implicate both *O'Brien* and the secondary effects analyses, understanding the distinctions between the tests is key to reaching the correct result. (Internal citations omitted) (App. 19-20).

¶38 Finally, the Tax satisfies the fourth prong of the *O'Brien* test as well, in that the burdens that the Tax places on protected expression are no greater than necessary. Although the Supreme Court's use of the "no greater than necessary" language in *O'Brien* appears similar to the "least restrictive means" requirement for strict scrutiny, the Court has made clear that this prong does not require the state to show that its chosen means for advancing the substantial state interest is the least restrictive means available. Instead, the fourth prong of the *O'Brien* test *imposes only a requirement that the regulation be "narrowly tailored," in the sense that it "promote a substantial government interest that would be achieved less effectively absent the regulation.*" De minimis impacts on protected speech are permissible. (Internal citations omitted) (Emphasis added) (App. 38).

REASONS FOR GRANTING THE WRIT

POINT I

UTAH CODE ANN. TITLE 59 CHAPTER 27 IS A CONTENT-BASED TAX WHICH VIOLATES THE RIGHTS OF PETITIONERS TO FREE SPEECH.

The disputed Tax is a content-based tax which violates the First and Fourteenth Amendments, contrary to the consistent decisions of this Court. This 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). Since then, this Court has stricken several attempts to tax speech, as a violation of the First Amendment. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) this Court invalidated a license law which required members of the Jehovah's Witnesses to obtain a license before distribution of pamphlets from door to door: "It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional." 319 U.S. at 108. In *Minneapolis Star v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 586 (1983), this Court invalidated a "use tax" on paper and ink used by newspapers:

> 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.

This 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: "'[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.

In *City 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 (see *Marks v. United States*, 430 U.S. 188 (1977)), specifically rejected a content-based tax to deal with secondary effects:

> 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).

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.[1]

---

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

Since that time, the Courts have consistently stricken taxes aimed at speech.

The Utah Court described the tax at issue as falling on nudity and not on expression. No business within the contemplation of the legislature, however, provided services merely by allowing nudity. Only expressive nudity was targeted. Expression is protected by the First Amendment against censorship, 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). In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court recognized First Amendment protection for topless dancing in places not selling alcohol, on overbreadth grounds, as it would also apply to more "artistic" productions. This tax is censorship and is aimed at expressive conduct without regulating social ills which may accompany such conduct. Furthermore, it would apply to "mainstream" entertainment, should that entertainment be presented for at least 31 days during a calendar year. See also *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). This Court has allowed regulation of nude dancing and other adult entertainment on the basis of "negative secondary effects" generated by establishments which feature such entertainment. See *Young v. American Mini Theatres*, 427 U.S. 50 (1976). *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is the most frequently cited "secondary effects" case:

> 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.

This Court has 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). Both the plurality and the dissent in *City of Erie* cited approvingly *Doran* and *Schad*.

The dissent in the Utah Supreme Court recognized what the legislature had done:

> ¶62 Despite the majority's efforts to demonstrate otherwise, this case is not the same as *Erie*. Rather, the Utah Legislature has enacted a statute that, by its own terms, makes it a content-based tax on First Amendment expressive speech; hence strict scrutiny should apply. Because the Utah State Tax Commission (the Commission) cannot show that the Tax is necessary to serve a compelling state interest and is narrowly tailored to that end, I would hold that the Tax violates the First Amendment to the United States Constitution. (App. 44).

This tax was promoted as a reaction to the "secondary effects" of adult businesses, including those which feature nude dancing. The law, however, is not a time, place or manner restriction. It is not

aimed at the local effects of a business at a particular time or place. The legislative history of the Act instead includes an attempt to build a connection between adult entertainment businesses and those who exhibit "paraphilias". However, the link is not that of cause and effect, but simple statistical and anecdotal information that such people may "access" such entertainment. The law is a content-based burden, subject to strict scrutiny. While the Utah Supreme Court rejected the State's arguments concerning "secondary effects", it also rejected strict scrutiny, and upheld the tax under its view of the "intermediate scrutiny" test promulgated in *United States v. O'Brien*, 391 U.S. 367 (1968):

> ¶ 33 A review of the relevant case law shows that the second prong of the *O'Brien* test does not require that the state provide evidentiary proof of a connection between the speech it regulates and secondary effects. Instead, all that is required is that the state show its regulation would advance a substantial state interest. (App. 25-26). See also Point II below.

