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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 6, PAGES 1217 – 1455

INDEX TO APPELLANTS' APPENDIX

<table>
<tr><th>Filing Date</th><th>Description</th><th>Vol.</th><th>Page</th></tr>
<tr><td></td><td><table>
<tr><td>Waiver of Notice, dated 11/22/13</td><td>3637</td></tr>
<tr><td>Transcript of Nevada Tax Commission (only the portions of Nevada Tax Commission relevant to this matter), 12/09/13</td><td>3638-3642</td></tr>
<tr><td>Nevada Tax Commission’s Decision, 02/12/14</td><td>3643-3718</td></tr>
</table></td><td>18
18

18</td><td>3776
3777-3781

3782-3857</td></tr>
<tr><td>12/09/2011</td><td>Minutes</td><td>1</td><td>48-49</td></tr>
<tr><td>12/16/2011</td><td>Minutes</td><td>1</td><td>50-51</td></tr>
<tr><td>06/08/2012</td><td>Minutes</td><td>1</td><td>84-85</td></tr>
<tr><td>09/22/2015</td><td>Minutes</td><td>18</td><td>3867-3868</td></tr>
<tr><td>10/27/2015</td><td>Minutes</td><td>18</td><td>3877-3878</td></tr>
<tr><td>11/24/2015</td><td>Minutes</td><td>18</td><td>3907-3909</td></tr>
<tr><td>10/15/2013</td><td>Minutes – Status Check</td><td>1</td><td>95-96</td></tr>
<tr><td>02/26/2016</td><td>Notice of Appeal</td><td>18</td><td>3934-4006</td></tr>
<tr><td>06/24/2016</td><td>Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision</td><td>19</td><td>4027-4035</td></tr>
<tr><td>10/26/2011</td><td>Notice of Entry of Order</td><td>1</td><td>19-23</td></tr>
<tr><td>11/21/2011</td><td>Notice of Entry of Order</td><td>1</td><td>28-33</td></tr>
<tr><td>02/02/2012</td><td>Notice of Entry of Order</td><td>1</td><td>54-59</td></tr>
<tr><td>06/22/2012</td><td>Notice of Entry of Order</td><td>1</td><td>88-93</td></tr>
<tr><td>3/28/2014</td><td>Notice of Entry of Order</td><td>1</td><td>119-126</td></tr>
</table>

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

Westlaw.

24 F.3d 705

24 F.3d 705
(Cite as: 24 F.3d 705)

TK's Video, Inc. v. Denton County, Tex.
C.A.5 (Tex.),1994.

United States Court of Appeals,Fifth Circuit.
TK'S VIDEO, INC., Plaintiff-Appellant,
v.
DENTON COUNTY, TEXAS, Defendant-Appellee.
TK'S VIDEO, INC., Plaintiff-Appellee,
v.
DENTON COUNTY, TEXAS,
Defendant-Appellant.
Nos. 93-4631, 93-5234.

June 20, 1994.
Opinion Denying Rehearing July 26, 1994.

Adult book and video store brought action challenging county's licensing requirements for adult businesses. The United States District Court for the Eastern District of Texas, Paul N. Brown, J., 830 F.Supp. 335, struck some parts of challenged regulations and awarded store attorney fees, and appeals were taken. The Court of Appeals, Patrick E. Higginbotham, J., held that: (1) county was required to assure maintenance of status quo while processing application for license by business existing when county adopted its regulation, but (2) remaining parts of district court's order were correct. On Petition for Rehearing the Court of Appeals further held that its original holding did not impermissibly rewrite county order to meet constitutional requirements.

Affirmed in part; vacated and remanded in part.

West Headnotes

[1] Constitutional Law 92 ⟸2194

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2193 Print Publications
92k2194 k. In General. Most Cited Cases
(Formerly 92k90.4(6), 92k90.4(4), 92k90.4(3))

Constitutional Law 92 ⟸2204

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2204 k. In General. Most Cited Cases
(Formerly 92k90.4(6), 92k90.4(4), 92k90.4(3))

Constitutional Law 92 ⟸2225

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2224 Motion Pictures and Videos
92k2225 k. In General. Most Cited Cases
(Formerly 92k90.4(6), 92k90.4(4), 92k90.4(3))

Erotic nonobscene printed matter, films, and live entertainment are sheltered by First Amendment but enjoy less protection than some other forms of speech such as political speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⟸1512

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))

24 F.3d 705
(Cite as: 24 F.3d 705)

Constitutional Law 92 ⇐1514

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
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90(3))

Constitutional Law 92 ⇐1515

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
92k1515 k. Existence of Other Channels of Expression. Most Cited Cases
(Formerly 92k90(3))

"Content-neutral time, place, or manner restriction" must be justified without reference to content of regulated speech, must be narrowly tailored to serve significant or substantial governmental interest, and must preserve ample alternative means of community. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⇐2208

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.1(4))

Licenses 238 ⇐7(1)

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

County's 60-day license application review period for adult entertainment business did not unduly burden First Amendment rights of adult businesses; regulation was not content-based, and licensing entailed reviewing applications, performing background checks, making identification cards, and policing design, layout, and zoning arrangements. U.S.C.A. Const.Amend. 1.

[4] Licenses 238 ⇐22

238 Licenses
238I For Occupations and Privileges
238k22 k. Proceedings to Procure License or Certificate. Most Cited Cases

County was required to maintain status quo while reviewing license application of adult business which existed when county adopted regulation requiring licensing of such businesses.

[5] Licenses 238 ⇐7(1)

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

County regulation requiring licensing of adult businesses was not deficient in failing to include automatic stay pending appeal of administrative decision denying application for license, where time provided for reviewing application was not unduly restrictive and expeditious judicial review was available; availability of expeditious judicial review obviated need for automatic stay.

[6] Constitutional Law 92 ⇐2208

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases

(Formerly 92k90.1(4))

Licenses 238 ⚿7(1)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(1) k. In General. Most Cited Cases
County could constitutionally require disclosure by owners and employees of adult entertaining businesses of age, recent infractions of adult business regulations, and recent convictions for some sexual offenses; disclosure requirement related to substantial government interest of curtailing pernicious side effects of adult entertainment businesses. U.S.C.A. Const.Amend. 1

[7] Constitutional Law 92 ⚿2208

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.1(4))

Licenses 238 ⚿22

238 Licenses
238I For Occupations and Privileges
238k22 k. Proceedings to Procure License or Certificate. Most Cited Cases
County could constitutionally require applicants for license for adult entertainment business to post sign on business premises disclosing request for license and to disclose request by advertising in local newspaper; notice requirements were not onerous and were not disguised censorship, but, rather, they were typical of notices routinely required in zoning regulations. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1170

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases
(Formerly 92k82(3))
Government cannot tax First Amendment rights, but it can exact narrowly tailored fees to defray administrative cost of regulation. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⚿2208

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.1(4))

Licenses 238 ⚿7(9)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(9) k. Reasonableness of Fees. Most Cited Cases
County's application fees of $500 for each business seeking license for adult entertainment business and $50 for each individual requesting license were tied to cost of investigating applicants and processing licenses and, thus, were not a tax on First Amendment rights. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿2225

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2224 Motion Pictures and Videos
92k2225 k. In General. Most Cited Cases
(Formerly 92k90.4(4))

Obscenity 281 ⚿2.5

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
County's regulations concerning design and layout of adult film and video theaters were narrowly tailored to substantial government interest in preventing illegal and unsanitary sexual activity in adult theaters and, thus, did not violate First Amendment. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⇐2208

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2203 Sexually Oriented Businesses; Adult Businesses or Entertainment
92k2208 k. Licenses and Permits in General. Most Cited Cases
(Formerly 92k90.1(4))

Public Amusement and Entertainment 315T⇐9(1)

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases
(Formerly 92k90.1(4))
Procedures for issuing, suspending, or revoking licenses to conduct adult entertainment businesses did not violate First Amendment so long as procedures could be objectively measured and rested on adequate factual bases either obvious by their terms or ascertainable by reference to other sources of law. U.S.C.A. Const.Amend. 1.

[12] Federal Civil Procedure 170A ⇐2737.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.5 k. Particular Types of Cases. Most Cited Cases
District court did not abuse its discretion by awarding attorney fees to adult entertainment business which successfully challenged portions of county's licensure requirements. U.S.C.A. Const.Amend. 1.

[13] Federal Civil Procedure 170A ⇐2737.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.1 k. Result; Prevailing Parties; "American Rule". Most Cited Cases
To receive attorney fees, plaintiff must be "prevailing party," that is, must succeed on significant issue that achieves some of the benefit sought in bringing suit; prevailing party must effect change in legal relationship between the plaintiff and defendant.

[14] Federal Civil Procedure 170A ⇐2737.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.5 k. Particular Types of Cases. Most Cited Cases
Fact that adult entertainment business had not applied for license did not preclude finding that it was "prevailing party," for purposes of awarding it attorney fees incurred challenging county's licensure requirements, where adult entertainment business was required to apply for license in order to continue operating. U.S.C.A. Const.Amend. 1.

[15] Federal Civil Procedure 170A ⇐2737.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.5 k. Particular Types of Cases. Most Cited Cases
District court did not abuse its discretion by awarding to adult entertainment business $7,500 of $22,487.50 in attorney fees requested for successful challenge to portions of county's licensure requirements for such businesses, even though business asserted 72 constitutional challenges and

prevailed on only five of them. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⇨2502(1)

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2502 Business and Industry
92k2502(1) k. In General. Most Cited Cases
(Formerly 92k70.1(7.1))
Court of Appeals' prior holding did not impermissibly rewrite county order to meet constitutional requirements, but, rather, left such rewriting to county authorities, and merely held that county could not, prior to final licensing decision, constitutionally regulate under order by altering status quo of adult business license applicant who was in business on effective date of order; implicit in ruling was rejection of contention that omission in order rendered it facially invalid.

[17] Federal Civil Procedure 170A ⇨2743.1

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2743 Appellate Costs
170Ak2743.1 k. In General. Most Cited Cases
Operator of adult business prevailed on significant issue on appeal for purposes of determining entitlement to attorney fees, where Court of Appeals concluded that county could not, prior to final licensing decision, constitutionally regulate adult businesses by altering status quo of license applicant in business on effective date of county order.

Brad Reich, Arthur M. Schwartz, Michael W. Gross , Denver, CO, for appellant in No. 93-4631.
Terrence S. Welch, Jimmy Edward Crouch, William C. Arnold, Pamela A. Wells, Denton County Crim. Dist. Atty., Dallas, TX, for appellee in No. 93-4631.

Terrence S. Welch, William C. Arnold, Vial, Hamilton, Koch & Knox, Dallas, TX, for appellant in No. 93-5234.
Brad Reich, Arthur M. Schwartz, Michael W. Gross , Denver, CO, Malcolm Dade, Dallas, TX, for appellee in No. 93-5234.

