**MARK E. FERRARIO** (1625)
**GREENBERG TRAURIG, LLP**
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89136
Tel: (702) 792-3773
Fax: (702) 792-9002
Email: FerrarioM@gtlaw.com
*Counsel for Appellant SHAC, LLC*

**WILLIAM H. BROWN** (7623)
**LAMBROSE | BROWN PLLC**
300 S. Fourth St., Ste. 700
Las Vegas, Nevada 89101
Tel: (702) 816-2200
Fax: (702) 816-2300
Email: WBrown@LambroseBrown.com
*Counsel for all Petitioners*
*except SHAC, LLC*

Electronically Filed
Oct 27 2016 04:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**SUPREME COURT**
**OF THE STATE OF NEVADA**

**K-KEL, INC.**, d/b/a Spearmint Rhino Gentlemen's Club, et al.,

Appellants,

vs.

**NEVADA DEPARTMENT OF TAXATION**, et al.,

Respondents.

Supreme Court Docket: 69886

District Court Case: A-11-648894-J
Consolidated with A-14-697515-J

**Appellants' Appendix**

**APPELLANTS' APPENDIX**
**VOLUME 4, PAGES 742 – 989**

# INDEX TO APPELLANTS' APPENDIX


| Filing Date | Description | Vol. | Page |
|---|---|---|---|
| 06/24/2016 | Amended Notice of Appeal | 19 | 4036-4038 |
| 06/23/2016 | Amended Order Denying Judicial Review of Administrative Decision | 19 | 4021-4026 |
| 09/28/2011 | Application for Leave to Present Additional Evidence to the Nevada Tax Commission<br><br>Exhibit 13 (ONLY) – Department Letter of November 17, 20013 Re: Southern California Edison<br><br>(This exhibit was erroneously omitted in the Supplement to the Record Filed on January 26, 2015) | 1 | 13-15 |
| 01/26/2015 | Entire Record of Administrative Proceedings Filed with District Court via Compact Disc (District Court Case No. A-11-648894-J): | | |
| | Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11 (1-30) | 1 | 140-169 |
| | Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group. (31-34) | 1 | 170-173 |
| | Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen's clubs in the proposed amended version of Chapter 368A. (35-37) | 1 | 174-176 |
| | Ex. 3 – October 9, 2003, email to former Department Director Dino (38-43) | 1 | 177-182 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | DiCianno from an attorney on behalf of the Bellagio hotel and casino discussion the constitutionality of the proposed amendments. | | | |
| | Ex. 4 – October 21, 2003, email to DiCianno with a transcript of the Nevada Gaming Commission discussing the importance of subjecting the gentlemen's clubs to the LET. | 44-67 | 1 | 183-206 |
| | Ex. 5 – First Reprint of Senate Bill 247 which contains a counsel digest specifically referencing adult entertainment and what would happen if that proposed portion of the Bill were held unconstitutional. | 68-92 | 1 | 207-231 |
| | Ex. 6 – Minutes of the May 16, 2005, meeting of the Assembly Committee on Commerce and Labor which discusses what happens if the proposed live adult entertainment provisions are held unconstitutional. | 93-110 | 1 | 232-249 |
| | Ex. 7 – Minutes of the May 26, 2005, meeting of the Assembly Committee on Ways and Means, which specifically references the Department's position on there being two distinct categories: live entertainment and live adult entertainment. Exhibit E to the minutes is an email from DiCianno setting forth this distinction. | 111-118 | 2 | 250-257 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | Ex. 8 – Untitled Revenue Analysis. | 119-121 | 2 | 258-260 |
| | Ex. 9 – November 9, 2004, Memo to Chinnock, Executive Director of Department. | 122 | 2 | 261 |
| | Ex. 10 – April 24, 2004, DiCianno Email. | 123 | 2 | 262 |
| | Ex. 11 – November 18, 2003, Barbara Smith Campbell Email. | 124-125 | 2 | 263-264 |
| | Ex. 12 – Minutes of June 5, 2005, Meeting of Senate Committee on Taxation. | 126-137 | 2 | 265-276 |
| | Ex. 14 – **Deja Vu Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation**, 2006 WL 2161980 (D. Nev. July 28, 2006) – dismissal of lawsuit. | 138-141 | 2 | 277-280 |
| | Ex. 15 – Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006. | 142-153 | 2 | 281-292 |
| | Ex. 16 – Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006. | 154-165 | 2 | 293-304 |
| | 8th Judicial District Court Administrative Record, filed 10/21/11 | | | |
| | (Index of Documents) | 166-170 | 2 | 306-309 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | Petitioner's Claims for Refund of Tax on Live Entertainment, February 27, 2007 (Tax Period: January 2004) | 1-41 | 171-211 | 2 | 310-350 |
| | Petitioners' Claim for Refund of Tax on Live Entertainment, March 28, 2007 (Tax Period: February 2004) | 42-84 | 212-254 | 2 | 351-393 |
| | Respondent's Response to Refund Requests, April 3, 2007 | 85-96 | 255-266 | 2 | 394-405 |
| | Petitioners' Claims for Refund of Tax on Live Entertainment, April 26, 2007 (Tax Period: March 2004) | 97-139 | 267-309 | 2 | 406-448 |
| | Respondent's Response to Refund Requests, April 30, 2007 | 140-145 | 310-315 | 2 | 449-454 |
| | Petitioners' Claims for Refund of Tax on Live Entertainment, May 30, 2007 (Tax Period: April 2004) | 146-188 | 316-358 | 2 | 455-497 |
| | Respondent's Response to Refund Requests, June 4, 2007 | 189-194 | 359-364 | 3 | 498-503 |
| | Petitioners' Formal Notice of Appeal, May 1, 2007 (The following pages in this section were intentionally left blank) | 195-273 | 365-443 | 3 | 504-582 |
| | Petitioners' Correspondence Regarding Amended Notice of Hearing, June 19, 2007 | 274-276 | 444-446 | 3 | 583-585 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | Respondents' Amended Notice of Hearing, June 8, 2007 | 277-280 | 447-450 | 3 | 586-589 |
| | Respondents' Notice of Hearing, June 7, 2007 | 281-284 | 451-454 | 3 | 590-593 |
| | Bradley J. Shafer Formal Notice of Appearance, June 8, 2007 | 285-286 | 455-456 | 3 | 594-595 |
| | Petitioners' Correspondence Regarding Notice of Appeal of Denial of Claim for Refund, June 21, 2007 | 287-333 | 457-503 | 3 | 596-642 |
| | Department's Brief and Exhibits in Support of the Department's Denial of Appellant's Refund Requests, June 15, 2007 | 334-351 | 504-521 | 3 | 643-660 |
| | Appellants' Reply Brief and Exhibits in Opposition to the Nevada Department of Taxation's Denial of Appellant's Refund Requests | 352-387 | 522-557 | 3 | 661-696 |
| | Department's Supplemental Brief in Support of the Department's Denial of Appellant's Refund Requests | 388-392 | 558-562 | 3 | 697-701 |
| | Department's Power Point Presentation | 393-415 | 563-585 | 3 | 702-724 |
| | Department's Appendix of Cases, Statutes and Other Authorities<br><br>(Index of Appendix) | 416-418 | 586-588 | 3 | 725-727 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | Appendix 1 – Sheriff v. Burdg | 419-426 | 589-596 | 3 | 728-735 |
| | Appendix 2 – Cashman Photo Concessions and Labs v. Nevada Gaming Commission | 427-432 | 597-602 | 3 | 736-741 |
| | Appendix 3 – List v. Whisler | 433-441 | 603-611 | 4 | 742-750 |
| | Appendix 4 – Whitehead v. Comm'n on Judicial Discipline | 442-482 | 612-652 | 4 | 751-791 |
| | Appendix 5 – Murdock v. Commonwealth of Pennsylvania | 483-493 | 653-663 | 4 | 792-802 |
| | Appendix 6 – Jimmy Swaggart Ministries v. Board of Equalization | 494-509 | 664-679 | 4 | 803-818 |
| | Appendix 7 – Minneapolis Star v. Minnesota Comm'r of Revenue | 510-530 | 680-700 | 4 | 819-839 |
| | Appendix 8 – Adams Outdoor Advertising v. Borought of Stroudsburg | 531-546 | 701-716 | 4 | 840-855 |
| | Appendix 9 – Ward v. Rock Against Racism | 547-568 | 717-738 | 4 | 856-877 |
| | Appendix 10 – Leathers v. Medlock | 569-586 | 739-756 | 4 | 878-895 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | Appendix 11 – Madden v. Kentucky | 587-596 | 757-766 | 4 | 896-905 |
| | Appendix 12 – Forbes v. City of Seattle | 597-612 | 767-782 | 4 | 906-921 |
| | Appendix 13 – Simon & Schuster, Inc. v. Members of New York State Crime Victims Board | 613-630 | 783-800 | 4 | 922-939 |
| | Appendix 14 – City of Las Angeles v. Alameda Books, Inc. | 631-651 | 801-821 | 4 | 940-960 |
| | Appendix 15 – California Highway Patrol v. Superior Court | 652-668 | 822-838 | 4 | 961-977 |
| | Appendix 16 – Vermont Society of Assoc. Executives v. Milne | 669-680 | 839-850 | 4 | 978-989 |
| | Appendix 17 – Comptroller of the Treasury v. Clyde's of Chevy Chase, Inc. | 681-704 | 851-874 | 5 | 990-1013 |
| | Appendix 18 – Chapter 368A | 705-720 | 875-890 | 5 | 1014-1029 |
| | Appendix 19 – IRC §§ 4231 through 4234 | 721-727 | 891-897 | 5 | 1030-1036 |
| | Appendix 20 – Nevada State Attorney General Opinion No. 85-17 | 728-733 | 898-903 | 5 | 1037-1042 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | Appendix 21 – Committee Notes regarding S.B. 497, June 6, 1995 | 734-746 | 904-916 | 5 | 1043-1055 |
| | Petitioners' Correspondence Regarding Supplemental Material Submitted for Appeal | 747-749 | 917-919 | 5 | 1056-1058 |
| | Petitioners' Power Point Presentation | 750-787 | 920-957 | 5 | 1059-1096 |
| | Supplemental Submission on Behalf of Taxpayers/Appellants | | | | |
| | Index | 788-792 | 958-962 | 5 | 1097-1101 |
| | 1. Arkansas Writers Project, Inc. v. Charles D. Ragland | 793-803 | 963-973 | 5 | 1102-1112 |
| | 2. Grosjean v. American Press Co. | 804-812 | 974-982 | 5 | 1113-1121 |
| | 3. Jimmy Swaggard Ministries v. Board of Equalization of California | 813-826 | 983-996 | 5 | 1122-1135 |
| | 4. Leathers v. Medlock | 827-843 | 997-1013 | 5 | 1136-1152 |
| | 5. Minneapolis Star and Tribune Company v. Minnesota Commissioners of Revenue | 844-863 | 1014-1033 | 5 | 1153-1172 |
| | 6. Murdock v. Commonwealth of Pennsylvania | 864-872 | 1034-1042 | 5 | 1173-1181 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | 7. Regan v. Taxation with Representation of Washington and Taxation with Representation of Washington v. Donald T. Regan | 873-884 | 1043-1054 | 5 | 1182-1193 |
| | 8. City of Las Angeles v. Alameda Books, Inc. | 885-907 | 1055-1077 | 5 | 1194-1216 |
| | 9. TK's Video, Inc. v. Denton County, Texas | 908-935 | 1078-1105 | 6 | 1217-1244 |
| | Theresa Enterprises, Inc. v. United State of America | 936-949 | 1106-1119 | 6 | 1245-1258 |
| | 10. Festival Enterprises, Inc. v. City of Pleasant Hill | 950-954 | 1120-1124 | 6 | 1259-1263 |
| | 11. United Artists Communications, Inc. v. City of Montclair | 955-960 | 1125-1130 | 6 | 1264-1269 |
| | 12. Vermont Society of Association Executives v. James Milne | 961-982 | 1131-1152 | 6 | 1270-1291 |
| | 13. Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah | 983-1017 | 1153-1187 | 6 | 1292-1326 |
| | 14. City of LaDue v. Margaret Gilleo | 1018-1029 | 1188-1199 | 6 | 1327-1338 |
| | 15. United States v. Eichman | 1030-1039 | 1200-1209 | 6 | 1339-1348 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | 16. Adams Outdoor Advertising v. Borough or Stroudsburg | 1040-1052 | 1210-1222 | 6 | 1349-1361 |
| | 17. Forbes v. City of Seattle | 1053-1066 | 1223-1236 | 6 | 1362-1375 |
| | 18. NRS 360.291 | 1067-1070 | 1237-1240 | 6 | 1376-1379 |
| | 19. NRS Chapter 368 A | 1071-1086 | 1241-1256 | 6 | 1380-1395 |
| | 20. Excerpts of Minutes of Senate Committee on Taxation – May 26, 2003 | 1087-1090 | 1257-1260 | 6 | 1396-1399 |
| | 21. Excerpts of Senate Bill No. 8 – 2003 Nevada Laws 20th Sp. Sess. Ch. 5 (S.B. 8) | 1091-1109 | 1261-1279 | 6 | 1400-1418 |
| | 22. Adopted Regulation of the Nevada tax Commission – R212-03 | 1110-1122 | 1280-1292 | 6 | 1419-1431 |
| | 23. Excerpts of the Legislative History of A.B. 554-2005 | 1123-1146 | 1293-1316 | 6 | 1432-1455 |
| | 24. Excerpts of Minutes of the Assembly Committee on Commerce and Labor Meeting – May 16, 2005 | 1147-1162 | 1317-1332 | 7 | 1456-1471 |
| | 25. Senate Bill No. 3 – 2005 Nevada Laws 22nd Sp. Sess. Ch. 9 (S.B. 3) | 1163-1171 | 1333-1341 | 7 | 1472-1480 |

| Filing Date | Description | | | Vol. | Page |
|---|---|---|---|---|---|
| | 26. Assembly Bill No. 554 – 2005 Nevada Laws Ch. 484 (A.B. 554) | 1172-1179 | 1342-1349 | 7 | 1481-1488 |
| | 27. Assembly Bill No. 487 – 2007 Nevada Laws Ch. 547 (A.B. 487) | 1180-1182 | 1350-1352 | 7 | 1489-1491 |
| | 28. Nevada Department of Taxation Annual Report for Fiscal Years 2004-2005 and 2005-2006 | 1183-1187 | 1353-1357 | 7 | 1492-1496 |
| | 29. Initial Request for Refund Letter (specimen copy) | 1188-1194 | 1358-1364 | | 1497-1503 |
| | 30. Nevada Tax Department's Denials of Request for Refunds | 1195-1218 | 1365-1388 | 7 | 1504-1527 |
| | Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, July 9, 2007 | 1219-1237 | 1389-1407 | 7 | 1528-1546 |
| | Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, August 6, 2007 | 1238-1332 | 1408-1502 | 7 | 1547-1641 |
| | Commission's Findings of Facts and Conclusions of Law and Decision, October 12, 2007 | 1333-1334 | 1503-1504 | 7 | 1642-1643 |
| | Petitioners' Request for a Copy of the Nevada Tax Commission's Formal | 1335 | 1505 | 7 | 1644 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | Written Ruling, August 22, 2007 | | | |
| | These Bates Numbered Pages Were Left Blank Intentionally: 202; 210; 218; 226; 234; 242; 250; 258; 266; 294; 309; 317; 318; and 326 | | | |
| | Opposition to Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 10/21/11 | 1506-1555 | 7 | 1645-1694 |
| | Reply in Support of Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 11/07/11 | 1556-1642 | 8 | 1695-1781 |
| | Transcript of Hearing, dated 12/09/11 | 1643-1656 | 8 | 1782-1795 |
| | Notice of Entry of Order Granting Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 02/02/12 | 1657-1662 | 8 | 1796-1801 |
| | Document submitted by Taxpayer on Remand | | | |
| | A – Memorandum - Analysis of Revenue Impact | 1663-1665 | 8 | 1802-1804 |
| | B – Live Entertainment Tax by number of seats (2004) | 1666-1668 | 8 | 1805-1807 |
| | C – Department of Taxation Update Request | 1669-1672 | 8 | 1808-1811 |
| | D – Live Entertainment Tax information and press releases | 1673-1681 | 8 | 1812-1820 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | (various dated and undated documents | | | |
| | E – LET Updates, Southern Nevada, 7/19/04 | 1682-1683 | 8 | 1821-1822 |
| | F – Live Entertainment Tax- Seating Capacity 300-7400, January-December 2004 | 1684-1685 | 8 | 1823-1824 |
| | G – LET by venue (DV000028-blank page) | 1686-1694 | 8 | 1825-1833 |
| | H – LET by category and venue | 1695-1699 | 8 | 1834-1838 |
| | I – 10% LET- Gentleman's Clubs | 1700-1703 | 8 | 1839-1842 |
| | J – LET account summary | 1704-1710 | 8 | 1843-1849 |
| | K – Various Correspondence to and from taxpayers - December 1 0, 2003, December 12, 2003, May 17, 2005, April 2, 2007, January 3, 2008 | 1711-1720 | 8 | 1850-1859 |
| | L – LET Tax received 2004- 2008 | 1721-1777 | 8 | 1860-1916 |
| | M – LET Tax received fiscal year 2007 | 1778-1779 | 8 | 1917-1918 |
| | N – Monthly deposit report, prepared April 17 2009 | 1780-1788 | 8 | 1919-1927 |
| | O – General Fund Revenues, fiscal year 2005- 2008, forecast 2009 - 2011 | 1789-1790 | 8 | 1928-1929 |
| | P – SB 247 Bill History | 1791-1793 | 8 | 1930-1932 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | Q – Department of Taxation- "What You Need to Know About Nevada's Live Entertainment Tax" 10/21/03, 7/6/05 and 8/15/05 and PowerPoint presentation | 1794-1855 | 9 | 1933-1994 |
| | R – Seating capacity information by district | 1856-1858 | 9 | 1995-1997 |
| | S – LET tax information for LCB | 1859-1862 | 9 | 1998-2001 |
| | T – Memorandum regarding LET tax- 5/21/04 | 1863-1867 | 9 | 2002-2006 |
| | U – LET tax seating capacity 300 - 7 400, January - September 2004 | 1868-1869 | 9 | 2007-2008 |
| | V – AB 281 information regarding LET | 1870-1872 | 9 | 2009-2011 |
| | W – Draft Regulations for discussions 8/25/03 | 1873-1881 | 9 | 2012-2020 |
| | X – Changes effective July 2005 | 1882-1883 | 9 | 2021-2022 |
| | Y – Public Notice September 5, 2003, proposed regulations | 1884-1935 | 9 | 2023-2074 |
| | Z – Memorandum and adopted regulations, December 7, 2003 | 1936-2007 | 9 | 2075-2146 |
| | AA – Regulation, LCB File No. R1 05-05, February 23, 2006 | 2008-2055 | 10 | 2147-2194 |
| | BB – Minutes of Senate Committee on Taxation June 5, 2005 | 2056-2135 | 10 | 2195-2274 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | CC – LET PowerPoint presentation | 2136-2146 | 10 | 2275-2285 |
| | DD – Public Notice September 26, 2003, proposed regulations | 2147-2201 | 10 | 2286-2340 |
| | EE – Public Notice October 23,2003 for meeting dated October 30, 2003 | 2202-2290 | 11 | 2341-2429 |
| | FF – Public Notice October 24, 2003, proposed regulations | 2291-2370 | 11 | 2430-2509 |
| | GG – Notice of Public Meeting and Transcript of Public Meeting November 25, 2003 | 2371-2414 | 11 | 2510-2553 |
| | HH – Nevada Tax Commission Meeting and Proposed Regulations - Posted November 19, 2003 | 2415-2496 | 12 | 2554-2635 |
| | II – LET reports | 2497-2512 | 12 | 2636-2651 |
| | JJ – LET workshop- Compact Disc | 2513-2514 | 12 | 2652-2653 |
| | KK – Legislative History | 2515-2569 | 12 | 2654-2708 |
| | KK – Legislative History (Continued) | 2570-2815 | 13 | 2709-2954 |
| | KK – Legislative History (Continued) | 2816-2856 | 14 | 2955-2995 |
| | LET Updated Requests | 2857-3064 | 14 | 2996-3203 |
| | LET Updated Requests (Continued) | 3065-3156 | 15 | 3204-3295 |
| | LET PowerPoint | 3157-3168 | 15 | 3296-3307 |

| Filing Date | Description | | Vol. | Page |
|---|---|---|---|---|
| | Letter from Petitioner's counsel to the Nevada Tax Commission re: NAC 360.135 Request for Subpoenas to Dino DiCianno, Michelle Jacobs, and Tesa Wanamaker, dated 06/14/12 | 3169-3173 | 15 | 3308-3312 |
| | Letter from Respondent's counsel to the Nevada Tax Commission in opposition to the request for subpoenas, dated 06/15/12 | 3174-3179 | 15 | 3313-3318 |
| | Letter from Petitioner's counsel to the Nevada Tax Commission in reply to Petitioner's opposition to the request for subpoenas, plus Exhibit A-B, dated 06/19/12 | 3180-3190 | 15 | 3319-3329 |
| | Nevada Department of Taxation's Brief on Remand to Consider Additional Evidence, plus Exhibits A-G, dated 06/19/12 | 3191-3341 | 16 | 3330-3480 |
| | Letter from Respondent's counsel to the Nevada Tax Commission re: Sur-Reply to the request for subpoenas, dated 06/20/12 | 3342-3373 | 16 | 3481-3512 |
| | Letter from Petitioner's counsel to the Nevada Tax Commission re: Supplement to Reply to the request for subpoenas, dated 06/20/12 | 3374-3567 | 17 | 3513-3706 |
| | Transcript of Nevada Tax Commission, 06/25/12 | 3658-3604 | 17 | 3707-3743 |
| | Nevada Tax Commission Decision Letter, dated 09/06/12 | 3605-3610 | 17 | 3744-3749 |
| | Hearing Officer's Order on Remand, dated 08/27/13 | 3611-3618 | 17 | 3750-3757 |
| | Stipulation for Submission on the Record, 10/24/13 | 3619-3634 | 18 | 3758-3773 |
| | Nevada Tax Commission Notice of Hearing, dated 11/22/13 | 3635-3636 | 18 | 3774-3775 |

| Filing Date | Description | Vol. | Page |
|---|---|---|---|
| | Waiver of Notice, dated 11/22/13 — 3637 | 18 | 3776 |
| | Transcript of Nevada Tax Commission (only the portions of Nevada Tax Commission relevant to this matter), 12/09/13 — 3638-3642 | 18 | 3777-3781 |
| | Nevada Tax Commission's Decision, 02/12/14 — 3643-3718 | 18 | 3782-3857 |
| 12/09/2011 | Minutes | 1 | 48-49 |
| 12/16/2011 | Minutes | 1 | 50-51 |
| 06/08/2012 | Minutes | 1 | 84-85 |
| 09/22/2015 | Minutes | 18 | 3867-3868 |
| 10/27/2015 | Minutes | 18 | 3877-3878 |
| 11/24/2015 | Minutes | 18 | 3907-3909 |
| 10/15/2013 | Minutes – Status Check | 1 | 95-96 |
| 02/26/2016 | Notice of Appeal | 18 | 3934-4006 |
| 06/24/2016 | Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision | 19 | 4027-4035 |
| 10/26/2011 | Notice of Entry of Order | 1 | 19-23 |
| 11/21/2011 | Notice of Entry of Order | 1 | 28-33 |
| 02/02/2012 | Notice of Entry of Order | 1 | 54-59 |
| 06/22/2012 | Notice of Entry of Order | 1 | 88-93 |
| 3/28/2014 | Notice of Entry of Order | 1 | 119-126 |

| Filing Date | Description | Vol. | Page |
|---|---|---|---|
| 02/04/2016 | Notice of Entry of Order Denying Judicial Review of Administrative Decision | 18 | 3921-3933 |
| 10/13/2015 | Notice of Entry of Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review | 18 | 3872-3876 |
| 03/31/2015 | Notice of Entry of Order Granting Stipulation and Order to Extend Time | 18 | 3861-3866 |
| 03/26/2014 | Notice of Entry of Stipulation and Order Consolidating Cases | 1 | 111-118 |
| 01/22/2015 | Notice of Entry of Stipulation and Order for Extension of Time | 1 | 130-134 |
| 06/27/2016 | Notice of Entry of Stipulation and Proposed Amended Order | 19 | 4039-4055 |
| 01/15/2016 | Order Denying Judicial Review of Administrative Decision | 18 | 3911-3920 |
| 06/21/2012 | Order Denying Stay | 1 | 86-87 |
| 10/09/2015 | Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review | 18 | 3869-3871 |
| 02/01/2012 | Order Granting Plaintiffs Application for Leave to Present Additional Evidence to the Nevada Tax Commission | 1 | 52-53 |
| 09/09/2013 | Order Scheduling Status Check | 1 | 94 |
| 12/02/2015 | Order to Statistically Close Case | 18 | 3910 |
| 09/23/2011 | Petition for Judicial Review | 1 | 1-12 |

| Filing Date | Description | Vol. | Page |
|---|---|---|---|
| 03/11/2014 | Petition for Judicial Review (District Court Case No. A-14-697515-J) | 1 | 97-106 |
| 03/24/2014 | Stipulation and Order Consolidating Cases (Consolidating A-14-697515-J with A-11-648894-J) | 1 | 107-110 |
| 11/21/2011 | Stipulation and Order for Continuance | 1 | 25-27 |
| 10/25/2011 | Stipulation and Order for Extension of Time | 1 | 16-18 |
| 01/21/2015 | Stipulation and Order for Extension of Time | 1 | 127-129 |
| 03/30/2015 | Stipulation and Order for Extension of Time | 18 | 3858-3860 |
| 06/23/2016 | Stipulation and Proposed Amended Order | 19 | 4007-4020 |
| 01/26/2015 | Supplement to the Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Entire Record - Index) | 1 | 136-139 |
| 12/09/2011 | Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J) | 1 | 34-47 |
| 06/08/2012 | Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J) | 1 | 60-83 |
| 10/27/2015 | Transcript of Proceedings Before the Honorable Jerry A. Wiese, II – October 27, 2015 (Re: Oral Argument on Petition for Judicial Review) (District Court Case No. A-11-648894-J) (Entered into District Court Case No. A-14-697515-J) | 18 | 3879-3906 |
| 01/26/2015 | Transmittal of Supplement to the Record on Appeal | 1 | 135 |

# APPENDIX 10

499 U.S. 439, 111 S.Ct. 1438, 69 Rad. Reg. 2d (P & F) 60, 113 L.Ed.2d 494, 59 USLW 4281, 18 Media L. Rep. 1953

Briefs and Other Related Documents

Supreme Court of the United States
Timothy J. LEATHERS, Commissioner of Revenues of Arkansas, Petitioner,
v.
Daniel L. MEDLOCK et al.
Daniel L. MEDLOCK, et al., Petitioners,
v.
Timothy J. LEATHERS, Commissioner of Revenues of Arkansas, et al.
Nos. 90-29, 90-38.
Argued Jan. 9, 1991.
Decided April 16, 1991.

Cable television subscriber and trade organization of cable operators brought action challenging imposition of sales tax on cable television services. The Chancery Court, Pulaski County, Lee A. Munson, Chancellor, upheld sales tax. Appeal was taken. The Arkansas Supreme Court, 301 Ark. 483, 785 S.W.2d 202, reversed and remanded. Subscriber, operators and Arkansas Commissioner of Revenues petitioned for certiorari. The Supreme Court, Justice O'Connor, held that Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment.
Affirmed in part, and reversed in part and remanded.
Justice Marshall filed a dissenting opinion in which Justice Blackmun joined.
Opinion on remand, 305 Ark. 610, 808 S.W.2d 785.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Cable television operator is engaged in "speech" under First Amendment, and is, in much of its operation, part of the "press" since it provides to its subscribers news, information, and entertainment. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Fact that cable television is taxed differently from other media does not by itself raise First

Amendment concerns. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)

Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment; tax generally applied to receipts from sale of all tangible personal property and broad range of services unless within group of specific exemptions, there was no indication that Arkansas had targeted cable television in purposeful attempt to interfere with its First Amendment activities, and sales tax was not content based. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))

Differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress expression of particular ideas or viewpoints. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

Absent compelling justification, government may not exercise its taxing power to single out the press. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))

Tax is suspect under First Amendment if it targets a small group of speakers. U.S.C.A. Const.Amend. 1.

[7] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))

Tax will trigger heightened scrutiny under First Amendment if it discriminates on basis of content of taxpayer speech. U.S.C.A. Const.Amend. 1.

***1439 Syllabus** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Arkansas' Gross Receipts Act imposes a tax on receipts from the sale of all tangible personal property and specified services, but expressly exempts, *inter alia*, certain receipts from newspaper and magazine sales. In 1987, Act 188 amended the Gross Receipts Act to impose the tax on cable television. Petitioners in No. 90-38, a cable television subscriber, a cable operator, and a cable trade organization (cable petitioners), brought this class action in the State Chancery Court, contending that their expressive rights under the First Amendment and their rights under the Equal Protection Clause of the Fourteenth Amendment were violated by the extension of the tax to cable services, the exemption from the tax of newspapers and magazines, and the exclusion from the list of services subject to the tax of scrambled satellite broadcast television services to home dish-antennae owners. In 1989, shortly after the Chancery Court upheld the constitutionality of Act 188, Arkansas adopted Act 769, which extended the tax to, among other things, all television services to paying customers. On appeal, the State Supreme Court held that the tax was not invalid after the passage of Act 769 because the Constitution does not prohibit the differential taxation of different media. However, believing that the First Amendment does prohibit discriminatory taxation among members of the same medium, and that cable and scrambled satellite television services were "substantially the same," the Supreme Court held that the tax was unconstitutional for the period during which it applied to cable but not satellite broadcast services.
*Held:*
1. Arkansas' extension of its generally applicable sales tax to cable television services***1440** alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment. Pp. 1442-1447.
(a) Although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, the fact that it is taxed differently from other media does not by itself raise First Amendment concerns. ***440** The Arkansas tax presents none of the First Amendment difficulties that have led this Court to strike down

differential taxation of speakers. See, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209. It is a tax of general applicability covering all tangible personal property and a broad range of services and, thus, does not single out the press and thereby threaten to hinder it as a watchdog of government activity. Furthermore, there is no indication that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities, nor is the tax structured so as to raise suspicion that it was intended to do so. Arkansas has not selected a small group of speakers to bear fully the burden of the tax, since, even if the State Supreme Court's finding that cable and satellite television are the same medium is accepted, Act 188 extended the tax uniformly to the approximately 100 cable systems then operating in the State. Finally, the tax is not content based, since there is nothing in the statute's language that refers to the content of mass media communications, and since the record contains no evidence that the variety of programming cable television offers subscribers differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines. Pp. 1442-1445.
(b) Thus, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated their First Amendment rights. See *Arkansas Writers', supra*, at 233, 107 S.Ct., at 1729. This Court's decisions do not support their argument that such a basis exists here because the tax discriminates among media and discriminated for a time within a medium. Taken together, cases such as *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129, *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607, and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614, establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. Nothing about Arkansas' choice to exclude or exempt certain media from its tax has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in the record indicate that this broad-based, content-neutral tax is likely to stifle the free exchange of ideas. Pp. 1445-1447.
2. The question whether Arkansas' temporary tax distinction between cable and satellite services violated the Equal Protection Clause must be addressed by the State Supreme Court on remand. P. 1447.
301 Ark. 483, 785 S.W.2d 202 (1990), affirmed in part, reversed in part, and remanded.
***441** O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 1447.

*William E. Keadle* argued the cause for petitioner in No.90-29 and respondents in No. 90-38. With him on the briefs was *Larry D. Vaught*.
*Eugene G. Sayre* argued the cause and filed briefs for petitioners in No. 90-38 and respondents in No. 90-29.†
†Briefs of *amici curiae* urging reversal were filed for Dow Jones & Co., Inc., by *Richard J. Tofel* and *Robert D. Sack;* for the Indiana Cable Telvision Association Inc. by *D. Craig Martin;* and for the National Cable Television Association, Inc., by *H. Bartow Farr III*, *Richard G. Taranto*, *Brenda L. Fox*, and *Michael S. Schooler*.
Briefs of *amici curiae* urging affirmance were filed for the City of Los Angeles, California, et al., by *Larrine S. Holbrooke*, *William R. Malone*, *Edward J. Perez*, and *Barry A. Lindahl;* and for the City of New York et al. by *Robert Alan Garrett*.
Briefs of *amici curiae* were filed for Cablevision Industries Corp. et al. by *Brent N. Rushforth;* for the California Cable Television Association by *Frank W. Lloyd III*, *Diane B. Burstein*, and *Alan J. Gardner;* for Century Communications Corp, et al. by *John P. Cole, Jr.*, and *Wesley R. Heppler;* for the Competitive Cable Associaiton et al. by *Harold R. Farrow*, *Sol Schildhause*, and *Robert M. Bramson;* for Greater Media Cablevision, Inc., by *Robert H. Louis* and *Salvatore M. DeBunda;* and for the National Association of Broadcasters et al. by *Jack N. Goodman* and *James J. Popham*.

Justice O'CONNOR delivered the opinion of the Court.
These consolidated cases require us to consider the constitutionality of a state sales tax that excludes or exempts certain segments of the media but not others.

I

Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services. Ark.Code Ann. §§ 26-52-301, 26-52-302 (1987 and Supp.1989). The Act exempts from the tax certain sales of goods and services. § 26-52-401 (Supp.1989). Counties *442 within Arkansas impose a 1% tax on all goods and services subject to taxation under the Gross Receipts Act, §§ 26-74-307, 26-74-222 (1987 and Supp.1989), and cities may impose a further 1/2 or 1% tax on these items, § 26-75-307 (1987).