This 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 "secondary effects" we referred to in *Renton*.

This question of constitutional law has become increasingly significant as states and local governments across the nation are considering, and some adopting, various content-based tax schemes. Whether motivated by the exigencies of the current financial crisis, hostility to erotic expression, or both, a growing number of legislatures are considering measures to impose special taxes on such speech.[2] Some state and local tax schemes have resulted in

[2] See, e.g., S.B. 44, 95th Leg., Reg. Sess. (Mich. 2009) (proposed excise tax on adult entertainment facilities); S.B. 91 (09 LC37 0904S), 150th Gen. Assem., 1st Sess. (Ga. 2009) (proposed surcharge on sexually oriented businesses); A. 646, 2008-2009 Leg., 2009 Sess. (N.J. 2009) (proposed fee on sexually oriented businesses); A. 7126, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented businesses); A. 8158, 2009-2010 Leg., Reg. Sess. (N.Y. 2009) (proposed surcharge on sexually oriented media); H.B. 809, 106th Gen. Assem., 2009 Sess. (Tenn. 2009) (proposed annual tax of 25% on sales of sexually oriented material); H.B. 2070, 81st Leg., Reg. Sess. (Tex. 2009) (proposed admission fee for certain sexually oriented businesses); H.B. 2291, 79th Leg., 1st Sess. (W. Va. 2009) (proposed tax on sale or rental of obscene materials); H.B. 2242, 80th Gen. Assem., 2d Sess. (Iowa 2004) (proposed 25% tax on "adult enterprises"); S.B. 821, 92nd Gen. Assem., Reg. Sess. (Mo. 2004) (proposed 5% tax on adult entertainment and services); H.B. 1532, 2005 Leg., Reg. Sess. (Okla. 2005) (proposed 10% tax on sexually explicit businesses); H.B. 2466, 2007-2008 Leg., 2007 Sess. (Kan. 2007) (proposed 10% tax on sexually explicit businesses); A.B. 1551, 2007-2008 Leg., Reg. Sess. (Cal. 2007) (proposed 8% tax on adult entertainment enterprises); H.B. 304, Leg., Sess. 2009 (Pa. 2009) (proposed fee on sexually oriented businesses).

litigation in the lower courts, with mixed results. Without reaching constitutional issues, the New York Division of Tax Appeals reversed an initial finding of the Department of Taxation and held that an amusement sales tax exemption for "dramatic or musical arts performances" also applies to adult entertainment cabarets. *677 New Loudon Corp., d/b/a Nite Moves*, DTA No. 821458 (N.Y. Tax App., Mar. 12, 2009) ("that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of [the] Tax Law"). That decision was recently reversed by the New York Tax Appeals Tribunal in *677 New Loudon Corp. d/b/a Nite Moves,* DTA No. 821458, reinstating the assessment on April 14, 2010. Constitutional issues were disposed of in one short paragraph at the end of the decision, without citation of authority. That case is now pending before the Appellate Division of the New York Supreme Court, Third Dept., as *677 New Loudon Corp. v. Tax Appeals Tribunal*, Docket No. 509646. The Texas Court of Appeals, in *Combs v. Texas Entertainment Ass'n, Inc*., 287 S.W.3d 852, (Tex. Ct. App. 2009) invalidated a five dollar per customer charge on patrons of live nude entertainment. That case is now pending before the Supreme Court of Texas, as *Combs v. Texas Entertainment Ass'n, Inc*. Case No. 09-0481; and oral arguments were heard on March 25, 2010. The Illinois Supreme Court upheld city and county ordinances which allowed discriminatory tax

treatment, based on content, in *Pooh-Bah Enterprises v. County of Cook*, 232 Ill.2d 463, 905 N.E. 2d 781 (Ill. 2009), *cert. denied*, 130 S.Ct. 258 (2009), though the Court there distinguished the case as not involving a tax issue, but a subsidy of the arts. Pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, essentially all challenges to taxes must be brought in State Courts; and this Court is the only Federal check on such taxing powers. These developments suggest a pressing need for this Court to clarify the law governing discriminatory taxation of free expression. Without guidance from this Court, lower courts will continue to reach disparate results on this important question of constitutional law.