Appeals from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.
PATRICK E. HIGGINBOTHAM, Circuit Judge:
TK's Video, Inc., an adult book and video store, sued Denton County, Texas, contending its licensing requirements for "adult" businesses violate the First and Fourteenth Amendments.[FN1] The district court held several licensing requirements unconstitutional, severed them, upheld the others, and awarded attorney's fees, 830 F.Supp. 335. Both TK's and Denton County appealed. We reject contentions that the County's licensing scheme was impermissibly broad and failed to provide adequate procedural protection, including judicial review. We affirm except in one particular. We find that the County regulation fails to assure maintenance of the status quo while processing an application for a license by a business existing when the County adopted its regulation.

FN1. This Order of Denton County is attached as Appendix A.

I.

[1] Erotic nonobscene printed matter, films, and live entertainment are sheltered by the First Amendment, *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 130 (3rd Cir.1993), but enjoy less protection than some other forms of speech such as political speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976) . There is no contention that TK's sells obscene pornographic material. Rather, TK's is regulated as an adult book and video store.

[2] We distinguish between regulating the content

and regulating the consequence of protected activity. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication. *Id.*

Under the first *City of Renton* factor, the Denton County order must justify its restrictions by reference to effects attending the regulated speech. The order, by its own terms, combats pernicious side effects of adult businesses such as prostitution, disease, street crime, and urban blight. It does not censor, prevent entrepreneurs from marketing, or impede customers from obtaining communicative material. The County's regulation does not on its face regulate content. Rather, the regulation is aimed at the impact on the surrounding community. But there are also procedural limits to regulating even at this lesser level of protection.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), Justice O'Connor, writing for Justices Stevens and Kennedy, and joined in the judgment by Justices Brennan, Marshall, and Blackmun, stated that content-neutral regulations contain adequate procedural safeguards when (1) any prior restraint before judicial review of the licensing process is for *708 a specified brief period during which the status quo is maintained; and (2) there is prompt judicial review after denial of a license.

II.

[3] TK's first charges that the Denton County order, which provides that a county official shall issue an operating license within 60 days after receiving the application unless he discovers one of several disqualifying facts, fails to provide adequate procedural safeguards.[FN2] TK's argues that the county must have a deadline shorter than 60 days and that it must not interfere with normal business operation during the application process.

FN2. The Order provides that "[a]ll decisions of the county director of public works become final within thirty (30) days." No one contends that this provision prevents an immediate appeal of a denial of license to the district court of Denton County. We read this language as setting a time within which an appeal must be lodged.

Under *FW/PBS*, the County must ensure that any restraint before judicial review is limited to a specified brief period. In *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141, 88 S.Ct. 754, 755-56, 19 L.Ed.2d 966 (1967) (per curiam), the Supreme Court found that 50 to 57 days is not a specified brief period. It is true that Denton County's order placed a 60-day limit on licensing procedures after receipt of an application. But the regulation in *Teitel* was content-based. The ordinance in *Teitel* also required administrators to review films before they could be shown, a relatively easy task compared to licensing adult businesses and the people who run them. Licensing entails reviewing applications, performing background checks, making identification cards, and policing design, layout, and zoning arrangements. We are persuaded that Denton County's order creates less of a danger to free speech and requires a more time-consuming inquiry than screening movies. We conclude that here 60 days for acting on license applications imposes no undue burden.

[4] TK's also urges that the regulation is invalid for a related reason. It urges that Denton County fails to assure maintenance of the status quo. The contention is that the County cannot constitutionally shut down an existing business while its application for a license is pending and that TK's was operating when Denton County adopted its regulation. The County points out that it has not attempted to close TK's; that because its regulation is content-neutral, it is not obligated to refrain from regulation during the licensing period. The district court rejected TK's contention concluding that interim regulation is implicit in a valid period for issuing a license. This is true as far as it goes, but it is qualified by the further limit that the County must maintain the status quo. We agree that an applicant for a license

not in business when the Order was adopted is not free to operate while its license is pending.

Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process. It is no answer that the County has not elected to do so. The absence of constraint internal to the regulation is no more than open ended licensing. Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the State.

The regulating order does not address the problem. The order maintains the status quo pending judicial review for licensees facing suspension or revocation. An applicant denied a license has a right to de novo review by the state district court and, by the terms of the Order, filing an appeal stays a Decision of the Director of Public Works in suspending or revoking a license until final decision by the state district court. Because TK's was in business when the Order was adopted, its free speech activity cannot be suppressed pending review of its license application by the County.

[5] TK's also contends that the Order is deficient in failing to provide an automatic stay pending appeal of an administrative decision denying an application for a license. This argument is in essence a twin of the contention that the status quo must be maintained. We have concluded that the County cannot alter the status quo during the licensing process. There is then nothing to stay except a denial of a license. Stated another way, the issue is whether a business must be *709 allowed to commence operation without a license during judicial review. Here we agree with the district court that a valid time period within which the County can act carries the implicit rejection of such required interim licensing. Nor is this unduly restrictive, given the availability of expeditious judicial review. A rejected license applicant has thirty days to seek judicial relief before the order of the Director of Public Works becomes final. *National Socialist Party v. Village of Skokie,* 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977).

This does not answer the further question of how much of the total licensing process must be complete within the specified brief period, specifically whether the brief period includes completion of judicial review. Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

TK's objects that the order does not provide automatic and prompt judicial review, or an automatic stay of an order denying a license. As we explained, the Order provides that filing a notice of appeal to the state district court of Denton County stays an administrative decision revoking or suspending a license. So the focus of TK's contention is on the absence of a stay of an order denying a license. *FW/PBS* requires only a prompt judicial hearing, a standard that the order meets by giving an unsuccessful license applicant 30 days to appeal to a district court in Denton County "on a trial de novo basis." The availability of expeditious judicial review obviates the need for an automatic stay. *National Socialist Party v. Village of Skokie,* 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977).

III.

A.

[6] TK's urges that the County's list of persons associated with its business who must be licensed is impermissibly broad. Denton County required a license from numerous persons associated with adult businesses. The district court, however, struck down licensing requirements for stockholders, limited partners, equity holders and their employees, and property owners and equity holders associated with adult businesses from the regulation. This exclusion is not at issue and the regulation now extends only to owners, clerks, and

employees of adult businesses, corporations or directors of adult businesses and their employees, and partners in adult businesses and their employees.

Under the licensing provision the County Director of Public Works must approve a license unless he finds an enumerated disqualifying factor such as a prior adult business regulatory violation or a conviction for a certain sexual offense.

Licensing clerks and employees ensures that only persons who satisfy basic legal and hygienic standards work in adult businesses. The County also requires that all adult business employees wear an identification card at work. The County says that this requirement permits it to monitor the work force of adult businesses and to ensure that only duly authorized adults work in these enterprises.

While corporations reasonably may be obliged to submit detailed business information to obtain a license, the requirement that owners and employees disclose personal information to County officials is more burdensome. The Denton County order requires owners and employees to disclose only their age, recent infractions of certain adult business regulations, and recent convictions for certain sexual offenses. The County says that their information assists in making background checks and preparing identification cards.

Compelled content-neutral disclosure of owner and employee information can chill protected expression. *See Talley v. California*, 362 U.S. 60, 64, 80 S.Ct. 536, 538-39, 4 L.Ed.2d 559 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-62, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488 (1958). This chill could occur even if suppressing particular expression is unintended. *NAACP*, 357 U.S. at 461, 78 S.Ct. at 1171. We insist that *710 countervailing state interests must further a substantial government interest. *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1975) (per curiam). This protective skirt requires a "relevant correlation" or " substantial relation" between the information required and the government interest. *Id.*

We are persuaded that requiring owners and employees to supply information about their age and certain prior regulatory infractions and sexual offenses substantially relates to the substantial government interest of curtailing pernicious side effects of adult businesses. The Denton County order does not demand comprehensive disclosure of personal information, but only information reflecting ability to function responsibly in the adult business setting.

The Seventh and Ninth Circuits have invalidated disclosure requirements. In *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980), the court invalidated the required disclosure of past aliases, criminal convictions, and ordinance violations as unrelated to the city's stated goal of preventing adult businesses from congregating in one location. *Id.* at 1215-19.

In *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 224-26 (9th Cir.1989), the court invalidated a shareholder disclosure rule. The city wanted to use the information to notify shareholders of ordinance requirements and to hold them legally responsible for violations, although officers and directors, not shareholders, have legal responsibility for businesses. The court found no logical connection between the shareholder disclosure rule and the stated purpose for the information. *Id.* at 226.

Genusa and *Acorn* are not apposite. The Denton County order outlines the ambitious agenda of curtailing negative side effects not simply of clusters of adult businesses, but of each adult business. Disclosure of owner and employee personal history might not be tailored to locating adult businesses, but it does monitor persons with a history of regulatory violations or sexual misconduct who would manage or work in them. These histories are plainly correlated with the side effects that can attend these businesses, the regulation of which was the legislative objective. In more legalistic and abstract terms, ends and means are substantially related. Insisting on this fit of ends and means both assures a level of scrutiny appropriate to the protected character of the activities and sluices regulation away from content, training it on business offal.

B.

[7] An applicant requesting a license must post a sign on the business premises disclosing his request. An applicant must also disclose his request by advertising in local newspapers. The district court upheld these disclosure requirements, while striking down a requirement requiring applicants to notify property owners within a specified radius of the proposed enterprise. The two notice provisions that survived challenge in the district court ensure that potential neighbors know about the impending arrival of adult businesses. Notice to others of pending zoning regulation is supported by a substantial state interest, serving the practical role of allowing effected persons an opportunity to examine the request and test its accuracy. These notice requirements are not onerous. Nor are they disguised censorship. Rather, they are typical of notices routinely required in zoning regulations. We are persuaded that the notice requirements are sufficiently tailored to the regulatory objective.

C.

[8][9] Government cannot tax First Amendment rights, but it can exact narrowly tailored fees to defray administrative cost of regulation. *Cox v. New Hampshire,* 312 U.S. 569, 576-77, 61 S.Ct. 762, 765-66, 85 L.Ed. 1049 (1941). Denton County requires each business and individual requesting a license to pay annual fees of $500 and $50, respectively. The district court found these amounts tied to the cost of investigating applicants and processing licenses. We agree.

D.

[10] We have upheld design and layout regulations for adult film and video theaters. *See FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298, 1304 (5th Cir.1988), *aff'd in part, rev'd in part, vacated in part,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The Denton*711 County order contains specifications identical to those previously upheld. Completely private and poorly lit viewing booths encourage illegal and unsanitary sexual activity in adult theatres. *See FW/PBS,* 837 F.2d at 1304. The design and layout regulations narrowly respond to a substantial governmental interest.

E.

[11] The remaining requirements in the Denton County order for issuing, suspending, or revoking licenses resemble those in the *FW/PBS* ordinance, which survived constitutional challenge. *See id.* at 1305-06. These procedures, like those in *FW/PBS,* can be objectively measured and rest on adequate factual bases either obvious by their terms or ascertainable by reference to other sources of law. *See id.* at 1306.

IV.