The Gross Receipts Act expressly exempts receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. See §§ 26-52-401(4), (14) (Supp.1989); Revenue Policy Statement 1988-1 (Mar. 10, 1988), reprinted in CCH Ark.Tax Rep. ¶ 69-415. Before 1987, the Act did not list among those services subject to the sales tax either cable television [FN1] or scrambled satellite broadcast television services to home dish-antennae owners.[FN2] See § 26-52-301 (1987). In 1987, Arkansas adopted Act 188, which amended the Gross Receipts Act to impose the sales tax on cable television. 1987 Ark.Gen.Acts, No. 188, § 1.

FN1. Cable systems receive television, radio, or other signals through antennae located at their so-called "headends." Information gathered in this way, as well as any other material that the system operator wishes to transmit, is then conducted through cables strung over utility poles and through underground conduits to subscribers. See generally D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video: Law and Policy § 1.03 (1989).

FN2. Satellite television broadcast services transmit over-the-air "scrambled" signals directly to the satellite dishes of subscribers, who must pay for the right to view the signals. See generally A. Easton & S. Easton, The Complete Sourcebook of Home Satellite TV 57-66 (1988).

Daniel L. Medlock, a cable television subscriber, Community Communications Co., a cable television operator, and the Arkansas Cable Television Association, Inc., a trade organization composed of approximately 80 cable operators with systems throughout the State (cable petitioners), brought this class action in the Arkansas Chancery Court to challenge the extension of the sales tax to cable television services. Cable petitioners contended that their expressive activities are protected by the First Amendment and are comparable to those of newspapers, magazines, and scrambled satellite broadcast television. They argued that Arkansas' sales taxation *443 of cable services, and exemption or exclusion from the tax of newspapers, magazines, and satellite broadcast services, violated their constitutional rights under the First Amendment and under the Equal Protection Clause of the Fourteenth Amendment.

The Chancery Court granted cable petitioners' motion for a preliminary injunction, requiring Arkansas to place in escrow the challenged sales taxes and to keep records identifying collections of the taxes. Both sides introduced extensive testimony and documentary evidence at the hearing on this motion and at the subsequent trial. Following the trial, the Chancery Court concluded that cable television's necessary use of public rights-of-way distinguishes it for constitutional purposes from other media. It therefore upheld the constitutionality of Act 188, dissolved its preliminary injunction, and ordered all funds collected in escrow released.

In 1989, shortly after the Chancery Court issued its decision, Arkansas adopted Act 769, which extended the sales tax to "all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers **1442 or users." 1989 Ark.Gen.Acts, No. 769, § 1. On appeal to the Arkansas Supreme Court, cable petitioners again challenged the State's sales tax on the ground that, notwithstanding Act 769, it continued unconstitutionally to discriminate against cable television. The Supreme Court rejected the claim that the tax was invalid after the passage of Act 769, holding that the Constitution does not prohibit the differential taxation of different media. *Medlock v. Pledger*, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990). The court

believed, however, that the First Amendment prohibits discriminatory taxation among members of the same medium. On the record before it, the court found that cable television services and satellite broadcast services to home dish-antennae owners were "substantially the same." *Ibid.* The State Supreme Court rejected the Chancery Court's conclusion that cable television's use of public ***444** rights-of-way justified its differential sales tax treatment, explaining that cable operators already paid franchise fees for that right. *Id.*, at 485, 785 S.W.2d, at 203. It therefore held that Arkansas' sales tax was unconstitutional under the First Amendment for the period during which cable television, but not satellite broadcast services, were subject to the tax. *Id.*, at 487; 785 S.W.2d, at 204.

Both cable petitioners and the Arkansas Commissioner of Revenues petitioned this Court for certiorari. We consolidated these petitions and granted certiorari, *Pledger v. Medlock*, 498 U.S. 809, 111 S.Ct. 41, 42, 112 L.Ed.2d 18 (1990), in order to resolve the question, left open in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987), whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media.

II

[1] [2] [3] Cable television provides to its subscribers news, information, and entertainment. It is engaged in "speech" under the First Amendment, and is, in much of its operation, part of the "press." See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986). That it is taxed differently from other media does not by itself, however, raise First Amendment concerns. Our cases have held that a tax that discriminates among speakers is constitutionally suspect only in certain circumstances.

In *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the Court considered a First Amendment challenge to a Louisiana law that singled out publications with weekly circulations above 20,000 for a 2% tax on gross receipts from advertising. The tax fell exclusively on 13 newspapers. Four other daily newspapers and 120 weekly newspapers with weekly circulations of less than 20,000 were not taxed. The Court discussed at length the pre-First Amendment English and American tradition of taxes imposed exclusively on the press. This invidious form of censorship was intended to curtail the circulation of newspapers and thereby prevent the ***445** people from acquiring knowledge of government activities. *Id.*, at 246-251, 56 S.Ct., at 447-451. The Court held that the tax at issue in *Grosjean* was of this type and was therefore unconstitutional. *Id.*, at 250, 56 S.Ct., at 449.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), we noted that it was unclear whether the result in *Grosjean* depended on our perception in that case that the State had imposed the tax with the intent to penalize a selected group of newspapers or whether the structure of the tax was sufficient to invalidate it. See 460 U.S., at 580, 103 S.Ct., at 1369 (citing cases and commentary). *Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds: "Illicit legislative intent is not the *sine qua non* of a ****1443** violation of the First Amendment." *Id.*, at 592, 103 S.Ct., at 1376.

At issue in *Minneapolis Star* was a Minnesota special use tax on the cost of paper and ink consumed in the production of publications. The tax exempted the first $100,000 worth of paper and ink consumed annually. Eleven publishers, producing only 14 of the State's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The Minneapolis Star & Tribune Co. (Star Tribune) was responsible for roughly two-thirds of the total revenue raised by the tax. The following year, 13 publishers, producing only 16 of the State's 374 paid circulation papers, paid the tax. Again, the Star Tribune bore roughly two-thirds of the tax's burden. We found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself.

We nevertheless held the Minnesota tax unconstitutional for two reasons. First, the tax singled out the press for special treatment. We noted that the general applicability of any burdensome tax law helps

to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from this politicalconstraint. ***446** See *id.*, at 585, 103 S.Ct., at 1371. Given "the basic assumption of our political system that the press will often serve as an important restraint on government," we feared that the threat of exclusive taxation of the press could operate "as effectively as a censor to check critical comment." *Ibid.* "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment," that it is presumptively unconstitutional. *Ibid.*

Beyond singling out the press, the Minnesota tax targeted a small group of newspapers-those so large that they remained subject to the tax despite its exemption for the first $100,000 of ink and paper consumed annually. The tax thus resembled a penalty for certain newspapers. Once again, the scheme appeared to have such potential for abuse that we concluded that it violated the First Amendment: "[W]hen the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises." *Id.*, at 592, 103 S.Ct., at 1375.

*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), reaffirmed the rule that selective taxation of the press through the narrow targeting of individual members offends the First Amendment. In that case, Arkansas Writers' Project sought a refund of state taxes it had paid on sales of the Arkansas Times, a general interest magazine, under Arkansas' Gross Receipts Act of 1941. Exempt from the sales tax were receipts from sales of religious, professional, trade and sports magazines. See *id.*, at 224-226, 107 S.Ct., at 1725-1726. We held that Arkansas' magazine exemption, which meant that only "a few Arkansas magazines pay any sales tax," operated in much the same way as did the $100,000 exemption in *Minneapolis Star* and therefore suffered from the same type of discrimination identified in that case. *Id.*, at 229, 107 S.Ct., at 1727. Moreover, the basis on which the tax differentiated among magazines depended entirely on their content. *Ibid.*

[4] [5] [6] [7] ***447** These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. See *Grosjean*, 297 U.S., at 244-249, 56 S.Ct., at 446-449; *Minneapolis Star*, 460 U.S., at 585, 103 S.Ct., at 1371. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. See ****1444** *id.*, at 575, 103 S.Ct., at 1365; *Arkansas Writers'*, 481 U.S., at 229, 107 S.Ct., at 1727. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. See *id.*, at 229-231, 107 S.Ct., at 1727-1729.

The Arkansas tax at issue here presents none of these types of discrimination. The Arkansas sales tax is a tax of general applicability. It applies to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions. Among the services on which the tax is imposed are natural gas, electricity, water, ice, and steam utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets for admission to places of amusement or athletic, entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities. See Ark.Code Ann. § 26-52-301 (Supp.1989). The tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity. Cf. *Minneapolis Star, supra*, 460 U.S., at 585, 103 S.Ct., at 1371. We have said repeatedly that a State may impose on the press a generally applicable tax. See ***448** *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 387-388, 110 S.Ct. 688, 694-695, 107 L.Ed.2d 796 (1990); *Arkansas Writers', supra*, 481 U.S., at 229, 107 S.Ct., at 1727; *Minneapolis Star, supra*, 460 U.S., at 586, and n. 9, 103 S.Ct., at 1372-1373, and n. 9.

Furthermore, there is no indication in these cases that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities. Nor is the tax one that is structured so as to raise suspicion that it was intended to do so. Unlike the taxes involved in *Grosjean* and *Minneapolis Star*, the Arkansas tax has not selected a narrow group to bear fully the burden of the tax.

The tax is also structurally dissimilar to the tax involved in *Arkansas Writers'*. In that case, only "a few" Arkansas magazines paid the State's sales tax. See *Arkansas Writers'*, 481 U.S., at 229, and n. 4, 107 S.Ct., at 1727, and n. 4. Arkansas Writers' Project maintained before the Court that the Arkansas Times was the only Arkansas publication that paid sales tax. The Commissioner contended that two additional periodicals also paid the tax. We responded that, "[w]hether there are three Arkansas magazines paying tax or only one, the burden of the tax clearly falls on a limited group of publishers." *Id.*, at 229, n. 4, 107 S.Ct., at 1727, n. 4. In contrast, Act 188 extended Arkansas' sales tax uniformly to the approximately 100 cable systems then operating in the State. See App. to Pet. for Cert. in No. 90-38, p. 12a. While none of the seven scrambled satellite broadcast services then available in Arkansas, Tr. 12 (Aug. 19, 1987), was taxed until Act 769 became effective, Arkansas' extension of its sales tax to cable television hardly resembles a "penalty for a few." See *Minneapolis Star*, *supra*, 460 U.S., at 592, 103 S.Ct., at 1375; *Arkansas Writers'*, *supra*, 481 U.S., at 229, and n. 4, 107 S.Ct., at 1727, and n. 4.

The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas. "The constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion, ***449** putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice ****1445** upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787-1788, 29 L.Ed.2d 284 (1971). There is no comparable danger from a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State. That the Arkansas Supreme Court found cable and satellite television to be the same medium does not change this conclusion. Even if we accept this finding, the fact remains that the tax affected approximately 100 suppliers of cable television services. This is not a tax structure that resembles a penalty for particular speakers or particular ideas.

Finally, Arkansas' sales tax is not content based. There is nothing in the language of the statute that refers to the content of mass media communications. Moreover, the record establishes that cable television offers subscribers a variety of programming that presents a mixture of news, information, and entertainment. It contains no evidence, nor is it contended, that this material differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines.

Because the Arkansas sales tax presents none of the First Amendment difficulties that have led us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated petitioners' First Amendment rights. See *Arkansas Writers'*, *supra*, 481 U.S., at 233, 107 S.Ct., at 1729. Petitioners argue that such a basis exists here: Arkansas' tax discriminates among media and, if the Arkansas Supreme Court's conclusion regarding cable and satellite television is accepted, discriminated for a time within a medium. Petitioners argue that such intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular***450** ideas, violates the First Amendment. Our cases do not support such a rule.

*Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. In that case, we considered provisions of the Internal Revenue Code that discriminated between contributions to lobbying organizations. One section of the Code conferred tax-exempt status on certain nonprofit organizations that did not engage in lobbying activities. Contributions to those organizations were deductible. Another section of the Code conferred tax-exempt status on certain other nonprofit

organizations that did lobby, but contributions to them were not deductible. Taxpayers contributing to veterans' organizations were, however, permitted to deduct their contributions regardless of those organizations' lobbying activities.

The tax distinction between these lobbying organizations did not trigger heightened scrutiny under the First Amendment. *Id.*, at 546-551, 103 S.Ct., at 2001-2004. We explained that a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction.[FN3] *Id.*, at 546, 103 S.Ct., at 2001. For this proposition, we relied on *Cammarano v. United States*, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959). In *Cammarano*, the Court considered an Internal Revenue regulation that denied a tax deduction for money spent by businesses on publicity programs directed at pending state ****1446** legislation. The Court held that the regulation did not violate the First Amendment because it did not discriminate on the basis of who was spending the money on ***451** publicity or what the person or business was advocating. The regulation was therefore "plainly not ' "aimed at the suppression of dangerous ideas." ' " *Id.*, at 513, 79 S.Ct., at 533, quoting *Speiser v. Randall*, 357 U.S. 513, 519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958).

FN3. Certain *amici* in support of cable petitioners argue that *Regan* is distinguishable from these cases because the petitioners in *Regan* were complaining that their contributions to lobbying organizations should be tax *deductible*, while cable petitioners complain that sales of their services should be tax *exempt*. This is a distinction without a difference. As we explained in *Regan*, "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." 461 U.S., at 544, 103 S.Ct., at 2000.

*Regan*, while similar to *Cammarano*, presented the additional fact that Congress had chosen to exempt from taxes contributions to veterans' organizations, while not exempting other contributions. This did not change the analysis. Inherent in the power to tax is the power to discriminate in taxation. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan, supra*, 461 U.S., at 547, 103 S.Ct., at 2002. See also *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 407-408, 84 L.Ed. 590 (1940); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 58 S.Ct. 721, 724, 82 L.Ed. 1024 (1938); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 294, 18 S.Ct. 594, 598, 42 L.Ed. 1037 (1898).

*Cammarano* established that the government need not exempt speech from a generally applicable tax. *Regan* established that a tax scheme does not become suspect simply because it exempts only some speech. *Regan* reiterated in the First Amendment context the strong presumption in favor of duly enacted taxation schemes. In so doing, the Court quoted the rule announced more than 40 years earlier in *Madden*, an equal protection case:

" 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot***452** have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' " *Madden, supra*, 309 U.S., at 87-88, 60 S.Ct., at 408 (footnotes omitted), quoted in *Regan*, 461 U.S., at 547-548, 103 S.Ct., at 2002.

On the record in *Regan*, there appeared no such "hostile and oppressive discrimination." We explained that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Id.*, at 548, 103 S.Ct., at 2002 (internal quotation marks omitted). But that was not the case. The exemption for contributions to veterans' organizations applied without reference to the content of the speech involved; it was not intended to suppress any ideas; and there was no demonstration that it had that effect. *Ibid.* Under these circumstances, the selection of the veterans' organizations for a tax preference was "obviously a

matter of policy and discretion." Id., at 549, 103 S.Ct., at 2002 (internal quotation marks omitted).

That a differential burden on speakers is insufficient by itself to raise First Amendment concerns is evident as well from Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946), and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). Those cases do not involve taxation, but they do involve government action that places differential burdens on members of the press. The Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. § 201 et **1447 seq., applies generally to newspapers as to other businesses, but it exempts from its requirements certain small papers. § 213(a)(8). Publishers of larger daily newspapers argued that the differential burden thereby placed on them violates the First Amendment. The Court upheld the exemption because there was no indication that the government had singled out the press for special treatment, Walling, supra, at 194, 66 S.Ct., at 498, or that the exemption was a " 'deliberate and *453 calculated device' " to penalize a certain group of newspapers, Mabee, supra, 327 U.S., at 184, 66 S.Ct., at 514, quoting Grosjean, 297 U.S., at 250, 56 S.Ct., at 449.

Taken together, Regan, Mabee, and Oklahoma Press establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. That was the case in Grosjean, Minneapolis Star, and Arkansas Writers', but it is not the case here. The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

Before the Arkansas Chancery Court, cable petitioners contended that the State's tax distinction between cable and other media violated the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. App. to Pet. for Cert. in No. 90-38, p. 21a. The Chancery Court rejected both claims, and cable petitioners challenged these holdings before the Arkansas Supreme Court. That court did not reach the equal protection question as to the State's temporary tax distinction between cable and satellite services because it disallowed that distinction on First Amendment grounds. We leave it to the Arkansas Supreme Court to address this question on remand.

For the foregoing reasons, the judgment of the Arkansas Supreme Court is affirmed in part and reversed in part, and the cases are remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

*454 Justice MARSHALL, with whom Justice BLACKMUN joins, dissenting.
This Court has long recognized that the freedom of the press prohibits government from using the tax power to discriminate against individual members of the media or against the media as a whole. See Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). The Framers of the First Amendment, we have explained, specifically intended to prevent government from using disparate tax burdens to impair the untrammeled dissemination of information. We granted certiorari in this case to consider whether the obligation not to discriminate against individual members of the press prohibits the State from taxing one information medium-cable television-more heavily than others. The majority's answer to this question-that the State is free to discriminate between otherwise like-situated media so long as the more heavily taxed medium is not too "small" in number-is no answer at all, for it fails to explain which media actors are entitled to equal tax treatment. Indeed, the majority so adamantly proclaims the irrelevance of this problem that its analysis calls into question whether any general obligation to treat media actors even-handedly survives today's decision. Because I believe the majority has unwisely cut **1448 back on the principles that inform our selective-taxation precedents, and because I believe that the First

Amendment prohibits the State from singling out a particular information medium for heavier tax burdens than are borne by like-situated media, I dissent.

I

A

Our decisions on selective taxation establish a nondiscrimination principle for like-situated members of the press. Under this principle, "differential treatment, unless justified ***455** by some special characteristic of the press, ... is presumptively unconstitutional," and must be struck down "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star, supra*, 460 U.S., at 585, 103 S.Ct., at 1372.

The nondiscrimination principle is an instance of government's general First Amendment obligation not to interfere with the press as an institution. As the Court explained in *Grosjean*, the purpose of the Free Press Clause "was to preserve an untrammeled press as a vital source of public information." 297 U.S., at 250, 56 S.Ct., at 449. Reviewing both the historical abuses associated with England's infamous " 'taxes on knowledge' " and the debates surrounding ratification of the Constitution, see *id.*, at 246-250, 56 S.Ct., at 447-449; *Minneapolis Star*, 460 U.S., at 583-586, and nn. 6-7, 103 S.Ct., at 1370-1372, and nn. 6-7, our decisions have recognized that the Framers viewed selective taxation as a distinctively potent "means of abridging the freedom of the press," *id.*, at 586, n. 7, 103 S.Ct., at 1372, n. 7.

We previously have applied the nondiscrimination principle in two contexts. First, we have held that this principle prohibits the State from imposing on the media tax burdens not borne by like-situated nonmedia enterprises. Thus, in *Minneapolis Star*, we struck down a use tax that applied to the ink and paper used in newspaper production but not to any other item used as a component of a good to be sold at retail. See *id.*, at 578, 581-582, 103 S.Ct., at 1368, 1369-1370. Second, we have held that the non-discrimination principle prohibits the State from taxing *individual* members of the press unequally. Thus, as an alternative ground in *Minneapolis Star*, we concluded that the State's use tax violated the First Amendment because it exempted the first $100,000 worth of ink and paper consumed and thus effectively singled out large publishers for a disproportionate tax burden. See *id.*, at 591-592, 103 S.Ct., at 1375-1376. Similarly, in *Arkansas Writers' Project*, we concluded that selective exemptions for certain periodicals rendered unconstitutional the application of a general sales tax to the remaining ***456** periodicals "because [the tax] [was] not evenly applied to *all* magazines." See 481 U.S., at 229, 107 S.Ct., at 1727 (emphasis added); see also *Grosjean v. American Press Co., supra* (tax applied only to newspapers that meet circulation threshold unconstitutionally discriminates against more widely circulated newspapers).

Before today, however, we had not addressed whether the nondiscrimination principle prohibits the State from singling out a particular information medium for tax burdens not borne by other media. *Grosjean* and *Minneapolis Star* both invalidated tax schemes that discriminated between different members of a single medium, namely, newspapers. Similarly, *Arkansas Writers' Project* invalidated a general sales tax because it "treat [ed] some magazines less favorably than others," 481 U.S., at 229, 107 S.Ct., at 1728, leaving open the question whether less favorable tax treatment of magazines than of newspapers furnished an additional ground for invalidating the scheme, see *id.*, at 233, 107 S.Ct., at 1729-30. This case squarely presents the question whether the State may discriminate between distinct information media, for under Arkansas' general sales tax scheme, cable operators pay a sales tax on ****1449** their subscription fees that is not paid by newspaper or magazine companies on their subscription fees or by television or radio broadcasters on their advertising revenues.[FN1] In my view, the principles ***457** that animate our selective-taxation cases clearly condemn this form of discrimination.

FN1. Subject to various exemptions, Arkansas law imposes a 4% tax on the receipts from sales of all tangible personal property and of specified services. Ark.Code Ann. §§ 26-52-

301, 26-52-302, 26-52-401 (1987 and Supp.1989). Cable television service is expressly included in the tax. See § 26-52-301(3)(D)(i) (Supp.1989). Proceeds from the sale of newspapers, § 26-52-401(4) (Supp.1989), and from the sale of magazines by subscription, § 26-52-401(14) (Supp.1989); Revenue Policy Statement 1988-1 (Mar. 10, 1988), reprinted in CCH Ark. Tax Rep. ¶ 69-415, are expressly exempted, as are the proceeds from the sale of advertising in newspapers and other publications, § 26-52-401 (13) (Supp.1989). Proceeds from the sale of advertising for broadcast radio and television services are not included in the tax.

Insofar as the Arkansas Supreme Court found that cable and scrambled satellite television are a *single* medium, 301 Ark. 483, 487, 785 S.W.2d 202, 204-205 (1990), this case also involves a straightforward application of *Arkansas Writers' Project* and *Minneapolis Star* in resolving the cable operators' constitutional challenge to the taxes that they paid prior to 1989, the year in which Arkansas amended its sales tax to include the subscription fees collected by scrambled-satellite television. I would affirm on that basis the Arkansas Supreme Court's conclusion that the pre-1989 version of the Arkansas sales tax violated the First Amendment by imposing on cable a tax burden not borne by its scrambled-satellite television.

B

Although cable television transmits information by distinctive means, the *information service* provided by cable does not differ significantly from the information services provided by Arkansas' newspapers, magazines, television broadcasters, and radio stations. This Court has recognized that cable operators exercise the same core press function of "communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers," *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, 106 S.Ct. 2034, 2038, 90 L.Ed.2d 480 (1986), and that "[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707, 99 S.Ct. 1435, 1445, 59 L.Ed.2d 692 (1979). See also *ante*, at 1442 (acknowledging that cable television is "part of the 'press' "). In addition, the cable-service providers in this case put on extensive and unrebutted proof at trial designed to show that consumers regard the news, sports, and entertainment features provided by cable as largely interchangeable with the services provided by other members of the ***458** print and electronic media. See App. 81-85, 100-101, 108, 115, 133-137, 165-170. See generally *Competition, Rate Deregulation and the Commission's Policies Relating to Provision of Cable Television Service*, 5 FCC Record 4962, 4967 (1990) (discussing competition between cable and other forms of television).

Because cable competes with members of the print and electronic media in the larger information market, the power to discriminate between these media triggers the central concern underlying the nondiscrimination principle: the risk of covert censorship. The nondiscrimination principle protects the press from censorship prophylactically, condemning any selective-taxation scheme that presents the "*potential* for abuse" by the State, *Minneapolis Star*, 460 U.S., at 592, 103 S.Ct., at 1375-76 (emphasis added), independent of any actual "evidence of an improper censorial motive," *Arkansas Writers' Project*, *supra*, 481 U.S., at 228, 107 S.Ct., at 1727; see *Minneapolis Star*, *supra*, 460 U.S., at 592, 103 S.Ct., at 1376 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). The power to discriminate among like-situated media presents such a risk. By imposing tax burdens that disadvantage one information medium relative to another, the State can favor those ****1450** media that it likes and punish those that it dislikes.

Inflicting a competitive disadvantage on a disfavored medium violates the First Amendment "command that the government ... shall not impede the free flow of ideas." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424-25, 89 L.Ed. 2013 (1945). We have previously recognized that differential taxation *within* an information medium distorts the marketplace of ideas by imposing on some speakers costs not borne by their competitors. See *Grosjean*, 297 U.S., at 241, 244-245, 56 S.Ct., at 445, 446-47 (noting competitive disadvantage arising from differential tax based on newspaper circulation). Differential taxation *across* different media likewise "limit[s] the

circulation of information to which the public is entitled," *id.*, at 250, 56 S.Ct., at 449, where, as here, the ***459** relevant media compete in the same information market. By taxing cable television more heavily relative to its social cost than newspapers, magazines, broadcast television and radio, Arkansas distorts consumer preferences for particular information formats, and thereby impairs "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States, supra*, 326 U.S., at 20, 65 S.Ct., at 1424-1425.

Because the power selectively to tax cable operators triggers the concerns that underlie the nondiscrimination principle, the State bears the burden of demonstrating that "differential treatment" of cable television is justified by some "special characteristic" of that particular information medium or by some other "counterbalancing interest of compelling importance that [the State] cannot achieve without differential taxation." *Minneapolis Star, supra*, 460 U.S., at 585, 103 S.Ct., at 1372 (footnote omitted). The State has failed to make such a showing in this case. As the Arkansas Supreme Court found, the amount collected from the cable operators pursuant to the state sales tax does not correspond to any social cost peculiar to cable-television service, see 301 Ark. 483, 485, 785 S.W.2d 202, 203 (1990); indeed, cable operators in Arkansas must pay a franchise fee expressly designed to defray the cost associated with cable's unique exploitation of public rights of way. See *ibid.* The only justification that the State asserts for taxing cable operators more heavily than newspapers, magazines, television broadcasters and radio stations is its interest in raising revenue. See Brief for Respondents in No. 90-38, p. 9. This interest is not sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle. See *Arkansas Writers' Project*, 481 U.S., at 231-232, 107 S.Ct., at 1728-1729; *Minneapolis Star, supra*, 460 U.S., at 586, 103 S.Ct., at 1372-73. [FN2]

FN2. I need not consider what, if any, state interests might justify selective taxation of cable television, since the State has advanced no interest other than revenue enhancement. I also do not dispute that the unique characteristics of cable may justify special regulatory treatment of that medium. See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496, 106 S.Ct. 2034, 2038-39, 90 L.Ed.2d 480 (1986) (BLACKMUN, J., concurring); cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-401, 89 S.Ct. 1794, 1804-1812, 23 L.Ed.2d 371 (1969). I conclude only that the State is not free to burden cable with a selective tax absent a clear nexus between the tax and a "special characteristic" of cable television service or a "counterbalancing interest of compelling importance." *Minneapolis Star*, 460 U.S., at 585, 103 S.Ct., at 1372.

***460** II

The majority is undisturbed by Arkansas' discriminatory tax regime. According to the majority, the power to single out cable for heavier tax burdens presents no realistic threat of governmental abuse. The majority also dismisses the notion that the State has any general obligation to treat members of the press evenhandedly. Neither of these conclusions is supportable.

A

The majority dismisses the risk of governmental abuse under the Arkansas tax scheme ****1451** on the ground that the number of media actors exposed to the tax is "large." *Ante*, at 1445. According to the majority, where a tax is generally applicable to nonmedia enterprises, the selective application of that tax to different segments of the media offends the First Amendment only if the tax is limited to "a small number of speakers," *ante*, at 1444, for it is only under those circumstances that selective taxation "resembles a penalty for particular speakers or particular ideas," *ante*, at 1445. The selective sales tax at issue in *Arkansas Writers' Project*, the majority points out, applied to no more than three magazines. See *ante*, at 1444. The tax at issue here, "[i]n contrast," applies "uniformly to the approximately *100* cable systems" in operation in Arkansas. *Ibid.* (emphasis added). In my view, this analysis is overly simplistic and is unresponsive to the concerns that inform our selective-taxation

precedents.

To start, the majority's approach provides no meaningful guidance on the intermedia scope of the nondiscrimination principle. From the majority's discussion, we can infer that three is a sufficiently "small" number of affected actors to ***461** trigger First Amendment problems and that one hundred is too "large" to do so. But the majority fails to pinpoint the magic number *between* three and one hundred actors above which discriminatory taxation can be accomplished with impunity. Would the result in this case be different if Arkansas had only 50 cable-service providers? Or 25? The suggestion that the First Amendment prohibits selective taxation that "resembles a penalty" is no more helpful. A test that turns on whether a selective tax "penalizes" a particular medium presupposes some baseline establishing that medium's entitlement to equality of treatment with other media. The majority never develops any theory of the State's obligation to treat like-situated media equally, except to say that the State must avoid discriminating against too "small" a number of media actors.

In addition, the majority's focus on absolute numbers fails to reflect the concerns that inform the nondiscrimination principle. The theory underlying the majority's "small versus large" test is that "a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State," *ante,* at 1445, poses no "risk of affecting only a limited range of views," *ante,* at 1444. This assumption is unfounded. The record in this case furnishes ample support for the conclusion that the State's cable operators make unique contributions to the information market. See, *e.g.,* App. 82 (testimony of cable operator that he offers "certain religious programming" that "people demand ... because they otherwise could not have access to it"); *id.,* at 138 (cable offers Spanish-language information network); *id.,* at 150 (cable broadcast of local city council meetings). The majority offers no reason to believe that programs like these are duplicated by other media. Thus, to the extent that selective taxation makes it harder for Arkansas' 100 cable operators to compete with Arkansas' 500 newspapers, magazines, and broadcast television and radio stations, see 1 Gale Directory of Publications and Broadcast Media 67-68 ***462** 123d ed. 1991), Arkansas' discriminatory tax *does* "risk ... affecting only a limited range of views," and may well "distort the market for ideas" in a manner akin to direct "content-based regulation." *Ante,* at 1444.[FN3]

FN3. Even if it did happen to apply neutrally across the range of viewpoints expressed in the Arkansas information market, Arkansas' discriminatory tax would still raise First Amendment problems. "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 553, 103 S.Ct. 1997, 2005, 76 L.Ed.2d 129 (1983) (BLACKMUN, J., concurring).

The majority also mistakenly assesses the impact of Arkansas' discriminatory tax as if the State's 100 cable operators comprised 100 ****1452** additional actors in a *statewide* information market. In fact, most communities are serviced by only a single cable operator. See generally 1 Gale Directory, *supra,* at 69-91. Thus, in any given locale, Arkansas' discriminatory tax may disadvantage a *single* actor, a "small" number even under the majority's calculus.

Even more important, the majority's focus on absolute numbers ignores the potential for abuse inherent in the State's power to discriminate based on *medium identity.* So long as the disproportionately taxed medium is sufficiently "large," nothing in the majority's test prevents the State from singling out a particular medium for higher taxes, either because the State does not like the character of the services that the medium provides or because the State simply wishes to confer an advantage upon the medium's competitors.

Indeed, the facts of this case highlight the potential for governmental abuse inherent in the power to discriminate among like-situated media based on their identities. Before this litigation began, most receipts generated by the media-including newspaper sales, certain magazine subscription fees, print and electronic media advertising revenues, and cable television and scrambled-satellite television subscription fees-were either expressly exempted from, or not expressly included in, the Arkansas sales tax. See ***463** Ark.Code Ann. §§ 84-1903, 84-1904(f), (j), (1947 and Supp.1985); see also *Arkansas Writers' Project,* 481 U.S., at 224-225, 107 S.Ct., at 1725-1726. Effective July 1, 1987,

however, the legislature expanded the tax base to include cable television subscription fees. See App. to Pet. for Cert. in No. 90-38, p. 16a. Cable operators then filed this suit, protesting the discriminatory treatment in general and the absence of any tax on scrambled-satellite television-cable's closest rival-in particular. While the case was pending on appeal to the Arkansas Supreme Court, the Arkansas legislature again amended the sales tax, this time extending the tax to the subscription fees paid for scrambled-satellite television. 301 Ark., at 484, 785 S.W.2d, at 203. Of course, for all we know, the legislature's initial decision selectively to tax cable may have been prompted by a similar plea from traditional broadcast media to curtail competition from the emerging cable industry. If the legislature did indeed respond to such importunings, the tax would implicate government censorship as surely as if the government itself disapproved of the new competitors.

As I have noted, however, our precedents do not require "evidence of an improper censorial motive," *Arkansas Writers' Project, supra,* 481 U.S. at 228, 107 S.Ct. at 1727, before we may find that a discriminatory tax violates the Free Press Clause; it is enough that the application of a tax offers the "*potential* for abuse," *Minneapolis Star,* 460 U.S., at 592, 103 S.Ct., at 1375 (emphasis added). That potential is surely present when the legislature may, at will, include or exclude various media sectors from a general tax.

B

The majority, however, does not flinch at the prospect of intermedia discrimination. Purporting to draw on *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)-a decision dealing with the tax-deductibility of lobbying expenditures-the majority embraces "the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates *on *464 the basis of ideas." Ante,* at 1445 (emphasis added). "[T]he power to discriminate in taxation," the majority insists, is "[i]nherent in the power to tax." *Ante,* at 1446.

Read for all they are worth, these propositions would essentially annihilate the nondiscrimination principle, at least as it applies to tax differentials between individual members of the press. If *Minneapolis Star, Arkansas Writers' Project,* and *Grosjean* stand for anything, it is that the "power to tax" does *not **1453* include "the power to discriminate" when the press is involved. Nor is it the case under these decisions that a tax regime that singles out individual members of the press implicates the First Amendment *only* when it is "directed at, or presents the danger of suppressing, *particular* ideas." *Ante,* at 1447 (emphasis added). Even when structured in a manner that is content-neutral, a scheme that imposes differential burdens on like-situated members of the press violates the First Amendment because it poses *the risk* that the State might abuse this power. See *Minneapolis Star, supra,* at 592, 103 S.Ct., at 1375-76.

At a minimum, the majority incorrectly conflates our cases on selective taxation of the press and our cases on the selective taxation (or subsidization) of speech generally. *Regan* holds that the government does not invariably violate the Free Speech Clause when it selectively subsidizes one group of speakers according to content-neutral criteria. This power, when exercised with appropriate restraint, inheres in government's legitimate authority to tap the energy of expressive activity to promote the public welfare. See *Buckley v. Valeo,* 424 U.S. 1, 90-97, 96 S.Ct. 612, 668-672, 46 L.Ed.2d 659 (1976).