Licensing fees for adult businesses, however, have been upheld by Federal courts only 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)." In *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), a discriminatory license tax involving adult businesses was invalidated where the tax was not related to the

costs of regulating those businesses. See also *729, Inc. v. Kenton County Fiscal Court*, 151 F.3d 485 (6th Cir. 2008); and *Big Hat Books v. Blackford County Prosecutor*, 565 F. Supp. 2d 981, 994-995 (S.D. Ind. 2008) (striking $250 assessment on sale of sexually explicit materials).

This Court, in *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105 (1991), stated that: "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. The expressive activity in this case is dance; and the discrimination is against the forum used, that of an establishment which features nudity for at least 30 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.

In *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000) this Court struck down a Federal statute requiring 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: "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." See also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253-254 (2002), this Court invalidated a Federal statute aimed at preventing child pornography: "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." 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 (1973) (*per curiam*).

This 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 (1997):

> 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."

The tax at issue here singles out speech for burden because of the alleged possibility that lawful speech may tend to influence the listener towards inappropriate conduct. 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. Once again from the dissent in the Utah Supreme Court:

> ¶68 The Tax is a content-based regulation. It applies solely based on the narrow content of the business activity, namely, whether it involves nudity. While the Commission argues that the Tax could be applied conceptually to any type of business, this purported expansive reach does not make it content neutral. Just the opposite is true: it applies to exotic dancing but not to traditional ballet, an art exhibit, or a theatrical performance. In short, it is the content of expression that triggers the Tax. (App. 46-47).

The statute at issue here is directed at nudity that is "accompanied by expressive activity". It does *not* purport to affect public nudity; and there is no application of the tax except to businesses which feature nudity in an expressive setting.

POINT II

THE STATUTE IS UNCONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY TEST OF *O'BRIEN*.

The standard for the application of intermediate scrutiny is *United States. v. O'Brien*, 391 U.S. 367 (1968). As the Utah Court correctly pointed out:

> ¶24 As a content-neutral regulation of conduct that imposes incidental burdens on some protected expression, the Tax is constitutional so long as it passes intermediate scrutiny under the *O'Brien* test. Under

> *O'Brien*, a regulation of conduct is constitutional and must be upheld so long as: (1) it is within the power of the legislature to enact; (2) it furthers a substantial government interest; (3) the government interest is unrelated to the suppression of protected expression; and (4) any incidental restrictions it imposes on protected expression are not greater than is essential to further the interest. (App. 19-20).

This Court there upheld a conviction of a man who burned his draft card in an act of civil disobedience. A general statute regulating behavior may *incidentally* burden expression. The Court found that the statute did not violate the First Amendment by restricting the destruction of a draft card in a symbolic act of resistance to the draft: "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment." *Id.* at 376. This Court held that the statutory scheme which required persons of draft age to register for the draft and to carry their draft cards on their person was a valid exercise of Congressional power to raise an army and to maintain the security of the country:

> The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing

> people who knowingly and wilfully destroy or mutilate them. *Id.* at 391-80. (Internal citations omitted).

In that case, however, there was a direct link between the regulation and the public purpose. That link is imperative for a law to pass intermediate scrutiny. In *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) this Court held 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."

The Utah Supreme Court dispensed with the need for such a link in its decision here; and in doing so, it failed to apply intermediate scrutiny. The State claims that money needs to be raised for sex offender therapy; but the targeted tax is unrelated to the need. The Utah Court erred in its application of *O'Brien*, because it neglected the heightened scrutiny which is required even when the effect on protected expression is "incidental". Because there is *absolutely no evidence of any connection* between the target of the tax and the evil sought to be addressed, the tax is *not* narrowly tailored as a matter of law. The challenged tax provisions fail to comport with the requirement that "any incidental restrictions it imposes on protected expression is not greater than is essential to further the interest" 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. It is not mainly a revenue raising measure. The Utah Court was simply wrong in stating: "The legislative record before us supports the conclusion that the predominant reason the Tax was enacted was to provide treatment for sex offenders, not to suppress protected expression." ¶ 19.