[12][13] Denton County argues that the district court abused its discretion by finding that TK's was entitled to attorney's fees. *See United States v. Mississippi,* 921 F.2d 604, 609 (5th Cir.1991). To receive attorney's fees, a plaintiff must be a prevailing party, that is, the plaintiff must succeed on a significant issue that achieves some of the benefit the plaintiff sought in bringing suit. *Farrar v. Hobby,* 506 U.S. 103, ---, 113 S.Ct. 566, 572, 121 L.Ed.2d 494 (1992). A prevailing party must effect change in the legal relationship between plaintiff and defendant. *Id.* at ---, 113 S.Ct. at 572-73.

TK's has succeeded on significant issues and has altered its legal relationship to the County. The district court invalidated licensure requirements for stockholders, limited partners, equity holders, and property owners associated with adult businesses. As well, the court invalidated the notice requirement in regard to property owners in close proximity to proposed adult businesses. We have, in turn, insisted on a status quo provision. These holdings materially alter the relationship of TK's to the county.

[14] Denton County urges that TK's has not applied for a license, so the invalidation of any part of the order has not altered any legal relationship. This

ignores the reality that TK's must apply for a license to continue operation. After the trial court's and this court's judgment, however, TK's must meet fewer requirements. TK's lawsuit has altered the relevant legal regime.

In *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam), the Court reversed an attorney's fees award after a successful lawsuit to modify prison policies because one plaintiff had died and the other had been released. It found that a victory "could not have in any way benefited either plaintiff." *Id.* at 4, 109 S.Ct. at 203-04. Similarly, in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), the Court invalidated as vague a school regulation requiring that meetings during nonschool hours be conducted only with prior approval of the principal. The court suggested that this finding alone would not support prevailing party status without "evidence that the plaintiffs were ever refused permission to use school premises during nonschool hours." *Id.* at 792, 109 S.Ct. at 1493-94.

In *Rhodes*, the plaintiffs stood little chance of benefiting from the changed policy. They would do so only if they returned to prison. That chance was too speculative for the surviving plaintiff and nonexistent for the dead one. As a result, the lawsuit did not materially alter the legal relationship between the parties. A similar rationale explains *Texas State Teachers*, in which the plaintiffs failed to show that the principal had ever withheld permission for a meeting. As the plaintiffs may have been free to meet regardless of their suit, it was uncertain whether success on the merits would alter any legal relationship.

In contrast to the plaintiffs in *Rhodes* and *Texas State Teachers*, TK's faces certain regulation. First, TK's must seek a license to continue operation. The original order, partially invalidated by the district court, would have required TK's to seek licensure of stockholders, limited partners, equity holders, and certain property owners, and to notify certain neighbors at its business location. Unlike the plaintiffs in *Rhodes*, TK's would have been subject to these unconstitutional requirements with virtual certainty.

Second, the requirements that TK's seek licenses for certain persons and notify certain neighbors were not vague or optional, but *712 were prerequisites for operation. These invalidated regulations did not resemble the school rule in *Texas State Teachers* because, unlike the principal's unstructured decisionmaking process, they were neither indefinite by their terms nor discretionary in their application. TK's must meet these requirements to remain open.

Denton County cites *LaGrange Trading Co. v. Broussard*, No. 90-2306, 1993 WL 188672, 1993 U.S.Dist. LEXIS 7281 (E.D.La. May 25, 1993), in which an adult bookstore challenged a zoning ordinance to remain at its present location. The court upheld most of the ordinance, but invalidated a special permit requirement. From this partial victory, the plaintiff sought attorney's fees. The court denied the request because the remaining provisions would require the business to move anyway. *Id.*, 1993 WL 188672 at *4-5, 1993 U.S.Dist. LEXIS 7281 at *16. Unlike the plaintiff in that case, TK's benefits from its lawsuit.

[15] The district court entertained a request by Michael Gross for $22,487.50 in attorney's fees, but reduced the actual award to $7,500. Denton County argues that the $7,500 is unreasonably high given the degree of TK's success. In particular, the County notes that TK's asserted 72 constitutional challenges to the order, but prevailed on only 5 of them, a 7% success rate, which might suggest that $7,500 of the $22,487.50, or 33% of the requested fees, is too generous. TK's counsel was able and the County's counting fails to capture the success of this suit. We do not think so, but even if the award is generous, it is not an abuse of discretion.

We affirm the district court's carefully crafted decree in virtually all respects. We remand to the district court with instruction to enter judgment with the additional declaration that until the order of the Director of Public Works becomes final, an applicant for a license in business on the effective date of the Order cannot otherwise be regulated by the Order.

24 F.3d 705
(Cite as: 24 F.3d 705)

AFFIRMED in part, VACATED and REMANDED in part.

APPENDIX A

STATE OF TEXAS

COMMISSIONER'S COURT FOR DENTON COUNTY

SEXUALLY ORIENTED BUSINESSES ORDER

AN ORDER PROVIDING FOR LICENSING AND REGULATION OF SEXUALLY ORIENTED BUSINESSES IN UNINCORPORATED AREAS OF DENTON COUNTY, TEXAS.

WHEREAS, there are sexually oriented businesses in the unincorporated area of Denton County and there is the potential for future businesses that require special supervision from the public safety agencies of the county in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County; and

WHEREAS, the Commissioner's Court finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the County which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and

WHEREAS, licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

*713 WHEREAS, there is convincing documented evidence that sexually oriented businesses, because of their very nature have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values, and

WHEREAS, it is recognized that sexually oriented businesses, due to their nature, have serious objectionable operational characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban and rural blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the Commissioner's Court desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban and rural blight; and

WHEREAS, it is not the intent of this order to suppress any speech activities protected by the First Amendment, but to enact a content-neutral ordinance which addresses the secondary effects of sexually oriented businesses; and

WHEREAS, it is not the intent of the Commissioner's Court to condone or legitimize the promotion of obscene material, and the Commissioner's Court recognizes that state law prohibits the promotion of obscene materials, and expects and encourages state enforcement officials to enforce state obscenity statutes against any such illegal activities in Denton County.

Pursuant to the authority granted by the Constitution and 243.001 et seq. Local Government Code of the State of Texas, BE IT ENACTED BY THE COMMISSIONER'S COURT OF DENTON COUNTY, TEXAS:

24 F.3d 705
(Cite as: 24 F.3d 705)

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24 F.3d 705
(Cite as: 24 F.3d 705)

ORDER OF THE COMMISSIONERS COURT

24 F.3d 705
(Cite as: 24 F.3d 705)

SEC. 1A-1. *PURPOSE AND INTENT.*

(a) It is the purpose of this order to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the county, and to establish reasonable and uniform regulations to prevent the concentration of sexually oriented businesses within the county. The provisions of this order have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this order to restrict or deny access *714 by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. The promotion of obscene material (not protected by the first Amendment) is enforceable through separate criminal sanctions under the penal code.

(b) It is the intent of the Commissioners Court that the locational regulations of this are promulgated pursuant to 243.001 *et. seq.* Local Government Code , as they apply to sexually oriented business.

SEC. 1A-2. *DEFINITIONS.*

In this order:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug operated or electronically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of " specified sexual activities" or "specified anatomical areas,"

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or
(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
(A) persons who appear in a state of nudity; or
(B) live performances which are characterized by the exposure of "specified anatomical areas" or by " specified sexual activities"; or
(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of " specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:
(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, film, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or
(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or
(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are regularly shown and are

characterized by the depiction or description of " specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of " specified anatomical areas" or by "specified sexual activities."

(7) APPLICANT means a person who must apply for a license by this act.

(8) CHILD CARE FACILITY means a building used as a day nursery, children's boarding home, child placing agency or other place for the care or custody of children under fifteen years of age.

(9) CHURCH or PLACE OF RELIGIOUS WORSHIP means a building in which persons regularly assemble for worship,*715 intended primarily for purposes connected with faith, or for propagating a particular form of belief.

(10) COUNTY DIRECTOR OF PUBLIC WORKS means the Denton County director of public works or his designated agent.

(11) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(12) ESCORT AGENCY means a business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(13) ESTABLISHMENT means and includes any of the following:
(A) the opening or commencement of any sexually oriented business as a new business;
(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
(C) the addition of any sexually oriented business to any other existing sexually oriented business;
(D) the relocation of any sexually oriented business; or
(E) a location and place of business.

(14) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license on a person licensed under this act.

(15) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(16) NUDITY or a STATE OF NUDITY means:
(A) the appearance of a human bare buttock, anus, male genitals, female genitals, pubic region or female breasts; or
(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, pubic region or areola of the female breast.

(17) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(18) PUBLIC PARK means a tract of land maintained by the federal, state, or a local government for the recreation and enjoyment of the general public.

(19) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home district.

(20) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as a residence.

(21) SEMI-NUDE means a state of dress in which

clothing covers no more than the genitals, pubic region, and areola of the female breast, as well as portions of the body covered by supporting straps or devices.

(22) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:
(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(23) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(24) SHERIFF means the Sheriff of Denton County or his designated agent.

(25) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(26) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:
(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
*716 (B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
(C) masturbation, actual or simulated; or
(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(27) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on February 5, 1990.

(28) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:
(A) the sale, lease, or sublease of the business;
(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or
(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of the law upon the death of the person possessing the ownership or control.

SEC. 1A-3. *CLASSIFICATION.*

Sexually oriented businesses are classified as follows:
(1) adult arcades;
(2) adult bookstores or adult video stores;
(3) adult cabarets;
(4) adult motels;
(5) adult motion picture theaters;
(6) adult theaters;
(7) escort agencies;
(8) nude model studios; and
(9) sexual encounter centers.

SEC. 1A-4. *LICENSE REQUIRED AND DUTIES OF APPLICANT.*

(a) The following are required to be licensed:

(1) All owners, clerks, and employees of a sexually oriented business are required to be licensed to operate or work in said business.

(2) All corporations, stockholders or directors of any sexually oriented business and their employees.

(3) All partners and limited partners in any sexually oriented business and their employees.

(4) All equity holders of any sexually oriented business and their employees.

(5) All real property owners, stockholders, executive officers, corporations, partners, limited

partners or equity holders and lien holders and their employees which are associated with any sexually oriented business requiring a license under this order.

(b) No person may work for any sexually oriented business without having on his or her person at all times while at work an appropriate identification card showing that he or she is currently licensed. Such identification shall be available at all times for inspection and shall be worn on the left breast of said employee during working periods.

(c) All potential employees and/or clerks of sexually oriented businesses must comply with Sec. 1A-4(a), (b), (g), (h), 1A-6(b), 1A-8, 1A-9, 1A-10, 1A-15, 1A-16, 1A-17, 1A-18, and not be in violation of Sec. 1A-5(a)(1), (3), (4), (6), (8), or (10) before being issued an identification card to work at the business. Application forms will be provided by the county director of public works and the determinations of compliance must be made by him within sixty (60) days from time of application.

(d) An application for a sexually oriented business license must be made on a form provided by the county director of public works. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 1A-19 of this order shall submit a diagram meeting the requirements of Section 1A-19. All locational requirements must be approved by the county director of public works within sixty (60) days from the time the application is filed.

*717 (e) The applicant for a sexually oriented business license must be qualified according to the provision of this order.

(f) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has an interest in the business must sign the application for a license as applicant and shall be considered a licensee if a license is granted.