But our cases on the selective taxation of the *press* strike a different posture. Although the Free Press Clause does not guarantee the press a preferred position over other speakers, the Free Press Clause does "protec[t] [members of press] from invidious discrimination." L. Tribe, American Constitutional Law § 12-20, p. 963 (2d ed. 1988). Selective taxation is precisely that. In light of the Framers' specific intent**465* "to preserve an untrammeled press as a vital source of public information," *Grosjean,* 297 U.S., at 250, 56 S.Ct., at 449; see *Minneapolis Star, supra,* 460 U.S., at 585, n. 7, 103 S.Ct., at 1372, n. 7, our precedents recognize that the Free Press Clause imposes a special obligation on government to avoid disrupting the integrity of the information market. As Justice Stewart explained:

"[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution." Stewart, "Or of the Press," 26 Hastings L.J. 631, 633 (1975) (emphasis in original).

Because they distort the competitive forces that animate this institution, tax differentials that fail to correspond to the social cost associated with different information media, and that are justified by nothing more than the State's desire for revenue, violate government's obligation of evenhandedness. Clearly, this is true of disproportionate taxation of cable television. Under the First Amendment, government simply has no business interfering with the process by which citizens' preferences for information formats evolve.[FN4]

FN4. The majority's reliance on *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946), and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), is also misplaced. At issue in those cases was a provision that exempted small newspapers with primarily local distribution from the Fair Labor Standards Act of 1938 (FLSA). In upholding the provision, the Court noted that the exemption promoted a legitimate interest in placing the exempted papers "on a parity with other small town enterprises" that also were not subject to regulation under the FLSA. *Mabee, supra*, 327 U.S., at 184, 66 S.Ct., at 514; see also *Oklahoma Press, supra*, 327 U.S., at 194, 66 S.Ct., at 498. In *Minneapolis Star*, we distinguished these cases on the ground that, unlike the FLSA exemption, Minnesota's discrimination between large and small newspapers did not derive from, or correspond to, any *general* state policy to benefit small businesses. See 460 U.S., at 592, and n. 16, 103 S.Ct., at 1375, and n. 16. Similarly, Arkansas' discrimination against cable operators derives not from any general, legitimate state policy unrelated to speech but rather from the simple decision of state officials to treat one information medium differently from all others. Thus, like the schemes in *Arkansas Writers' Project* and *Minneapolis Star*, but unlike the scheme at issue in *Mabee* and *Oklahoma Press*, the Arkansas tax scheme must be supported by a compelling interest to survive First Amendment scrutiny. Cf. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

***1454 *466** Today's decision unwisely discards these teachings. I dissent.

U.S.Ark.,1991.
Leathers v. Medlock
499 U.S. 439, 111 S.Ct. 1438, 69 Rad. Reg. 2d (P & F) 60, 113 L.Ed.2d 494, 59 USLW 4281, 18 Media L. Rep. 1953

Briefs and Other Related Documents (Back to top)

- 1991 WL 636578 (Oral Argument) Oral Argument (Jan. 09, 1991)
- 1991 WL 11007803 (Appellate Brief) Reply Brief for Petitioners in Docket No. 90-38 (Jan. 02, 1991)
- 1991 WL 521275 (Appellate Brief) REPLY BRIEF FOR PETITIONERS IN DOCKET NO. 90-38 (Jan. 2, 1991)
- 1990 WL 505787 (Appellate Brief) REPLY BRIEF ON THE MERITS BY APPELLANT IN DOCKET NO. 90-29 (Dec. 31, 1990)
- 1990 WL 10012775 (Appellate Brief) Brief of Amici Curiae the City of New York, the National League of Cities and the United States Conference of Mayors in Support of Respondents (Dec. 17, 1990)
- 1990 WL 505546 (Appellate Brief) BRIEF FOR RESPONDENTSIN DOCKET NO. 90-29 (Dec. 17, 1990)
- 1990 WL 505786 (Appellate Brief) BRIEF ON THE MERITS FOR APPELLEE IN DOCKET NO. 90-38 (Dec. 14, 1990)
- 1990 WL 10012750 (Appellate Brief) Brief of the National Association of Broadcasters and the Association of Independent Television Stations, Inc. as Amici Curiae in Support of Daniel L. Medlock, et al. (Nov. 15, 1990)

• 1990 WL 10012751 (Appellate Brief) Brief of Amici Curiae Cablevision Industries Corp., Comcast Corporation, and Cox Communications, Inc. in Support of Petitioners-Respondents Daniel L. Medlock, et al. (Nov. 15, 1990)
• 1990 WL 10012752 (Appellate Brief) Brief of Century Communications Corp., et al. as Amici Curiae in Support of Petitioners Medlock, et al. in Case No. 90-38%N*%N (Nov. 15, 1990)
• 1990 WL 10012754 (Appellate Brief) Brief Amicus Curiae of the California Cable Television Association in Support of Daniel L. Medlock, et al. (Nov. 15, 1990)
• 1990 WL 10012757 (Appellate Brief) Brief for Petitioners in Docket No. 90-38 (Nov. 15, 1990)
• 1990 WL 10012759 (Appellate Brief) Brief Amici Curiae of the Competitive Cable Association and the Media Institute in Support of Respondents in No. 90-29 and Petitioners in No. 90-38 (Nov. 15, 1990)
• 1990 WL 10012771 (Appellate Brief) Brief for Petitioners in Docket No. 90-38 (Nov. 15, 1990)
• 1990 WL 10012772 (Appellate Brief) Brief Amicus Curiae of Greater Media Cablevision, Inc. in Support of the Position of Daniel L.Medlock, et al. (Nov. 15, 1990)
• 1990 WL 505545 (Appellate Brief) BRIEF FOR PETITIONERS IN DOCKET NO. 90-38 (Nov. 15, 1990)
• 1990 WL 10012749 (Appellate Brief) Brief on the Merits by Appellant (Nov. 14, 1990)
• 1990 WL 505785 (Appellate Brief) BRIEF ON THE MERITS BY APPELLANT (Nov. 14, 1990)
• 1990 WL 10012762 (Appellate Brief) Brief on the Merits for Appellee in Docket No. 90-38 (Oct. Term 1990)
• 1990 WL 10012768 (Appellate Brief) Brief Amicus Curiae of Dow Jones & Company, Inc. in Support of Petitioners (Oct. Term 1990)
• 1990 WL 10012769 (Appellate Brief) Brief Amicus Curiae of National Cable Television Association, Inc. in Support of Petitioners (Oct. Term 1990)
• 1990 WL 10012770 (Appellate Brief) Brief of Indiana Cable Television Association Inc. as Amicus Curiae in Support of Petitioners (Oct. Term 1990)
• 1990 WL 10012774 (Appellate Brief) Brief of Amici Curiae Cities of Los Angeles, California and Dubuque, Iowa in Support of Respondents (Oct. Term 1990)
• 1990 WL 10012777 (Appellate Brief) Brief for Respondents in Docket No. 90-29 (Oct. Term 1990)
• 1990 WL 10012765 (Appellate Brief) Reply Brief of Petitioners to Respondents' Brief in Opposition (Aug. 13, 1990)
• 1990 WL 10022730 (Appellate Petition, Motion and Filing) Reply Brief of Petitioners to Respondents' Brief in Opposition (Aug. 13, 1990)
• 1990 WL 10022930 (Appellate Petition, Motion and Filing) Brief in Opposition to Petition for Writ of Certiorari (Aug. 03, 1990)
• 1990 WL 10022928 (Appellate Petition, Motion and Filing) Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Arkansas (Jul. 30, 1990)
• 1990 WL 10022729 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari to the Supreme Court of Arkansas (Jul. 02, 1990)
• 1990 WL 10022917 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari to the Supreme Court of Arkansas (Jul. 02, 1990)
END OF DOCUMENT

(C) 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

# APPENDIX 11

309 U.S. 83, 60 S.Ct. 406, 125 A.L.R. 1383, 84 L.Ed. 590

Briefs and Other Related Documents

Supreme Court of the United States
MADDEN
v.
COMMONWEALTH OF KENTUCKY et al.
No. 92.
Argued Dec. 14, 1939.
Decided Jan. 29, 1940.

Mr. Justice ROBERTS and Mr. Justice McREYNOLDS dissenting.
Appeal from the Court of Appeals of the Commonwealth of Kentucky.
Action by the Commonwealth of Kentucky, by James W. Martin, Commissioner of Revenue, against John E. Madden, Jr., executor of the estate of John E. Madden, deceased, to recover taxes on bank deposits. From a judgment of the Court of Appeals, 277 Ky. 343, 126 S.W.2d 463, affirming a judgment for plaintiff, defendant appeals; appeal opposed by H. Clyde Reeves, as successor Commissioner of Revenue.
Affirmed.

West Headnotes

[1] KeyCite Notes

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases
(Formerly 106k365(1))

The United States Supreme Court accepts interpretation of state laws by state appellate court.

[2] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3561 Property Taxes
92k3562 k. In General. Most Cited Cases
(Formerly 92k229(1))

The Fourteenth Amendment was not intended to compel states to adopt iron rules of equal taxation, and legislatures have broad discretion in classification, even more in taxation than in other fields. U.S.C.A. Const.Amend. 14.

[3] KeyCite Notes

92 Constitutional Law

92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1020 k. Classification or Discrimination in General. Most Cited Cases
(Formerly 92k48(6), 92k48)

The presumption of constitutionality of taxing statute can be overcome only by the most explicit demonstration that classification thereof is hostile and oppressive against particular persons and classes.

[4] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1033 k. In General. Most Cited Cases
(Formerly 92k48(6), 92k48)

One attacking a legislative classification has the burden of negativing every conceivable basis which might support it.

[5] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3561 Property Taxes
92k3564 k. Assessment and Collection. Most Cited Cases
(Formerly 92k229(3), 92k229(1))

92 Constitutional Law KeyCite Notes
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4136 Property Taxes
92k4137 k. In General. Most Cited Cases
(Formerly 92k284(1), 92k283)

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2127 k. Discrimination as to Rate or Amount. Most Cited Cases
(Formerly 371k40(7))

371 Taxation KeyCite Notes
371IV Excise Taxes in General
371k3250 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 371k53, 371k54)

The Kentucky statute taxing deposits in Kentucky banks at rate of 10 cents per $100, as compared with rate of 50 cents per $100 on deposits in banks outside the state, did not deny "equal protection of the laws" or "due process of law," since the classification is reasonable and related to differences in difficulty and expense of tax collection. Ky.St.1930, §§ 4019, 4019a-10; U.S.C.A.Const. Amend. 14.

[6] KeyCite Notes

92 Constitutional Law
92XXIV Privileges or Immunities; Emoluments
92XXIV(B) Privileges and Immunities of Citizens of the United States (Fourteenth Amendment)
92XXIV(B)2 Particular Issues and Applications
92k2925 k. Taxation. Most Cited Cases
(Formerly 92k206(1))

The right to carry out an incident to a trade, business, or calling such as the deposit of money in banks, is not a "privilege" of national citizenship protected by the Fourteenth Amendment, so as to preclude taxing deposits in foreign banks at greater rate than deposits in local banks. Ky.St.1930, §§ 4019, 4019a-10; U.S.C.A. Const.Amend. 14.

[7] KeyCite Notes

92 Constitutional Law
92XXIV Privileges or Immunities; Emoluments
92XXIV(B) Privileges and Immunities of Citizens of the United States (Fourteenth Amendment)
92XXIV(B)2 Particular Issues and Applications
92k2925 k. Taxation. Most Cited Cases
(Formerly 92k206(1))

371 Taxation KeyCite Notes
371I In General
371k2004 Power of State
371k2005 k. In General. Most Cited Cases
(Formerly 371k4)

Within constitutional limits, the state's power over taxation is plenary, and only emphatic requirements of the Constitution may authorize interpretation of the privileges and immunities clause which restricts power of states to manage their own fiscal affairs. U.S.C.A. Const.Amend. 14.

***407 *84** Messrs. Leo T. Wolford and Wm. Marshall Bullitt, both of Louisville, Ky., for appellant.
***85** Mr. Samuel M. Rosenstein, of Frankfort, Ky., for appellee.

Mr. Justice REED delivered the opinion of the Court.
This is an appeal[EN1] brought here under Section 237(a) of the Judicial Code, 28 U.S.C.A. s 344(a),

from a judgment of the Court of Appeals of Kentucky sustaining the validity of a statute of that state against an attack by the appellant on the ground of its being repugnant to the due process, equal protection,*86 and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States, U.S.C.A.

FN1 See Act of January 31, 1928, 45 Stat. 54.

The issue is whether a state statute which imposes on its citizens an annual ad valorem tax on their deposits in banks outside of the state at the rate of fifty cents per hundred dollars and at the same time imposes on their deposits in banks located within the state a similar ad valorem tax at the rate of ten cents per hundred dollars is obnoxious to the stated clauses of the Fourteenth Amendment. The relevant provisions of the Kentucky statutes for the period in question appear in the note below.[FN2]

FN2 Carroll's Kentucky Statutes, Baldwin Revision, 1930, s 4019a-10, p. 2052 (Ky.Acts. 1924, Ch. 116, s 3) provides:

'All property subject to taxation for state purposes shall be subject also to taxation in the county, city, school, or other taxing district in which same has a taxable situs, except the following classes of property which shall be subject to taxation for state purposes only:

'(4) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge, or otherwise, or unsecured, and shares of stock; * * *.'

Carroll's Kentucky Statutes, Baldwin's Revision 1930, s 4019, p. 2048 (Ky.Acts 1924, Ch. 116, s 1, p. 402, as reenacted in Ky.Acts 1926, Ch. 164, p. 739), provides as follows: 'An annual ad valorem tax for state purposes of thirty cents (30¢) upon each one hundred dollars ($100.00) of value of all real estate directed to be assessed for taxation, as provided by law and fifty cents (50¢) upon each one hundred dollars ($100.00) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one per cent. (0.1%) (i.e., 10 cents upon each $100) shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State, as now provided by law; * * *.'

[1] The opinion of the Court of Appeals of Kentucky in this case construes the exception in Section 4019, limiting the tax on bank deposits to one-tenth of one per cent, as applicable only to depositors in local financial institutions organized under the laws of Kentucky or under the national*87 banking laws. This interpretation of the state laws is of course accepted by us.[FN3]

FN3 St. Louis Southwestern Ry. Co. v. Arkansas, 235 U.S. 350, 362, 35 S.Ct. 99, 102, 59 L.Ed. 265; Storaasli v. Minnesota, 283 U.S. 57, 62, 51 S.Ct. 354, 355, 75 L.Ed. 839.

John E. Madden died in November, 1929, a citizen and resident of Fayette County, Kentucky. On several prior assessment dates, July 1 in Kentucky, Mr. Madden had on deposit in New York banks a considerable amount of funds. These deposits had not been reported for the purposes of taxation in Kentucky. That state brought suit against Mr. Madden's executor to have these deposits assessed as omitted property and to recover an ad valorem tax of 50 cents per hundred dollars as of July 1 of each year, together **408 with interest and penalties. The executor used as one defense against this claim the contention that a tax on deposits in banks outside of Kentucky at a higher rate than the tax upon bank deposits within Kentucky would abridge decedent's privileges and immunities as a citizen of the United States, deprive him of his property right and the liberty to keep money on deposit outside of Kentucky without due process of law, and deny to him equal protection of the law in violation of the Fourteenth Amendment. The Court of Appeals passed upon the constitutional questions submitted because of the difference in taxing rate between Kentucky deposits and out-of-

state deposits. It approved the classification as permissible under the due process and equal protection clauses and refused to accept the argument that its interpretation of the statutes violated the privileges and immunities clause.

[2] [3] [4] I. Classification.-The broad discretion as to classification possessed by a legislature in the field of taxation *88 has long been recognized.[FN4] This Court fifty years ago concluded that 'the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation,'[FN5] and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. [FN6] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.[FN7] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.[FN8]

FN4 New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024, and cases there cited.

FN5 Bell's Gap R.R. Co. v. Com. of Pennsylvania, 134 U.S. 232, 237, 10 S.Ct. 533, 535, 33 L.Ed. 892.

FN6 Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 329, 33 S.Ct. 833, 835, 57 L.Ed. 1206.

FN7 See the opinion of Mr. Justice Brandeis in Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 42, 46, 47, 48 S.Ct. 423, 426, 428, 72 L.Ed. 770.

FN8 Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79, 31 S.Ct. 337, 340, 55 L.Ed. 369, Ann.Cas.1912C, 160.

[5] Paying proper regard to the scope of a legislature's powers in these matters, the insubstantiality of appellant's claim that he has been denied equal protection or due process of law by the classification is at once apparent. When these statutes were adopted in 1917 during a general revision of Kentucky's tax laws, the chief problem facing the legislature was the formulation of an *89 enforceable system of intangible taxation.[FN9] By placing the duty of collection on local banks, the tax on **409 local deposits was made almost self-enforcing. The tax on deposits outside the state, however, still resembled that on investments in Watson v. State Comptroller, the collection of which was said to depend 'either upon (the taxpayer's) will or upon the vigilance and discretion of the local assessors.' [FN10] Here as in the Watson case the classification may have been 'founded in 'the purposes *90 and policy of taxation.'' The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection.[FN11]

FN9 Because of a prohibition in the Kentucky Constitution of 1891 against classification in taxation, the state and its political subdivisions taxed intangibles at the same rate as other property. This resulted in a total tax of about $2.65 per hundred dollars on intangibles, a tax which in the case of bank deposits almost equaled the interest on deposits. The high rate led to wide-spread evasion of the tax by concealment of intangibles; with bank deposits this took the form of withdrawals for deposits outside the

state. The unequal burden which this evasion placed on other forms of property led to agitation for reform as early as 1908. Two special tax commissions reported on the need for a constitutional amendment and a general tax reform. After an amendment permitting classification was adopted in 1916, a third committee made specific proposals for revision, and most of the recommendations were adopted at a special legislative session in 1917. See the message of Governor Stanley to the General Assembly of 1917, Kentucky Senate Journal of 1917, p. 13. In general the revision took the form of a drastic lowering of the rates on intangibles. An even lower rate was placed on bank deposits and almost complete collection assured by placing the duty of collection on the banks.

The studies which led to the general revision of 1917 may be found in Report of the Kentucky Tax Commission for 1909; Report of the Special Tax Commission of Kentucky for 1912-14; Report of the Kentucky Tax Commission for 1916. A careful examination of the workings of the revised system has been made by Dr. Simeon E. Leland. The Taxation of Intangibles in Kentucky, Bulletin of the Bureau of Business Research, College of Commerce, University of Kentucky, vol. 1, no. 1 (1929).

FN10 254 U.S. 122, 124, 41 S.Ct. 43, 44, 65 L.Ed. 170.

FN11 Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 511, 57 S.Ct. 868, 873, 81 L.Ed. 1245, 109 A.L.R. 1327.

II. Privileges and Immunities.-The appellant presses urgently upon us the argument that the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States[FN12] forbids the enforcement by the Commonwealth of Kentucky of this enactment which imposes upon the testator taxes five times as great on money deposited in banks outside the State as it does on money of others deposited in banks within the State. The privilege or immunity which appellant contends is abridged is the right to carry on business beyond the lines of the State of his residence, a right claimed as appertaining to national citizenship.

FN12 The 14th Amendment, Section 1, provides: '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 or immunities of citizens of the United States; * * *.'

[6] There is no occasion to attempt again an exposition of the views of this Court as to the proper limitations of the privileges and immunities clause. There is a very recent discussion in Hague v. Committee Industrial Organization.[FN13] The appellant purports to accept as sound the position stated as the view of all the justices concurring in the Hague decision. This position is that the privileges and immunities clause protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or *91 natural rights inherent in state citizenship.[FN14] This Court declared in the Slaughter-House Cases [FN15] that the Fourteenth Amendment as well as the Thirteenth**410 and Fifteenth were adopted to protect the negroes in their freedom. This almost contemporaneous interpretation extended the benefits of the privileges and immunities clause to other rights which are inherent in national citizenship but denied it to those which spring from *92 state citizenship.[FN16] In applying this constitutional principle this Court has determined that the right to operate an independent slaughter-house,[FN17] to sell wine on terms of equality with grape growers[FN18] and to operate businesses free of state regulation[FN19] were not privileges and immunities protected by the Fourteenth Amendment. And a state inheritance tax statute which limited exemptions to charitable corporations within the state was held not to infringe any right protected by the privileges and immunities clause.[FN20] The Court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights protected. [FN21] We think it quite clear that the right to carry out an incident to a trade, business or calling[FN22] such

as the deposit *93 of money in banks is not a privilege of national citizenship.

FN13 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423. The prior cases are collected in Note 2 of the dissenting opinion in Colgate v. Harvey, 296 U.S. 404, 445, 56 S.Ct. 252, 266, 80 L.Ed. 299, 102 A.L.R. 54, and Note 1 of Mr. Justice Stone's opinion in the Hague case, 307 U.S. 496, 520, 59 S.Ct. 954, 966, 83 L.Ed. 1423.

FN14 Mr. Justice Roberts' opinion, 307 U.S. at page 512, 59 S.Ct. at page 962, 83 L.Ed. 1423: 'Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgement, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.' C Mr. Justice Stone's opinion, 307 U.S. at pages 519-521, 59 S.Ct. at pages 966, 967, 83 L.Ed. 1423:

'Hence there is no occasion * * * to revive the contention, rejected by this Court in the Slaughter-House Cases, supra, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow out of the relationship of United States citizens to the national government.

'That such is the limited application of the privileges and immunities clause seems now to be conceded by my brethren.'

FN15 16 Wall. 36, at 71, 72, 21 L.Ed. 394:

'We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. * * *

'And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.'

FN16. Id. 16 Wall. 78, 79, 21 L.Ed. 394.

FN17 Slaughter-House Cases, supra.

FN18 Cox v. State of Texas, 202 U.S. 446, 26 S.Ct. 671, 50 L.Ed. 1099; cf. Bartemeyer v. Iowa, 18 Wall. 129, 21 L.Ed. 929; Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; Giozza v. Tiernan, 148 U.S. 657, 13 S.Ct. 721, 37 L.Ed. 599; Crane v. Campbell, 245 U.S. 304, 38 S.Ct. 98, 62 L.Ed. 304.

FN19 Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780; Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 27 S.Ct. 412, 51 L.Ed. 708; Western Union Telegraph Co. v. Commercial Milling Co., 218 U.S. 406, 31 S.Ct. 59, 54 L.Ed. 1088, 36 L.R.A.,N.S., 220, 21 Ann.Cas. 815; Rosenthal v. People of New York, 226 U.S. 260, 33 S.Ct. 27, 57 L.Ed.

212, Ann.Cas.19148, 71; Prudential Ins. Co. v. Cheek, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

FN20 Board of Education v. Illinois, 203 U.S. 553, 27 S.Ct. 171, 51 L.Ed. 314, 8 Ann.Cas. 157; cf. Ferry v. Spokane, P. & S. Ry., 258 U.S. 314, 42 S.Ct. 358, 66 L.Ed. 635, 20 A.L.R. 1326.

FN21 They have been described as 'privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States.' In re Kemmler, 136 U.S. 436, 448, 10 S.Ct. 930, 934, 34 L.Ed. 519. See also Slaughter-House Cases, supra, 16 Wall. at 79, 80, 21 L.Ed. 394; United States v. Cruikshank, 92 U.S. 542, 552, 23 L.Ed. 588; Williams v. Fears, 179 U.S. 270, 274, 21 S.Ct. 128, 129, 45 L.Ed. 186; Twining v. New Jersey, 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97.

FN22 Cf. Twining v. New Jersey, 211 U.S. 78, 94, 29 S.Ct. 14, 17, 53 L.Ed. 97.

[7] KC In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them.[FN23] It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

FN23 Twining v. New Jersey, supra, 211 U.S. 92, 29 S.Ct. 16, 53 L.Ed. 97.

***411** Appellant relies upon Colgate v. Harvey, supra,[FN24] as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that case as repugnant to the line of reasoning adopted here. As a consequence, Colgate v. Harvey, supra, must be and is overruled.

FN24 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54.

Affirmed.

Mr. Chief Justice HUGHES concurs in the result upon the ground, as stated by the Court of Appeals of Kentucky, that the classification adopted by the legislature rested upon a reasonable basis.

Mr. Justice ROBERTS.
I think that the judgment should be reversed. Four years ago in Colgate v. Harvey, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54, this court held that the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment prohibit such a discrimination as results from the statute now under review. I adhere to the views expressed in *94 the opinion of the court in that case, and think it should be followed in this.

Mr. Justice McREYNOLDS joins in this opinion.

U.S. 1940.

MADDEN v. COMMONWEALTH OF KENTUCKY
309 U.S. 83, 60 S.Ct. 406, 125 A.L.R. 1383, 84 L.Ed. 590

Briefs and Other Related Documents (Back to top)

- 1939 WL 48797 (Appellate Brief) Brief for Commonwealth of Kentucky, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky. (Dec. 4, 1939)
- 1939 WL 48796 (Appellate Brief) Brief for John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased. (Nov. 25, 1939)
- 1939 WL 48795 (Appellate Brief) Statement as to Jurisdiction. (Jun. 8, 1939)

END OF DOCUMENT

(C) 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

# APPENDIX 12

113 Wash.2d 929, 785 P.2d 431

View Washington Reports version

Supreme Court of Washington,
En Banc.
Roger FORBES, Appellant,
v.
CITY OF SEATTLE, Respondent.
No. 56367-5.
Jan. 18, 1990.
Reconsideration Denied March 28, 1990.

Operator of motion picture theaters brought action challenging city ordinance levying admission tax upon patrons of motion picture theaters and exempting patrons of nonprofit tax-exempt organizations. The Superior Court, King County, Charles V. Johnson, J., upheld ordinance, and operator appealed. The Supreme Court, Durham, J., held that: (1) tax did not impose prior restraint in violation of First Amendment, and (2) tax did not violate equal protection.
Affirmed.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2455 k. Protection of Constitutional Rights. Most Cited Cases
(Formerly 92k82(1))

When party alleges violation of rights protected under State and Federal Constitutions, Supreme Court first interprets and applies Washington State Constitution; however, whenever claim of right is made under Washington Constitution, Court must first decide if asserted right is more broadly protected under State Constitution than it is under federal constitutional law.

[2] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k967 k. Particular Claims. Most Cited Cases
(Formerly 92k46(2))

Theater operator's challenge to city admissions tax ordinance under both State and Federal Constitutions would be decided under federal constitutional law, where operators failed to discuss minimum criteria essential for state constitutional analysis.

[3] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1892 k. Motion Pictures and Videos. Most Cited Cases
(Formerly 92k90.1(6))

315T Public Amusement and Entertainment KeyCite Notes
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk8 k. Taxes and Fees. Most Cited Cases
(Formerly 376k3.20 Theaters and Shows)

City's admissions tax imposed upon patrons of for-profit motion picture theaters was not a prior restraint in violation of First Amendment; tax did not vary according to content of particular motion picture and did not restrain, in advance, exhibition of any motion picture. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1892 k. Motion Pictures and Videos. Most Cited Cases
(Formerly 92k90.1(6))

315T Public Amusement and Entertainment KeyCite Notes
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk8 k. Taxes and Fees. Most Cited Cases
(Formerly 376k3.20 Theaters and Shows)

City's admissions tax imposed upon patrons at for-profit motion picture theaters was not discriminatory and did not impermissibly infringe First Amendment free speech guarantees; tax treated for-profit theaters same as any other business which charged patrons admission, and revenues raised from tax and admissions to movie theaters supplied only one fifth of admission tax revenue. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3580 k. Other Particular Issues and Applications. Most Cited Cases
(Formerly 92k228.5)

315T Public Amusement and Entertainment KeyCite Notes
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions

315Tk8 k. Taxes and Fees. Most Cited Cases
(Formerly 376k3.20 Theaters and Shows)

City admissions tax imposed upon patrons of for-profit motion picture theaters did not violate equal protection by exempting patrons paying admission charge to artistic or cultural activities of college or university and nonprofit tax-exempt organizations. U.S.C.A. Const.Amends. 5, 14.

[6] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing Levels Set Forth or Compared. Most Cited Cases
(Formerly 92k213.1(1))

Under equal protection analysis, governmental action which either burdens fundamental right or employs suspect classification is subject to strict scrutiny; on other hand, statutes and ordinances which do not burden fundamental rights nor employ suspect classifications are generally subject to minimum scrutiny and will be upheld unless they rest on grounds wholly irrelevant to achievement of legitimate government objective. U.S.C.A. Const.Amends. 5, 14.

[7] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3072 k. Alien Status. Most Cited Cases
(Formerly 92k213.1(1))

92 Constitutional Law KeyCite Notes
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3078 k. Race, National Origin, or Ethnicity. Most Cited Cases
(Formerly 92k213.1(1))

Under equal protection analysis, "fundamental rights" are those explicitly or implicitly guaranteed by Constitution, while examples of "suspect classifications" include those based on race, nationality, or alienage. U.S.C.A. Const.Amends. 5, 14.

[8] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality

92k1006 Particular Issues and Applications
92k1021 k. Equal Protection. Most Cited Cases
(Formerly 92k48(6))

92 Constitutional Law KeyCite Notes
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1040 k. Equal Protection. Most Cited Cases
(Formerly 92k48(6))

When classification is subject to minimum scrutiny under equal protection analysis, party challenging classification has heavy burden of overcoming presumption of its constitutionality; furthermore, under minimum scrutiny, ordinance generally will not be declared to be unconstitutional unless it appears unconstitutional beyond reasonable doubt. U.S.C.A. Const.Amends. 5, 14.

[9] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))

For purposes of equal protection analysis, minimum scrutiny consists of three-step analysis which considers: whether legislation applies alike to all persons within designated class, whether there is reasonable grounds to distinguish between those who fall within class and those who do not, and whether classification has rational relationship to purpose of legislation. U.S.C.A. Const.Amends. 5, 14.

[10] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3039 k. In General. Most Cited Cases
(Formerly 92k211(2))

Where persons of different classes are treated differently, there is no equal protection violation; only where members of same class are treated differently may person proceed with equal protection claim. U.S.C.A. Const.Amends. 5, 14.

[11] KeyCite Notes

92 Constitutional Law

92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3580 k. Other Particular Issues and Applications. Most Cited Cases
(Formerly 92k228.5)

315T Public Amusement and Entertainment KeyCite Notes
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk6 k. Motion Pictures in General. Most Cited Cases
(Formerly 92k228.5)

Patrons attending for-profit motion picture theaters and patrons attending nonprofit, tax-exempt organization, were two distinct classes, for purposes of determining whether city's admissions tax which exempted patrons at nonprofit motion picture theaters violated equal protection. U.S.C.A. Const.Amends. 5, 14.

[12] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1021 k. Equal Protection. Most Cited Cases
(Formerly 92k48(6))

When classification is challenged on equal protection grounds, facts are presumed sufficient to justify classification. U.S.C.A. Const.Amends. 5, 14.

[13] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3063 Particular Rights
92k3065 k. Economic or Social Regulation in General. Most Cited Cases
(Formerly 92k228.5, 92k211(2))

92 Constitutional Law KeyCite Notes
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

Legislative bodies have very broad discretion in establishing classifications for economic and social legislation, in determining whether classification violates equal protection; furthermore, legislative body has even broader discretion and greater power in making classifications for purposes of taxation.

U.S.C.A. Const.Amends. 5, 14.

[14] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3043 k. Statutes and Other Written Regulations and Rules. Most Cited Cases (Formerly 92k211(2))

For purposes of reviewing equal protection challenges, city council has same powers of classification as Legislature. U.S.C.A. Const.Amends. 5, 14.

***432 *931** Jack R. Burns, Bellevue, for appellant.
Douglas N. Jewett, Seattle City Atty., Jorgen G. Bader, Asst., Seattle, for respondent.

DURHAM, Justice.
The present case tests the constitutionality of a Seattle municipal ordinance which levies an admission tax upon patrons of motion picture theaters, and exempts patrons of nonprofit, tax-exempt organizations from the tax. The trial court held the ordinance to be constitutional in all respects. We affirm.

The Seattle municipal ordinance at issue here was originally adopted March 31, 1943 and, as amended from time to time, has been in effect ever since. Seattle Municipal ***932** Code (SMC) 5.40. The ordinance, as authorized by RCW 35.21.280, levies an admission tax upon everyone who pays an admission charge. The admission tax is imposed at the rate of 5 percent of the admission charge. [FN1] SMC 5.40.020(B). Although the admission tax applies to a wide range of events for which an admission charge is required, SMC 5.40.010(A)(1)-(6), there are several categories of exemptions from the admission tax. *See* SMC 5.40.025-5.40.028.

FN1. Under the ordinance, the person receiving payment for an admission charge is responsible for collecting and remitting the admission tax to the City. SMC 5.40.070.

In the present case, Roger Forbes challenges the constitutionality of the ordinance. Forbes operates the Embassy and Midtown theaters in Seattle. Both the Embassy and the Midtown theaters exhibit feature length video tape motion picture films. Under the ordinance, patrons of Forbes' theaters are not exempt from the ***433 *admission tax*, and he has collected the admission tax accordingly.[FN2]

FN2. Movie tickets at the Embassy and Midtown theaters are $6 and the admission tax at 5 percent due from each patron is approximately 29 cents for each ticket.

On August 31, 1988, Forbes filed a civil action in King County Superior Court seeking a declaration that the admission tax violated rights guaranteed to his patrons by the first amendment to the United States Constitution and article 1, section 5 of the Washington State Constitution.[FN3] In addition, he alleged that exempting patrons attending artistic and cultural activities [FN4] of a college or university ***933** and nonprofit, tax-exempt organizations, which meet certain requirements,[FN5] from the admission tax violates the equal protection guaranties of the fourteenth amendment to the United States Constitution and article 1, section 12 of the Washington State Constitution. The City filed a counterclaim against Forbes alleging that although he has collected admission taxes from persons paying an admission charge to the Midtown and Embassy theaters, he has failed to remit those funds to the Director of Licenses and Consumer Affairs since October 1987.