Under "intermediate scrutiny", the State must show some clear relationship between this tax and *proven harms*; and that the measure deals with such proven harms to a *material degree*. More direct means are easily available to deal with the need for sex therapy; and *O'Brien* scrutiny requires them to be used. This tax is punitive in its effect; and it is so without any reference to secondary effects *or any other reason* to justify its choice of targets. In fact, such a burden of a general tax on any one person, of class of persons, truly would be "de minimis", which this tax most certainly is not.

The Utah Court emphasized the difference between the *O'Brien* test and the *Renton* test used in secondary effects cases, which it stated "are two distinct tests directed at two different inquiries." (¶ 25) (App. 20). The Court said that "understanding the distinctions between the two tests is key to reaching the correct result." *Id.* The Utah Court rejected the "secondary effects" arguments relied upon by both the trial court and the State's attorneys; but did not properly differentiate between the two tests. The tests are more similar than the Court stated; and they are often intertwined. The essential difference is the nature of the problem addressed. In

the zoning cases, the constant problem is that of secondary effects. In *O'Brien* itself, the problem was avoiding disruption of the Selective Service Act and the constitutional power of Congress to wage war. Here, it is said that the problem is that of sex offenders who are not receiving therapy that is needed to avoid re-offending. The missing link is most obvious: The Court rejected the Attorney General's argument that the existence of adult entertainment businesses *causes or contributes to* that problem. (See ¶¶ 25-29) (App. 23-29). When the Court did so, it cut the tie to either the *O'Brien* test or the *Renton* "secondary effects" test. It is this link which is necessary for a statute to pass intermediate scrutiny.

In *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) this Court 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. *Id.* at 438.

The link between the regulation and "secondary effects" in the *Renton* line of cases is exactly the same as the link that is required under *O'Brien*. The regulation under *O'Brien* must be "narrowly tailored"

(*Bushco* ¶ 38; App. 31) to deal with a problem that is connected with the solution. The legislature took pains to add into the record concerns about "paraphilias" to provide some tenuous link between the target of the tax and the need for more money to deal with sex offender therapy. But the Court did not mention any such link. There is no authority whatsoever for taxing adult businesses because of the general need for sex therapy.

This Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) again discussed "secondary effects" and the *O'Brien* test, making no differentiation in the targets of the two tests. Justice O'Connor, writing for the majority (on this point) referred to the ordinances as one designed to deal with such effects:

> In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. 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, but rather the*

> *secondary effects, such as the impacts on public health, safety, and welfare*, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988).

529 U.S. at 291. (Emphasis added).

It is well established that there must be a reasonable relation between perceived evils (whether they be secondary effects or disruption of the war effort) and the remedy applied by the government. See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (n. 20). As observed by the Utah dissent:

> ¶75 Because the Tax regulates expression "based on its content, it must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). The Commission, however, argues that the Tax's constitutionality should be evaluated under intermediate scrutiny because it regulates based on negative secondary effects. However, the doctrine of secondary effects does not apply. The sole secondary effect the Commission identifies is sex offenses. This effect, however, lacks any empirical, reasonable connection to the viewing of nudity, which consequently makes the Tax a reaction to a primary effect. (App. 50).

The Utah Court seemed to say that choosing nudity in a commercial setting as the target of a

narrow-based tax, which almost certainly will raise very little money, required no justification. The requirement, however, of narrow tailoring, does indeed require a link between the regulation and the problem; and this link is not present.

CONCLUSION

This case contains important issues regarding taxation and the First Amendment. Moreover, the issues have recently been litigated in several forums; and there is a movement towards similar taxes in various States, which requires clear guidelines from this Court. This is a content-based tax which is not imposed as a consequence of "secondary effects". Instead, it is directed towards alleged "primary effects", including the effect it may have on those who might be, or might become, sex offenders. Such a tax should be subject to strict scrutiny. Because all challenges to such taxes must be brought in State courts; and because such scrutiny is less likely to be applied by State courts, litigation will certainly multiply without further guidance.

RESPECTFULLY SUBMITTED this 25th day of May, 2010.

W. ANDREW MCCULLOUGH, L.L.C.

W. ANDREW MCCULLOUGH
Attorney for Petitioners