(g) The fact that a person possesses any other valid license required by law does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses another business license shall comply with the requirements and provisions of this order as well as the requirements and provisions of the laws concerning the other license.

(h) Each applicant shall attach two copies of a recent photo to his or her application form.

(i) Each applicant for a business license shall, upon the filing of the application and payment of the filing fee, place signs (at least 24 inches x 36 inches in size) which provide notification and information specifically stating "SEXUALLY ORIENTED BUSINESS LICENSE APPLICATION PENDING" and the date on which the application was filed. All lettering on the signs must be at least 1 and 1/2 inches x 2 inches in size for each letter on the sign. The signs must be of sufficient quantities to be placed upon the property so as to identify it as being subject to a proposed sexually oriented license. It shall be the duty of each applicant as to each particular application to erect said signs along all the property's public road or highway frontage so as to be clearly visible from the public road or highway. If a property does not have a public road or highway frontage, then signs shall be placed upon the closest available right of way and upon the property. One sign shall be erected for each three hundred-foot increment of each public road or highway frontage on said property existing or any part thereof. Said signs shall be erected not less than fourteen (14) days after the filing of the application for the sexually oriented business license and remain erected until the application has been approved by the county director of public works.

(j) Every applicant for a sexually oriented business

license shall give notice of the application by publication at his own expense in two consecutive issues of a newspaper of general circulation published in Denton County, Texas. The notice shall be printed in 10-point boldface type and shall include: (1) the fact that a sexually oriented business license has been applied for; (2) the exact location of the place of business for which the permit is sought; (3) the names of each owner of the business and, if the business is operated under an assumed name, the trade name together with the names of all owners; and (4) if the applicant is a corporation, the names and titles of all officers. Such notice shall be printed not less than fourteen (14) days after the application is filed with the public works department.

(k) Written notice of the application for a sexually oriented business license shall be sent to all owners of real property lying within one thousand (1000) feet of property on which the license is requested. Such notice shall be sent not less than fourteen (14) days after the application is filed with the county director of public works. The notice of the application for a sexually oriented business license described herein shall be given by posting such notice properly addressed and postage paid to each taxpayer as the ownership appears on the last approved county tax roll. Each property owner shall have fourteen (14) days from the mailing of the notice to advise the county director of public works of a locational restriction under Sec. 1A-13(a) or (b) of this order. It is the responsibility of the applicant for a license to send this notice.

(*l*) An applicant for a renewal permit or an existing business at the time of the passage of this order is not required to publish notice or meet the posting requirements of (i), (j) and (k) above.

SEC. 1A-5. *ISSUANCE OF LICENSE.*

(a) The county director of public works shall approve the issuance of a license to an applicant within sixty (60) days after receipt *718 of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the county of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business. The county tax assessor shall make this determination and report his findings to the county director of public works within sixty (60) days from the time the application is filed.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this order, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect. The sheriff of Denton County shall make this determination and report his findings to the county director of public works within sixty (60) days from the time the application is filed.

(5) The premises to be used for the sexually oriented business have not been approved by the county director of public works as being in compliance with this order. Reports of compliance or non-compliance with this order must be completed by the county director of public works within sixty (60) days from the time the application is filed.

(6) The license fee required by this order has not been paid.

(7) An applicant has failed to comply with the requirements of Sec. 1A-4(i), (j) or (k) unless exempt under 1A-4(1).

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding twelve (12) months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action

by law enforcement officers.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 1A-7, 1A-12, 1A-13, 1A-15, 1A-16, 1A-17, 1A-18, 1A-19, or 1A-20.

(10) An applicant or an applicant's spouse has been convicted of a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal code:
(aa) prostitution;
(bb) promotion of prostitution;
(cc) aggravated promotion of prostitution;
(dd) compelling prostitution;
(ee) obscenity;
(ff) sale, distribution, or display of harmful material to minor;
(gg) sexual performance by a child;
(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code;
(aa) public lewdness;
(bb) indecent exposure;
(cc) indecency with a child;

(iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

(v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor *719 offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 1A-5(a)(10)(B) has elapsed.

(d) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

(e) It shall be the duty of the sheriff to report the findings under Section 1A-5(a)(10) and 1A-5(c) above to the county director of public works within sixty (60) days from the time the application is filed.

SEC. 1A-6. *FEES.*

(a) The annual fee for a sexually oriented business license is $500.00.

(b) Each individual applicant shall pay a $50.00 fee with each application.

SEC. 1A-7. *INSPECTION.*

(a) An applicant or licensee shall permit

representatives of the sheriff's department and county public works department to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the sheriff's department at any time it is occupied or open for business.

(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation.

SEC. 1A-8. *EXPIRATION OF LICENSE.*

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 1A-4. Application for renewal should be made at least 60 days before the expiration date, and when made less than 60 days before the expiration date, the expiration of the license will not be affected.

(b) When the county director of public works denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the county director of public works finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final.

SEC. 1A-9. *SUSPENSION.*

The county director of public works shall suspend a license for a period not to exceed 30 days if he determines that a licensee has:

(1) violated or is not in compliance with any portion of this order;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexual oriented business premises as authorized by this order;

(4) knowingly permitted gambling by any person on the sexual oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers.

SEC. 1A-10. *REVOCATION.*

(a) The county director of public works shall revoke a license if a cause of suspension in Section 1A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The county director of public works shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the county director of public works during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

*720 (3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in Section 1A-5(a)(10)(A) for which the time period required in Section 1A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime

listed in Section 1A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the county for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.

(e) When the county director of public works revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the county director of public works finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 1A-5(a)(10)(B) has elapsed.

SEC. 1A-11. *APPEAL.*

If the county director of public works denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the county director of public works to a district court in this county on a trial de novo basis. Filing an appeal in a district court stays the county director of public works in suspending or revoking a license until the district court makes a final decision. All decisions of the county director of public works become final within thirty (30) days.

SEC. 1A-12. *TRANSFER OF LICENSE.*

(a) A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application.

SEC. 1A-13. *LOCATION OF SEXUALLY ORIENTED BUSINESSES.*

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church or place of religious worship;

(2) a public or private elementary or secondary school;

(3) a child care facility;

(4) a boundary of residential district as defined in this order;

(5) a public park;

(6) the property line of a lot devoted to a residential use as defined in this order; or

(7) another sexually oriented business which does not have a common entrance with one.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

*721 (c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or place of religious worship, or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. Such use will be permitted to continue for a period not to exceed one year, unless sooner terminated for any such reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented business are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church or place of religious worship, public or private elementary or secondary school, public park, residential district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked.

(h) All locational requirements of this section must be approved by the county director of public works within sixty (60) days from the time the application is filed.

SEC. 1A-14. *EXEMPTION FROM LOCATION RESTRICTIONS.*

(a) If the county director of public works denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 1A-13 of this order, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the county judge a written request for an exemption from the locational restrictions of Section 1A-13.

(b) If the written request is filed with the county judge within the 10-day limit, a permit and license appeal board shall consider the request. The county judge shall set a date for the hearing within 60 days from the date the written request is received. A board shall consist of five residents of Denton County, one from each of the commissioners precincts as appointed by the precinct commissioners and one appointed by the county judge. Each board member will serve a one (1) year term, with the chairperson of the board being appointed by a majority vote of the five (5) member board.

(c) A hearing by the board may proceed if at least three of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its

discretion, grant an exemption from the locational restrictions of Section 1A-13 if it makes the following findings:

(1) that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) that the granting of the exemption will not violate the spirit and intent of this order;

*722 (3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of renewal or restoration; and

(5) that all other applicable provisions of this order will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. Decisions of the permit and license appeal board are appealable to a district court of this county. Appeals from the permit and license appeal board must be made in writing to a district court of this county within thirty (30) days from the date of the final decision of the appeal board. After thirty (30) days, all decisions of the permit and appeal board become final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 1A-13 until the applicant applies for and received another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this order other than the locational restrictions of Section 1A-13.

SEC. 1A-15. *ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.*

(a) An escort agency shall not employ any person under the age of 18 years.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years.

SEC. 1A-16. *ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.*

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public.

SEC. 1A-17. *ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.*

24 F.3d 705
(Cite as: 24 F.3d 705)

(a) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(b) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) It is a defense to prosecution under Subsections (a) and (b) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

SEC. 1A-18. *ADDITIONAL REGULATIONS FOR ADULT MOTELS.*

(a) Evidence that a sleeping room in a hotel, motel or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel and that term is defined in this order.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he *723 rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" and "subrent" mean the act of permitting a room to be occupied for any form of consideration.

SEC. 1A-19. *REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.*

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The county director of public works may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the sheriff or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be

configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station. Viewing booths must be separated at least twelve (12) inches from the exterior walls of any other viewing booths by open space.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of Subsection (a) above *724 commits an offense if he knowingly fails to fulfill that duty.

(c) All locational requirements of this section must be approved by the county director of public works within sixty (60) days from the time the application is filed.

SEC. 1A-20. *DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.*

(a) A person commits an offense if, in a sexually oriented business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public.

SEC. 1A-21. *DEFENSES.*

(a) It is a defense to prosecution under Section 1A-4(a), 1A-13, or 1A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

24 F.3d 705

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(b) It is a defense to prosecution under Section 1A-4(a) or Section 1A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value.

SEC. 1A-22. *ENFORCEMENT.*

(a) As stated in Chapter 243 of the Local Government Code of Texas, the county may sue in district court for an injunction to prohibit the violation of a regulation of this order.

(b) As stated in Chapter 243 of the Local Government Code of Texas, an offense under this subsection is a Class A misdemeanor.

SEC. 1A-23. *SEVERABILITY.*

The terms, provisions, and conditions of this order are severable.

SEC. 1B-1. *TIME OF EFFECT.*

This order takes effect at 12:00 p.m. one day following its adoption.

PASSED and APPROVED this the 5th day of February, 1990.

/s/ Vic Burgess

Judge Vic Burgess

/s/ Buddy Cole

Commissioner Buddy Cole

/s/ Sandy Jacobs

Commissioner Sandy Jacobs

/s/ Lee Walker

Commissioner Lee Walker

/s/ Don Hill

Commissioner Don Hill

ON PETITION FOR REHEARING

July 26, 1994

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

*725 PER CURIAM:

TK's Video, Inc. challenged on First Amendment grounds a Denton County order regulating adult businesses. The district court found certain provisions unconstitutional, severed them, and upheld the rest. We found only one remaining constitutional infirmity. *See TK's Video, Inc. v. Denton County,* 24 F.3d 705 (5th Cir.1994). We concluded that the county's order did not guarantee to an adult business operating on the effective date of the ordinance that the status quo would be maintained prior to a final licensing decision, as required by *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 227-30, 110 S.Ct. 596, 605-07, 107 L.Ed.2d 603 (1990). We remanded the case to the district court with the instruction to enter judgment declaring that until the Director of Public Works makes a final licensing decision, a license applicant in business on the effective date of the order cannot be regulated by the order.