FN3. Appellant also sought a preliminary and permanent injunction to prohibit the City from acting pursuant to SMC 5.40 as well as a money judgment refunding all admission taxes heretofore paid to the City.

FN4. The exemption applies to "an opera, concert, dance recital or like musical entertainment, a play, puppet show or dramatic reading, an exhibition of painting, sculpture, or artistic or historical objects or to a museum, historic vessel or science center". SMC 5.40.026(A)(1).

FN5. *See* SMC 5.40.026(A)(1) and SMC 5.40.026(B)(1), (2).

The City subsequently moved for partial summary judgment and Forbes moved for summary judgment. On November 7, 1988, after considering the materials presented by the parties, and finding no genuine issue of material fact as to SMC 5.40 and the City's administration of its admission taxes, King County Superior Court Judge Charles V. Johnson granted partial summary judgment FN6 in favor of the City of Seattle, finding the ordinance constitutional in all respects. On November 10, 1988, Forbes timely filed notice of appeal of the trial court's judgment to the Court of Appeals. We accepted certification.

FN6. The court reserved for later adjudication the City's counterclaim against Roger Forbes for an accounting for admission taxes, which were collected from patrons, and for judgment for such taxes.

We are asked to decide if SMC 5.40 abridges the guaranties of free speech or equal protection of the state and federal constitutions. Forbes' two constitutional challenges are addressed separately.

We first address Forbes' free speech challenges. He argues that SMC 5.40.020, as applied to patrons of his theaters, constitutes a prior restraint. In addition, Forbes contends that the admission tax is a discriminatory tax which violates the first amendment to the United States Constitution and article 1, section 5 of the Washington State Constitution. These claims are addressed seriatim.

*934 [1] [2] When a party alleges a violation of rights protected under both the state and federal constitutions, we first interpret and apply the Washington State Constitution. *Seattle v. Mesiani*, 110 Wash.2d 454, 456, 755 P.2d 775 (1988); *O'Day v. King Cy.*, 109 Wash.2d 796, 801-02, 749 P.2d 142 (1988). However, whenever a claim of right is made under the Washington Constitution, we must first decide if the asserted right is more broadly protected under the state constitution than it is under federal constitutional law. *Bedford v. Sugarman*, 112 Wash.2d 500, 507, 772 P.2d 486 (1989). In *State v. Gunwall*, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986), we enumerated several nonexclusive neutral criteria which must be met before this court considers state constitutional analysis. As a matter of policy, examination of the *Gunwall* criteria is essential in order for the process of state constitutional analysis to be " 'articulable, reasonable and reasoned.' " *Bedford v. Sugarman, supra* at 507, 772 P.2d 486 (quoting *State v. Gunwall, supra* at 63, 720 P.2d 808). Because Forbes has failed **434 to discuss the minimum criteria mentioned in *Gunwall*, we decline to undertake a separate analysis of Const. art. 1, § 5 at this time. *State v. Carver*, 113 Wash.2d 591, 598-99, 781 P.2d 1308 (1989); *State v. Long*, 113 Wash.2d 266, 271, 778 P.2d 1027 (1989); *State v. Jones*, 112 Wash.2d 488, 498, 772 P.2d 496 (1989); *State v. Worrell*, 111 Wash.2d 537, 539 n. 1, 761 P.2d 56 (1988); *State v. Wethered*, 110 Wash.2d 466, 472, 755 P.2d 797 (1988). Accordingly, Forbes' free speech claims will be decided under federal constitutional law.

PRIOR RESTRAINT

[3] Forbes maintains that SMC 5.40.020 constitutes a prior restraint because it imposes a governmental charge (admission tax) upon patrons who pay an admission charge to for-profit motion

picture theaters.[FN7] He cites State v. Coe, 101 Wash.2d 364, 679 P.2d 353 (1984), to define the type of governmental action that constitutes a prior restraint. In ***935** *State v. Coe, supra,* we explained that prior restraints are " 'official restrictions imposed upon speech or other forms of expression in advance of actual publication.' " Coe, at 372, 679 P.2d 353 (quoting Seattle v. Bittner, 81 Wash.2d 747, 756, 505 P.2d 126 (1973)). Forbes argues that the admission tax acts as a prior restraint because it imposes a condition upon the exercise of the constitutionally guaranteed right to view motion pictures. In addition, he maintains that the admission tax chills protected speech by deterring potential recipients.

FN7. Forbes does not argue that he, as operator of the two theaters, is burdened by a prior restraint.

The rudimentary question underlying Forbes' prior restraint claim is whether the limitation imposed by the admission tax constitutes an unconstitutional prior restraint. We begin our analysis by noting that governmental action which amounts to an unconstitutional prior restraint usually has two distinguishing features. First, the governmental decision to restrain the speech is based on the content of the speech. Second, the speech is restrained in advance of publication. In the present case, however, these characteristics are absent. The admission tax is content neutral; *i.e.,* the tax does not vary according to the type of speech involved. Moreover, the admission tax does not restrain, in advance, the exhibition of any motion picture. Thus, Forbes' argument that SMC 5.40.020 is a presumptively unconstitutional prior restraint is not well-founded.

The limitation imposed upon Forbes' patrons by the challenged tax does not constitute a prior restraint. The admission tax is not "imposed upon speech", rather, it is imposed upon an admission charge. Consequently, the tax does not satisfy the *State v. Coe* definition of a prior restraint ("official restrictions imposed upon speech"). In other words, viewing a motion picture does not trigger the tax; rather, payment of an admission charge to a nonexempt event triggers the tax.

Moreover, not all limitations on protected speech constitute prior restraints. In the present case, the limitation is distinguishable from a prior restraint. In ***936** Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), the Supreme Court distinguished a closure order (against a bookstore) from a prior restraint by noting two significant differences between ordinary limitations and those limitations which constitute prior restraints:

First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited-indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

*Arcara,* at 705 n. 2, 106 S.Ct. at 3177 n. 2. *See also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S.Ct. 2199, 2207-08, 81 L.Ed.2d 17 (1984) ( "an order prohibiting ***435** dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny"). Similarly, the challenged ordinance here does not prohibit patrons of Forbes' theaters from viewing the motion pictures. Moreover, the admission tax does not depend on the content of a particular motion picture.

Finally, Forbes' claim that the admission tax chills recipients of protected speech is illusory. The record is devoid of any evidence that patrons of his theaters have in fact been deterred from viewing a film because of the admission tax.

In summary, a prior restraint is not a limitless label that attaches to any governmental action which impacts, no matter how indirectly or tangentially, First Amendment rights. A prior restraint occurs when the government engages in censorship; *i.e.,* when there is an official restriction imposed upon speech in advance of publication. Although SMC 5.40.020 places a limitation upon the ability of taxpayers to attend events where there is an admission charge, the admission tax does not constitute a prior restraint.

*937 DISCRIMINATORY TAX

[4] Forbes next argues that the challenged ordinance is a discriminatory tax that impermissibly infringes First Amendment guaranties of free speech.

Although it is well established that First Amendment activities may constitutionally be subject to genuinely nondiscriminatory taxation,[FN8] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987); *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936), the Supreme Court has recognized two forms of differential taxation which so burden the interests protected by the First Amendment that such treatment is impermissible unless the government demonstrates a counter-balancing interest of compelling importance that it cannot achieve without differential taxation. *Arkansas Writers' Project*, at 231, 107 S.Ct. at 1728; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295 (1983). The first situation is where the government singles out First Amendment activities as a whole for taxation. The second situation occurs where the government targets a subgroup of First Amendment activities (here, motion picture theaters) for taxation. *Arkansas Writers' Project*, at 228, 107 S.Ct. at 1727; *Minneapolis Star*, at 591, 103 S.Ct. at 1375. In this case, we are concerned only with the latter of these.

FN8. In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the Supreme Court explained the rationale for its approval of nondiscriminatory taxation by stating:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

*Minneapolis Star*, at 585, 103 S.Ct. at 1371-72.

Whether the Seattle admission tax discriminatorily impacts motion picture theaters is a question of fact. *938 Forbes maintains that the admission tax has a disproportionate impact upon movie theaters. He argues that the tax is discriminatory because "[m]ovie theaters alone pay in excess of 20% of the admission taxes generated." Reply Brief of Appellant, at 3. This misstates the situation. Movie theaters do not pay any of the admission taxes; patrons of movie theaters pay the admission tax. SMC 5.40.020. Thus, the proper inquiry is whether the admission tax has a discriminatory impact upon patrons of movie theaters, and Forbes has not offered any evidence which demonstrates that.

Moreover, the record indicates that the Seattle admission tax has broad application. The tax applies to any nonexempt event where there is an admission charge. Admission charges for both protected First Amendment activities and other activities are subject to the tax. The general applicability of the admission tax is confirmed **436 by the fact that Forbes has not pointed to any paid admissions (excluding those which may be statutorily exempted) which are not taxed. In addition, the Seattle admission tax has much broader application than the taxes which were struck down in *Arkansas Writers' Project*, *Minneapolis Star*, and *Grosjean*. In each of those cases, the tax impacted *only* First Amendment activities.

Forbes, however, cites *Festival Enters., Inc. v. Pleasant Hill*, 182 Cal.App.3d 960, 227 Cal.Rptr. 601, *review denied* (1986) and *United Artists Communications, Inc. v. Montclair*, 209 Cal.App.3d 245, 257 Cal.Rptr. 124, *cert. denied*, 493 U.S. 918, 110 S.Ct. 280, 107 L.Ed.2d 260 (1989), as examples of admission tax ordinances "indistinguishable" from the present case, which were held to be unconstitutional, in part because they were not generally applicable taxes. These cases, however, are not instructive. The facts of both *Festival Enters.* and *United Artists* are substantially different from

the present case.

In *Festival Enters.*, the admission tax ordinance, although broadly worded to apply to other forms of entertainment, affected *only* the plaintiff's theaters. Festival Enters., 182 Cal.App.3d at 963. Moreover, the plaintiffs in ***939** *Festival Enters.* were forced to bear the entire impact of the admissions tax not only at the time of enactment, but for the foreseeable future.[FN9] Festival Enters., 182 Cal.App.3d at 964.

FN9. The court stated, "We cannot ignore the minutes of the city council meeting which indicate that only plaintiffs' theatres were relied upon to pay the tax and that the council members had no other businesses in mind when it passed the ordinance." Festival Enters., 182 Cal.App.3d at 965-66.

In *United Artists,* the admission tax ordinance, although neutral on its face, in reality disproportionately taxed certain admissions. In fact, *90 percent* of the admissions tax was borne by four businesses, all of which were engaged in protected speech.[FN10] United Artists, 209 Cal.App.3d at 252, 257 Cal.Rptr. at 128.

FN10. The four businesses included two movie theaters and two adult book stores with viewing booths.

Thus, in both *Festival Enters.* and *United Artists,* just as in *Minneapolis Star,* the tax in question appeared to apply to a broad range of businesses, but in reality its burden fell disproportionately upon one to four businesses. By comparison, Seattle's admission tax treats for-profit theaters the same as any other business which charges its patrons an admission charge. In fact, the record indicates that Seattle has several hundred admission tax accounts, but only approximately two dozen movie theater accounts. Revenues raised from the tax on admissions to movie theaters supply only one-fifth of the admission tax revenues. Thus, we conclude that the City is not singling out patrons of movie theaters for taxation. Unlike the admission tax in *Festival Enters.* and *United Artists,* the Seattle admission tax does not fall disproportionately upon persons engaged in protected speech activities.

Because we have determined that the admission tax does not discriminatorily impact First Amendment activities, it is not necessary to consider whether there is a compelling state interest for the tax.

In summary, the Seattle admission tax is a content-neutral tax that does not single out those engaged in First ***940** Amendment activities for taxation. The tax is neither special nor unique and is generally applicable to all persons who pay admissions. In no way does the tax resemble a penalty directed at a few protected speech activities. We conclude that SMC 5.40.020 does not constitute a prior restraint or constitute discriminatory taxation of First Amendment activities.

## EQUAL PROTECTION

[5] [KC] We are next asked to decide if the admission tax exemption, found in SMC 5.40.026, for patrons paying an admission charge to artistic or cultural activities of a college or university and nonprofit tax-exempt organizations denies equal protection to patrons of for-profit motion picture theaters who are required to pay the admission****437** tax. We conclude that there is no constitutional deprivation.

Although Forbes contends that the admission tax exemption violates the equal protection guaranties of both the state and federal constitutions, he has failed to discuss the *Gunwall* criteria, which is a condition precedent to our examination of whether the state constitution affords greater protection than the federal constitution. See discussion, *supra.* Consequently, we decline to address the state constitutional claim. However, we do reach the federal claim and follow federal equal protection

analysis.

[6] [7] [8] We begin by identifying the appropriate standard of judicial scrutiny. *Financial Pac. Leasing, Inc. v. Tacoma*, 113 Wash.2d 143, 147, 776 P.2d 136 (1989); *Convention Ctr. Coalition v. Seattle*, 107 Wash.2d 370, 378, 730 P.2d 636 (1986); *Paulson v. County of Pierce*, 99 Wash.2d 645, 652, 664 P.2d 1202, *appeal dismissed*, 464 U.S. 957, 104 S.Ct. 386, 78 L.Ed.2d 331 (1983). Under equal protection analysis, governmental action which either burdens a fundamental right or employs a suspect classification [FN11] is subject to strict scrutiny. ***941** *Nielsen v. Washington State Bar Ass'n*, 90 Wash.2d 818, 820, 585 P.2d 1191 (1978). On the other hand, statutes and ordinances which do not burden fundamental rights nor employ suspect classifications are generally subject to minimum scrutiny and will be upheld unless they rest on grounds wholly irrelevant to the achievement of a legitimate government objective.[FN12] *Financial Pac. Leasing, Inc.*, 113 Wash.2d at 147, 776 P.2d 136; *Petersen v. State*, 100 Wash.2d 421, 444, 671 P.2d 230 (1983); *Paulson v. County of Pierce*, 99 Wash.2d at 652, 664 P.2d 1202. In the case before us, we are not presented with an ordinance which employs a suspect classification. Accordingly, unless the classification used to distinguish which patrons are exempt from the admission tax unduly burdens a fundamental right, the ordinance will be subject to minimum scrutiny.

FN11. "Fundamental rights" are those "explicitly or implicitly guaranteed by the Constitution", *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1973), while examples of "suspect classifications" include those based on race, nationality, or alienage. *State v. Schaaf*, 109 Wash.2d 1, 18, 743 P.2d 240 (1987).

FN12. When a classification is subject to minimum scrutiny, the party challenging the classification has the heavy burden of overcoming the presumption of its constitutionality. *Convention Ctr. Coalition v. Seattle*, 107 Wash.2d at 378, 730 P.2d 636; *Bellevue Sch. Dist. 405 v. Brazier Constr. Co.*, 100 Wash.2d 776, 782, 675 P.2d 232 (1984). Furthermore, under minimum scrutiny, an ordinance generally will not be declared to be unconstitutional unless it appears unconstitutional beyond a reasonable doubt. *Haberman v. WPPSS*, 109 Wash.2d 107, 139, 744 P.2d 1032, 750 P.2d 254 (1987); *State v. Dixon*, 78 Wash.2d 796, 479 P.2d 931 (1971).

Forbes maintains that the admission tax exemption does burden a fundamental right. He argues that because the exhibition of motion pictures is a form of expression protected by the First Amendment, any governmental burden on the exhibition of motion pictures, such as requiring patrons to pay an admission tax, is subject to strict scrutiny. This reasoning, however, misses the mark. The question is not whether the imposition of the admission tax on Forbes' patrons burdens the First Amendment; rather, the question is whether the classification used to determine which individuals are exempt from the tax ***942** unduly burdens the First Amendment and therefore violates the equal protection clause.[FN13] We conclude that the distinction between patrons of for-profit motion picture theaters and patrons of nonprofit, tax-exempt theaters does not unduly burden the First Amendment.

FN13. Forbes appears to collapse his substantive First Amendment claim and his equal protection claim together. Such analysis is not instructive. Forbes' First Amendment claim is addressed *supra*. Here we consider the equal protection challenge, which looks to whether the government has made an improper classification. If a classification scheme is proper, the issue of which class a particular individual belongs in is not an equal protection matter. The equal protection clause itself applies only to the making of the classifications, not to the adjudication of the individual situations. J. Nowak, R. Rotunda & N. Young, *Constitutional Law* § 14.2 (3d ed. 1986). Simply stated, the equal protection clause guarantees that people who are similarly situated will be treated similarly.

****438** The classification between the two groups of patrons does not depend upon whether a patron attends an event at an organization which engages in free speech activities; rather, exemption from

the tax depends solely upon whether a patron attends an event at an organization which meets specifically enumerated criteria. *See* SMC 5.40.026, 5.40.085.[FN14] Moreover, unlike the cases which have found an equal protection violation based upon an ordinance unduly burdening the First Amendment,[FN15] the classification in the present case does not hinge on the content of the speech the motion picture theater chooses to exhibit; rather, the classification is simply between patrons of for-profit theaters and patrons of nonprofit, tax-exempt theaters. In other words, the ordinance does not classify individuals based on the exercise of their First Amendment rights.

FN14. The admission tax exemption in question applies generally to nonprofit, tax-exempt organizations which, among other activities, also exhibit motion pictures. The exemption is not limited in any way to organizations which engage only in free speech activities.

FN15. *See Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

[9] Given the foregoing analysis, SMC 5.40.026 must satisfy only minimum scrutiny to pass constitutional muster. Minimum scrutiny consists of a 3-step analysis which ***943** considers: (1) does the legislation apply alike to all persons within a designated class; (2) are there reasonable grounds to distinguish between those who fall within the class and those who do not, and (3) does the classification have a rational relationship to the purpose of the legislation. *Financial Pac. Leasing, Inc. v. Tacoma*, 113 Wash.2d 143, 147, 776 P.2d 136 (1989); *O'Day v. King Cy.*, 109 Wash.2d 796, 814, 749 P.2d 142 (1988); *Haberman v. WPPSS*, 109 Wash.2d 107, 139, 744 P.2d 1032, 750 P.2d 254 (1987); *United Parcel Serv., Inc. v. Department of Rev.*, 102 Wash.2d 355, 367, 687 P.2d 186 (1984); *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wash.2d 831, 835-36, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 835 (1980).

[10] Under minimum scrutiny, Forbes must first establish that the ordinance treats two similarly situated classes of people unequally. *Jones v. Helms*, 452 U.S. 412, 423, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981). Where persons of different classes are treated differently, there is no equal protection violation. *Financial Pac. Leasing, Inc. v. Tacoma, supra*, 113 Wash.2d at 147, 776 P.2d 136. Only where members of the same class are treated dissimilarly may a person proceed with an equal protection claim.

[11] Because patrons attending for-profit motion picture theaters and patrons attending nonprofit, tax-exempt organizations are two distinct classes, and the admission tax exemption applies equally to all members of the class it designates, there is no unequal treatment of members of the same class. *Convention Ctr. Coalition v. Seattle*, 107 Wash.2d 370, 379, 730 P.2d 636 (1986). Every patron who pays an admission charge to an event of a nonprofit, tax-exempt organization is exempt from the Seattle admission charge.

[12] Second, under minimum scrutiny, Forbes must demonstrate that there is no reasonable basis for the classification between the two groups. *United Parcel Serv., Inc. v. Department of Rev., supra*, 102 Wash.2d at 369, 687 P.2d 186. It is not our function to consider the propriety of the tax exemption, or to criticize the public policy which may have prompted adoption ***944** of the ordinance. *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wash.2d 1, 7, 435 P.2d 975 (1968). So long as the " 'classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' " *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527, 79 S.Ct. 437, 441, 3 L.Ed.2d 480 (1959) (quoting *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed. 883 (1909)); *State v. Hi-Lo Foods, Inc.*, 62 Wash.2d 534, 540, 383 P.2d 910 (1963). In addition, when a classification****439** is challenged, facts are presumed sufficient to justify the classification. *Brewer v. Copeland*, 86 Wash.2d 58, 61, 542

P.2d 445 (1975).

[13] [14] It is well established that legislative bodies [FN16] have very broad discretion in establishing classifications for economic and social legislation. *Sonitrol Northwest, Inc. v. Seattle*, 84 Wash.2d 588, 590, 528 P.2d 474 (1974). Furthermore, a legislative body has even broader discretion and greater power in making classifications for purposes of taxation. *United Parcel Serv., Inc. v. Department of Rev., supra*, 102 Wash.2d at 368, 687 P.2d 186.[FN17] For example, in ***945** *Black v. State*, 67 Wash.2d 97, 406 P.2d 761 (1965), this court held that there was a sufficient difference between a floating hotel and a hotel constructed on land to justify the levying of an excise tax upon the leasing of one and exempting the other from the tax. In *Hemphill v. Tax Comm'n*, 65 Wash.2d 889, 400 P.2d 297 (1965), *appeal dismissed*, 383 U.S. 103, 86 S.Ct. 716, 15 L.Ed.2d 615 (1966), the court upheld a sales tax which was imposed on admission fees of amusement and recreation activities such as golf, ski lifts, skating, and billiards, but which exempted bowling. In *Boeing Co. v. State*, 74 Wash.2d 82, 442 P.2d 970 (1968), the court upheld a use tax imposed on bailments of personalty not involving consideration, even though leases of personalty were not taxed. The basis of the subject classification was simply the fact that lessees paid for the use of the personalty while bailees did not.

FN16. For purposes of reviewing equal protection challenges, a city council has the same powers of classification as the Legislature. *Austin v. Seattle*, 176 Wash. 654, 657, 30 P.2d 646, 93 A.L.R. 203 (1934).

FN17. *See also Sonitrol Northwest, Inc. v. Seattle*, 84 Wash.2d at 591, 528 P.2d 474; *Commonwealth Title Ins. Co. v. Tacoma*, 81 Wash.2d 391, 395, 502 P.2d 1024 (1972) ("[T]he legislative power is particularly broad in the area of taxation. It is inherent in the exercise of the power to tax that a state be free to select the objects or subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation."); *Oil Heat Inst. v. Mukilteo*, 81 Wash.2d 7, 11, 498 P.2d 864 (1972); *Boeing Co. v. State*, 74 Wash.2d 82, 86, 442 P.2d 970 (1968); *Hemphill v. Tax Comm'n*, 65 Wash.2d 889, 400 P.2d 297 (1965), *appeal dismissed*, 383 U.S. 103, 86 S.Ct. 716, 15 L.Ed.2d 615 (1966); *Bates v. McLeod*, 11 Wash.2d 648, 654-55, 120 P.2d 472 (1941) ("In the matter of classifying the subjects of taxation, the legislature has a very wide discretion.... the question of what persons shall constitute the class is one primarily for the legislature to determine, and its determination cannot be interfered with by the courts unless clearly arbitrary and without any reasonable basis.").

In the present case, the record indicates several reasonable grounds to distinguish between patrons paying an admission charge to a for-profit motion picture theater and patrons paying an admission charge to a nonprofit, tax-exempt organization exhibiting artistic performances.[FN18] ***946** Nonprofit, tax-exempt organizations are in a functionally separate class from for-profit motion picture theaters. In any event, there is no doubt that a distinction does ****440** exist, and Forbes has made no showing that the distinction is arbitrary or capricious. Consequently, he has not satisfied his burden of demonstrating that there is no reasonable basis for the admission tax exemption.

FN18. Diann Shope, former legislative assistant to City Council member Phyllis Lamphere, stated in her affidavit several reasons for the exemption:

[First,] [a]n arts organization sponsoring an event exempt from admission taxes sets its ticket prices at a rate affordable to the general public-far below the break-even price, let alone a price that will make a profit. Some tickets are kept even lower to encourage new audiences, and make it possible for students and senior citizens to attend. Adding an admission tax would either dissuade potential ticket buyers, or if the organization absorbed the tax, require them to raise more contributed income.

[Second, the exemption] sets an example that may assist the sponsoring organization in securing private donations and volunteers....

> [Third, the exemption] ... serves to stimulate contributions from the private sector for artistic and cultural events....
>
> [Finally,] Arts organizations with their own financial income and resources have less need for public funds through service contracts. If artistic or cultural events of nonprofit tax-exempt organizations were taxed, the Arts Commission and the art community would be pressing the City for a substantially larger appropriation to maintain the quality of artistic and cultural activities in the City. If the exemption of artistic and cultural events from the admission tax were to end, there would be a profound negative impact upon art and cultural activities in Seattle.
>
> Clerk's Papers, at 46-47.

Third, under minimum scrutiny, Forbes must demonstrate that there is no rational relationship between the classification and the purpose of the ordinance. *United Parcel Serv., Inc. v. Department of Rev., supra,* 102 Wash.2d at 369, 687 P.2d 186. The test for reviewing the classification is merely whether "any state of facts reasonably can be conceived that would sustain [the classification]." *Allied Stores of Ohio, Inc. v. Bowers, supra,* 358 U.S. at 528, 79 S.Ct. at 441. Accordingly, Forbes must do more than merely question the wisdom and expediency of the ordinance. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs,* 92 Wash.2d 831, 836, 601 P.2d 936 (1979), *appeal dismissed,* 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 835 (1980). He must show conclusively that the classification is contrary to the purpose of the ordinance. *Yakima Cy. Deputy Sheriff's Ass'n,* 92 Wash.2d at 836, 601 P.2d 936.

Forbes argues that there is no correlation between the admission tax exemption for patrons of nonprofit, tax-exempt organizations and the articulated purpose of the ordinance, which is to "reduce the amount that the City would need to appropriate from the City's General Fund for maintenance and development of these activities." Shope Affidavit, Clerk's Papers, at 43. Even assuming that there is no correlation, this argument does not conclusively demonstrate that the classification is contrary to the purpose of the tax exemption. [FN19] Although the admission tax exemption may not precisely satisfy the stated purpose of ***947** the exemption, mere imprecision in the correlation between the means employed and the end desired is not enough to render a classification constitutionally infirm. *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970). Although Forbes has questioned the wisdom of the admission tax exemption, he has not satisfied his burden of demonstrating that the classification is contrary to the articulated purpose of the ordinance.

> FN19. The record reveals that the City established the admission tax exemption in question as part of an overall program to further artistic and cultural activities. The City Council thought "that is was more efficient to let the sponsoring organization collect and keep the money than for the City to apply its tax, receive the money, and then appropriate it out again." Shope Affidavit, Clerk's Papers, at 43. There is no evidence that the exemption is contrary to that goal.

In summary, Forbes has failed to demonstrate that the admission tax exemption does not satisfy the 3-step minimum scrutiny inquiry. Accordingly, we affirm the trial court's decision that SMC 5.40.026 does not violate equal protection.

We hold that SMC 5.40 does not abridge either the First Amendment guaranty of free speech or the Fourteenth Amendment guaranty of equal protection. The decision of the trial court is affirmed.

CALLOW, C.J., UTTER, BRACHTENBACH, DORE, ANDERSEN, DOLLIVER and SMITH, JJ., and PEARSON, J. Pro Tem., concur.

Wash.,1990.

Forbes v. City of Seattle
113 Wash.2d 929, 785 P.2d 431

END OF DOCUMENT

(C) 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

# APPENDIX 13

502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476, 60 USLW 4029, 19 Media L. Rep. 1609

Briefs and Other Related Documents

Supreme Court of the United States
SIMON & SCHUSTER, INC., Petitioner
v.
MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, et al.
No. 90-1059.
Argued Oct. 15, 1991.
Decided Dec. 10, 1991.

Publisher sued members of New York State Crime Victims Board, seeking order declaring that New York's "Son of Sam" statute, which required that accused or convicted criminal's income from works describing his crime be deposited in escrow account, which funds were then made available to victims of crime and criminal's other creditors, violated First and Fourteenth Amendments. The District Court, 724 F.Supp. 170, John F. Keenan, J., found for Board, and publisher appealed. The Court of Appeals, 916 F.2d 777, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, J., held that: (1) statute was presumptively inconsistent with First Amendment, and (2) statute was not narrowly tailored to achieve State's objective of compensating victims from profits of crime.
Justice Blackmun and Justice Kennedy issued opinions concurring in judgment.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90.1(1))

Statute is presumptively inconsistent with First Amendment if it imposes financial burden on speakers because of content of their speech. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))

Official scrutiny of content of publications as basis for imposing tax is entirely incompatible with First Amendment's guarantee of freedom of press. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90(1))

Regulations which permit Government to discriminate on basis of content of message cannot be tolerated under First Amendment. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90.1(1))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 k. Viewpoint or Idea Discrimination. Most Cited Cases
(Formerly 92k90.1(1))

In context of financial regulation, Government's ability to impose content-based burdens on speech raises specter that Government may effectively drive certain ideas or viewpoints from marketplace; First Amendment presumptively places this sort of discrimination beyond power of Government. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In General. Most Cited Cases
(Formerly 92k90(1))

Constitutional right of free expression is intended to remove governmental restraints from arena of public discussion, putting decision as to what views shall be voiced largely into hands of each of us in belief that no other approach would comport with premise of individual dignity and choice upon which our political system rests. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement; Criminal Conduct
92k1817 k. Profiting from Criminal Activity or Advocacy Thereof. Most Cited Cases
(Formerly 92k90.1(1))

110 Criminal Law KeyCite Notes
110XXVI Incidents of Conviction
110k1221 k. Rights to Property Subject of or Connected with Crime. Most Cited Cases
(Formerly 110k1206.1(1))

New York's "Son of Sam" law, which requires that accused or convicted criminal's income from works describing his crime be deposited in escrow account, which funds are then made available to victims of crime and criminal's other creditors, was presumptively inconsistent with First Amendment; whether First Amendment "speaker" is considered to be criminal/accused criminal or publisher, law singles out speech on particular subject for financial burden that it places on no other speech and no other income. U.S.C.A. Const.Amend. 1; N.Y. McKinney's Executive Law § 632-a.

[7] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In General. Most Cited Cases
(Formerly 92k90(1))

Illicit legislative intent is not sine qua non of violation of First Amendment. U.S.C.A. Const.Amend. 1.

[8] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1504 k. Exercise of Police Power; Relationship to Governmental Interest or Public Welfare. Most Cited Cases
(Formerly 92k90(3))

Even regulations aimed at proper governmental concerns can restrict unduly exercise of rights protected by First Amendment. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90.1(1))

Government's power to impose content-based financial disincentives on speech does not vary with identity of speaker. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases (Formerly 92k90.1(1))

Where law establishes financial disincentive to create or publish works with particular content, State, in order to justify such differential treatment, must show that its regulation is necessary to serve compelling state interest and is narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

[11] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1559 k. Offensive, Vulgar, Abusive, or Insulting Speech. Most Cited Cases (Formerly 92k90.1(1))

Fact that society may find speech offensive is not sufficient reason for suppressing it; indeed, if it is speaker's opinion that gives offense, that consequence is reason for according it constitutional protection. U.S.C.A. Const.Amend. 1.

[12] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1559 k. Offensive, Vulgar, Abusive, or Insulting Speech. Most Cited Cases (Formerly 92k90.1(1))

If there is bedrock principle underlying First Amendment, it is that Government may not prohibit expression of idea simply because society finds idea itself offensive or disagreeable. U.S.C.A. Const.Amend. 1.

[13] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement; Criminal Conduct
92k1817 k. Profiting from Criminal Activity or Advocacy Thereof. Most Cited Cases

(Formerly 92k90.1(1))

110 Criminal Law KeyCite Notes
110XXVI Incidents of Conviction
110k1221 k. Rights to Property Subject of or Connected with Crime. Most Cited Cases
(Formerly 110k1206.1(1))

New York's "Son of Sam" law, which required that accused or convicted criminal's income from works describing his crime be deposited in escrow account, which funds were then made available to victims of crime and criminal's other creditors, was not narrowly tailored to advance State's compelling interest in compensating victims from fruits of crime; statute was significantly overinclusive, as it applied to works on any subject, provided that they expressed author's thoughts or recollections about his crime, however tangentially or incidentally. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Executive Law § 632-a.

[14] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement; Criminal Conduct
92k1817 k. Profiting from Criminal Activity or Advocacy Thereof. Most Cited Cases
(Formerly 92k90.1(1))

While State had compelling interest in compensating victims from fruits of crime, it had little if any interest in limiting such compensation to proceeds of wrongdoer's speech about crime. U.S.C.A. Const.Amend. 1.

[15] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases
(Formerly 92k90(3))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90(3))

Statutes are content neutral where they are intended to serve purposes unrelated to content of regulated speech, despite their incidental effects on some speakers but not others; however, regulations must be narrowly tailored to advance interest asserted by State, and regulation is not "tailored narrowly" where substantial portion of burden on speech does not serve to advance State's

content-neutral goals. U.S.C.A. Const.Amend. 1.

West Codenotes

Prior Version Held Unconstitutional

McKinney's Executive Law § 632-a.

****502** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***105** Among other things, New York's "Son of Sam" law provides that an "entity" contracting ****503** with a person "accused or convicted of a crime" for the production of a book or other work describing the crime must pay to respondent Crime Victims Board any moneys owed to that person under the contract; requires the Board to deposit such funds in an escrow account for payment to any victim who, within five years, obtains a civil judgment against the accused or convicted person and to the criminal's other creditors; and defines "person convicted of a crime" to include "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." After it discovered that petitioner publisher had signed an agreement with an author who had contracted with admitted organized crime figure Henry Hill for the production of a book about Hill's life, the Board, *inter alia*, determined that petitioner had violated the Son of Sam law and ordered it to turn over all money payable to Hill. Petitioner then brought suit under 42 U.S.C. § 1983, seeking a declaration that the law violates the First Amendment and an injunction barring the law's enforcement. The District Court found the law to be consistent with the Amendment, and the Court of Appeals affirmed.

*Held:* The Son of Sam law is inconsistent with the First Amendment. Pp. 508-512.