[16] TK's petitions for rehearings alleging that we directed the district court to engraft this procedural safeguard directly onto the Denton County order in

24 F.3d 705
(Cite as: 24 F.3d 705)

violation of *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir.1978) (en banc), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), instead of striking down the order altogether. The objection focuses on language in *Universal Amusement Co.* stating that federal courts cannot rewrite Texas statutes to incorporate the kind of procedural safeguards mentioned in *FW/PBS*. TK's alleges that our instruction to the district court amounts to a rewriting of the Denton County order at odds with the original legislative intent behind the order.

TK's is mistaken. We held that the county cannot prior to a final licensing decision constitutionally regulate under the order by altering the status quo of a license applicant in business on the effective date of the order. Any rewriting of the Denton County order to meet constitutional requirements has been left to the Denton County authorities. Our grant of declaratory relief will support an injunction by the district court to enforce its terms if the other requisites of injunctive relief are shown. That is, TK's could obtain protection should it need to do so-from any threat to enforce before the final licensing decision, provided TK's has made application for a license. Implicit in our ruling is a rejection of any contention that this omission in the statute renders it facially invalid. To the contrary, the omission appears to present risk only to TK's.

[17] TK's also notes that although we found that the Denton County order was constitutionally deficient in one respect, we did not award attorney's fees for work done on the appeal. We agree that TK's has prevailed on a significant constitutional issue on appeal, but leave to the district court the determination of the proper amount of attorney's fees.

The petition for rehearing is denied.

C.A.5 (Tex.),1994.
TK's Video, Inc. v. Denton County, Tex.
24 F.3d 705

END OF DOCUMENT

C. STATE TAX CASES

United States District Court; C.D. California
Theresa Enterprises, Inc., dba The Hello Doll
v.
United States of America.

CV 74-389-AAH
May 26, 1976

HAUK, Judge

Instructions

***1** Ladies of the jury, now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the law applicable to this case and it's your duty to follow these instructions of the law as I give them to you in deciding the facts.

Now, in a civil case such as you have here before you the party asserting the affirmative of an issue has the burden of proving it by a preponderance of the evidence. In this case, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the issue of whether the dancers here involved were independent contractors or were employees.

Now, the issue upon which the plaintiff has the burden is to show by a preponderance of the evidence that the dancers who danced at The Hello Doll run by the plaintiff corporation—and you have to treat a corporation just like you treat an individual person because it is a person in the law—that these dancers who danced at The Hello Doll during the quarters of 1968, 1969, 1970, and the first three quarters of 1971—that they were independent contractors and not employees of that club and, therefore, plaintiff is entitled to receive the sum of $332.18 together with interest thereon provided by law.

Now, the defendant has the burden of establishing by the preponderance of the evidence all the facts necessary to prove that the assessment made upon plaintiff by the director of the Internal Revenue Service Western Region assessing additional taxes of $32,275.06 was duly made according to law and was not paid by plaintiff and is now due and owing.

In this connection, you are instructed that there is a rebuttable presumption which is a form of evidence that such assessment was duly made according to law; and the plaintiff must rebut that presumption by a preponderance of the evidence in order to sustain its burden that, of course, it was not duly made according to law which as I have indicated to you really depends on that issue of whether the **dancers** were **independent contractors** or **employees**. The burden is upon the plaintiff of course by a preponderance of the evidence to show that the **dancers** were **independent contractors** rather than **employees**.

The controversy in this case revolves around whether **dancers performing** at the plaintiff's place of business, The Hello Doll, were **employees** or **independent contractors** for the years 1968 to 1970 and the first three quarters of 1971. A secondary issue is whether the taxes were properly computed by the defendant government by using an averaging method, if in fact the **dancers** or some of them were **employees** and not **independent contractors**.

The parties have entered into a stipulation of fact and you are to regard the following facts as true without the presentation of any evidence whatsoever:

During the period in suit, plaintiff Theresa Enterprises, Inc., doing business as The Hello Doll, conducted its business at 10910 Magnolia Boulevard, North Hollywood, California 91601;

***2** During the period in suit, Elmer Altman and Jeanette Altman were the sole stockholders of

Theresa Enterprises, Inc., each owning fifty percent of its stock. Mr. Altman was the president and Mrs. Altman the secretary-treasurer of the corporation. Each served as a corporate director;

During the period in suit, Mr. Altman was the manager of the corporation's business, The Hello Doll. Mrs. Altman managed the bar, overseeing the waitresses, ringing up the cash and acting as hostess;

The Hello Doll was engaged in the sale of alcoholic beverages by the drink to customers. In addition to the drinks, visual entertainment was provided by dancers at no additional charge over the cost of the drink;

During the period in issue, the facilities of the club consisted of a bar, bar stools, tables, and chairs for service to customers and a stage and/or stages for the presentation of visual dancing **entertainment**. The stage and/or stages were equipped with spotlights and mirrors;

Music was provided by a coin operated jukebox;

During the periods involved, plaintiff determined that **dancers** appearing at its club were **independent contractors** rather than **employees**, and accordingly federal payroll taxes were not withheld from the remuneration which the **dancers** received. In contrast, bartenders, waitresses, and doormen were **considered employees** and the applicable federal taxes were withheld from their wages;

Dancers were obtained from **entertainment** agencies, primarily the Galaxy Agency, through newspaper advertisements and by word of mouth;

Dancers appearing at The Hello Doll were not prohibited by the corporation from working at other clubs and/or jobs;

Dancers were engaged by Elmer Altman on an individual basis;

Plaintiff's tax returns were prepared by a certified public accountant;

The **dancers**, as a condition of working at The Hello Doll, did not have to make any financial investment in Theresa Enterprises. The remuneration which they received was based on the number of hours they worked;

Pursuant to police regulations, the dancers were prohibited from mingling with the customers, soliciting drinks, or funds for the jukebox;

No dance training was furnished by plaintiff;

Dancers supplied their own costumes. However, it is in dispute whether costumes were subject to the approval of the management and whether the management advised the dancer as to what costume was required;

The dancers were engaged on an individual basis.

Now, the plaintiff contends that it is entitled to recover $332.18 paid to the Internal Revenue Service for Social Security, unemployment and withholding taxes for the periods involved, together with interest as provided by law. Plaintiff contends that it is not liable for the amount it has paid and therefore is entitled to a refund on the ground that the dancers were not its employees but were instead independent contractors. In other words, if the dancers were not the plaintiff's employees, the plaintiff is entitled to recover the money for which the plaintiff has sued.

***3** On the other hand, if they were employees of the plaintiff, the latter is not entitled to the money it seeks to recover in this case and the only question will be the proper computation of the taxes.

In this regard, it is up to you to find whether all or certain of the dancers were employees or independent contractors; the taxes due or not due dependent upon your findings as to whether all or certain of the dancers were employees or independent contractors—Well, that's your duty to determine that, too.

In other words, it's up to you to determine first of all Were all or any of the dancers independent contractors or employees? We have a special verdict for that so we can go down each of the names and indicate independent contractor or employee, as you may find, as to that particular dancer.

Now, this doesn't mean that I'm trying to tell you what you should find. You may find whatever you wish wherever you find it by the preponderance of the evidence, of course. You've got to follow all the rules of law. But you can find all of the dancers were independent contractors or all of them were employees or some were independent contractors and some were employees. And that's up to you.

If you should find that any or all of the dancers were employees, then you have to find the amount of tax that is owing.

If you find none of them were, of course, it's your duty to indicate that the $332.18 be returned to the plaintiff. Once you make that finding, if you do make that finding, the Court will determine the rest.

On the other hand, if you find for the defendant, that is, that some or all of these dancers were employees rather than independent contractors, you have to decide whether you will follow the method of the government's computation, the so-called averaging method, or whether you follow the so-called individual method. You can work that out, but if you have any problems with that, you can come back to the Court and ask for instructions and I will take it up at that time, as I say, if you do need help.

All right. As I say, the defendant contends that it is entitled to judgment against the plaintiff for unpaid Internal Revenue Service taxes for Social Security, unemployment, and withholding taxes for the periods involved, plaintiff having paid only the taxes relating to one employee in each quarter.

The law provides that, in these divisible taxes, as they are called, the taxpayer can pay for one employee for any quarter—each quarter involved, and pay that total amount, whatever it may be—in this case $332.18; and thereby that becomes a basis for filing a suit and getting jurisdiction in the federal court for a refund, as well as the basis for, and which the Court can order, for abatement of the entire tax. It's a method of, well, permitting a taxpayer an easier way to get into the federal court, you might say. They don't have to pay the whole tax. They can pay a portion, as I indicated, and then sue for refund of what they paid and then obtain abatement of the balance of the claimed tax.

***4** On the other hand, the government here of course has counterclaimed for the entire tax as they see it, the $32,000. The computation by the defendant is some $14,000, but we will get into that in a moment.

It is therefore necessary for you to decide whether the **dancers** were **independent contractors** or **employees** during these periods. A person rendering services to another for compensation does so either as an **employee** of the person for whom the services are being rendered or as an **independent contractor**. Therefore, you must determine whether the relationship between the **dancers** on the one hand and the plaintiff on the other hand and whether such was this relationship that they were **independent contractors** rendering services for the plaintiff or were they **employees** of the plaintiff.

On the other hand, as has been stipulated, the plaintiff **paid** employment taxes, as appropriate, for other **employees** of the business such as waitresses and bartenders and you need not concern yourself with any person other than the **dancers**.

And, of course, the corporation is treated as a person in law.

Now, there are a number of factors which you must take into consideration in making a determination as to whether the **dancers** and each of them employed by the plaintiff were **employees** or **independent contractors**. No one factor is controlling; rather your determination should be made from all of the evidence in this case.

Generally the relationship of employer and **employee** exists when the person for whom services are **performed** has the right to control and direct the individual who **performs** the services, not only as to the result to be accomplished, but also as to the details and means by which that result is accomplished. In general, if an individual is subject to the control or direction of another, merely as to the result to be accomplished by the work but not as to the means and methods for accomplishing the result, he is an independent contractor. Any single fact or small group of facts is not conclusive evidence of the presence or absence of control of the details and means by which the result to be accomplished is accomplished. There are a number of factual situations which can be applied to determine the status of any individual. They are briefly stated as follows:

An employee must comply with the instructions about when, where, and how she is to work; whereas an independent contractor is not required to comply with such instructions.

An employee is trained by the person who hires him; an independent contractor uses her own methods in doing the work and receives no training from the purchaser of the services.

Another factor is the existence of a continuing relationship between the person hiring the services and the person performing the services. In that regard, you may consider the transient nature of the services rendered in this instance as being a factor to consider among other factors.

If a worker substantially controls her own time, that's another factor indicative of her being an independent contractor. On the other hand, if the hours of work are substantially regulated by the employer, this is indicative of the employment or employee nature of the relationship.

***5** If the services rendered are artistic in nature and not subject to control as to how they are to be performed, that is indicative of an independent contractor.

If the worker must devote full time to the business of the employer, then this is a factor that should be condidered favorable to employment. If on the other hand, the worker can work when and for whom she chooses, this is an indication that she is an independent contractor.

Another factor to be considered by you is that an employee is required to perform services in a pattern or mode set for her by the employer. But an independent contractor is free to follow her own pattern of work.

Another factor to be considered by you is whether oral and written reports must be made to the hiret. If so, it may tend to show employment; if not, it tends to indicate that the worker is an independent contractor.

Another factor is the nature of payment for work, whether it is on an hourly basis or not does not necessarily determine whether an individual is an independent contractor or an employee. Even persons who work by the hour are not necessarily so considered as employees—either as employees or as independent contractors merely from that hourly rate.

You have to look, as I say, at all the factors that I'm discussing.

Another factor to consider is business and traveling expenses. If an employer pays the worker's business or traveling expenses, it's an indication, though not necessarily conclusive, that the individual is an employee.

On the other hand, if the worker is paid on an hourly basis and must take care of her own expenses, it is an indication, but again not necessarily conclusive, that she is an independent contractor.

Another factor is the furnishing of tools, materials, costumes or props by the employer. This would be indicative, though not conclusive, of an employment relationship. On the other hand, if the individual furnishes her own tools, materials, costumes or props for dance routines, it is indicative though not conclusive of an independent contractor.

Another factor is whether or not a person works for a number of persons or firms at the same time. If so, it usually but not necessarily indicates an independent contractor relationship. If not, it usually indicates an employee relationship.

Another factor is whether or not an individual makes her services available to the general public. If so, it generally, but not necessarily conclusively, indicates an independent contractor relationship. If not, it generally but not necessarily conclusively indicates an employee relationship.

Retention of an agency or an agent which or who then contacts members of the general public who may have an interest in the performance of the services of a worker is generally but again not absolutely or necessarily, as I say, an indication of an independent contractor relationship.

The test essentially lies in the degree to which the principal, that's the hirer or employer, may intervene to control the details of the agent's—of the worker here, the dancer's performance.

***6** That in the end is really all that can be said. Once again, that test is that—whether the hirer can control the details of the dancer's performance.

The law and the courts have said that that in the end is really all that can be said. You take all these various factors into account, but the test is control of the details. If the details are controlled, then the dancer is an employee; if the details are not controlled, then the dancer is an independent contractor. That's the test.

In the case here at bar, the plaintiff or the plaintiff's officer did intervene to some degree, but so does a general building contractor for instance intervene in the work of subcontractors. He decides how the different parts of the work must be timed and how they shall be fitted together. If he finds it desirable to cut out this or that from the specifications, he does so.

Some such supervision is inherent in any joint undertaking, but that does not make an independent contractor an employee. The test once again is whether there is any control over the details of the performance by the dancers.

If there is, that indicates an employee relationship; if there isn't, it indicates an independent contractor. But nothing I have said in these instructions is to give you any hint or intimation as to what I think you should decide. That's up to you.

The stipulated fact, for instance, that no training of the **dancers** by the plaintiff was required or given as a prerequisite to their **performance** is another factor which you should **consider** as indicating though not necessarily conclusively that the **dancers** are **independent contractors**.

Another factor you may **consider** is whether the relationship between any or all of the **dancers** on the one hand and the plaintiff on the other hand was sporadic and indefinite, consisting of irregular occurrences and without any continuing or permanent relationship between the **dancers** and the plaintiff of any determined time for appearance or **performance**.

If so, this is an indication again, and once again, but not conclusive of an **independent contractor** relationship. If not, it's an indication of an **employee** relationship.

Another factor which you may **consider** is whether or not any definite hours of work were

established by the employer. If not, it's an indication of lack of control and, therefore, the existence of an **independent contractor** relationship.

If there were, then it's an indication though not conclusive, again, of an **employee** relationship.

Another factor which you may **consider** is whether or not the plaintiff recruited **dancers** on the basis of **performing** dancing for prices agreed upon in advance and the **dancers pay** their own expenses such as agents' fees, costumes, cosmetics and other items—and wearing apparel used in their **performances**.

If so, you may **consider** this as an indication though not conclusive of an **independent contractor** relationship. If not, you may **consider** it, though not conclusive, as evidence of an **employee** relationship.

***7** If you should find that one, some, or all of the **dancers** were **employees** of the plaintiff, your next matter for determination as I told you is whether the taxes were properly computed by the government as to each **dancer**. If you find that the Revenue Agent had reasonable access to specific information from plaintiff's books, records, or **employees** or from plaintiff himself sufficient to accurately and reliably compute the employment taxes as to each **dancer**, then the plaintiff is entitled to have such taxes recomputed on that basis.

If you should find that they are **employees**, of course—If they are indepenent **contractors**, you know what your duty is there. It's just to refund the $332.18.

In this case, as I said, the burden is upon Theresa Enterprises to prove its case by the greater weight of the evidence. A fact is proven by the greater weight of the evidence when the evidence that establishes the fact has more convincing force than the evidence opposed to it and creates in your mind a belief that a fact is more likely true than not true.

Many of you are probably familiar with Social Security and unemployment benefits, at least to the extent of having heard of them. These programs are paid for by specially designed taxes. The law requires each employer to deduct a certain amount from wages paid employees.

It also requires an employee to pay an equal amount as his share of the tax for Social Security benefits.

The law relating to unemployment taxes requires that each employer of four or more persons pay tax equal to a certain percentage of the annual wages of the employees. These taxes must be paid by the employer to the Internal Revenue Service, an agency of the United States of America.

Most of you are also probably familiar with the provisions of law concerning withholding of federal income taxes from the wages of an employee based upon the relationship between an employee and an employer. They require an employer making payments of wages to an employee that he shall deduct and withhold from the amount of gross wages paid a certain amount of tax which is then periodically paid by the employer to the federal government for the employee.

Of course these laws only apply to individuals who employ employees and not to individuals or corporations who hire independent contractors.

In this case plaintiff contends that it is entitled to recover $332.18, together with interest, which was paid to the Internal Revenue Service for Social Security, unemployment and withholding taxes assessed for all four quarters of 1968, 1969, 1970 and the first three quarters of 1971. Plaintiff Theresa Enterprises contend that it is entitled to recover this amount from the United States on the grounds that the dancers who danced at its club, The Hello Doll, were not employees of the corporation but were independent contractors.

On the other hand, the defendant, the United States of America, has counterclaimed against the plaintiff for the unpaid portion of the assessed Social Security, unemployment and withholding taxes

on the grounds that the dancers who danced at The Hello Doll for the periods in suit were employees of the corporation and not independent contractors. In other words, if the dancers who danced at The Hello Doll were independent contractors of the corporation, then plaintiff is entitled to recover the money for which it has sued. However, if the dancers were employees of the corporation, then plaintiff is not entitled to recover against the United States and the United States is entitled to recover against plaintiff on its counterclaim either the—if you're taking all the dancers as a group—as I say, if they are all employees, either the sum of $32,275.06, which the government computed, together with interest; or the sum of—Well, it's somewhere here but I cant't seem to fund it. Fourteen thousand something, but I want to give it to you, or you can come down and ask for furthr instructions If you can't remember the exact figure which I cant't, but I have it down here somewhere. I don't remember which instruction I have it in.

*8 MR. MAXWELL: Your Honor—

THE COURT: Can counsel stipulate what that amount is?

MR. MAXWELL: Yes, your Honor. $14,849.95.

MR. NIESEN: That's right.

THE COURT: Fourteen thousand?

MR. MAXWELL: $14,849.95.

MR. NIESEN: That's what appears on Exhibit 12, your Honor.

THE COURT: All right. That's by computation by the plaintiff.

Now, of course, those who figures of $32,275.06 and this other figure, I'll help you work that, the getting of it, but it applies to all the dancers.

Now, if you only find some of them, we're going to have to—and that will be up to me, to look at your special interrogatories and then adjust the figures accordingly.

So you don't have to fill in—If you come up with a defense verdict, you do not have to fill in those figures if you just answer the interrogatories. I'll do the figuring for you. Answer the interrogatories and come up with a verdict, but based on whether or not these dancers were independent contractors or employees.

If they are independent contractors, judgment for the plaintiff; if they are employees, judgment for the defendant. And then the amount of dollar signs I'll figure out. In the case of the plaintiff, we already know what that is, $332.18, and that will be in the verdict. All right.

Now, it's necessary therefore for you to decide based on the evidence presented whether the relationship of employer-employee existed during the taxable periods in issue or whether that relationship was hirer, principal, as they're sometimes called, or even employer, an independent contractor. A person rendering services to another for compensation does so either as an employee of the person for whom the services are being rendered or as an independent contractor. Therefore, you have to determine whether the relationship between the dancers and the plaintiff was such that they were employees or independent contractors.

As I said, and as I have given you, there are a number of factors which you should take into consideration in making your determination of whether the dancers were employees or independent contractors. No one factor is controlling; rather, your determination should be made from all of the evidence in this case, but there is this one basic principle we discussed many times here and that is the right to control the details of the work as distinguished from the right to control the results.

Now, it is the right to control and not whether any control was actually exercised that matters. In

other words, it is not necessary that the employer actually direct or control the manner in which the services are performed. Also, the right to control may be more extensive in some instances than in others. An employer has a right to control if he has a right to exercise such supervision as the nature of the work requires. If the task of the dancers was so simple that constant or detailed supervision was not needed, then the lack of actual control over the manner in which the work was performed may be, but not necessarily, again, of no significance. It's up to you to determine the significance to be given all of the evidence, keeping in mind these various factors which I have indicated and this test of control of the details of the performance.

***9** Whether plaintiff exercised control or had the right to control or to force compliance by the dancers with the police regulations in order to protect its liquor license is not determinative of whether the employees were independent contractors.

An employer has the right to control an employee. Thus, it is important to determine whether the plaintiff had the right to direct and control the dancers at The Hello Doll, not only as to the results desired, which means independent contractor, but also as to the details, manner, and means by which the results are accomplished.

You should ask yourself whether the plaintiff had the right to control the number and the frequency of breaks, the details of the dance routines, the details of how the dancers performed their work including their rotation schedule, the details of the type of equipment and costuming and other props they could use and the details of their working schedule.

If you should find that the plaintiff had the right to control such details and the manner and means by which the detailed results were to be accomplished, such a finding by you would indicate but not necessarily conclusively an employer-employee relationship. The absence of such elements of control of details by the plaintiff could indicate, but not necessarily conclusively, a finding that the dancers were independent contractors and not employees.

You should give no particular weight as to whether the dancers worked any particular designated hours. The important consideration of course is whether the plaintiff had the right to require them to work eat specified times, not what hours they actually worked.

Another factor—I have given you an awful lot of them, but these are all various factors that you may or may not find conclusive; that's up to you.

Another factor you may **consider** is whether the **dancers** who danced at The Hello Doll worked as an important or integral part of the regular business of that club or were their services ancillary and subordinate. If the **dancers** were an integral part of the regular business of the club, this would indicate that they are **employees** of the club.

On the other hand, if their services were ancillary and subordinate to the regulr business of the club, this would indicate that the **dancers** were carrying on an **independent** business and, therefore, **independent contractors**.

And again, this is just a factor but not to be conclusive. It's one of the many factors which you may **consider**, again the main test being of course as I pointed out to you control of the details and means of the **performance** and not just control of the results. If details are controlled, it indicates **employee**. If the results only are controlled, it indicates **independent contractor**.