(a) Whether the First Amendment "speaker" is considered to be Hill, whose income the New York law places in escrow because of the story he has told, or petitioner, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the law singles out speech on a particular subject for a financial burden that it places on no other speech and no other income and, thus, is presumptively inconsistent with the Amendment. *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S.Ct. 1438, 1443-1444, 113 L.Ed.2d 494; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 1728, 95 L.Ed.2d 209. The fact that the law escrows speech-derived income, rather than taxing a percentage of it outright as did the law invalidated in *Arkansas Writers' Project*, cannot serve as the basis for disparate treatment under the Amendment, since both forms of financial burden operate as disincentives to speak. Moreover, the ***106** Board's assertion that discriminatory financial treatment is suspect only when the legislature intends to suppress certain ideas is incorrect, since this Court has long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights under the Amendment. Furthermore, the Board's claim that the law is permissible under the Amendment because it focuses generally on an "entity" rather than specifically on the *media* falters, first, on semantic grounds, since any entity that enters into a contract with a convicted person to transmit that person's speech becomes by definition a medium of communication, and, second, on constitutional grounds, since the governmental power to impose content-based financial disincentives on speech does not vary with the identity of the speaker. Accordingly, in order to justify the differential treatment imposed by the law, 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, 107 S.Ct., at 1728. Pp. 508-509.

(b) The State has a compelling interest in compensating victims from the fruits of crime. Cf. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629, 109 S.Ct. 2646, 2654, 105 L.Ed.2d 528.

However, contrary to the Board's assertion, the State has little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime. The Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of criminals' "storytelling" than ***504** from any of their other assets, nor offer any justification for a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims. Cf., *e.g.*, *Arkansas Writers' Project, supra,* 481 U.S., at 231, 107 S.Ct., at 1728. Like the governmental entities in the latter and similar cases, the Board has taken the *effect* of the statute and posited that effect as the State's interest. Pp. 509-511.
(c) The New York law is not narrowly tailored to achieve the State's objective of compensating victims from the profits of crime. The law is significantly overinclusive, since it applies to works on *any* subject provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally, and since its broad definition of "person convicted of a crime" enables the Board to escrow the income of an author who admits in his work to having committed a crime, whether or not he was ever actually accused or convicted. These two provisions combine to encompass a wide range of existing and potential works that do not enable a criminal to profit from his crime while a victim remains uncompensated. Pp. 511-512.
916 F.2d 777 (CA2 1990), reversed.
***107** O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, and SOUTER, JJ., joined. BLACKMUN, J., *post,* p. 512, and KENNEDY, J., *post,* p. 512, filed opinions concurring in the judgment. THOMAS, J., took no part in the consideration or decision of the case.

Ronald S. Rauchberg, New York City, for petitioner.
Howard L. Zwickel, New York City, for respondents.

***108** Justice O'CONNOR delivered the opinion of the Court.
New York's "Son of Sam" law requires that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account. These funds are then made available to the victims of the crime and the criminal's other creditors. We consider whether this statute is consistent with the First Amendment.

I

A

In the summer of 1977, New York was terrorized by a serial killer popularly known as the Son of Sam. The hunt for the Son of Sam received considerable publicity, and by the time David Berkowitz was identified as the killer and apprehended, the rights to his story were worth a substantial amount. Berkowitz's chance to profit from his notoriety while his victims and their families remained uncompensated did not escape the notice of New York's Legislature. The State quickly enacted the statute at issue, N.Y.Exec.Law § 632-a (McKinney 1982 and Supp.1991).

The statute was intended to "ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering." Assembly Bill Memorandum Re: A 9019, July 22, 1977, reprinted in Legislative Bill Jacket, 1977 N.Y.Laws, ch. 823. As the author of the statute explained: "It is abhorrent to one's sense of justice and decency that an individual ... can expect to receive large sums of money for his story once he is captured-while five people are dead, [and] other people were injured as a result of his conduct." ***109** Memorandum of Sen. Emanuel R. Gold, reprinted in New York State Legislative Annual, 1977, p. 267.

The Son of Sam law, as later amended, requires any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to respondent New York State Crime Victims Board (Board), and to turn over any income ***505** under that contract to the Board. This requirement applies to all such contracts in any medium of communication:

"Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives." N.Y.Exec.Law § 632-a(1) (McKinney 1982).

The Board is then required to deposit the payment in an escrow account "for the benefit of and payable to any victim ... provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such [accused or convicted] person or his representatives." *Ibid.* After five years, if no actions are pending, "the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives." § 632-a(4). This 5-year period in which to bring a civil action against the convicted ***110** person begins to run when the escrow account is established, and supersedes any limitations period that expires earlier. § 632-a(7).

Subsection (8) grants priority to two classes of claims against the escrow account. First, upon a court order, the Board must release assets "for the exclusive purpose of retaining legal representation." § 632-a(8). In addition, the Board has the discretion, after giving notice to the victims of the crime, to "make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account." *Ibid.* This provision permits payments to literary agents and other such representatives. Payments under subsection (8) may not exceed one-fifth of the amount collected in the account. *Ibid.*

Claims against the account are given the following priorities: (a) payments ordered by the Board under subsection (8); (b) subrogation claims of the State for payments made to victims of the crime; (c) civil judgments obtained by victims of the crime; and (d) claims of other creditors of the accused or convicted person, including state and local tax authorities. N.Y.Exec.Law § 632-a(11) (McKinney Supp.1991).

Subsection (10) broadly defines "person convicted of a crime" to include "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial *and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.*" § 632-a(10)(b) (emphasis added). Thus a person who has never been accused or convicted of a crime in the ordinary sense, but who admits in a book or other work to having committed a crime, is within the statute's coverage.

As recently construed by the New York Court of Appeals, however, the statute does not apply to victimless crimes. *Children of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713, 726, 570 N.Y.S.2d 453, 460, 573 N.E.2d 541, 548 (1991).

***111** The Son of Sam law supplements pre-existing statutory schemes authorizing the Board to compensate crime victims for their losses, see N.Y.Exec.Law § 631 (McKinney 1982 and Supp.1991), permitting courts to order the proceeds of crime forfeited to the State, see N.Y.Civ.Prac.Law §§ 1310-1352 (McKinney Supp.1991), providing for orders of restitution at sentencing, N.Y.Penal Law § 60.27 (McKinney 1987), and affording prejudgment attachment procedures to ensure that wrongdoers do not dissipate their assets, N.Y.Civ.Prac.Law §§ 6201-6226 (McKinney ****506** 1980 and Supp.1991). The escrow arrangement established by the Son of Sam law enhances these provisions only insofar as the accused or convicted person earns income within the scope of § 632-a(1).

Since its enactment in 1977, the Son of Sam law has been invoked only a handful of times. As might be expected, the individuals whose profits the Board has sought to escrow have all become well known for having committed highly publicized crimes. These include Jean Harris, the convicted killer of "Scarsdale Diet" Doctor Herman Tarnower; Mark David Chapman, the man convicted of assassinating John Lennon; and R. Foster Winans, the former Wall Street Journal columnist convicted

of insider trading. Ironically, the statute was never applied to the Son of Sam himself; David Berkowitz was found incompetent to stand trial, and the statute at that time applied only to criminals who had actually been convicted. N.Y.Times, Feb. 20, 1991, p. B8, col. 4. According to the Board, Berkowitz voluntarily paid his share of the royalties from the book Son of Sam, published in 1981, to his victims or their estates. Brief for Respondents 8, n. 13.

This case began in 1986, when the Board first became aware of the contract between petitioner Simon & Schuster and admitted organized crime figure Henry Hill.

***112** B

Looking back from the safety of the Federal Witness Protection Program, Henry Hill recalled: "At the age of twelve my ambition was to be a gangster. To be a wiseguy. To me being a wiseguy was better than being president of the United States." N. Pileggi, Wiseguy: Life in a Mafia Family 19 (1985) (hereinafter Wiseguy). Whatever one might think of Hill, at the very least it can be said that he realized his dreams. After a career spanning 25 years, Hill admitted engineering some of the most daring crimes of his day, including the 1978-1979 Boston College basketball point-shaving scandal, and the theft of $6 million from Lufthansa Airlines in 1978, the largest successful cash robbery in American history. Wiseguy 9. Most of Hill's crimes were more banausic: He committed extortion, he imported and distributed narcotics, and he organized numerous robberies.

Hill was arrested in 1980. In exchange for immunity from prosecution, he testified against many of his former colleagues. Since his arrest, he has lived under an assumed name in an unknown part of the country.

In August 1981, Hill entered into a contract with author Nicholas Pileggi for the production of a book about Hill's life. The following month, Hill and Pileggi signed a publishing agreement with Simon & Schuster, Inc. Under the agreement, Simon & Schuster agreed to make payments to both Hill and Pileggi. Over the next few years, according to Pileggi, he and Hill "talked at length virtually every single day, with not more than an occasional Sunday or holiday skipped. We spent more than three hundred hours together; my notes of conversations with Henry occupy more than six linear file feet." App. 27. Because producing the book required such a substantial investment of time and effort, Hill sought compensation. *Ibid.*

The result of Hill and Pileggi's collaboration was Wiseguy, which was published in January 1986. The book depicts, in colorful detail, the day-to-day existence of organized crime, ***113** primarily in Hill's first-person narrative. Throughout Wiseguy, Hill frankly admits to having participated in an astonishing variety of crimes. He discusses, among other things, his conviction of extortion and the prison sentence he served. In one portion of the book, Hill recounts how members of the Mafia received preferential treatment in prison:

"The dorm was a separate three-story building outside the wall, which looked more like a Holiday Inn than a prison. There were four guys to a room, and we had comfortable beds and private baths. ***507** There were two dozen rooms on each floor, and each of them had mob guys living in them. It was like a wiseguy convention-the whole Gotti crew, Jimmy Doyle and his guys, 'Ernie Boy' Abbamonte and 'Joe Crow' Delvecchio, Vinnie Aloi, Frank Cotroni.

"It was wild. There was wine and booze, and it was kept in bath-oil or after-shave jars. The hacks in the honor dorm were almost all on the take, and even though it was against the rules, we used to cook in our rooms. Looking back, I don't think Paulie went to the general mess five times in the two and a half years he was there. We had a stove and pots and pans and silverware stacked in the bathroom. We had glasses and an ice-water cooler where we kept the fresh meats and cheeses. When there was an inspection, we stored the stuff in the false ceiling, and once in a while, if it was confiscated, we'd just go to the kitchen and get new stuff.

"We had the best food smuggled into our dorm from the kitchen. Steaks, veal cutlets, shrimp, red snapper. Whatever the hacks could buy, we ate. It cost me two, three hundred a week. Guys like

Paulie spent five hundred to a thousand bucks a week. Scotch cost thirty dollars a pint. The hacks used to bring it inside the walls in their lunch pails. We never ran out of booze, because we had six hacks bringing it in six days a week. Depending on what you wanted and how much you were ***114** willing to spend, life could be almost bearable." Wiseguy 150-151.

Wiseguy was reviewed favorably: The Washington Post called it an " 'amply detailed and entirely fascinating book that amounts to a piece of revisionist history,' " while New York Daily News columnist Jimmy Breslin named it " 'the best book on crime in America ever written.' " App. 5. The book was also a commercial success: Within 19 months of its publication, more than a million copies were in print. A few years later, the book was converted into a film called Goodfellas, which won a host of awards as the best film of 1990.

From Henry Hill's perspective, however, the publicity generated by the book's success proved less desirable. The Crime Victims Board learned of Wiseguy in January 1986, soon after it was published.

C

On January 31, the Board notified Simon & Schuster: "It has come to our attention that you may have contracted with a person accused or convicted of a crime for the payment of monies to such person." App. 86. The Board ordered Simon & Schuster to furnish copies of any contracts it had entered into with Hill, to provide the dollar amounts and dates of all payments it had made to Hill, and to suspend all payments to Hill in the future. Simon & Schuster complied with this order. By that time, Simon & Schuster had paid Hill's literary agent $96,250 in advances and royalties on Hill's behalf, and was holding $27,958 for eventual payment to Hill.

The Board reviewed the book and the contract, and on May 21, 1987, issued a proposed determination and order. The Board determined that Wiseguy was covered by § 632-a of the Executive Law, that Simon & Schuster had violated the law by failing to turn over its contract with Hill to the Board and by making payments to Hill, and that all money owed to ***115** Hill under the contract had to be turned over to the Board to be held in escrow for the victims of Hill's crimes. The Board ordered Hill to turn over the payments he had already received, and ordered Simon & Schuster to turn over all money payable to Hill at the time or in the future.

Simon & Schuster brought suit in August 1987, under 42 U.S.C. § 1983, seeking a declaration that the Son of Sam law violates the First Amendment and an injunction barring the statute's enforcement. After the parties filed cross-motions for summary judgment, the District Court found the statute to be consistent with the First Amendment. ****508** 724 F.Supp. 170 (SDNY 1989). A divided Court of Appeals affirmed. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (CA2 1990).

Because the Federal Government and most of the States have enacted statutes with similar objectives, see 18 U.S.C. § 3681; Note, *Simon & Schuster, Inc. v. Fischetti*: Can New York's Son of Sam Law Survive First Amendment Challenge?, 66 Notre Dame L.Rev. 1075, n. 6 (1991) (listing state statutes), the issue is significant and likely to recur. We accordingly granted certiorari, 498 U.S. 1081, 111 S.Ct. 950, 112 L.Ed.2d 1039 (1991), and we now reverse.

II

A

[1] [2] A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S.Ct. 1438, 1443-1444, 113 L.Ed.2d 494 (1991). As we emphasized in invalidating a content-based magazine tax: "[O]fficial 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." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 1728, 95 L.Ed.2d 209 (1987).

[3] [4] [5] This is a notion so engrained in our First Amendment jurisprudence that last Term we found it so "obvious" as to ***116** not require explanation. *Leathers, supra*, 499 U.S., at 447, 111 S.Ct., at 1444. 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." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984). See also *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). In the context of financial regulation, it bears repeating, as we did in *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. 499 U.S., at 448-449, 111 S.Ct., at 1444-1445. The First Amendment presumptively places this sort of discrimination beyond the power of the government. As we reiterated in *Leathers*: " 'The constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.' " *Id.*, at 448-449, 111 S.Ct., at 1444-1445 (quoting *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971)).

[6] The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. Whether the First Amendment "speaker" is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.

The Board tries unsuccessfully to distinguish the Son of Sam law from the discriminatory tax at issue in *Arkansas Writers' Project*. While the Son of Sam law escrows all of the speaker's speech-derived income for at least five years, ***117** rather than taxing a percentage of it outright, this difference can hardly serve as the basis for disparate treatment under the First Amendment. Both forms of financial burden operate as disincentives to speak; indeed, in many cases it ****509** will be impossible to discern in advance which type of regulation will be more costly to the speaker.

[7] [8] The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592, 103 S.Ct. 1365, 1375, 75 L.Ed.2d 295 (1983). Simon & Schuster need adduce "no evidence of an improper censorial motive." *Arkansas Writers' Project, supra*, 481 U.S., at 228, 107 S.Ct., at 1727. As we concluded in *Minneapolis Star*: "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." 460 U.S., at 592, 103 S.Ct., at 1375.

[9] Finally, the Board claims that even if the First Amendment prohibits content-based financial regulation specifically of the *media*, the Son of Sam law is different, because it imposes a general burden on any "entity" contracting with a convicted person to transmit that person's speech. Cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670, 111 S.Ct. 2513, 2518, 115 L.Ed.2d 586 (1991) ("[E]nforcement of ... general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations"). This argument falters on both

semantic and constitutional grounds. Any "entity" that enters into such a contract becomes by definition a medium of communication, if it was not one already. In any event, the characterization of an entity as a member of the "media" is irrelevant for these purposes. The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.

*118 [10] KC The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. In order to justify such differential treatment, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S., at 231, 107 S.Ct., at 1728.

B

[11] KC [12] KC The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers. See Brief for Respondents 38, n. 38. As we have often had occasion to repeat: " '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' " *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978)). " 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " *United States v. Eichman*, 496 U.S. 310, 319, 110 S.Ct. 2404, 2410, 110 L.Ed.2d 287 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545, 105 L.Ed.2d 342 (1989)). The Board thus does not assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization.

[13] KC There can be little doubt, on the other hand, that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders **510 of restitution. See N.Y.Civ.Prac.Law §§ 6201-6226 (McKinney 1980 and Supp.1991); *119 N.Y.Penal Law § 60.27 (McKinney 1987). We have recognized the importance of this interest before, in the Sixth Amendment context. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629, 109 S.Ct. 2646, 2654, 105 L.Ed.2d 528 (1989).

The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes. Like most if not all States, New York has long recognized the "fundamental equitable principle," *Children of Bedford v. Petromelis*, 77 N.Y.2d, at 727, 570 N.Y.S.2d, at 460, 573 N.E.2d, at 548, that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889). The force of this interest is evidenced by the State's statutory provisions for the forfeiture of the proceeds and instrumentalities of crime. See N.Y.Civ.Prac.Law §§ 1310-1352 (McKinney Supp.1991).

The parties debate whether book royalties can properly be termed the profits of crime, but that is a question we need not address here. For the purposes of this case, we can assume without deciding that the income escrowed by the Son of Sam law represents the fruits of crime. We need only conclude that the State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims.

[14] KC The Board attempts to define the State's interest more narrowly, as "ensuring that criminals

do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries." Brief for Respondents 46. Here the Board is on far shakier ground. The Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of such "storytelling" than from any of the criminal's other assets. Nor can the Board offer any justification for a distinction between this expressive activity and ***120** any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims. Thus even if the State can be said to have an interest in classifying a criminal's assets in this manner, that interest is hardly compelling.

We have rejected similar assertions of a compelling interest in the past. In *Arkansas Writers' Project* and *Minneapolis Star*, we observed that while the State certainly has an important interest in raising revenue through taxation, that interest hardly justified selective taxation of the press, as it was completely unrelated to a press/non-press distinction. *Arkansas Writers' Project, supra*, 481 U.S., at 231, 107 S.Ct., at 1728-1729; *Minneapolis Star*, 460 U.S., at 586, 103 S.Ct., at 1372. Likewise, in *Carey v. Brown*, 447 U.S. 455, 467-469, 100 S.Ct. 2286, 2293-2295, 65 L.Ed.2d 263 (1980), we recognized the State's interest in preserving privacy by prohibiting residential picketing, but refused to permit the State to ban only nonlabor picketing. This was because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Id.*, at 465, 100 S.Ct., at 2293. Much the same is true here. The distinction drawn by the Son of Sam law has nothing to do with the State's interest in transferring the proceeds of crime from criminals to their victims.

Like the government entities in the above cases, the Board has taken the *effect* of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored. As Judge Newman pointed out in his dissent from the opinion of the Court of Appeals, such an argument "eliminates the entire inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is ****511** anxious to regulate the designated category of speech." 916 F.2d, at 785.

In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the ***121** wrongdoer's speech about the crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective.

C

As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive. As counsel for the Board conceded at oral argument, the statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. See Tr. of Oral Arg. 30, 38; see also App. 109. In addition, the statute's broad definition of "person convicted of a crime" enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted. § 632-a(10)(b).

[15] These two provisions combine to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure; Civil Disobedience, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard. See A. Haley & Malcolm X, The Autobiography of Malcolm X 108-125 (1964); H. Thoreau, Civil Disobedience 18-22 (1849, reprinted 1969); The Confessions of Saint Augustine 31, 36-37 (Franklin Library ed. 1980). *Amicus* Association of American Publishers, Inc., has submitted a sobering bibliography listing hundreds of works by American prisoners and ex-prisoners, many of which contain descriptions of the

crimes for which the authors were incarcerated,including ***122** works by such authors as Emma Goldman and Martin Luther King, Jr. A list of prominent figures whose autobiographies would be subject to the statute if written is not difficult to construct: The list could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons. The argument that a statute like the Son of Sam law would prevent publication of *all* of these works is hyperbole-some would have been written without compensation-but the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated. FN*

FN* Because the Son of Sam law is so overinclusive, we need not address the Board's contention that the statute is content neutral under our decisions in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In these cases, we determined that statutes were content neutral where they were intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others. Even under *Ward* and *Renton*, however, regulations must be "narrowly tailored" to advance the interest asserted by the State. *Ward, supra*, 491 U.S., at 798, 109 S.Ct., at 2757; *Renton, supra*, 475 U.S., at 52, 106 S.Ct. at 931. A regulation is not "narrowly tailored"-even under the more lenient tailoring standards applied in *Ward* and *Renton*-where, as here, "a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Ward, supra*, 491 U.S., at 799, 109 S.Ct., at 2758. Thus whether the Son of Sam law is analyzed as content neutral under *Ward* or content based under *Leathers*, it is too overinclusive to satisfy the requirements of the First Amendment. And, in light of our conclusion in this case, we need not decide whether, as Justice BLACKMUN suggests, the Son of Sam law is underinclusive as well as overinclusive. Nor does this case present a need to address Justice KENNEDY's discussion of what is a longstanding debate, see G. Gunther, Constitutional Law 1069-1070 (12th ed. 1991), on an issue which the parties before us have neither briefed nor argued.

****512 *123** Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective of compensating crime victims from the profits of crime.

III

The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York's, and we have no occasion to determine the constitutionality of these other laws. We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.

The judgment of the Court of Appeals is accordingly

*Reversed.*

Justice THOMAS took no part in the consideration or decision of this case.

Justice BLACKMUN, concurring in the judgment.
I am in general agreement with what the Court says in its opinion. I think, however, that the New York statute is underinclusive as well as overinclusive and that we should ***124** say so. Most other States have similar legislation and deserve from this Court all the guidance it can render in this very sensitive area.

Justice KENNEDY, concurring in the judgment.
The New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written. The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the State can show that the statute " 'is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' " *Ante*, at 509 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987)). That test or formulation derives from our equal protection jurisprudence, see, *e.g.*, *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 273-274, 106 S.Ct. 1842, 1846-1847, 90 L.Ed.2d 260 (1986) (opinion of Powell, J.); *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943), and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums.

Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of ****513** some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.

Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a ***125** concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.

This said, it must be acknowledged that the compelling interest inquiry has found its way into our First Amendment jurisprudence of late, even where the sole question is, or ought to be, whether the restriction is in fact content based. Although the notion that protected speech may be restricted on the basis of content if the restriction survives what has sometimes been termed " 'the most exacting scrutiny,' " *Texas v. Johnson*, 491 U.S. 397, 412, 109 S.Ct. 2533, 2543, 105 L.Ed.2d 342 (1989), may seem familiar, the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment. In *Johnson*, for example, we cited *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988), as support for the approach. *Boos v. Barry* in turn cited *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983), for the proposition that to justify a content-based restriction on political speech in a public forum, the State must show that "the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos v. Barry*, *supra*, 485 U.S., at 321, 108 S.Ct., at 1163. Turning to the appropriate page in *Perry*, we discover that the statement was supported with a citation of *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980). Looking at last to *Carey*, it turns out the Court was making a statement about equal protection: "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Id.*, at 461-462, 100 S.Ct., at 2290-2291. Thus was a principle of equal protection transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's

power to regulate the content of speech.

***126** The employment of the compelling interest test in the present context is in no way justified by my colleagues' citation of *Arkansas Writers' Project v. Ragland*, *Ante*, at 509. True, both *Ragland* and the case on which it relied, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), recite either the compelling interest test or a close variant, see *Ragland, supra*, 481 U.S., at 231, 107 S.Ct., at 1728-1729; *Minneapolis Star, supra*, 460 U.S., at 585, 103 S.Ct., at 1371-1372, but neither is a case in which the State regulates speech for its content.

There are, of course, other cases, some even predating the slow metamorphosis of *Carey v. Brown*'s equal protection analysis into First Amendment law, which apply the compelling interest test, but these authorities also address issues other than content censorship. See *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637-638, 46 L.Ed.2d 659 (1976) (upholding content-neutral limitations on financial contributions to campaigns for federal office and striking down content-neutral limitations on financial expenditures for such campaigns); *Cousins v. Wigoda*, 419 U.S. 477, 489, 95 S.Ct. 541, 548-549, 42 L.Ed.2d 595 (1975) (content-neutral restriction on freedom of association); ****514** *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340-341, 9 L.Ed.2d 405 (1963) (content-neutral prohibition on solicitation by lawyers); *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960) (content-neutral statute compelling teachers in state-supported schools or colleges to disclose all organizations to which they belonged or contributed).

The inapplicability of the compelling interest test to content-based restrictions on speech is demonstrated by our repeated statement that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). See also *Ragland*, 481 U.S., at 229-230, 107 S.Ct., at 1727-1728 (citing *Mosley*); *Regan v. Time, Inc.*, 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). These ***127** general statements about the government's lack of power to engage in content discrimination reflect a surer basis for protecting speech than does the test used by the Court today.

There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, see, *e.g.*, *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), defamation, see, *e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), incitement, see, *e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), or situations presenting some grave and imminent danger the government has the power to prevent, see, *e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931). These are, however, historic and traditional categories long familiar to the bar, although with respect to the last category it is most difficult for the government to prevail. See *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). While it cannot be said with certainty that the foregoing types of expression are or will remain the only ones that are without First Amendment protection, as evidenced by the proscription of some visual depictions of sexual conduct by children, see *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the use of these traditional legal categories is preferable to the sort of ad hoc balancing that the Court henceforth must perform in every case if the analysis here used becomes our standard test.

As a practical matter, perhaps we will interpret the compelling interest test in cases involving content regulation so that the results become parallel to the historic categories I have discussed, although an enterprise such as today's tends not to remain *pro forma* but to take on a life of its own. When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment, as is true in the case before us.

To forgo the compelling interest test in cases involving direct content-based burdens on speech would not, of course, ***128** eliminate the need for difficult judgments respecting First Amendment issues.

Among the questions we cannot avoid the necessity of deciding are: Whether the restricted expression falls within one of the unprotected categories discussed above, *supra*, at 514; whether some other constitutional right is impaired, see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); whether, in the case of a regulation of activity which combines expressive with nonexpressive elements, the regulation aims at the activity or the expression, compare *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), with *Texas v. Johnson*, 491 U.S., at 406-410, 109 S.Ct., at 2540-2542; whether the regulation restricts ***515** speech itself or only the time, place, or manner of speech, see *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); and whether the regulation is in fact content based or content neutral. See *Boos v. Barry*, 485 U.S., at 319-321, 108 S.Ct., at 1162-1163. However difficult the lines may be to draw in some cases, here the answer to each of these questions is clear.

The case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment. I would recognize this opportunity to confirm our past holdings and to rule that the New York statute amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to end the matter.

With these observations, I concur in the judgment of the Court holding the statute invalid.

U.S.N.Y.,1991.
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.
502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476, 60 USLW 4029, 19 Media L. Rep. 1609

Briefs and Other Related Documents (Back to top)

- 1991 WL 636236 (Oral Argument) Oral Argument (Oct. 15, 1991)
- 1991 WL 521574 (Appellate Brief) REPLY BRIEF FOR THE PETITIONER (Jun. 28, 1991)
- 1991 WL 521573 (Appellate Brief) BRIEF FOR RESPONDENTS (May. 30, 1991)
- 1991 WL 11009197 (Appellate Petition, Motion and Filing) Brief for the United States as Amicus Curiae (Apr. 19, 1991)
- 1991 WL 521572 (Appellate Brief) BRIEF FOR THE PETITIONER (Apr. 18, 1991)
- 1991 WL 11009085 (Appellate Petition, Motion and Filing) Reply Brief in Support of the Petition for Certiorari (Feb. 05, 1991)
- 1991 WL 11009220 (Appellate Petition, Motion and Filing) Brief Amicus Curiae on Behalf of the Association of American Publishers, Inc. in Support of Petitioner, Simon & Schuster, Inc (Jan. 29, 1991)
- 1991 WL 11009198 (Appellate Petition, Motion and Filing) Brief of Motion Picture Association of America, Inc., as Amicus Curiae, in Support of Petition for a Writ of Certiorari (Jan. 28, 1991)
- 1991 WL 11009347 (Appellate Petition, Motion and Filing) Respondents' Brief in Opposition to Petition for a Writ of Certiorari (Jan. 25, 1991)
- 1991 WL 11009089 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Jan. 02, 1991)

END OF DOCUMENT

(C) 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

# APPENDIX 14

535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670, 70 USLW 4369, 30 Media L. Rep. 1769, 02 Cal. Daily Op. Serv. 4067, 2002 Daily Journal D.A.R. 5167, 15 Fla. L. Weekly Fed. S 267

Briefs and Other Related Documents

Supreme Court of the United States
CITY OF LOS ANGELES, Petitioner,
v.
ALAMEDA BOOKS, INC., et al.
No. 00-799.
Argued Dec. 4, 2001.
Decided May 13, 2002.

Adult businesses brought § 1983 action, challenging city ordinance prohibiting operation of multiple adult businesses in single building. The United States District Court for the Central District of California, Dean D. Pregerson, J., granted summary judgment for businesses. City appealed. The Ninth Circuit Court of Appeals, Michael Daly Hawkins, Circuit Judge, 222 F.3d 719, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that city could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing businesses' First Amendment challenge.
Reversed and remanded.
Justice Scalia concurred and filed opinion.
Justice Kennedy concurred in judgment and filed opinion.
Justice Souter filed dissenting opinion, in which Justices Stevens and Ginsburg joined and Justice Breyer joined in part.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1508 Time, Place, or Manner Restrictions
92k1509 k. In General. Most Cited Cases
(Formerly 92k90(3))

Reducing crime is a substantial government interest, for purpose of justifying time, place and manner regulation of speech. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2213 k. Secondary Effects. Most Cited Cases
(Formerly 92k90.4(3))

315T Public Amusement and Entertainment KeyCite Notes
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases
(Formerly 376k3 Theaters and Shows)

City could reasonably rely on police department study correlating crime patterns with concentrations of adult businesses when opposing First Amendment challenge to ordinance barring more than one adult entertainment business in same building, even though study had focused on single-use establishments; study fairly supported city's rationale for ordinance. (Per Justice O'Connor, with the Chief Justice and two Justices concurring and one Justice concurring in judgment). U.S.C.A. Const.Amend. 1.

***1728 *425 Syllabus** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Based on its 1977 study concluding that concentrations of adult entertainment establishments are associated with higher crime rates in surrounding communities, petitioner city enacted an ordinance prohibiting such enterprises within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. Los Angeles Municipal Code § 12.70(C) (1978). Because the ordinance's method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure, the ***1729** city later amended the ordinance to prohibit "more than one adult entertainment business in the same building." § 12.70(C) (1983). Respondents, two adult establishments that openly operate combined bookstores/video arcades in violation of § 12.70(C), as amended, sued under 42 U.S.C. § 1983 for declaratory and injunctive relief, alleging that the ordinance, on its face, violates the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the District Court reasoned that neither the 1977 study nor a report cited in *Hart Book Stores v. Edmisten*, a Fourth Circuit case upholding a similar statute, supported a reasonable belief that multiple-use adult establishments produce the secondary effects the city asserted as content-neutral justifications for its prohibition. Subjecting § 12.70(C) to strict scrutiny, the court granted respondents summary judgment because it felt the city had not offered evidence demonstrating that its prohibition was necessary to serve a compelling government interest. The Ninth Circuit affirmed on the different ground that, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments was designed to serve its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29.

*Held:* The judgment is reversed, and the case is remanded.

222 F.3d 719, reversed and remanded.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS, concluded that Los Angeles may reasonably rely ***426** on its 1977 study to demonstrate that its present ban on multiple-use adult establishments serves its interest in reducing crime. Pp. 1733-1738.

(a) The 1977 study's central component is a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, *e.g.*, robbery and prostitution grew much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. The city may reasonably rely on the police department's conclusions regarding crime patterns to overcome summary judgment. In finding to the contrary on the ground that the 1977 study focused on the effect on crime rates of a concentration of establishments-not a concentration of operations within a single establishment-the Ninth Circuit misunderstood the study's implications. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, such

areas are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the 1977 study's findings, and thus reasonable, for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates. Neither the Ninth Circuit nor respondents nor the dissent provides any reason to question the city's theory. If this Court were to accept their view, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest. *Renton* specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. The Court there held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs ***1730** fail to cast direct 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 *Renton* standard. 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. See, *e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265. This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily***427** correct. Therefore, it must be concluded that the city, at this stage of the litigation, has complied with *Renton's* evidentiary requirement. Pp. 1733-1738.

(b) The Court need not resolve the parties' dispute over whether the city can rely on evidence from *Hart Book Stores* to overcome summary judgment, nor respondents' alternative argument that the ordinance is not a time, place, and manner regulation, but is effectively a ban on adult video arcades that must be subjected to strict scrutiny. P. 1738.

Justice KENNEDY concluded that this Court's precedents may allow Los Angeles to impose its regulation in the exercise of the zoning authority, and that the city is not, at least, to be foreclosed by summary judgment. Pp. 1739-1744.

(a) Under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, if a city can decrease the crime and blight associated with adult businesses by exercising its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection, even if the measure identifies the problem outside the establishments by reference to the speech inside-that is, even if the measure is content based. On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. For example, it may not impose a content-based fee or tax, see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209, even if the government purports to justify the fee by reference to secondary effects, see *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101. That the ordinance at issue is more a typical land-use restriction than a law suppressing speech is suggested by the fact that it is not limited to expressive activities, but extends, *e.g.*, to massage parlors, which the city has found to cause the same undesirable secondary effects; also, it is just one part of an elaborate web of land-use regulations intended to promote the social value of the land as a whole without suppressing some activities or favoring others. Thus, the ordinance is not so suspect that it must be subjected to the strict scrutiny that content-based laws demand in other instances. Rather, it calls for intermediate scrutiny, as *Renton* held. Pp. 1739-1741.

(b) *Renton's* description of an ordinance similar to Los Angeles' as "content neutral," 475 U.S., at 48, 106 S.Ct. 925, was something of a fiction. These ordinances are content based, and should be so described. Nevertheless, *Renton's* central holding is sound. P. 1741.

(c) The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like the one at issue may reduce the costs of secondary effects without substantially reducing speech. If two adult businesses are under the same roof, an ordinance requiring***428** them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. The premise must be that businesses-even those that have always been under one roof-will for the most part disperse rather than shut down, that the quantity of speech will be substantially ***1731** undiminished, and that total secondary effects will be significantly reduced. As to whether there is sufficient evidence to support this proposition, the Court has consistently held that a city must

have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g.*, *Renton, supra*, at 51-52, 106 S.Ct. 925. Here, the proposition to be shown is supported by common experience and a study showing a correlation between the concentration of adult establishments and crime. Assuming that the study supports the city's original dispersal ordinance, most of the necessary analysis follows. To justify the ordinance at issue, the city may infer-from its study and from its own experience-that two adult businesses under the same roof are no better than two next door, and that knocking down the wall between the two would not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Pp. 1741-1743.
(d) Because these considerations seem well enough established in common experience and the Court's case law, the ordinance survives summary judgment. Pp. 1743-1744.
O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 1738. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 1739. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II, *post*, p. 1744.

Michael L. Kiekner, Los Angeles, CA, for petitioner.
John H. Weston, Los Angeles, CA, for respondents.
For U.S. Supreme Court briefs, see:2001 WL 535665 (Pet.Brief)2001 WL 1575796 (Resp.Brief)2001 WL 1104728 (Reply.Brief)

***429** Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.
Los Angeles Municipal Code § 12.70(C) (1983), as amended, prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Respondents, two adult establishments that each operated an adult bookstore and an adult video arcade in the same building, filed a suit under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), alleging that § 12.70(C) violates the First Amendment and seeking declaratory and injunctive relief. The District Court granted summary judgment to respondents, finding that the city of Los Angeles' prohibition was a content-based regulation of speech that failed strict scrutiny. The Court of Appeals for the Ninth Circuit affirmed, but on different grounds. It held that, even if § 12.70(C) were a content-neutral regulation, the city failed to demonstrate that the ***430** prohibition was designed to serve a substantial government interest. Specifically, the Court of Appeals found that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects. Therefore, the Court of Appeals held the Los Angeles prohibition on such establishments invalid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and its precedents interpreting that case. 222 F.3d 719, 723-728 (2000). We reverse and remand. The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.

***1732** I

In 1977, the city of Los Angeles conducted a comprehensive study of adult establishments and concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. See App. 35-162 (Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (City Plan Case No. 26475, City Council File No. 74-4521-S.3, June 1977)). Accordingly, the city enacted an ordinance prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. See Los Angeles Municipal Code § 12.70(C) (1978).

There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult

businesses operated under common ownership and housed in a single structure. See ***431** App. 29 (Los Angeles Dept. of City Planning, Amendment-Proposed Ordinance to Prohibit the Establishment of More than One Adult Entertainment Business at a Single Location (City Plan Case No. 26475, City Council File No. 82-0155, Jan. 13, 1983)). The ordinance the city enacted, however, directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line ... from the closest exterior structural wall of each business." Los Angeles Municipal Code § 12.70(D) (1978). Subsequent to enactment, the city realized that this method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure.

Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) by adding a prohibition on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Los Angeles Municipal Code § 12.70(C) (1983). The amended ordinance defines an "Adult Entertainment Business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." § 12.70(B)(17). The ordinance uses the term "business" to refer to certain types of goods or services sold in adult establishments, rather than the establishment itself. Relevant for purposes of this case are also the ordinance's definitions of adult bookstores and arcades. An "Adult Bookstore" is an operation that "has as a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes ***432** that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Respondents, Alameda Books, Inc., and Highland Books, Inc., are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or 500 feet of any religious institution, public park, or school. Each establishment occupies less than 3,000 square feet. Both respondents rent and sell sexually oriented products, including videocassettes. Additionally, both provide booths where patrons can view videocassettes for a fee. Although respondents are located in different buildings, each operates its retail sales and rental operations in the same commercial space in which its video booths are located. There are no ****1733** physical distinctions between the different operations within each establishment and each establishment has only one entrance. 222 F.3d, at 721. Respondents concede they are openly operating in violation of § 12.70(C) of the city's code, as amended. Brief for Respondents 7; Brief for Petitioner 9.

After a city building inspector found in 1995 that Alameda Books, Inc., was operating both as an adult bookstore and an adult arcade in violation of the city's adult zoning regulations, respondents joined as plaintiffs and sued under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. 222 F.3d, at 721. At issue in this case is count I of the complaint, which alleges a facial violation of the First Amendment. Both the city and respondents filed cross-motions for summary judgment.

The District Court for the Central District of California initially denied both motions on the First Amendment issues in count I, concluding that there was "a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area." App. 255. After respondents filed a motion for reconsideration, however, the District ***433** Court found that Los Angeles' prohibition on multiple-use adult establishments was not a content-neutral regulation of speech. App. to Pet. for Cert. 51. It reasoned that neither the city's 1977 study nor a report cited in *Hart Book Stores v. Edmisten*, 612 F.2d 821 (C.A.4 1979) (upholding a North Carolina statute that also banned multiple-use adult establishments), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the city asserted as content-neutral justifications for its prohibition. App. to Pet. for Cert. 34-47. Therefore, the District Court proceeded to subject the Los Angeles ordinance to strict scrutiny. Because it felt that the city did not offer evidence to demonstrate that its prohibition is necessary to serve a compelling government interest, the District Court *granted* summary judgment for respondents and issued a permanent injunction enjoining the enforcement of the ordinance against respondents. *Id.*, at 51.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Court of Appeals determined that it did not have to reach the District Court's decision that the Los Angeles ordinance was content based because, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the city's substantial interest in reducing crime. The challenged ordinance was therefore invalid under *Renton*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, 222 F.3d, at 723-724. We granted certiorari, 532 U.S. 902, 121 S.Ct. 1223, 149 L.Ed.2d 134 (2001), to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton, supra.*

II

In *Renton v. Playtime Theatres, Inc., supra*, this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, ***434** or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. *Id.*, at 46, 106 S.Ct. 925. We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. ****1734** *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230-231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). We held, however, that the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Renton, supra*, at 47-49, 106 S.Ct. 925. Finally, given this finding, we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. 475 U.S., at 50, 106 S.Ct. 925. We concluded that Renton had met this burden, and we upheld its ordinance. *Id.*, at 51-54, 106 S.Ct. 925.

The Court of Appeals applied the same analysis to evaluate the Los Angeles ordinance challenged in this case. First, the Court of Appeals found that the Los Angeles ordinance was not a complete ban on adult entertainment establishments, but rather a sort of adult zoning regulation, which *Renton* considered a time, place, and manner regulation. 222 F.3d, at 723. The Court of Appeals turned to the second step of the *Renton* analysis, but did not draw any conclusions about whether the Los Angeles ordinance was content based. It explained that, even if the Los Angeles ordinance were content neutral, the city had failed to demonstrate,***435** as required by the third step of the *Renton* analysis, that its prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime. The Court of Appeals noted that the primary evidence relied upon by Los Angeles to demonstrate a link between combination adult businesses and harmful secondary effects was the 1977 study conducted by the city's planning department. The Court of Appeals found, however, that the city could not rely on that study because it did not " 'suppor[t] a reasonable belief that [the] combination [of] businesses ... produced harmful secondary effects of the type asserted.' " 222 F.3d, at 724. For similar reasons, the Court of Appeals also rejected the city's attempt to rely on a report on health conditions inside adult video arcades described in *Hart Book Stores, supra*, a case that upheld a North Carolina statute similar to the Los Angeles ordinance challenged in this case.

The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide. App. 124-125.

[1] The 1977 study also contains reports conducted directly by the staff of the Los Angeles Planning Department that examine the relationship between adult establishments and property values. These staff reports, however, are inconclusive. Not surprisingly, the parties focus their dispute before this Court on the report by the Los Angeles Police Department. Because we find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against *436 the city, we also focus on the portion of the 1977 study drawn from the police department report.

The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the **1735 effect that a concentration of establishments-not a concentration of operations within a single establishment-had on crime rates. The Court of Appeals pointed out that the study treated combination adult bookstore/arcades as single establishments and did not study the effect of any separate-standing adult bookstore or arcade. 222 F.3d, at 724.

[2] The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

*437 Neither the Court of Appeals, nor respondents, nor the dissent provides any reason to question the city's theory. In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rates in neighborhoods with a concentration of adult establishments can be attributed entirely to the presence of permanent walls between, and separate entrances to, each individual adult operation. While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

The error that the Court of Appeals made is that it required the city to prove that its theory about a concentration of adult operations attracting crowds of customers, much like a minimall or department store does, is a necessary consequence of the 1977 study. For example, the Court of Appeals refused to allow the city to draw the inference that "the expansion of an adult bookstore to include an adult arcade would increase" business activity and "produce the harmful secondary effects identified in the Study." 222 F.3d, at 726. It reasoned that such an inference would justify limits on the inventory of an adult bookstore, not a ban on the combination of an adult bookstore and an adult arcade. The Court of Appeals simply replaced the city's theory-that having many different operations in close proximity attracts crowds-with its own-that the size of an operation attracts crowds. If the Court of Appeals' theory is correct, then inventory limits make more sense. If the city's theory is correct, then a prohibition on the combination of businesses makes more sense. Both theories are consistent with the data in the 1977 study. The Court of Appeals' analysis, however, implicitly requires the city to prove that its theory is the only one that can plausibly explain the data *438 because only in this manner can the city refute the Court of Appeals' logic.

Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will **1736 force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves that all adult businesses, whether or not they are located near other adult businesses, generate crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest.

In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925; see also, *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a 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 direct doubt on this rationale, either by demonstrating that the municipality's *439 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. See, *e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton*.

Justice SOUTER faults the city for relying on the 1977 study not because the study fails to support the city's theory that adult department stores, like adult minimalls, attract customers and thus crime, but because the city does not demonstrate that freestanding single-use adult establishments reduce crime. See *post*, at 1747-1749 (dissenting opinion). In effect, Justice SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e.g.*, *Barnes*, *supra*, at 583-584, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a " 'reasonable opportunity to experiment with solutions' " to address the secondary effects of protected speech. *Renton*, *supra*, at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because *440 the solution would, by definition, not have been implemented previously. The city's ordinance banning multiple-use**1737 adult establishments is such a solution. Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. But without such arcades, the city does not have a treatment group to compare with the control group of multiple-use adult establishments, and without such a comparison Justice SOUTER would strike down the city's ordinance. This leaves the city with no means to address the secondary effects with which it is concerned.

Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion); see also *Landmark*

*Communications, Inc. v. Virginia*, 435 U.S. 829, 843-844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra*, at 665-666, 114 S.Ct. 2445; *Erie, supra*, at 297-298, 120 S.Ct. 1382 (plurality opinion). We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. 475 U.S., at 48-50, 106 S.Ct. 925. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. See *Erie, supra*, at 298-299, 120 S.Ct. 1382.

Justice SOUTER would have us rethink this balance, and indeed the entire *Renton* framework. In *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." 475 U.S., at 47-54, 106 S.Ct. 925. The former requires courts to verify that the "predominate concerns" motivating the ***441** ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Id.*, at 47, 106 S.Ct. 925 (emphasis deleted) The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id.*, at 50-52, 106 S.Ct. 925. Justice SOUTER would either merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, and raise the evidentiary bar that a municipality must pass. His logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise. See *post*, at 1746.

We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest. Pet. for Cert. I. Second, there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary effects. In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. 222 F.3d, at 723. It would be inappropriate for this Court to reach the question of content neutrality before permitting the lower court to pass upon it. Finally, Justice SOUTER does ****1738** not clarify the sort of evidence upon which municipalities may rely to meet the evidentiary burden he would require. It is easy to say that courts must demand evidence ***442** when "common experience" or "common assumptions" are incorrect, see *post*, at 1747, but it is difficult for courts to know ahead of time whether that condition is met. Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Erie*, 529 U.S., at 297-298, 120 S.Ct. 1382 (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is " 'reasonably believed to be relevant' " to the secondary effects that they seek to address. *Id.*, at 296.

III

The city of Los Angeles argues that its prohibition on multiuse establishments draws further support from a study of the poor health conditions in adult video arcades described in *Hart Book Stores*, a case that upheld a North Carolina ordinance similar to that challenged here. See 612 F.2d, at 828-829, n. 9. Respondents argue that the city cannot rely on evidence from *Hart Book Stores* because the city cannot prove it examined that evidence before it enacted the current version of § 12.70(C). Brief for Respondents 21. Respondents note, moreover, that unsanitary conditions in adult video arcades would persist regardless of whether arcades were operated in the same buildings as, say, adult bookstores. *Ibid.*

We do not, however, need to resolve the parties' dispute over evidence cited in *Hart Book Stores*. Unlike the city of Renton, the city of Los Angeles conducted its own study of adult businesses. We

have concluded that the Los Angeles study provides evidence to support the city's theory that a concentration of adult operations in one locale attracts crime, and can be reasonably relied upon to demonstrate that Los Angeles Municipal Code § 12.70(C) (1983) is designed to promote the city's interest in reducing crime. Therefore, the city need not present foreign studies to overcome the summary judgment against it.

***443** Before concluding, it should be noted that respondents argue, as an alternative basis to sustain the Court of Appeals' judgment, that the Los Angeles ordinance is not a typical zoning regulation. Rather, respondents explain, the prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12-13. Respondents request that the Court hold that the Los Angeles ordinance is not a time, place, and manner regulation, and that the Court subject the ordinance to strict scrutiny. This also appears to be the theme of Justice KENNEDY's concurrence. He contends that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Post,* at 1742 (opinion concurring in judgment). We consider that unobjectionable proposition as simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.

Accordingly, we reverse the Court of Appeals' judgment granting summary judgment to respondents and remand the case for further proceedings.

*It is so ordered.*

Justice SCALIA, concurring.
I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment***1739** traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering***444** sex. See, *e.g., Erie v. Pap's A.M.,* 529 U.S. 277, 310, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (SCALIA, J., concurring in judgment); *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 256-261, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (SCALIA, J., concurring in part and dissenting in part).

Justice KENNEDY, concurring in the judgment.
Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another-even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton v. Playtime*

*Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), described a similar ordinance as "content neutral," and I agree with the dissent that the designation ***445** is imprecise. Second, in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur.

I

In *Renton*, the Court determined that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside-that is, even if the measure is in that sense content based.

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. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) ("[O]fficial 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 true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible****1740** strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood ***446** for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The challenge is to protect the activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be "content based." It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But cf. *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1872). The business might well be the city's most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926) ("A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

***447** True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content

discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause similar secondary effects. See Los Angeles Municipal Code §§ 12.70(B)(8) (1978), 12.70(B)(17) (1983), 12.70(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See § 12.02 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan ... in order to encourage the most appropriate use of land ... and to promote the health, safety, and the general welfare ..."). All this further suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech.

***1741** For these reasons, the ordinance is not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton*.

***448** II

In *Renton*, the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was "content based." The ordinance "by its terms [was] 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, 106 S.Ct. 925 (internal quotation marks omitted). On this premise, the Court designated the restriction "content neutral." *Ibid.*

The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* "treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47, 106 S.Ct. 925. The fiction that this sort of ordinance is content neutral-or "content neutral"-is perhaps more confusing than helpful, as Justice SOUTER demonstrates, see *post*, at 1745 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322, and n. 2, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based, and we should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See ***449** *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126-127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

III

The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions." Pet. for Cert. I. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

***1742** At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice SOUTER. See *post,* at 1746. The rationale of ***450** the ordinance must be that it will suppress secondary effects-and not by suppressing speech.

The plurality's statement of the proposition to be supported is somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws ... a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) "reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante,* at 1735.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them ***451** to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must be that businesses-even those that have always been under one roof-will for the most part disperse rather than shut down. True, this premise has its own conundrum. As Justice SOUTER writes, "[t]he city ... claims no interest in the proliferation of adult establishments." *Post,* at 1748. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: Is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at ***1743** least at the outset, and that very little evidence is required. See, *e.g.*, *Renton*, 475 U.S., at 51-52, 106 S.Ct. 925 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city

relies upon is reasonably believed to be relevant to the problem that the city addresses"); Young, 427 U.S., at 71, 96 S.Ct. 2440 ("[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); Erie v. Pap's A.M., 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See Renton, supra, at 51-52, 106 S.Ct. 925. The Los Angeles City Council ***452** knows the streets of Los Angeles better than we do. See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 665-666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); Erie, supra, at 297-298, 120 S.Ct. 1382 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city's study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters, and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code § 12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation-a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to ***453** speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer-from its study and from its own experience-that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

IV

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions ****1744** can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to Part II, dissenting.
In 1977, the city of Los Angeles studied sections of the city with high and low concentrations of adult business establishments catering to the market for the erotic. The city found no certain correlation between the location of those establishments and depressed property values, but it did find some correlation between areas of higher concentrations of such business and higher crime rates. On that basis, Los Angeles followed the examples of other cities in adopting a zoning ordinance requiring dispersion of adult ***454** establishments. I assume that the ordinance was constitutional when adopted, see, *e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d

310 (1976), and assume for purposes of this case that the original ordinance remains valid today.[FN1]

FN1. Although *amicus* First Amendment Lawyers Association argues that recent studies refute the findings of adult business correlations with secondary effects sufficient to justify such an ordinance, Brief for First Amendment Lawyers Association as *Amicus Curiae* 21-23, the issue is one I do not reach.

The city subsequently amended its ordinance to forbid clusters of such businesses at one address, as in a mall. The city has, in turn, taken a third step to apply this amendment to prohibit even a single proprietor from doing business in a traditional way that combines an adult bookstore, selling books, magazines, and videos, with an adult arcade, consisting of open viewing booths, where potential purchasers of videos can view them for a fee.

From a policy of dispersing adult establishments, the city has thus moved to a policy of dividing them in two. The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, see *Infra*, at 1748, n. 4, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

I

This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression. The variants of middle-tier tests cover a grab bag of restrictive statutes, with a corresponding variety of justifications. ***455** While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure****1745** that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)). A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least restrictive narrow tailoring to serve it, see *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); since merely protecting listeners from offense at the message is not a legitimate interest of the government, see *Cohen v. California*, 403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), strict scrutiny leaves few survivors.

The comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech or other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning, see ***456** *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); the sentiment may not provoke, but being blasted out of a sound sleep does. In such a case, we ask simply whether the regulation is "narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). A middle-tier standard is also applied to limits on expression through action that is otherwise

subject to regulation for nonexpressive purposes, the best known example being the prohibition on destroying draft cards as an act of protest, United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); here a regulation passes muster "if it furthers an important or substantial governmental interest ... unrelated to the suppression of free expression" by a restriction "no greater than is essential to the furtherance of that interest," id., at 377, 88 S.Ct. 1673. As mentioned already, yet another middle-tier variety is zoning restriction as a means of responding to the "secondary effects" of adult businesses, principally crime and declining property values in the neighborhood. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).[FN2]

FN2. Limiting such effects qualifies as a substantial governmental interest, and an ordinance has been said to survive if it is shown to serve such ends without unreasonably limiting alternatives. *Renton*, 475 U.S., at 50, 106 S.Ct. 925. Because *Renton* called its secondary-effects ordinance a mere time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning, see *Infra*, at 1745, I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), formulation quoted above. *O'Brien* is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized. Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion).

Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, id., at 46, 106 S.Ct. 925, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of ***457** what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said. *Id.*, at 47, 106 S.Ct. 925.

****1746** It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

***458** In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); Young, 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a

pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.[FN3]

FN3. Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin, supra*, at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield, supra*, at 771, 113 S.Ct. 1792.

Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market***459** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g.*, ****1747** *Renton, supra*, at 51, 106 S.Ct. 925; *Young, supra*, at 55, 96 S.Ct. 2440.

And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. See *Erie v. Pap's A.M.*, 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *Id.*, at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. See *Renton*, 475 U.S., at 51, 106 S.Ct. 925; *Young, supra*, at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase***460** crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

II

Our cases on the subject have referred to studies, undertaken with varying degrees of formality, showing the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates or depressed property values. See, *e.g.*, *Renton, supra*, at 50-51, 106 S.Ct. 925; *Young*, 427 U.S., at 55, 96 S.Ct. 2440. Although we have held that intermediate scrutiny of secondary-effects legislation does not demand a fresh evidentiary study of its factual basis if the published results of investigations elsewhere are "reasonably" thought to be applicable in a different municipal setting, *Renton, supra*, at 51-52, 106 S.Ct. 925, the city here took responsibility to make its own enquiry, App. 35-162. As already mentioned, the study was inconclusive as to any correlation between adult business and lower property values, *id.*, at 45, 106 S.Ct. 925, and it reported no association between higher crime rates and any isolated adult establishments. But it did find a geographical correlation of higher concentrations of adult establishments with higher crime rates, *id.*, at 43, 106 S.Ct. 925, and with this study in hand, Los Angeles enacted its 1978 ordinance requiring dispersion of adult stores and theaters. This original position of the ordinance is not challenged today, and I will assume its justification on the theory accepted in *Young*, that eliminating concentrations of adult establishments will spread out the documented secondary effects and render them more manageable that way.

***1748** The application of the 1983 amendment now before us is, however, a different matter. My concern is not with the ***461** assumption behind the amendment itself, that a conglomeration of adult businesses under one roof, as in a minimall or adult department store, will produce undesirable secondary effects comparable to what a cluster of separate adult establishments brings about, *ante*, at 1735. That may or may not be so. The assumption that is clearly unsupported, however, goes to the city's supposed interest in applying the amendment to the book and video stores in question, and in applying it to break them up. The city, of course, claims no interest in the proliferation of adult establishments, the ostensible consequence of splitting the sales and viewing activities so as to produce two stores where once there was one. Nor does the city assert any interest in limiting the sale of adult expressive material as such, or reducing the number of adult video booths in the city, for that would be clear content-based regulation, and the city was careful in its 1977 report to disclaim any such intent. App. 54.[FN4]

FN4. Finally, the city does not assert an interest in curbing any secondary effects within the combined bookstore-arcades. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (1979), the Fourth Circuit upheld a similar ban in North Carolina, relying in part on a county health department report on the results of an inspection of several of the combined adult bookstore-video arcades in Wake County, North Carolina. *Id.*, at 828-829, n. 9. The inspection revealed unsanitary conditions and evidence of salacious activities taking place within the video cubicles. *Ibid.* The city introduces this case to defend its breakup policy although it is not clear from the opinion how separating these video arcades from the adult bookstores would deter the activities that took place within them. In any event, while *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), allowed a city to rely on the experiences and studies of other cities, it did not dispense with the requirement that "whatever evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses," *id.*, at 51-52, 106 S.Ct. 925, and the evidence relied upon by the Fourth Circuit is certainly not necessarily relevant to the Los Angeles ordinance. Since November 1977, five years before the enactment of the ordinance at issue, Los Angeles has regulated adult video booths, prohibiting doors, setting minimum levels of lighting, and requiring that their interiors be fully visible from the entrance to the premises. Los Angeles Municipal Code §§ 103.101(i), (j). Thus, it seems less likely that the unsanitary conditions identified in *Hart Book Stores* would exist in video arcades in Los Angeles, and the city has suggested no evidence that they do. For that reason, *Hart Book Stores* gives no indication of a substantial governmental interest that the ban on multiuse adult establishments would further.

***462** Rather, the city apparently assumes that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another.[FN5] But the city neither says

this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. The Los Angeles study treats such combined stores as one, see *id.*, at 81-82, 96 S.Ct. 2440, and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm; nor has the city called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption. In fact, if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for we may fairly suspect that the study said nothing about the secondary effects of ***1749** freestanding stores because no effects were observed. The reasonable supposition, then, is that splitting some of them up will have no consequence for secondary effects whatever.[FN6]

FN5. The plurality indulges the city's assumption but goes no further to justify it than stating what is obvious from what the city's study says about concentrations of adult establishments (but not isolated ones): the presence of several adult businesses in one neighborhood draws "a greater concentration of adult consumers to the neighborhood, [which] either attracts or generates criminal activity." *Ante,* at 1735.

FN6. In *Renton,* the Court approved a zoning ordinance "aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood." 475 U.S., at 50, 106 S.Ct. 925. The city, however, does not appeal to that decision to show that combined bookstore-arcades isolated from other adult establishments, like the theaters in *Renton,* give rise to negative secondary effects, perhaps recognizing that such a finding would only call into doubt the sensibility of the city's decision to proliferate such businesses. See *ante,* at 1736. Although the question may be open whether a city can rely on the experiences of other cities when they contradict its own studies, that question is not implicated here, as Los Angeles relies exclusively on its own study, which is tellingly silent on the question whether isolated adult establishments have any bearing on criminal activity.

***463** The inescapable point is that the city does not even claim that the 1977 study provides any support for its assumption. We have previously accepted studies, like the city's own study here, as showing a causal connection between concentrations of adult business and identified secondary effects.[FN7] Since that is an acceptable basis for requiring adult businesses to disperse when they are housed in separate premises, there is certainly a relevant argument to be made that restricting their concentration at one spacious address should have some effect on sales and traffic, and effects in the neighborhood. But even if that argument may justify a ban on adult "minimalls," *ante,* at 1735, it provides no support for what the city proposes to do here. The bookstores involved here are not concentrations of traditionally separate adult businesses that have been studied and shown to have an association with secondary effects, and they exemplify no new form of concentration like a mall under one roof. They are combinations of selling and viewing activities that have commonly been combined, and the plurality itself recognizes, *ante,* at 1736, that no study conducted by the city has reported that this type of traditional business, any more than any other adult business, has a correlation with secondary effects ***464** in the absence of concentration with other adult establishments in the neighborhood. And even if splitting viewing booths from the bookstores that continue to sell videos were to turn some customers away (or send them in search of video arcades in other neighborhoods), it is nothing but speculation to think that marginally lower traffic to one store would have any measurable effect on the neighborhood, let alone an effect on associated crime that has never been shown to exist in the first place.[FN8]

FN7. As already noted, n. 1, *supra, amicus* First Amendment Lawyers Association argues that more recent studies show no such thing, but this case involves no such challenge to the previously accepted causal connection.

FN8. Justice KENNEDY would indulge the city in this speculation, so long as it could show that the ordinance will "leav[e] the quantity and accessibility of speech substantially

intact." *Ante,* at 1742 (opinion concurring in judgment). But the suggestion that the speculated consequences may justify content-correlated regulation if speech is only slightly burdened turns intermediate scrutiny on its head. Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted governmental interest, not the burden on speech, which must simply be no greater than necessary to further that interest. *Erie,* 529 U.S., at 301, 120 S.Ct. 1382; see also n. 2, *supra*. Nor has Justice KENNEDY even shown that this ordinance leaves speech "substantially intact." He posits an example in which two adult stores draw 100 customers, and each business operating separately draws 49. *Ante,* at 1743. It does not follow, however, that a combined

# APPENDIX 15

135 Cal.App.4th 488, 38 Cal.Rptr.3d 16, 06 Cal. Daily Op. Serv. 130, 2006 Daily Journal D.A.R. 151

Briefs and Other Related Documents

Court of Appeal, First District, Division 3, California.
CALIFORNIA HIGHWAY PATROL, Petitioner,
v.
The SUPERIOR COURT of Alameda County, Respondent;
Esteban Allende et al., Real Parties in Interest.
No. A109209.
Jan. 4, 2006.
As Modified on Denial of Rehearing Jan. 31, 2006.
Review Denied March 29, 2006.[FN*]

FN* Corrigan, J., did not participate therein.

**Background:** Drivers who objected to emergency response costs which had been charged against them under statutes permitting reimbursement of costs incurred in an incident resulting from a person driving under the influence of intoxicants (DUI) sued the California Highway Patrol (CHP) seeking declaratory and injunctive relief. The Superior Court, Alameda County, Ronald Sabraw, J., granted summary adjudication in favor of drivers, limiting recoverable costs under the statutes. CHP filed petition for writ of mandate.

**Holdings:** The Court of Appeal, Pollak, J., held that:
(1) for purposes of these reimbursement statutes, qualifying "incident" need not be actual automobile accident, but must involve something more than mere DUI arrest, and
(2) recoverable "expense of emergency response" under these statutes includes costs of activities related to enforcement of DUI laws at scene and traveling to and from scene, but costs incurred after DUI suspect is booked and required reports are prepared are not recoverable.

Petition granted.

West Headnotes

[1] KeyCite Notes

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(4) k. Modification or Vacation of Judgment or Order. Most Cited Cases

Interlocutory writ review was appropriate for petition filed by California Highway Patrol challenging trial court's restrictive interpretation, in response to plaintiffs' motion for summary adjudication in declaratory judgment action, of statutes permitting reimbursement of costs incurred in an incident resulting from a person driving under the influence of intoxicants (DUI), because the petition raised an issue of first impression that was of widespread interest, as the multiplicity of similar, pending lawsuits confirmed, and thus judicial economy would be served by early appellate resolution of issue raised. West's Ann.Cal.C.C.P. § 437c(m)(1); West's Ann.Cal.Gov.Code §§ 53150, 53156.

[2] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

The Court of Appeal reviews de novo the trial court's decision to grant summary adjudication and is not bound by the trial court's stated reasons or rationales.

[3] KeyCite Notes

268 Municipal Corporations
268VIII Municipal Expenses and Charges and Statutory Liabilities
268k258 k. Expenses of Municipal Government in General. Most Cited Cases

For purposes of statutes permitting law enforcement agency to seek reimbursement of costs incurred during response to "incident" resulting from person driving under influence of intoxicants (DUI), qualifying incident need not be actual automobile accident, but must involve something more than mere DUI arrest; while scope of statute encompassed more than accidents, there was nothing in legislative history to indicate legislative intent to include arrests following ordinary traffic stops. West's Ann.Cal.Gov.Code §§ 53150, 53156.

[4] KeyCite Notes

27 Amicus Curiae
27k3 k. Powers, Functions, and Proceedings. Most Cited Cases

As a general matter the appellate court does not consider new arguments raised on appeal by amicus curiae, but there are occasions when it is appropriate to do so.

[5] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.

[6] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases

As a general rule in order to be cognizable, legislative history must shed light on the collegial view of

the Legislature as a whole.

[7] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k216 k. Motives and Opinions of Legislators. Most Cited Cases

The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted.

[8] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(3) k. Long Continuance of Construction, and Approval or Acquiescence. Most Cited Cases

The legislative failure to modify a consistent and longstanding administrative interpretation, which the Legislature is presumed to know, may reflect legislative approval of the administrative interpretation.

[9] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.3 k. Legislative Hearings, Reports, Etc. Most Cited Cases

Opinions of the Legislative Counsel are not binding on the court that is construing a statute, though they may be considered in ascertaining legislative intent.

[10] KeyCite Notes

268 Municipal Corporations
268VIII Municipal Expenses and Charges and Statutory Liabilities
268k258 k. Expenses of Municipal Government in General. Most Cited Cases

Recoverable "expense of emergency response," under statutes permitting law enforcement agency to seek reimbursement of costs incurred during response to incident resulting from person driving under influence of intoxicants (DUI), included costs of activities related to enforcement of DUI laws at scene and traveling to and from scene, but costs incurred after DUI suspect was booked and reports prepared were not recoverable; cost of performing field sobriety test and making arrest, transporting and booking driver, administering chemical tests, and preparing reports were recoverable, as well as costs for activities unrelated to enforcement of DUI laws, such as directing traffic and ensuring public

safety at accident site, investigating accident, preparing accident reports, and transporting disabled vehicles. West's Ann.Cal.Gov.Code §§ 53150, 53156(a).

*See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 104; Cal. Jur. 3d, Criminal Law: Post-Trial Proceedings, § 421.*

***18** S. Chandler Visher, Matthew J. Witteman, San Francisco, Bradley C. Arnold, for real parties in interest Esteban Allende et al.
Bill Lockyer, Attorney General, Miguel A. Neri, Fiel Tigno, Supervising Deputy Attorneys General, Karen Donald, Deputy Attorney General, for petitioner California Highway Patrol.
Ann Miller Ravel, County Counsel Winifred Botha, Lead Deputy County Counsel Aryn P. Harris, Deputy County Counsel for County of Santa Clara and the League of California Cities as amicus curiae on behalf of petitioner.

POLLAK, J.
***492** California law permits public agencies such as petitioner California Highway Patrol (CHP) to seek reimbursement of emergency ***493** response costs from any person causing an incident requiring an emergency response as a consequence of driving under the influence of alcohol or drugs (sometimes referred to as DUI). (Gov.Code, § 53150.)[FN1] In this writ proceeding we consider which costs a public agency may recover under the governing statute.

FN1. All further statutory references are to the Government Code unless otherwise specified.

The trial court granted summary adjudication to real party in interest Esteban Allende, concluding that the CHP may not recover expenses incurred to enforce the laws that prohibit driving under the influence of alcohol or drugs, including the cost of performing a field sobriety test and making an arrest. The trial court limited recovery to response costs for activities which it deemed unrelated to enforcement of the DUI laws, such as directing traffic and ensuring public safety at the accident site, investigating the accident, preparing accident reports, and transporting disabled vehicles. The CHP argues that the trial court applied too restrictive a standard, which would compel it to perform an artificial and unworkable allocation of officer response time into recoverable and nonrecoverable components. We agree with the CHP and, accordingly, grant a peremptory writ of mandate.

## FACTUAL AND PROCEDURAL BACKGROUND

The relevant material facts are undisputed. Esteban Allende caused an accident while driving under the influence of alcohol. Three CHP officers responded to ***19** the scene. No one was injured and the accident caused what the CHP described as minor damage to the two vehicles involved. Allende concedes the proximate cause of the accident was the negligent operation of his vehicle.

The CHP billed Allende $360 for its costs in responding to the accident. The CHP claimed 7.5 hours of officer time at a rate of $48 per hour, itemized as 3.5 hours for accident investigation, 0.5 hours for vehicle storage, 3.0 hours for "in custody" activities, and 0.5 hours for traffic control.