One other factor you may **consider** though not conclusive of course is whether the service rendered required a special skill or knowledge. If a special skill or knowledge is required, the person rendering it may be an **independent contractor**. On the other hand, if the service required no particular skill or knowledge, the indication is that those rendering it are **employees**. These are not necessarily conclusive. It's up to you the jury to decide whether the **dancers** who are here involved were **independent contractors** or **employees** and I'm only giving you various factors which you may **consider** in this regard and you should keep in mind that the description given by either side here to the **dancers** is not controlling, whether the government described them as **employees** and

the plaintiff described them as **independent contractors**. It is not controlling. You have to look at all these factors that I have indicated to you to make the determination and the test that I have given you.

***10** In this regard, neither an employer nor an employee can avoid the payment of Social Security taxes or withholding taxes by the use of a label. You are to determine whether the relationship between the corporation and the dancers was one of employment or of independent contract, taking into account all the factors I have mentioned to you and all of the evidence in this case, including the state of mind and understanding of the plaintiff and its officers on the one hand and the dancers on the other hand.

One factor among all those given to you in these instructions which you may consider is the nature and content of the contractual relationship between the agency dancers in The Hello Doll during 1968, '69, '70, and the first three quarters of 1971, and the agency or agencies which placed or referred these agency dancers to The Hello Doll in that period. In this connection, such contractual relationship between the dancers and the agency or agencies is relevant to the relationship between the dancers and The Hello Doll, but whether and to what extent it tends to show either an independent contractor relationship or an employee relationship between the dancers and The Hello Doll is up to you the jury as the fact finders in the case.

What I have given you as factors to be considered are not the only ones which may be relevant to your determination in this case. I suppose we could think up hundreds of them, factors which we might relate to this test of whether or not there was the right to control the details of the performances of the dancers as distinguished from the result to be achieved and I tried to give you a number of the factors which may be relevant to your determination in this case. I have given them to you to use as some sort of guidlines to follow. Thus, there may well be other factors which you might think up yourself that I have not mentioned. However, in your deliberations you should bear in mind that no one factor is determinative of the issue before you. In making your determination you should carefully weigh all of the factors in evidence which has been brought before you.

If you should find the relationship of employer-employee exists in fact, with regard to any dancer or dancers, the employer itself is not excused from paying over the appropriate amount of Social Security, withholding and federal unemployment taxes on the grounds that the employee refused to allow the employer to collect those taxes out of the employees' wages.

Forms of verdicts have been prepared for your convience.

Now, let's take up what I call the general verdicts. There is a jury verdict here for plaintiff and it reads as follows. First is the title.

'We the jury in the above-entitled action find in favor of plaintiff and against defendant and further that defendant shall pay as refund to the plaintiff a sum in the amount of $332.18 together with interest provided by law.' If you find for the plaintiff, you sign that.

Then there's one for the defendant. If you find for the defendant:

***11** 'We the jury in the above-entitled action find in favor of defendant and against plaintiff and further that plaintiff shall pay to defendant a sum in the amount of blank dollars.'

Now, you use that $32,000 figure or we'll fill it in here for you in the courtroom if that's the way you find if you can't remember it, but I wonder if I can write down on a piece of paper—

Will counsel stipulate to that, that that may go into the jury room with the two figures?

MR. MAXWELL: Yes, your Honor. I'll be happy to do that.

MR. NIESEN: Yes, your Honor.

THE COURT: All right. Mr. Clerk, give me a blank piece of paper.

Now, this of course is only if you find—It has to tie in to what I call the special verdicts which I'll discuss in a moment. I'm just going to write down the two figures.

Well, we'll say this is only if you find the dancers, all of the dancers were employees. Two figures, thirty-two thoustand—Oh, has anybody got that figure handy?

MR. MAXWELL: Well, it's—

THE COURT: Once again. Has anybody got that figure?

MR. MAXWELL: I can give you $32,811.04.

THE COURT: No. That's not the right figure.

MR. MAXWELL: But it's less the $332.18.

THE COURT: No. I suppose it would be pretty hard for the reporter to find it.

$32,275.06. And I'll put beside that if it's so stipulated 'GOV COMPUTATION.'

MR. NIESEN: So stipulated, your Honor.

MR. MAXWELL: That's so stipulated, your Honor.

THE COURT: All right. The other number is—

MR. MAXWELL: $14,849.95.

THE COURT: And we'll call that the plaintiff's, 'PLTF.'

MR. MAXWELL: It's Exhibit No. 12, your Honor.

THE COURT: The plaintiff's computation, yes. We have the full computation of both the government and the plaintiff among the exhibits which you'll note when you go to the jury room. I forget whether it's Exhibit 9 or 12.

MR. NIESEN: It's the correct computation, your Honor, which is on Exhibit No. 12. Exhibit 12.

THE COURT: Yes. And the other one I think is Exhibit 9.

MR. NIESEN: Yes, your Honor.

MR. MAXWELL: The defendant's computation is Exhibit 12.

THE COURT: Plaintiff's?

MR. MAXWELL: I mean plaintiff's.

THE COURT: Exhibit 12?

MR. MAXWELL: Yes, sir.

THE COURT: And the defendant's is?

MR. NIESEN: Exhibit 9 is Mr. Altman's computation. Exhibit 12 is the—

MR. MAXWELL: The first computation is the one that was corrected by Mr. Nicholson. It is Exhibit 12.

THE COURT: The accountant?

MR. MAXWELL: Yes, sir.

THE COURT: Now, the government's computation is—

MR. NIESEN: I believe it is Exhibit B, the certificate of assessments and payments, your Honor.

THE COURT: Now let's see. I think it's Exhibit 13, isn't it?

MR. MAXWELL: I don't think there really is one, your Honor.

THE COURT: That's the agency contract.

THE COURT: All right. It's in there. It's in those sheets, in the summary sheets.

MR. NIESEN: That would be Exhibit 5 through 12, your Honor.

THE COURT: Yes. The Exhibit F series. Remember we have 1 out of twelve and 5, 6, 7, 8, 9, 10 and all and 12 out of twelve. F-5 and 9 and 12. All those figures you will find for the government's computations.

***12** All right. Anyhow, this sheet of paper will go in with you with these two verdicts, the plaintiff's verdict as we will call it. It will go in with the defense verdict.

Where is that now?

THE CLERK: Here.

THE COURT: Of course. All right. Now there is another verdict here which is a special verdict and you will have to fill that out along with one or the other, either the plaintiff or the defendant verdict depending on how you arrive at it; but you will also have to fill this out which says the special verdict as follows:

And then it states—there is an interrogatory that says 'State whether each of the following dancers were independent contractors or employees,' and then in the right column is for the dancer, and so on. The dancer is named anad then there's a little box here like a ballot to be marked 'Independent contractor' or 'employee.'

You have to fill that out and, therefore, vote on every one.

If you vote them all one way, why, you mark the boxes all that say 'independent contractor'; if you vote all employees, mark the other way.

If you vote that some are and some aren't, then you vote as you find them.

Do you understand how to work that? It consists of about four pages of these names. I don't want this affidavit of service on here, Mr. Clerk. You can take that.

Now, we have to have after you have done that, we need a thing to be signed by the foreperson of the jury and the date. We don't have that on here, Mr. Clerk.

THE CLERK: Do you want me to add it on?

THE COURT: If counsel will stipulate, I can put it on the front page here. In other words, where it

says the answer of the jury.

MR. NIESEN: So stipulated, your Honor.

THE COURT: I will put here 'Verified and dated—'

I'm writing this out in longhand. 'Verified and dated,' and then the blank for the date and then another blank for the person.

How do we say that? Foreperson of the jury.

MR. MAXWELL: That will be satisfactory, your Honor. That's all fine.

THE COURT: All right. Thank you.

MR. NIESEN: Fine, your Honor.

THE COURT: All right. That will be on the front page and that will be where the foreperson will verify and will make the marks for the entire jury in the boxes provided.

If you have any trouble, let us know. I think it's all self-explanatory.

The answer in each instance must be the unanimous answer of each of the jury. The foreperson will write in the unanimous verdict in the space provided opposite to the question in the little boxes.

You will note that there's a place that I've written in there for the foreman or foreperson to sign and verify the special verdict, and then of course the foreperson has to sign and date the general verdict which you can find, for the plaintiff or the defendant; and then you will return with your unanimous verdict or verdicts, because we will have one general verdict and one special verdict, and then you will return with them to the courtroom.

If you should find by a preponderance of the evidence that the defendant United States of America is entitled to your verdict, then you should consider the two methods of computing withholding tax due to the defendant from plaintiff and the two methods briefly are as follows:

***13** When income tax withholding is involved, examining officer should request the employer to compute the withholding under existing la and regulations and verify the employer's computation to the extent necessary.

An alternative method of computing withholding rates is provided that reasonably may be used where, because of lack of records or if the employer declines to compute the employer liability, or no other method is available—and under the computed—under the alternative method, the applicable rate for income tax withholding is computed on the basis of the average annual wage of the employees involved.

Well, you don't have to go through that computation because the computation has been made by the government on this alternative method and the computation has been made on the individual method by the taxpayer, by the plaintiff.

As I say, if you find your verdict is for the defendant, you should award such sum as is shown by the preponderance of the evidence to be due under one or the other of these methods of computation, the one relied on by the plaintiff and the second one relied upon by the defendant, the government.

Note that you are to proceed to such computation only if your verdict is for the defendant U. S. A., and I'm not going to ask you to do that computation. You can fill in the figures when you find for all of them and I think we have stipulated that, if you do that, that you should fill in those one or the other of those figures in your verdict if it is for the government, even though you may find some of the

dancers are independent contractors and some are employees and, therefore, the figures are not accurate. But we want to know which computation you find to be the best computation under the evidence, whether it's the plaintiff's or the government's.

In other words, the regular method used by the plaintiff or the alternative method used by the government, and what we do is this:

We were thinking about it and we might as well be quite open and frank with the jury. We were thinking if your verdict is for the defendant, you can put in either the $14,000 or the $32,000 figure and we will know from that which computation you used.

And then, if your finding is that some of the dancers were independent contractors and some were employees, why, I can use a percentage figure to cut down these dollar signs which are the total figures, as you can understand that. These are total figures, assuming all of the dancers were employees.

So we will have to see how your special verdict comes out. There are several reasons.

For several reasons, before we put in the final figures, if you have not considered all the dancers to be employees, only some—and of course if you consider all the dancers to be independent contractors, you know you don't get to that defense verdict anyhow because your verdict is for the plaintiff and we know what that amount is, and we put it in there, $332.18.

Well, all right. I think I have talked enough and long enough and I have a few concluding instructions to give you more as suggestions really than instructions.

***14** THE COURT: Have you dated it and signed it?

THE WITNESS: I dated it and signed it, yes, your Honor.

THE COURT: All right. Let each juror look at it and see if that states your respective verdict.

Now hand it to the bailiff. All right. Let's see it a second.

(Brief pause.)

THE COURT: Yes, I see you've signed the date line and put the date on the foreperson line.