The 3.5 hours billed for accident investigation are described as officer response time, on-scene investigation, follow-up investigation, and writing reports, including an officer's sworn statement (Form DS-367), a DUI arrest report (Form 202), a vehicle accident report (Form STD 270), and a traffic collision report (Form 555). The half-hour billed for vehicle storage includes time spent calling for a tow, waiting for the tow truck, filling out paperwork related to the tow, and otherwise processing the towing of Allende's vehicle. The three hours for "in custody" time include time spent on a field sobriety test and Allende's arrest as well as the transportation, chemical testing, and ***494** booking of Allende. The half-hour for traffic control includes time spent directing traffic, placing flares, and otherwise controlling traffic at the scene of the accident.

Allende paid $63 toward the $360 invoice. Then he and another person who received a similar CHP bill

for emergency response expenses associated with a DUI-related accident, Michele Grundhoeffer, filed a class action complaint against the CHP. In the operative complaint, Allende and Grundhoeffer seek to certify several classes of persons who received bills from the CHP for emergency response expenses in which some or all of the billed services allegedly are not "emergency response" services. Allende and Grundhoeffer contend the CHP may bill only for goods and services rendered at the scene of an incident or for the salaries of police personnel going to and from the scene. According to the complaint, "law enforcement" costs incurred for the investigation, detention, arrest, and booking of individuals suspected of a DUI offense do not qualify for reimbursement. In addition to seeking declaratory and injunctive relief, the complaint contains causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, restitution, and an equal protection claim that DUI defendants are singled out to pay law enforcement costs without being afforded criminal procedural protections.

Allende filed a motion for summary adjudication as to three of the causes of action for declaratory relief, seeking a determination that under section 53150 the CHP may not charge for the cost of his arrest, the cost of services rendered away from the scene of the accident, or the cost of the DUI investigation.[FN2] In order to obtain a definitive interpretation of the statutes in question, the CHP waived its right to resolve class issues, including whether certification of a class is proper, prior to adjudication on the merits. The parties prepared a stipulated set of undisputed facts in order to permit the court to address the purely legal question of the proper interpretation of sections 53150 and 53156.

FN2. Allende moved for summary adjudication of the second, third, and fourth causes of action, which seek declaratory relief. These causes of action seek a determination of the rights and obligations of the parties under section 53150 et seq. with respect to (1) whether the CHP may bill for law enforcement activities, (2) whether the CHP may bill only for goods and services rendered at the scene of an incident, or for the salaries of personnel going to and from the scene, and (3) whether the CHP may bill for investigative costs.

The trial court granted summary adjudication on the first, second, third, and ***20** fourth causes of action, declaring the rights and obligations of the parties under sections 53150 and 53156.[FN3] The trial court held that "the CHP may bill Allende only for the expense of the CHP's emergency response to the ***495** accident on March 26, 2003, that arose directly because of the response to the incident. The CHP can recover the salaries of the CHP officers who have to spend time directly related to an incident. This will include matters such as responding to the scene of an accident ..., directing traffic and ensuring public safety at the site of the accident ..., investigating the accident ..., preparing reports about the accident (including, but not limited to Form STD 270 and Form 555) ..., [and] transporting any disabled vehicles. The CHP may not, however, recover for officer time spent because a driver was driving the vehicle under the influence as prohibited by Vehicle Code 23152 or other Vehicle Code sections. This will include matters such as performing a field sobriety test, making an arrest, transporting the driver, booking the driver, administering chemical tests, and preparing reports about the potential violation of Vehicle Code 23152 or other Vehicle Code sections (including, but not limited to Form 202)."

FN3. Allende did not move for summary adjudication on the first cause of action for declaratory relief. That cause of action appears merely to reiterate the issues on which Allende seeks declaratory relief in the second, third, and fourth causes of action.

The court held that in-custody costs are not recoverable but that costs for traffic control, vehicle storage, and accident investigation are recoverable. A potential factual dispute arose concerning the allocation of time between recoverable and nonrecoverable components for accident investigation because the time spent preparing reports included preparation of the DUI arrest report (Form 202), which is not a recoverable expense under the trial court's analysis. However, Allende conceded that for the purpose of the motion all costs associated with accident investigation could be treated as arising from response to the incident, and the court therefore held the salaries for the full three and a

half hours of accident investigation to be recoverable. A triable issue of material fact would have existed but for Allende's concession, which the trial court stated was based on the factually improbable assumption that the officers spent no time preparing the DUI arrest report. The trial court thus concluded the CHP may recover $216 of the $360 Allende was originally charged.

Noting that the interpretation of sections 53150 and 53156 presents a controlling question of law as to which there are substantial grounds for a difference of opinion, the trial court invited interlocutory review of its ruling, citing Code of Civil Procedure section 166.1. The court observed there are four similar cases pending in Alameda County, as well as additional similar cases filed in other counties.

The CHP thereafter filed in this court a petition for a writ of mandate challenging the trial court's order. After we issued an order to show cause, the County of Santa Clara and the League of California Cities submitted a ***496** request to file an amicus curiae brief.[FN4] County of Santa Clara contends the court's analysis will not be complete unless we first address what constitutes an "incident" triggering a public agency's right to seek reimbursement of costs under section 53150. Because the definition of "incident" bears upon those costs that are recoverable under the statute, we granted the request to file an amicus brief and afforded the parties an opportunity to respond.

FN4. For ease of reference, we refer to amici curiae collectively as amicus or County of Santa Clara.

****21 DISCUSSION**

**1. *Standard of review***

[1] "An order granting a motion for summary adjudication may be reviewed by way of a petition for a writ of mandate." (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 81, 12 Cal.Rptr.3d 97; Code Civ. Proc., § 437c, subd. (m)(1).) Appeal from a judgment after trial ordinarily represents an adequate remedy at law for a party aggrieved by an order granting summary adjudication. Here, however, interlocutory writ review is appropriate because the petition raises an issue of first impression that is of widespread interest, as the multiplicity of similar lawsuits confirms. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273, 258 Cal.Rptr. 66.) Judicial economy is served by an early appellate resolution of the issue.

[2] "We review de novo the trial court's decision to grant summary adjudication and are not bound by the trial court's stated reasons or rationales." (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 927, 134 Cal.Rptr.2d 101.) Summary adjudication shall be granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) There are no disputed material facts here relevant to those costs that are recoverable under sections 53150 and 53156, subdivision (a).

Our task is one of statutory interpretation. " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.' " (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 221, 17 Cal.Rptr.3d 842, 96 P.3d 141.) "We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.] If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we ' "select the ***497** construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.)

### 2. *Sections 53150 and 53156*

Sections 53150 through 53159 establish the statutory framework allowing public agencies to recover emergency response expenses from persons who intentionally or negligently cause incidents requiring an emergency response. Section 53150 defines the circumstances under which a person driving a motor vehicle may be liable for the expense of an emergency response, and section 53156, subdivision (a) (hereafter section 53156(a)) defines "expense of an emergency response."

Section 53150 provides: "Any person who is under the influence of an alcoholic beverage or any drug, or the combined influence of an alcoholic beverage and any drug, whose negligent operation of a motor vehicle caused by that influence proximately causes any incident resulting in an appropriate emergency response, and any person whose intentionally wrongful conduct proximately causes any incident resulting in an appropriate emergency response, is liable for the expense of an emergency response by a public agency to the incident." FN5

FN5. Similarly, sections 53151 and 53152 hold operators of civil aircraft and boats liable for the expense of an emergency response to a DUI incident or an incident resulting from the operator's intentionally wrongful conduct. Section 53153 sets out presumptions for determining when a person is under the influence.

**22 Section 53156(a) defines "expense of an emergency response" as "reasonable costs incurred by a public agency in reasonably making an appropriate emergency response to the incident, but shall only include those costs directly arising because of the response to the particular incident. Reasonable costs shall include the costs of providing police, firefighting, rescue, and emergency medical services at the scene of the incident, as well as the salaries of the personnel responding to the incident."

As originally enacted, section 53155 limited a person's liability for emergency response expenses to $500 for a particular incident. (Added by Stats.1985, ch. 337, § 1.) In 1986 the Legislature amended section 53155, increasing the liability limit to $1,000 per incident. (As amended by Stats.1986, ch. 1112, § 1.) Effective January 1, 2005, the liability limit is $12,000 per incident. (§ 53155, as amended by Stats.2004, ch. 51, § 1.)

### *498 3. *What qualifies as an "incident" under section 53150?*

[3] The petition requires determination of whether the "expense of an emergency response," as defined in section 53156(a), includes costs associated with functions performed to investigate and prosecute a violation of the DUI laws, as distinct from public safety functions unrelated to potential criminal prosecution. However, before addressing which costs are recoverable, we must first determine what constitutes an "incident" under section 53150, triggering a public agency's right to seek reimbursement. Amicus contends the trial court predicated its analysis on the flawed and unduly restrictive assumption that an "incident" is equivalent to an "accident." According to County of Santa Clara, an arrest for driving under the influence of alcohol or drugs qualifies as an "incident," regardless of whether the driver causes an accident.FN6

FN6. Although the amicus contends the term "incident" encompasses more than accidents, it does not propose a more precise definition of the term other than to urge that DUI arrests qualify as "incidents."

[4] As a general matter we do not consider new arguments raised on appeal by amicus curiae. ( *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813-814, 187 Cal.Rptr. 310.) However,

there are occasions when it is appropriate to do so. (See *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511, 146 Cal.Rptr. 614, 579 P.2d 505.) This is such an occasion. We agree with County of Santa Clara that the definition of "incident" is fundamental to the analysis of those costs that are recoverable under sections 53150 and 53156(a). If a public agency may recover its response costs associated with a DUI arrest even when no accident results, such law enforcement costs necessarily would be recoverable when the driver's intoxication causes an accident. The issue raised by County of Santa Clara is a purely legal issue of statutory interpretation and is not dependent upon the development of a factual record in the trial court. Moreover, the positions taken by the parties and the trial court are based on assumptions about what constitutes an "incident." Accordingly, we address the definition of "incident" as used in section 53150. We have afforded the parties an opportunity to brief the issue. (§ 68081.)

[5] Nowhere in the statute is the term "incident" defined. Based on the plain language of section 53150, however, "incident" necessarily means something more than the negligent operation of a motor **23 vehicle while under the influence of an intoxicant. Section 53150 contains five elements that must be satisfied before costs may be imposed: "Any person who is [1] under the influence of an alcoholic beverage or any drug, ... [2] whose negligent operation of a motor vehicle [3] caused by that influence [4] proximately causes any incident [5] resulting in an appropriate emergency response, ... is *499 liable for the expense of an emergency response by a public agency to the incident." The "negligent operation of a motor vehicle" caused by drinking or drug use must proximately cause the "incident" requiring an emergency response. Thus, the "incident" and the impaired driving that cause it are distinct events. Any other reading would render the word "incident" superfluous, violating the principle of statutory construction that "whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (See *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330, 87 Cal.Rptr.2d 423, 981 P.2d 52.)

Although an arrest is an event distinct from the negligent driving that prompts it, an arrest following a traffic stop by itself does not qualify as an "incident." If the Legislature had intended *any* police intervention involving a person driving under the influence to qualify for recovery of response costs, it could have provided simply that a person is liable for costs incurred by a public agency responding to that person's operation of a vehicle while intoxicated. There would have been no need to add the requirement of an incident. Moreover, regardless of how one defines "incident," the term is followed by language limiting the incidents for which costs may be recovered to those "resulting in an appropriate emergency response." (§ 53150.) It would be a highly strained interpretation to consider stopping a motorist for driving under the influence, without more, as an "emergency" within the meaning of section 53150. Indeed, the Vehicle Code defines "emergency response situation" in one context to mean "instances in which necessary measures are needed in order to prevent injury or death to persons or to prevent, confine, or mitigate damage or destruction to property." (Veh.Code, § 23116, subd. (e).) While the purpose underlying the prohibition of driving under the influence and the enforcement of that prohibition is of course public safety, that general objective hardly transforms every arrest for DUI into an emergency.

County of Santa Clara contends that interpreting "incident" as "accident" would lead to absurd results, arguing that a person who scuffs a lamp post while parking would cause an "incident" but an intoxicated driver who gives rise to an emergency response by stalling on train tracks would not. But neither the parties nor the trial court have taken the position that an "incident" must involve an accident. The trial court acknowledged that an event "such as abandoning a vehicle in a roadway and impeding or blocking the normal and reasonable movement of traffic" may constitute an incident. The CHP has chosen as a matter of policy to seek cost recovery only for traffic accidents, but its internal policy documents acknowledge that the statute allows reimbursement for costs associated with *any* DUI incident, not simply accidents. Moreover, we are not persuaded that absurd results will follow unless "incident" is defined to include simple traffic stops resulting in *500 DUI arrests. As the trial court recognized, an event not involving an accident may necessitate an emergency response. Situations such as the abandonment of a vehicle on railroad tracks, unlike a traffic stop or an arrest at a DUI checkpoint, may involve an emergency response to prevent harm to persons or property and

require more of a peace officer's time and attention than the typical enforcement of the DUI laws.

**24 To the extent there is ambiguity in the meaning of "incident," we turn to legislative history for guidance. ( *Day v. City of Fontana, supra,* 25 Cal.4th at p. 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) The cost recovery statutes, codified in sections 53150 through 53158,[FN7] were added to the Government Code in 1985 by Senate Bill No. 735 (1985-1986 Reg. Sess.). (Stats.1985, ch. 337, § 1.) As introduced, Senate Bill No. 735 required the occurrence of a drunk-driving accident before a public agency could recover emergency response costs. The initial proposal would have limited cost recovery to situations involving an "incident resulting in injury to or death to any person, including [the driver], or damage to any property...." (Sen. Bill No. 735 (1985-1986 Reg. Sess.) as introduced Mar. 4, 1985.) The legislation was patterned after other laws allowing recovery of costs incurred in responding to fires started negligently or intentionally. (See Legis. Counsel's Dig., Sen. Bill No. 735 (1985-1986 Reg. Sess.) as introduced Mar. 4, 1985, p. 1.) The Senate subsequently amended Senate Bill No. 735-to address the admissibility in a subsequent criminal action of testimony in proceedings under the cost recovery statute-but it retained the requirement that an incident result in personal injury, death, or property damage in order to permit cost reimbursement. (Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Apr. 18, 1985.)

FN7. Section 53159 addresses several additional situations in which public agencies may seek recovery for emergency response costs and was added to the Government Code by legislation passed in 2004. (Stats.2004, ch. 51, § 2.)

The Assembly Judiciary Committee next reviewed Senate Bill No. 735 and questioned whether the accident-based limitation was too narrow: "What is the rationale for requiring injury or damage in order to trigger liability? Would it not be more appropriate for liability to arise *whenever* a public agency reasonably provides emergency services in response to such an incident, whether or not there is damage?" (Assem. Com. on Jud., Analysis of Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Apr. 18, 1985, p. 2.) In response to this concern, the Assembly amended the legislation so that reimbursement could be sought for emergency response costs regardless of whether an incident resulted in property damage or personal injury. (Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended June 12, 1985.) The Legislature ultimately passed this version of the bill. Relying in part on this legislative history, County of Santa Clara argues that the Legislature intended to expand the bill's coverage to include arrests. We *501 disagree. While the scope of the statute was expanded to cover more than accidents, there is nothing to indicate the Legislature intended to include arrests following ordinary traffic stops. We have found no support in the legislative history for the proposition that an ordinary traffic stop constitutes an emergency response.

[6] [7] County of Santa Clara claims that when the Legislature increased the cost recovery cap in section 53155 from $500 to $1,000, the author of Senate Bill No. 735 clarified that arrests are considered "incidents." However, the document on which amicus bases this claim is not cognizable as legislative history. "[A]s a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole.*" ( *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30, 34 Cal.Rptr.3d 520.) In the document in question, someone identified as the legislative analyst for the author of Senate Bill No. 735 answers questions about the Legislature's intent in enacting the bill. Among other things, the date, source, and purpose of this document are unclear. (See *Id.* at p. 37, 34 Cal.Rptr.3d 520.) Based on the **25 context of the discussion, the document appears to have been created after both the enactment of Senate Bill No. 735 and the subsequent amendment increasing the cost recovery limit. Legislative history, of course, reflects the understanding of the Legislature as a whole at the time it enacts a statute. The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted. ( *Id.* at p. 38, 34 Cal.Rptr.3d 520.)

[8] County of Santa Clara also suggests the Legislature has tacitly approved the practice of billing

drunk drivers for costs associated with ordinary arrests, claiming the Legislature was aware of the practice but left the statute unchanged in this respect when it amended other provisions in the statute. Amicus cites newspaper articles from the late 1980's indicating that a number of cities were attempting to recover costs associated with DUI arrests. The legislative failure to modify a consistent and longstanding administrative interpretation, which the Legislature is presumed to know, may reflect legislative approval of the administrative interpretation. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 22, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) While this principle may apply when a state agency is charged with administering a particular statutory scheme, it has dubious application when numerous cities and counties are charged with applying state law, particularly when they apply the law inconsistently. Even assuming the Legislature as a whole was aware of the practices described in the newspaper articles, those articles at most indicate that in the late 1980's certain cities chose to pursue reimbursement for DUI arrests. The articles do not indicate how widespread or longstanding the practice was. We know, for ***502** example, that the CHP has not applied the law in the same manner as the cities discussed in the articles. In short, there is no consistent and long-standing administrative interpretation of an "incident" and we decline to presume that in failing to further amend the statute the Legislature approved of a particular interpretation followed by a select number of cities.

[9] In response to County of Santa Clara's amicus brief, Allende supplied this court with a 1988 opinion letter from the Legislative Counsel addressing whether public agencies may recover costs incurred following DUI arrests. "Opinions of the Legislative Counsel are not binding on the court, though they may be considered in ascertaining legislative intent." (*People v. $31,500 United States Currency* (1995) 32 Cal.App.4th 1442, 1460, 38 Cal.Rptr.2d 836.) The Legislative Counsel concluded that "In studying the legislative history of these [cost recovery] statutes, the use of the word 'incident' was used to mean the occurrence of an accident or an event involving more than simply an arrest." (Ops. Cal. Legis. Counsel, No. 6416 (Oct. 18, 1988) Emergency Response, p. 2.) Noting that the term "incident" is not defined, the Legislative Counsel turned to the definition of "expense of an emergency response" in section 53156(a). ( *Id.* at p. 3.) The Legislative Counsel determined that an "incident" entails more than an arrest because the types of expenses that may be claimed in section 53156(a) are emergency service costs, suggesting the Legislature did not intend the cost of ordinary arrests to be recoverable. ( *Ibid.*)

We agree with the Legislative Counsel's analysis and conclude that, as used in section 53150, an "incident" is any event that proximately causes an emergency response by a public agency. Although an accident is not necessary to trigger the right to reimbursement, an ordinary arrest, even for driving under the influence of alcohol or drugs, is not sufficient.

****26 4. *Recoverable emergency response costs under section 53156(a).***

[10] The trial court ruled that the CHP may recover costs directly related to the accident response but may not recover the cost of officer time enforcing the DUI laws, in effect dividing emergency response costs into those incurred to protect public safety and those incurred to enforce the DUI laws. The court premised its analysis on the distinction between an incident and the impaired driving that causes an incident, reasoning that section 53156(a) excludes costs relating to enforcement of the DUI laws because those expenses do not directly arise because of the response to the incident. The court took a narrow view of "directly arising," concluding that "even though a cost may be 'triggered' by driving under the influence, it does not 'arise' from an incident unless the cost is based on the incident itself."

***503** The language of the statute and its legislative history do not support such a distinction. Section 53156(a) defines "expense of an emergency response" to mean "reasonable costs incurred by a public agency in reasonably making an appropriate emergency response to the incident...." When the CHP responds to an incident, its reasonable response includes, in addition to directing traffic and investigating the accident, conducting a field sobriety test, making an arrest if appropriate under the

circumstances, preparing reports, and booking the driver.[FN8] As the CHP points out, such tasks are not only reasonable but are necessary components of the CHP's response to an incident caused by an intoxicated driver. Because the CHP is the state agency with the most expertise in conducting DUI-related accident investigations, it is in the best position to determine the appropriate components of an emergency response. Its consistent and long-standing interpretation of what constitutes a reimbursable emergency response expense under section 53156(a) is therefore entitled to deference. (See *Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at pp. 20-21, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

FN8. According to an internal CHP document prepared by the department's Research and Planning Section: "The Department has interpreted 'appropriate emergency response,' as used in Section 53150 GC, to be all inclusive of actions taken to fully and properly investigate and mitigate a DUI incident. The mitigation of, or response to, a DUI incident involves much more than travel time to the scene and those activities limited to the physical location of the incident itself. The scene is fluid as victims, witnesses, and suspects are transported to hospitals for care, requiring follow-up activities beyond the initial location of the original incident. The time necessary to mitigate this type of incident is considerably different; therefore, these costs as well as activities such as transporting and booking a subject into jail, are included in the list of activities assessed for reimbursement under the Department's DUI Cost Recovery Program." The memorandum explains that this approach is "based on the notion that, not only is an officer required to respond to an incident, but his/her obligation in doing so deprives citizens of a community of an officer's services until an incident is completely mitigated, including booking and report writing."

While recoverable costs are restricted to those "directly arising because of the response to the particular incident" (§ 53156(a)), this limiting language does not exclude activities related to enforcing the DUI laws. As just indicated, the role of officers at the scene of an incident necessarily includes law enforcement functions. The statute makes no distinction between these and public safety functions. There is no indication that any portion of salaries incurred because of an emergency response is unrecoverable. Rather, "reasonable costs" are defined to "include the costs of providing police, firefighting, rescue, and emergency medical services at the scene of the incident, *as well as the salaries**27 of the personnel responding to the incident.*" (§ 53156(a), italics added.) While the costs of the various services generally are limited to those incurred at the scene, the syntax of the statutory language ("as well as") indicates that the "salaries of the personnel responding to the incident" are not so limited. To the extent the time is spent on activities directly arising from the response to the incident, the salary reasonably ***504** allocated to that time is subject to reimbursement. Thus, for example, time spent preparing reports or transporting victims or the intoxicated driver from the scene of the incident is eligible for reimbursement.

Allowing cost recovery for law enforcement expenses does not give the term "incident" a different meaning in sections 53150 and 53156(a), as Allende suggests. While negligent operation of a vehicle by a drunk driver is not sufficient to qualify as an incident, it is an element of any incident qualifying for emergency response cost reimbursement. An "incident" is the triggering event that allows a public agency to recover its emergency response costs, but that term does not define which costs are recoverable.

Allende argues that using an incident as a trigger for reimbursement of law enforcement costs will lead to absurd results, giving as an example a DUI driver who hits a guardrail in the process of being stopped on suspicion of driving under the influence. Such an incident, he asserts, would allow the CHP to recover DUI-related costs it would not have been allowed to recover if the driver had missed the guardrail. But an incident must result in an emergency response before reimbursement is permitted, and it is questionable whether such a minor mishap following an ordinary traffic stop would qualify.[FN9] In all events, we see nothing illogical in allowing the occurrence of an incident to trigger the right to recover costs not otherwise reimbursable following an ordinary DUI arrest without incident. The Legislature singled out drivers who cause incidents resulting in an emergency response to bear the cost of that response. ( § 53150.) It is entirely reasonable to require persons whose drunken or drug-

affected driving has escalated to the point of causing an incident to bear the expense of police activities that would not be chargeable to a driver following a simple traffic stop and DUI arrest.

FN9. The collision in which Allende was involved, while causing minor damage, cannot be characterized as a trivial collision following an ordinary traffic stop. A CHP officer observed Allende weaving across lanes of heavy traffic on the freeway in an unsafe manner before Allende came to a stop in a "gore point" between a freeway and a transition road to another freeway. After the CHP officer repeatedly instructed Allende over a public address system to exit the freeway, Allende drove back into traffic and struck from behind a vehicle that had come to a stop on the transition road.

The legislative history supports an interpretation allowing recovery of expenses related to the enforcement of the DUI laws. When the Legislature was considering raising the liability limit in section 53155 from $500 to $1,000 in 1986, the legislative analysis discussed a sample breakdown of expenses for responding to a major accident that included costs for blood and breath testing, an activity Allende describes as a "law enforcement" function. FN10 (Assem. Com. on Jud., Analysis of Sen. Bill No. 1699 ***505** 1985-1986 Reg. Sess.) as amended Apr. 28, 1986, p. 2.) That cost breakdown also included the salaries of two patrolmen for five hours, but there was nothing to suggest the patrolmen's time was allocated between their response to the incident and the performance of their law enforcement responsibilities in connection with the incident. ( *Ibid.*) Allende points to nothing in the legislative history that suggests the Legislature intended***28** law enforcement officers to divide their response time into DUI response and accident response components.FN11

FN10. Subsequent legislation cannot change the meaning of an earlier enactment, but it may supply an indication of the intent behind the original legislation that may be considered. ( *City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 307, fn. 6, 3 Cal.Rptr.3d 473.)

FN11. In a petition for rehearing, Allende does cite the legislative history in support of the contention that investigative costs are not recoverable. Even if such costs were excluded from recovery, the limitation would have little bearing on whether law enforcement officers must allocate their time between accident response and DUI response components because investigative costs do not fall exclusively into either category. Furthermore, the legislative history does not support Allende's claim. Allende points to language in the original version of Senate Bill No. 735 imposing liability "for the expense of an emergency response by a public agency to *investigate the incident.*" (Sen. Bill No. 735 (1985-1986 Reg. Sess.) as introduced Mar. 4, 1985, p. 2, italics added.) The Legislature subsequently amended the bill to remove references to "investigating the incident," leading Allende to speculate the bill was amended in response to the CHP's concern that its budget would be reduced by amounts collected for accident investigation. (Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Apr. 18, 1985; Cal. Highway Patrol, Analysis of Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Mar. 4, 1985.) Allende points to commentary by the Department of Boating and Waterways stating the bill was "amended to preclude the cost of the 'investigation' of the incident...." (Cal. Dept. Boating and Waterways, com. on Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Apr. 18, 1985.) Other than that department's comment, we find no support for this conclusion. As the CHP commented at the time, the amendment eliminated the "requirement that the responding agency must investigate the accident." (Cal. Highway Patrol, Supp. Analysis of Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Apr. 18, 1985.) Thus, rather than precluding recovery for investigation costs, the amendment broadened the reach of the statute to authorize a responding public agency to seek cost recovery even if that agency did not participate in the investigation of the incident. Even after the bill was amended to delete references to incident investigation, the Department of Finance took the position that Senate Bill No. 735 would allow the CHP to recover investigation costs (but not administrative costs associated with collecting payments).

(Cal. Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended June 12, 1985, p. 2; see also Cal. Highway Patrol, Enrolled Bill Rep. on Sen. Bill No. 735 (1985-1986 Reg. Sess.) July 23, 1985.)

The Legislature did question which response expenses should be recoverable, but the discussion focused on whether a pro rata share of fixed costs or only incremental costs should qualify for reimbursement. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 735 (1985-1986 Reg. Sess.) as amended Apr. 18, 1985, p. 2.) In 1986, when the Legislature increased the liability limit from $500 to $1,000, it also amended section 53156(a) to add the sentence explicitly including within the definition of the expense of an emergency response the salaries of personnel responding to the incident. (Stats.1986, ch. 1112, § 2; Assem. Com on Judiciary, Analysis of ***506** Sen. Bill No. 1699 (1985-1986 Reg. Sess.) as amended Apr. 28, 1986, p. 2.) Before the amendment, it was understood that only overtime pay was recoverable as an emergency response cost because the statute did not authorize recovery of fixed costs. (Ops. Cal. Legis. Counsel, No. 9207 (May 9, 1986) Emergency Services; Assem. Com on Judiciary, Analysis of Sen. Bill No. 1699 (1985-1986 Reg. Sess.) as amended Apr. 28, 1986, p. 2.) The legislative analysis of the 1986 amendment makes clear that the language permitting recovery of costs "directly arising" because of the response to the incident was intended to clarify that, with the exception of salaries, a public agency's fixed costs do not qualify for reimbursement.[FN12] ( *Ibid.*) The use ***29** of "directly arising" in section 53156(a) is intended to distinguish between fixed and incremental (or "marginal") costs and not, as Allende and the trial court conclude, between law enforcement and public safety costs.

FN12. The legislative analysis from 1986 indicates that some public agencies were charging persons for fixed costs not authorized by Senate Bill No. 735. According to the analysis, Senate Bill No. 735 "limits recovery to *only* those costs which arise directly because of the response to the particular incident and does *not* permit recovery of a portion of an agency's fixed costs." (Assem. Com on Judiciary, Analysis of Sen. Bill No. 1699 (1985-1986 Reg. Sess.) as amended Apr. 28, 1986, p. 2.) The legislative analysis also contains language suggesting that this limitation applies to personnel costs (see *ibid.*), but the statements to this effect are not compatible with the unambiguous statutory language making "salaries," as distinguished from the overtime pay, eligible for reimbursement. Other portions of the legislative history indicate that the new restriction was aimed at excluding from reimbursement the amortization of equipment such as patrol cars and fire engines. No party to the present action has questioned the inclusion of at least some portion of officer salaries in reimbursable expenses.

Both Allende and the trial court rely on legislative history indicating that the purpose of the cost recovery statutes was to hold drunk drivers more fiscally accountable for the cost of responding to accidents which they cause. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1699 (1985-1986 Reg. Sess.) as introduced Feb. 5, 1986, p. 1.) We do not agree that this legislative purpose reflects an intent to limit the recovery to non-law-enforcement-related expenses. The intention to hold drunk drivers more fiscally accountable for the cost of responding to accidents does not indicate what is or is not to be included in the cost of responding to an incident.[FN13]

FN13. Allende also relies on comments made during a hearing on legislation proposed in 2004 that would have defined "emergency response" to include an enforcement stop by law enforcement using emergency lights or sirens or both. Allende notes that the bill died in committee. Comments made by an individual legislator in 2004 about unpassed legislation have little value as evidence of legislative intent behind the statute the legislation sought to amend. (See *Martin v. Szeto* (2004) 32 Cal.4th 445, 451, 9 Cal.Rptr.3d 687, 84 P.3d 374 [legislative failure to enact proposed amendment to existing legislation has little value as evidence of Legislature's original intent]; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572, fn. 5, 21 Cal.Rptr.3d 331, 101 P.3d 140 [understanding of individual legislator generally not considered].)

***507** At oral argument, counsel for Allende stressed the contention that permitting reimbursement of

law-enforcement-related expenses could not have been intended by the Legislature because those convicted of driving under the influence are already subject to fines and fees intended to reimburse expenses incurred in the criminal proceedings. (See Pen.Code, §§ 1463, 1463.001, 1463.17, 1464; *Fines and Forfeitures,* 25 Ops.Cal.Atty.Gen. 122, 123 (1955).) Any theoretical overlap in the expenses which these provisions are intended to cover is minimal since section 53156(a) does not include the principal costs of criminal enforcement, such as the costs of prosecution, judicial salaries and administration, and penal and probationary expenses. Moreover, criminal fines are not imposed unless the driver is prosecuted and convicted. The legislative history of several provisions proposing to modify the maximum amount of cost reimbursement, including the amendments adopted in 1986 and 2004, expressly acknowledged the criminal fines to which an intoxicated driver is subject, without any suggestion that such fines would limit the amount of reimbursement under section 53150. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1699 (1985-1986 Reg. Sess.) as introduced Feb. 5, 1986, p. 3; Sen Com. on Pub. Safety, Analysis of Sen. Bill No. 1830 (2003-2004 Reg. Sess) as introduced Feb. 20, 2004, p. 6; Sen. Com. on Pub. Safety, Analysis of Sen. Bill No. 1707 (2003-2004 Reg. Sess.) as introduced Feb. 20, 2004, p. 7 ["This liability is in addition to any other liability fines or fees that are imposed by law"].) Indeed, section 53158 provides expressly that "[i]t is the intent of the Legislature that the recovery of the expenses of an emergency response under this chapter shall supplement***30** and shall not supplant any other provisions of law relating to the recovery of those expenses."

Ultimately, the court's task is to interpret the statute in a manner that is not only consistent with its language, legislative history and purpose, but that is also workable and reasonable in practice. (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 832, 105 Cal.Rptr.2d 59.) Practical considerations weigh heavily in favor of adopting the CHP's interpretation of expenses recoverable under section 53156(a). To require law enforcement agencies to maintain time records allocating officer time between public safety and law enforcement functions would be burdensome and impracticable. Allende contends that segregating law enforcement costs is not impossible, because the CHP already categorizes its officer time into recoverable and nonrecoverable components. While the CHP divides officer response time into categories, those categories do not correspond to law enforcement and accident response functions. As the CHP points out, many of the activities performed by responding officers have multiple purposes and may relate both to accident investigation and to potential criminal prosecution. Allocating between public safety and law enforcement expenses would require arbitrary distinctions and classification of mixed costs. Indeed, in this case to avoid a factual dispute over the proper categorization of an expense, Allende made a concession the trial court acknowledged rested on a factually improbable ***508** assumption. Adopting Allende's interpretation of section 53156(a) would cause intractable uncertainty and should be avoided if possible.

Allende also claims that collecting law enforcement costs from persons not convicted of a crime raises constitutional issues and violates the general principle that counties should bear the costs of law enforcement absent a contrary legislative directive. The purported constitutional infirmity is that DUI defendants are singled out to pay law enforcement costs without criminal procedural protections. We do not agree that imposing response costs on DUI offenders violates constitutional principles. The case on which Allende relies, *People v. Thomas* (1996) 42 Cal.App.4th 798, 49 Cal.Rptr.2d 856, involved the imposition of a criminal fine without finding a violation of the statute on which the fine was based (see *id.* at p. 804, 49 Cal.Rptr.2d 856). The expenses subject to reimbursement under section 53150 are in the nature of a civil debt collectible by a public agency in the same manner as a contract debt. (§ 53154.) The debt is not a criminal fine and does not require criminal procedural protections. (Cf. *United States v. Ward* (1980) 448 U.S. 242, 248, 100 S.Ct. 2636, 65 L.Ed.2d 742 [distinguishing constitutional protections associated with civil and criminal penalties].) If a person invoiced for the expense of an emergency response disputes the invoice, the public agency must commence an action to collect the invoice amount as if the debt were a contractual obligation. (See Ops. Cal. Legis. Counsel, No. 23833 (Nov. 4, 1985) Emergency Response: Recovery of Costs, p. 1.) In such a civil proceeding, the public agency as plaintiff bears the burden of proving its entitlement to relief, and a person disputing an invoice is afforded adequate due process protections.

Although law enforcement costs are generally borne by the counties, this general rule may be overridden by legislation allowing cost recovery. (See *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 859, 223 Cal.Rptr. 846.) The Legislature here has expressly provided that

emergency response costs are recoverable. (§ 53150.) In County of San Luis Obispo, by contrast, a county **31 sought to recover costs incurred in exercising its police power by relying on general public nuisance statutes, despite case law establishing that governmental entities may not recover the cost of nuisance abatement under such statutes. ( County of San Luis Obispo v. Abalone Alliance, supra, at pp. 859-860, 223 Cal.Rptr. 846.) Moreover, County of San Luis Obispo involved such traditional law enforcement costs as the expense of the capture, detention, and prosecution of persons charged with a crime. ( Id. at p. 859, 223 Cal.Rptr. 846.) The CHP does not seek to recover costs associated with operating DUI checkpoints, incarcerating DUI suspects, or prosecuting drunk drivers.

We conclude that the trial court erred when it excluded from the "expense of an emergency response" in section 53156(a) the costs of activities related to enforcement of the DUI laws. An "appropriate emergency response" to an incident includes the cost of providing police services at the *509 scene, including, among other possible items, salary costs related to ensuring public safety at the scene of the incident, obtaining appropriate medical assistance, removing vehicles, investigating the cause of the incident, conducting field sobriety tests, and if appropriate arresting and detaining the subject.

Reimbursement may also be obtained for time spent away from the scene by responding public agency personnel, provided the response is reasonable and arises from the incident. Thus, for example, salary costs may be recovered for time spent traveling to and from the scene, transporting the subject from the scene, booking the subject, performing chemical tests, writing customarily required reports (including all accident and DUI-related reports that must be completed as a consequence of the incident), and performing follow-up investigation necessary to complete the reports. All of these activities directly arise because of the response to the incident, and must be performed regardless of whether there is a prosecution for a violation of the DUI laws.

Time spent by responding personnel on activities that are not customarily required as a consequence of investigating and mitigating a DUI incident is not eligible for reimbursement. Thus, salary costs incurred after a subject is booked and required reports prepared are not recoverable as expenses of an emergency response. Such costs, including the cost of an officer's time testifying against a DUI defendant, arise from a decision to prosecute the defendant. These costs are not recoverable under sections 53150 and 53156(a).

The undisputed facts permit a declaration of the rights and obligations of the parties under sections 53150 and 53156(a). Summary adjudication of Allende's declaratory relief causes of action is therefore appropriate, but the costs that the CHP may recover are greater than determined by the trial court. The CHP is entitled to reimbursement of response costs related to law enforcement purposes and, in this case, to all of its claimed costs charged to Allende.

## DISPOSITION

Let a peremptory writ of mandate issue directing respondent superior court to vacate its order granting Allende's motion for summary adjudication and to enter a new and different order consistent with this opinion. Petitioner shall recover the costs incurred in this writ proceeding.

We concur: McGUINESS, P.J. CORRIGAN, J.

Cal.App. 1 Dist.,2006.
California Highway Patrol v. Superior Court
135 Cal.App.4th 488, 38 Cal.Rptr.3d 16, 06 Cal. Daily Op. Serv. 130, 2006 Daily Journal D.A.R. 151

Briefs and Other Related Documents (Back to top)

- 2005 WL 3263551 (Appellate Brief) Real Party in Interest's Opposition to Request for Judicial Notice

of Amicus Curiae (Oct. 4, 2005)
• A109209 (Docket) (Feb. 14, 2005)
END OF DOCUMENT

(C) 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

# APPENDIX 16

172 Vt. 375, 779 A.2d 20

Briefs and Other Related Documents

Supreme Court of Vermont.
VERMONT SOCIETY OF ASSOCIATION EXECUTIVES, et al.
v.
James F. MILNE, Secretary of State.
No. 00-032.
June 8, 2001.
Motion to Amend Denied August 15, 2001.

Taxpayer sought refund from Commissioner of Taxes for lobby taxes it had paid to Secretary of State on lobbyist expenditures. The Washington Superior Court, David A. Jenkins, J., granted summary judgment for taxpayer, and found the lobby tax unconstitutional. Secretary of State appealed. The Supreme Court, Skoglund, J., held that tax violated the lobbyists' First Amendment rights to free speech by placing burden on their political activities, and thus was unconstitutional.
Affirmed.
Dooley, J., concurred and filed a separate opinion.
Morse, J., dissented and filed a separate opinion.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1721 k. Lobbying. Most Cited Cases
(Formerly 92k90.1(1))

Lobbying directly involves core political speech that lies at the very heart of what the First Amendment was designed to safeguard. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1491 k. Purpose of Constitutional Protection. Most Cited Cases
(Formerly 92k90(1))

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs; that is the case because speech concerning public affairs is more than self-expression, it is the essence of self-government. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))

The mere fact that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights; nor does one forfeit First Amendment rights merely by paying another to exercise them for him. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases
(Formerly 92k82(3), 92k82(6.1))

Where First Amendment interests are at stake, heightened scrutiny is required; hence, if a tax singles out and burdens freedoms protected by the First Amendment, the tax is unconstitutional unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1721 k. Lobbying. Most Cited Cases
(Formerly 92k90.1(1))

Lobby tax impacted lobbyist's First Amendment rights to free speech by singling out political speech for special treatment, and thus required heightened scrutiny; tax was aimed exclusively at lobbying expenditures and was completely distinct from the generally applicable sales tax. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1721 k. Lobbying. Most Cited Cases
(Formerly 92k90.1(1))

238 Licenses KeyCite Notes
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(1) k. In General. Most Cited Cases

Tax applied only to lobbyists violated the lobbyists' First Amendment rights to free speech by placing

burden on their political activities, even though it was applicable to all political viewpoints, and thus was unconstitutional; lobby tax was triggered by any type of expenditure made by lobbyist or employer of lobbyist that furthered the employer's efforts to influence legislative or administrative action, lobby tax was the only personal or professional service tax in the state, and the tax reached all types of expenditures rather than being only a sales tax. U.S.C.A. Const.Amend. 1.

[7] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))

Legislative intent is not the sine qua non of a violation of the First Amendment. U.S.C.A. Const.Amend. 1.

[8] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases
(Formerly 92k82(6.1))

Whatever its underlying purpose, a tax that singles out First Amendment interests places a heavy burden on the State to justify its action. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(A) In General
371k3601 Nature of Taxes
371k3602 k. In General. Most Cited Cases
(Formerly 371k1201.1)

The taxable event upon which a sales tax is imposed is the sale of a product or perhaps a service.

[10] KeyCite Notes

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(I) Collection and Enforcement
371k3706 Collection by Sellers or Others
371k3707 k. In General. Most Cited Cases
(Formerly 371k1338.1)

Generally, the seller of goods or services collects a sales tax from the purchaser of those goods or services at the time of the purchase for the benefit of the state.

[11] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases
(Formerly 92k82(6.1))

Generally applicable tax statutes are not subjected to heightened scrutiny in a First Amendment analysis, because society need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. U.S.C.A. Const.Amend. 1.

West Codenotes

Held Unconstitutional

2 V.S.A. § 264a

**21 *376 Robert B. Hemley of Gravel and Shea, Burlington, Nory Miller of Jenner & Block, and Jerald A. Jacobs of Shaw Pittman Potts & Trowbridge (Of Counsel), Washington, D.C., for Plaintiffs-Appellees.
William H. Sorrell, Attorney General, and Bridget C. Asay, Assistant Attorney General, Montpelier, for Defendant-Appellant.

Present: AMESTOY, C.J., DOOLEY, MORSE and SKOGLUND, JJ., and CHEEVER, Supr. J., Specially Assigned.

SKOGLUND, J.
In this appeal, the Secretary of State challenges the superior court's ruling that Vermont's tax on lobbying expenditures is unconstitutional. We conclude that, in singling out and burdening interests protected by the First Amendment, the lobby tax violates the United States Constitution under the heightened scrutiny required. Accordingly, we affirm the superior court's judgment.

Effective January 1, 1998, the Legislature imposed a five-percent tax "on the expenditures of lobbyists and employers of lobbyists.... in excess of $2,500.00." 2 V.S.A. § 264a(a).[FN1] The tax is expressly restricted to expenditures connected with **22 communications or activities aimed at influencing legislation or administrative action. See 2 V.S.A. § 261(5), (9) (defining terms "Expenditure" and "lobbying"). The lobby tax was enacted as part of a campaign finance reform statute that established a fund to provide public grants to candidates running for *377 the offices of governor and lieutenant governor. 1997, No. 64, § 2. The tax was earmarked as one of the primary sources to fund these grants. § 264a(d) (all revenues collected from lobby tax "shall be submitted to the state treasurer for deposit in the Vermont campaign fund established under section 2856 of Title 17").

FN1. In its entirety, the challenged statute provides as follows:

**§ 264a. Tax on expenditures of lobbyists**

(a) There is imposed and shall be collected a tax on the expenditures of lobbyists and employers of lobbyists. The tax shall be at the rate of five percent of the amount of the

expenditures in excess of $2,500.00 required to be reported in each calendar year by lobbyists and employers of lobbyists under section 264 of this title.

(b) The tax shall be paid to the secretary of state at the time that each periodic disclosure report is required to be filed under section 264(a) of this title.

(c) If any tax is not paid when due under subsection (b) of this section, the secretary shall notify the commissioner of taxes of the name, address and taxpayer identification number of such taxpayer and any other information necessary to determine the tax liability. The commissioner of taxes shall collect and enforce the tax imposed by this section, and shall have all the powers granted the commissioner for the collection and enforcement of the sales and use tax under chapter 233 of Title 32. Persons liable for the payment of the tax imposed by this section shall be subject to all penalties imposed on and have all rights of appeal afforded to persons liable for payment of the sales and use tax under chapter 233 of Title 32.

(d) All revenues collected by the secretary of state and the commissioner of taxes from the tax imposed by this section shall be submitted to the state treasurer for deposit in the Vermont campaign fund established under section 2856 of Title 17.

Plaintiffs, a group of nonprofit organizations employing lobbyists, initially filed a declaratory judgment action in the superior court alleging that the lobby tax unconstitutionally singled out and burdened protected First Amendment activities and violated equal protection guarantees. Plaintiffs requested that the court declare § 264a unconstitutional and enjoin the Commissioner of Taxes from enforcing the tax. The Secretary of State (hereinafter "the State") moved to dismiss the suit on the ground that plaintiffs had failed to exhaust administrative remedies established by statute for challenging the imposition of a tax. See 32 V.S.A. § 9777(a) (taxpayer may request hearing before commissioner to challenge assessment of unpaid taxes); 32 V.S.A. § 9781(a) (taxpayer may request tax refund from commissioner). The superior court denied the motion. Later, pursuant to the parties' agreement, one of the plaintiffs, Home Builders Association, requested a refund of taxes it had paid under § 264a. The commissioner denied the request, and that denial was appealed to the superior court, where it was consolidated with the declaratory judgment action. The parties then filed opposing motions for summary judgment.

The superior court granted summary judgment in favor of plaintiffs. Applying strict scrutiny, the court ruled that the lobby tax violates the First Amendment under the analysis set forth in *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). The court also concluded that the tax violates the equal protection provision of the Fourteenth Amendment and results in an unconstitutional double taxation of lobbyist expenditures. The court made no separate analysis under the Vermont Constitution, but determined that the tax violated the Vermont counterparts to the relevant federal constitutional provisions. The parties have not addressed on appeal whether the Vermont Constitution provides an alternative basis to strike down § 264a.[FN2]

FN2. Because plaintiffs have not challenged § 264a under the Vermont Constitution, and our resolution of their First Amendment claim resolves the parties' dispute, we need not consider whether the statute also violates our state constitution. See *State v. Jewett*, 146 Vt. 221, 222, 500 A.2d 233, 234 (1985).

The State argues on appeal that the superior court erred in (1) subjecting § 264a to heightened scrutiny under the First Amendment, (2) holding the statute unconstitutional under the First and ***378** Fourteenth Amendments to the United States Constitution, (3) reaching unbriefed claims under the Vermont Constitution, and (4) asserting jurisdiction over plaintiffs' claims without requiring them to first exhaust ****23** their administrative remedies. There are no facts in dispute. We apply de novo review to resolve the legal issue raised by the parties. See *O'Donnell v. Bank of Vermont*, 166 Vt. 221, 224, 692 A.2d 1212, 1214 (1997) (motion for summary judgment is reviewed under same standard as that applied by trial court).

The parties' characterizations of the lobby tax are in marked contrast to one another. In the State's view, § 264a is merely a generally applicable sales tax on the expenditures of a commercial service-lobbying-without regard to the content of the message provided by the service. To plaintiffs, however, § 264a is a special tax that unconstitutionally singles out and burdens core political speech protected by the First Amendment's right to petition the government. Under United States Supreme Court case law, if the State's characterization of § 264a as a generally applicable, content-neutral extension of the sales tax is correct, the statute is reviewed under a deferential rational-basis standard. On the other hand, if plaintiffs are correct that § 264a is a special tax burdening First Amendment interests, we apply a heightened standard of review, under which the State has conceded it cannot prevail. For the reasons set forth below, we agree with plaintiffs that the lobby tax is a special tax singling out First Amendment interests and thereby requiring heightened scrutiny.

I.

A.

Because the State questions the general notion of applying heightened scrutiny to a tax directed at lobbyists, as opposed to the press, we first consider the status of lobbying as a protected First Amendment interest. In relevant part, the First Amendment of the United States Constitution, which was made applicable to the states with the ratification of the Fourteenth Amendment, forbids laws "abridging the freedom of speech, or of the press; or the right of the people ... to petition the Government for a redress of grievances." The United States Supreme Court has never defined the scope of the right to lobby in any in-depth analysis, but lobbying unquestionably concerns core political speech that "implicates First Amendment guarantees of petition, expression, and assembly." *Kimbell v. Hooper*, 164 Vt. 80, 83, 665 A.2d 44, 46 (1995); see *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

***379** The venerable right to petition one's government to redress grievances extends back to the Magna Carta, where the Crown first formally recognized its duty to be accessible to all citizens. A. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 Harv. J.L. & Pub. Pol'y 149, 181-82 (1993). In America, the history of influencing legislative action began with the New Englander's personal appearance in the town meeting to make a complaint or request some sort of action. 1 N. Singer, Statutes and Statutory Construction § 13.02, at 657 (5th ed.1994). At times, a neighbor might speak for a fellow citizen unable to attend the meeting. " That neighbor was the first American lobbyist." *Id.*

That innocent beginning was soon to fall upon "evil ways" as aggressive new industries sought to obtain concessions from local, state, and federal legislators. Singer, *supra*, at 657. Recognizing the potential danger to our democratic system posed by abuses in lobbying, Congress and state governments passed reform statutes that required lobbyists to disclose who they were representing and how much they were spending on their clients' behalf. ****24** See *id.* § 13.04, at 663. These disclosure laws were generally upheld because they prevented special interest groups from drowning out "the voice of the people" and yet placed only an incidental burden on the right to petition one's government. *Harriss*, 347 U.S. at 625, 74 S.Ct. 808; see *Kimbell*, 164 Vt. at 85, 665 A.2d at 48 ("lobbying disclosure laws are supported by several compelling [governmental] interests" vital to protecting integrity of democratic process); *Fair Political Practices Comm'n v. Superior Court*, 25 Cal.3d 33, 157 Cal.Rptr. 855, 599 P.2d 46, 53-54 (1979) (requiring lobbyists to register and disclose expenditures does not substantially interfere with ability of lobbyists to raise their voices). Although courts, at least implicitly, recognized in these and other decisions that lobbying implicates First Amendment interests, there has been no detailed judicial analysis concerning the scope of the right to lobby, perhaps because of the lingering distrust of lobbying that has persisted in our society. See generally Thomas, *supra*, at 149-51, 160-66, 179-80.

[1] [2] Nevertheless, it is beyond dispute that lobbying directly involves core political speech

that lies at the very heart of what the First Amendment was designed to safeguard. See *Burson v. Freeman*, 504 U.S. 191, 196, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality opinion) (noting that one of three central concerns of First Amendment jurisprudence is "regulation of political speech"); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C.Cir.1968) ("While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged ... in trying ***380** to persuade Congressional action is exercising the First Amendment right of petition."); *Moffett v. Killian*, 360 F.Supp. 228, 231 (D.Conn.1973) (it is "beyond dispute that lobbyists and their employers ... have First Amendment rights"); *Fidanque v. Oregon Gov't Standards & Practices Comm'n*, 328 Or. 1, 969 P.2d 376, 379 (1998) ("Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects."). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). That is the case because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964).

[3] This is no less true because lobbyists are often paid to petition the government on behalf of others. See *Fair Political Practices Comm'n*, 157 Cal.Rptr. 855, 599 P.2d at 53 (lobbyist's function is obviously to exercise constitutional right to petition on behalf of employer); N. Singer, *supra*, § 13.16, at 684 (need and right to communicate with legislative bodies through medium of third party acting as spokesperson "appears hardly less fundamental" than other most basic tenants of our constitutional liberties safeguarded by First Amendment). "The mere fact ... that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights." *Moffett*, 360 F.Supp. at 231. Nor does one forfeit First Amendment rights merely by paying another to exercise them for him. *Id.* Indeed, notwithstanding the potential abuses posed by lobbying, the modern-day reality is that, in order to be effective, groups and organizations across the political spectrum are compelled to retain skilled legislative counsel to present positions concerning complex issues that often ****25** require significant research and investigation. N. Singer, *supra*, § 13.16, at 684 (legislatures should have benefit of best information available when legislating). Thus, the communications of paid lobbyists deserve no less constitutional protection than that afforded to the direct entreaties of individual citizens. *Id.*

Of course, we do not mean to suggest that lobbying is immunized from regulation. To the contrary, as noted, courts have routinely upheld lobbying disclosure statutes. See *Harriss*, 347 U.S. at 625-26, 74 S.Ct. 808; *Kimbell*, 164 Vt. at 85-88, 665 A.2d at 47-49. Courts have also suggested that the government may impose a regulatory fee "to defray the cost of administering legitimate regulation of First Amendment ***381** activity." *Moffett*, 360 F.Supp. at 231-32 (relying on *Cox v. New Hampshire*, 312 U.S. 569, 577, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105, 116-17, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), in striking down $35 fee for lobbying activities because funds from fee were far in excess of sums needed to administer statute's registration provisions).

In the instant case, however, the State does not claim that revenues from the lobby tax are intended to compensate it for administering Vermont's lobbyist disclosure statute. Cf. *Thrifty Rent-A-Car v. City of Denver*, 833 P.2d 852, 855 (Colo.Ct.App.1992) (transaction fee imposed on car rental company for each airport customer after company received $25,000 in gross monthly revenues was permissible user's fee, not illegal income tax, because it was used to defray expense of operating and improving airport facility). Indeed, § 264a(d) explicitly provides that all revenues collected from the lobby tax "shall be submitted to the state treasurer for deposit in the Vermont campaign fund established under section 2856 of Title 17." Thus, the tax cannot be construed as a regulatory fee, assuming that such a fee would pass constitutional muster. See *Fidanque*, 969 P.2d at 379-80 (holding that lobbyist registration fee violated state constitution, and noting that, whatever might be permissibility of regulatory fee imposed to administer statute, "the statute on its face does not tie the fee to the costs associated with registering lobbyists"); see also *Murdock*, 319 U.S. at 138, 63 S.Ct. 870 (Frankfurter, J., dissenting) ("There is no constitutional difference between a so-called regulatory fee and an imposition for purposes of revenue.").

B.

Apart from regulatory fees, the Supreme Court has also acknowledged that First Amendment activities are not immunized from "any of the ordinary forms of taxation for support of the government." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 80 L.Ed. 660 (1936). The Court in *Grosjean* emphasized, however, that a tax singling out interests protected by the First Amendment cannot stand. *Id.* at 244, 250, 56 S.Ct. 444 (it is settled law that freedoms of speech and press "are rights of the same fundamental character" safeguarded against abridgment by state legislation). In making this point, the Court examined the history and circumstances that led to the adoption of the First Amendment's abridgement clause. *Id.* at 244-48, 56 S.Ct. 444. The Court noted that the dominant purpose underlying the British taxes on the press and other modes of communication was to curtail "the acquisition of knowledge by the people in respect of their governmental affairs." *Id.* at 247, 56 S.Ct. 444. ***382** Accordingly, the Court concluded that the abridgment clause prohibited not only laws that directly censored First Amendment interests, but also laws that singled out those ****26** interests for special taxation. *Id.* at 248-50, 56 S.Ct. 444 (evil to be prevented by First Amendment was not merely censorship, but rather any government action that might prevent such free and general discussion of public matters as seems absolutely essential to prepare people for intelligent exercise of their rights as citizens).

The United States Supreme Court has consistently adhered to this principle of disallowing special taxes that single out and burden First Amendment interests. [FN3] For example, in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the Court struck down, on two independent grounds, a special use tax imposed on paper and ink products consumed in the production of publications. The first ground, the one most relevant to the instant case, was that the tax singled out a First Amendment interest for special treatment. While acknowledging that the government can subject First Amendment interests to "generally applicable" economic regulations without creating constitutional problems, the Court rejected the State's claim that the paper and ink tax was a substitute for the sales tax and thus part of a general scheme of taxation. *Id.* at 581, 103 S.Ct. 1365. The Court noted that its previous cases approving such economic regulation "emphasized the *general applicability* of the challenged regulation *to all businesses.*" *Id.* at 583, 103 S.Ct. 1365 (emphasis added). The Court reasoned that there is less concern that "a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Id.* at 585, 103 S.Ct. 1365. When the tax singles out a select group, however, the political constraint is absent, and "the threat of burdensome taxes becomes acute." *Id.*

FN3. The Supreme Court has held, however, that the government is not required to subsidize First Amendment interests through tax-exempt status or tax deductions. See *Regan v. Taxation With Representation*, 461 U.S. 540, 546, 548-50, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (upholding statute creating tax-exempt status that restricted tax-deductible contributions to charitable organizations not involved in lobbying; First Amendment does not require government to subsidize protected activity); *Cammarano v. United States*, 358 U.S. 498, 512-13, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959) (upholding regulations denying deductions for lobbying expenses; taxpayers are simply being required to pay for their constitutionally protected activities out of their own pocket, as all persons engaged in similar activities are required to do).

[4] According to the Court, where First Amendment interests are at stake, heightened scrutiny is required. See *id.* Hence, if a tax singles out and burdens freedoms protected by the First Amendment, the tax ***383** is unconstitutional "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* The Court emphasized that the State's interest in raising revenue, standing alone, could never satisfy this stringent standard because the State could raise revenue by taxing businesses generally, and thereby avoid imposing a special burden on First Amendment interests. *Id.* at 586, 103 S.Ct. 1365.

The Court acknowledged the absence of evidence that the special use tax on paper and ink products was the result of any impermissible or censorial motive on the part of the legislature, but nonetheless struck the tax down because it singled out First Amendment interests without a compelling government interest to support it. *Id.* at 580, 586, 103 S.Ct. 1365. The Court also rejected as immaterial the State's contention that the special tax was less burdensome**27 than what a straightforward sales tax would have been, holding that special treatment threatens First Amendment interests "not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment." *Id.* at 588, 103 S.Ct. 1365; see *Moffett*, 360 F.Supp. at 231 (under Supreme Court case law, "a tax on the exercise of First Amendment freedoms is unconstitutional even when there is no proof that the tax actually restrains the exercise of those freedoms").

These principles were reaffirmed in later cases in which the Supreme Court upheld *generally applicable* taxes that burdened First Amendment interests. See *Leathers*, 499 U.S. at 453, 111 S.Ct. 1438 ("the State's extension of its generally applicable sales tax to cable services ... does not violate the First Amendment"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990) (collection and payment of generally applicable sales and use tax on distribution of religious materials does not violate First Amendment). In *Leathers*, the Court considered the constitutionality of an extension of Arkansas's gross receipts tax to cable, television, and radio services but not the print media. Reviewing its previous cases, the Court noted that a tax on First Amendment interests is "constitutionally suspect" and thus subject to heightened scrutiny when it singles out those interests, targets a small group of speakers, *or* discriminates on the basis of the content of the taxpayer's speech. *Leathers*, 499 U.S. at 447, 111 S.Ct. 1438. In upholding the statute under the first criterion, the one most relevant here, the Court stated that the tax in question was one "of general applicability" that applied to "a broad range of services," including telecommunications and utility services, as well as personal services such as furnishing services, repair services, and cleaning *384 services, among others. *Id.* Thus, the Court concluded that tax did not "single out" the First Amendment interest being burdened. *Id.*

The dissent contends that the lobby tax, like the tax deemed constitutional in *Leathers*, is one "imposed on other types of services, including utility and telecommunications." 172 Vt. at ----, 779 A.2d at 38. Applying this premise, the dissent then cites *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 660, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), for the proposition that the First Amendment does not always demand strict scrutiny of regulations that discriminate among media or different speakers within a single medium. See 172 Vt. at ----, 779 A.2d at 38. The problem with this argument is that the premise is wrong. The lobby tax is not a generally applicable tax that merely discriminates between First Amendment speakers. Rather, as explained more fully below, the lobby tax is a special tax that is aimed exclusively at lobbying expenditures and is completely distinct from the generally applicable sales tax, which is expressly applied to utility and telecommunication services. 32 V.S.A. § 9771(5).

We also find unavailing the State's suggestion, accepted by the dissent, that *Leathers* stands for the proposition that a tax burdening First Amendment interests is unconstitutional only if it suppresses the expression of particular ideas or viewpoints. In *Leathers*, the principal issue upon which the Court focused was whether Arkansas's generally applicable gross receipts tax could be imposed on cable and television services while exempting newspapers and magazines. The Court determined that a generally applicable tax would be upheld under these circumstances as long as it did not discriminate on the basis of viewpoint, which would **28 present the danger of suppressing particular ideas. *Id.* at 453, 111 S.Ct. 1438. The Court did not suggest, however, that taxes are presumptively valid as long as they do not discriminate based on viewpoint. Indeed, the Supreme Court has never upheld a tax that singled out First Amendment interests, irrespective of whether it suppressed particular viewpoints.

In sum, under Supreme Court case law, generally applicable laws burdening First Amendment interests may or may not be subject to heightened scrutiny, but laws that "single out" those interests "are always subject to at least some degree of heightened First Amendment scrutiny." *Turner*, 512 U.S. at 640-41, 114 S.Ct. 2445; see *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) ("Where a law is subjected to a colorable First

Amendment challenge, the rule of rationality which will sustain legislation against other *385 constitutional challenges typically does not have the same controlling force.").

C.

[5] [6] Applying this case law, we conclude that the lobby tax plainly warrants heightened scrutiny, under which it cannot pass constitutional muster. Indeed, it would be difficult to conceive of a more distinct, independent tax singling out a discrete group of First Amendment speakers. An examination of the particulars of the lobby tax belies the State's view that it is merely an extension of the sales tax assessing the financial transactions of a commercial enterprise.

[7] [8] As noted, the revenues generated from the lobby tax are submitted for deposit into the public campaign fund established in 17 V.S.A. § 2856. This suggests that lobbyists, who arguably represent the interests of the principal contributors to political campaigns, were specifically targeted in an effort to redirect, at least in part, some of the available funds of those contributors to a neutral public fund for candidates for the offices of governor and lieutenant governor. We need not delve into the underlying motives behind the tax, however. Notwithstanding the dissent's assertion that there is no basis to invalidate the lobby tax because it is not intended to inhibit freedom of speech and poses no real threat to lobbying activities, see --- Vt. at ----, ----, 779 A.2d at 39, 42, "legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592, 103 S.Ct. 1365. Whatever its underlying purpose, a tax that singles out First Amendment interests "places a heavy burden on the State to justify its action." *Id.* at 592-93, 103 S.Ct. 1365.

That is the case here. The lobby tax is triggered by any type of expenditure made by a lobbyist or an employer of a lobbyist that ultimately furthers the employer's efforts to influence legislative or administrative action. See 2 V.S.A. § 264a (tax is imposed on expenditures of lobbyists and employers of lobbyists); 2 V.S.A. § 261(5) ("Expenditure" means any "payment, distribution, loan, advance, deposit or gift of money or anything else of value and includes a contract, promise or agreement, whether or not legally enforceable, to make an expenditure", expenditure also includes any "sums expended in connection with lobbying, including research, consulting and other lobbying preparation and travel, meals and lodging"); 2 V.S.A. § 261(9) ( "Lobby" or "lobbying" means activities, communications with legislators or administrative officials, or solicitation of others "for the purpose of influencing legislative or administrative action"). Thus, not *386 only is the tax triggered **29 by expenditures connected with political speech, but it is even further specialized by being limited to expenditures aimed at influencing legislative or administrative action in particular, and not municipal action, for example. See *id.* § 261(1), (8) (limiting definition of "Administrative action" and "Legislative action" to activities of statewide administrative officials and legislators). In short, it singles out a component of the lobbying profession directed toward influencing statewide political action.

No other tax in Vermont is even remotely comparable to the lobby tax. Notably, lobbying is the first and only personal or professional service taxed in Vermont. See 32 V.S.A. § 9741(35) (excluding personal service transactions from sales tax, even if tangible goods are transferred, as long as goods are inconsequential and not separately priced). That fact alone distinguishes the lobby tax as one that singles out the communications and activities of lobbyists. Cf. *Brown v. Commonwealth*, 155 Pa.Cmwlth. 197, 624 A.2d 795, 796 n. 3, 797 (1993) (concluding that Pennsylvania's sales tax on lobbying services sold at retail does not offend First Amendment because tax is imposed on wide variety of services-including credit collection services, secretarial services, pest control services, employment agency services, computer programming services, lawn care services, and storage services-and thus does not single out lobbying for special tax treatment).

[9] [10] But the lobby tax is far more than a tax on lobbying services or sales transactions

involving lobbying services. Rather, the broad-based tax reaches all types of expenditures-whether or not they can be deemed sales or services-of both lobbyists *and their employers,* including salaries, meals, lodging, newsletters, loans, gifts, contracts or any other type of expenditure (or agreement to make an expenditure) aimed at influencing legislation or administrative action. Thus, notwithstanding the State's and the dissent's claims to the contrary, the lobby tax is completely distinct, in both form and function, from a sales tax. The taxable event upon which a sales tax is imposed is the sale of a product or perhaps a service. See *Thomas Steel Strip Corp. v. Limbach,* 61 Ohio St.3d 340, 575 N.E.2d 114, 116 (1991). Generally, the seller of goods or services collects a sales tax from the purchaser of those goods or services at the time of the purchase for the benefit of the state. *State Farm Mut. Auto. Ins. Co. v. Berthelot,* 732 So.2d 1230, 1234-35 (La.1999).

In contrast, the taxable event for the lobby tax is not a sales transaction, but rather the reporting of a taxable expenditure. The tax ***387** is imposed on the "expenditures" of lobbyists and their employers at the time that they are reported, not at the time that they are made. Further, at least where the paid lobbyist makes unreimbursed expenditures, the provider, not the purchaser or ultimate consumer, of the service pays the tax.[FN4] SEE *ApolLO STEREO MUSIc co. V. city of auRora,* 871 P.2d 1206, 1209 (Colo.1994) (when tax is imposed directly on business rather than on customers of business, it is more like income tax than sales tax); see also *Cox Cable v. City of New Orleans,* 624 So.2d 890, 893 (La.1993) (tax on cable television services has essential characteristics of sales tax because it is paid by the purchaser at time service is purchased, is collected by seller but cannot be assumed by seller, and is calculated by percentage of purchase***30** price of service); *Radiofone, Inc. v. City of New Orleans,* 616 So.2d 1243, 1247 (La.1993) (same conclusion with respect to tax on telecommunications services). In short, § 264a taxes certain aspects of the lobbying profession and is triggered, not by a sales transaction, but by the reporting of an expenditure associated with a taxable lobbying activity.

> FN4. The tax may ultimately be paid by the lobbyist's employer as part of the fee charged by the lobbyist, but the employer is also paying tax on the fee or salary paid to the lobbyist.

Not surprisingly, the tax on lobbying services is not mentioned anywhere in the statutes dealing with the sales tax, even though, as noted, the sales tax statute explicitly exempts all personal services. See 32 V.S.A. § 9741(35). Further, although the lobby tax necessarily results in an *additional* tax on products that have already been subjected to a sales tax, it is not specifically exempted from Vermont's generally applicable sales tax.[FN5] Cf. 32 V.S.A. § 9741 (listing sales that are exempt from generally applicable sales tax). Moreover, not only is the trigger for payment of the tax unique, but the tax is paid to the Secretary of State rather than the Commissioner of Taxes. Compare 2 V.S.A. § 264a(b) with 32 V.S.A. §§ 9771, 9776. The lobby tax uses special filing forms requiring different types of information and computation methods from what is required by sales or use tax forms. Unlike sales tax forms, copies of the special lobby tax forms must be filed with legislative counsel.

> FN5. The State contends that there is no need to exempt lobbying services because Vermont law does not have a general statutory provision that taxes services. That acknowledgment only highlights the State's untenable position that the tax on lobbyist services is merely an extension of the generally applicable sales tax.

Because imposition of the lobby tax depends on the purpose behind the expenditures rather than the nature of the transaction itself, it may function like a sales tax at times, but at other times like an income or ***388** payroll tax (on lobbyist fees or salaries) or a meals and rooms tax. It is, in fact, a completely unique type of tax triggered exclusively by core political speech concerning the right to petition one's government. Even if the State could make a reasonable argument that the lobby tax is an extension of the sales tax, which it cannot, it most definitely is not a *generally applicable* sales tax of the type that may burden First Amendment interests and still pass constitutional muster. See