THE FOREPERSON: Yes.

THE COURT: But that's all right.

The clerk will read and record the verdicts and then poll the jury.

THE CLERK: 'United States District Court, Central District of California

Theresa Enterprises, Inc., doing business as The Hello Doll, Plaintiff,

v.

United States of America, Defendant.}

CV 74-389-AAH

JURY VERDICT FOR THE DEFENDANT

'We, the jury, in the above-entitled action, find in favor of defendant and against plaintiff and further that plaintiff shall pay to defendant a sum in the amount of $32,275.06 together with interest

as provided by law.

'Dated this 26 day of May, 1976, in Los Angeles, California.'

Signed Catherine C. Edmondson, foreperson of the jury.

'United States District Court Central District of California

Theresa Enterprises, Inc., doing business as The Hello Doll, Plaintiff,

v.

United States of America, Defendant.}

CV 74-389-AAH

SPECIAL VERDICT

'We, the jury in the above-entitled action, unanimously find as follows:

'Interrogatory:

'(1) State whether each of the following dancers were independent contractors or employees.

'Answer of the Jury:'

THE COURT: Let the record show I'm not going to go individually. Let the record show that each answer on the special interrogatory shows that each of the answers to each of the dancers, the numbered dancers (a) through (YY) are marked as each and every and all are employees.

C.D.Cal. 1976.
Theresa Enterprises, Inc. v. U. S.
Not Reported in F.Supp., 1976 WL 4186 (C.D.Cal.), 42 A.F.T.R.2d 78-5778, 78-2 USTC P 9630

END OF DOCUMENT

182 Cal.App.3d 960, 227 Cal.Rptr. 601
(Cite as: 182 Cal.App.3d 960)

Festival Enterprises, Inc. v. City of Pleasant Hill
Cal.App.1.Dist.

FESTIVAL ENTERPRISES, INC., et al., Plaintiffs and Appellants,
v.
CITY OF PLEASANT HILL et al., Defendants and Appellants.
No. A030497.

Court of Appeal, First District, Division 5, California.
Jun 26, 1986.

SUMMARY

The owners of a movie theatre brought an action for declaratory and injunctive relief claiming that a city's tax on admissions to a broad range of sporting, artistic, and entertainment events was an unconstitutional interference with their right to free speech. The trial court agreed and entered preliminary and permanent injunctions against the enforcement of the tax. (Superior Court of Contra Costa County, No. 252307, David E. Pesonen, Judge.)

The Court of Appeal affirmed, holding that businesses engaged in protected speech may not be singled out for discriminatory tax treatment unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation; that the tax violated plaintiffs' free speech rights since the admissions tax was designed only to apply to amusement and entertainment businesses in the city; that plaintiffs' theatres were the only taxable entities in the city; that the main interest asserted by the city was the raising of revenues for general purposes; and the fact that the tax rate was uniform for all admission fees did not make it less burdensome on the protected activity. The court also held that the fact the tax ordinance was not facially discriminatory did not make it constitutional, as the court would look to the practical operation of the tax rather than its form. Finally, the court held that although there was a future possibility that other businesses subject to the tax would begin operations in the city, that fact did not save the tax scheme since there was no indication that these other businesses were contemplated or that they would be established at all. (Opinion by Low, P. J., with King and Haning, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Business and Occupational Licenses § 2--Power to License or Tax--Movie Theaters--Balancing of Interests.
Although municipalities can impose taxes on businesses engaged in protected speech, such as movie theatres, as part of a general taxation scheme without reaping constitutional problems, and may treat movie theatres as a separate class for tax treatment so long as the purpose of imposing the taxes is founded on natural, intrinsic, or fundamental distinctions which are reasonable in their relation to the object of the legislation, such businesses may not be singled out for discriminatory tax treatment unless the state asserts a counterbalancing interest of compelling importance that cannot be achieved without differential taxation.

(2) Business and Occupational Licenses § 4--Validity and Construction of Laws--Taxation of Admissions to Entertainment Events--Tax Only Applicable to One Business in Town--Use of Tax Revenue.
In an action by the owners of a movie theatre to enjoin the enforcement of a city's tax on admissions to a broad range of sporting, artistic, and

entertainment events, the trial court properly granted the owners an injunction where the owners' theatre was the only entity subject to the tax. The city had the burden of establishing an interest to justify interference with the owners' free speech rights, and had shown no particular justification for the tax other than for general revenue purposes.
[See Cal.Jur.3d, Business and Occupational Licenses, § 25; Am.Jur.2d, Constitutional Law, § 523.]
(3) Constitutional Law § 55--First Amendment--Scope and Nature--Freedom of Speech and Expression--Taxation Upon Protected Activities--Uniform Rate of Taxation--Effect of.
The fact that a city's tax on admissions to various entertainment events was set at a uniform rate for all events did not make it less burdensome on activities protected by U.S. Const., 1st Amend., since the gravamen of a differential tax treatment upon such activities is the threat that discriminatory taxes may be used to censor unpopular expression.

(4) Municipalities § 54--Ordinances--Validity--Conflict With Constitution-- Ordinance Imposing Tax on Admissions to Amusements--Facial Validity--Discriminatory Application.
The fact that a city's ordinance imposing a tax on admissions to a broad range of entertainment events was not facially discriminatory did not make it constitutional, where it had a discriminatory effect as applied, as there was only one business entity (a movie theatre) subject to the tax in the town at the time the ordinance was enacted. The possibility that future businesses might become subject to the tax did not save it as there was no indication that such other businesses were contemplated, and the city council members had no other businesses in mind when they passed the ordinance. Thus, the theatre owner was entitled to enjoin the city's collection of the tax, as the impact of the tax on its theatre was discriminatory and violated the equal protection clause of the federal Constitution.

COUNSEL
Barry J. London, Benjamin Berk and Lillick, McHose & Charles for Plaintiffs and Appellants.
Dennis A. Lee, City Attorney, and Charles O. Triebel, Jr., for Defendants and Appellants.
James A. McKelvey, City Attorney (Fresno), and Denise M. Kerner, Deputy City Attorney, as Amici Curiae on behalf of Defendants and Appellants.
LOW, P. J.
We hold that the city's "admissions tax," as applied to plaintiff theatre owners, imposes an impermissible burden on protected speech in violation of the free speech and equal protection clauses of the First and Fourteenth Amendments of the United States Constitution. We need not address contentions on the cross-appeal that this admissions tax was a "special tax" enacted in violation of article XIII A, section 4 of the California Constitution.

Plaintiffs are theatre owners who operate the only theatres in defendant City of Pleasant Hill. On September 26, 1983, the Pleasant Hill City Council adopted Ordinance No. 525, adding chapter 11.28 to the Pleasant Hill Municipal Code, which levies a 5 percent tax on the admission price of sporting events, movie theatres, concerts, shows, museums, performances, displays and exhibitions within the city. [FN1] This tax was enacted primarily to *963 provide revenue for needed street repairs. In an April 5, 1983, memorandum to the city council, the city manager explained the need to raise approximately $335,000 for necessary street repairs. The tax scheme proposed, and later approved by the city council, included one tax increase and three new taxes. One of the new taxes was the admissions tax. The projected yield from the admissions tax for fiscal year 1983-1984 was $215,000. The figure was based solely on the estimated revenues from plaintiffs' movie theatres.

FN1 Chapter 11.28, section 11.28.010 of the Pleasant Hill Municipal Code reads in part: "A. Admission Fee. 'Admission Fee' means any charge or renumeration made or received for the right or privilege to attend or be present at any show, performance, display or exhibition; and includes, but is not limited to the following: All charges for seats, chairs, tables, benches, space to stand or sit, and other similar accommodations, reserved or otherwise;

and including, but not limited to the following type of events: Basketball, softball, baseball, football, or wrestling exhibits, circuses, carnivals or other similar exhibits, ice or roller skating shows, museums, public hall, club room, assembly hall, theatre, auditorium or concert hall where any type of entertainment, amusement, concert or performance is given or held, motion picture theatres, horse shows, rodeos, air shows, etc."

Although the ordinance is broadly worded to apply to other forms of entertainment, plaintiffs' theatres are the only businesses currently affected by the tax. It is conceded by defendants that from the date the admissions tax was first proposed, no one knew if there would be businesses other than plaintiffs' that would be subject to the tax. The parties agree that other businesses subject to the tax do not now exist in the city and it is not known when, if ever, such businesses will appear in the future.

Plaintiffs filed a complaint for declaratory and injunctive relief claiming that the admissions tax was an unconstitutional interference with protected free speech and that it was a special tax which was not enacted by the two-thirds vote required by article XIII A, section 4 of the California Constitution. The trial court issued preliminary and permanent injunctions and found the tax to be an impermissible burden on free speech in violation of the federal Constitution. The court declined to decide whether the tax also violated article I, section 2 of the California Constitution.

I

(1)The showing of commercial motion pictures in plaintiffs' movie theatres is protected by the free speech and free press guaranties of the First and Fourteenth Amendments. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502 [96 L.Ed. 1098, 1106, 72 S.Ct. 777]; *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689 [68 Cal.Rptr. 721, 441 P.2d 281].) Governments can impose taxes on businesses engaged in protected activities as part of a general taxation scheme without reaping constitutional problems. (*Minneapolis Star v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575, 581 [75 L.Ed.2d 295, 302, 103 S.Ct. 1365].) The power to create classifications for taxation purposes is a broad one, within the discretion of the Legislature, and is subject only to limitations of the state and federal Constitutions. (*Fox etc. Corp. v. City of Bakersfield* (1950) 36 Cal.2d 136, 142 [222 P.2d 879].) There is nothing unconstitutional about treating plaintiffs' theatres as a separate class for tax treatment so long as "the purpose of imposing taxes is founded on natural, intrinsic or fundamental distinctions which are reasonable *964 in their relation to the object of the legislation ...." (*Ibid.*; also *City of Berkeley v. Oakland Raiders* (1983) 143 Cal.App.3d 636, 639-640 [192 Cal.Rptr. 66].)

However, special deference must be paid to businesses engaged in protected speech, and such activities may not be singled out for discriminatory tax treatment, unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. (*Minneapolis Star v. Minnesota Comm'r of Rev.*, *supra.*, 460 U.S. at p. 585 [75 L.Ed.2d at p. 304]; *City of Alameda v. Premier Communications Network, Inc.* (1984) 156 Cal.App.3d 148, 153 [202 Cal.Rptr. 684].)

(2)Plaintiffs were expected to bear the entire impact of the admissions tax, not only currently but for the foreseeable future. The admissions tax was not a broadly based tax applicable to businesses in general, but was additional to the basic business license tax. It was designed only to apply to amusement and entertainment businesses in the city, of which plaintiffs' theatres were the only taxable entities. The main interest asserted by the city, and reflected in the city council minutes, was the raising of revenue. While this interest is critical to the operation of any government, "[s]tanding alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the [city] could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." (*Minneapolis Star v.*

Minnesota Comm'r of Rev., supra., 460 U.S. at p. 586 [75 L.Ed.2d at p. 305], fn. omitted; *City of Alameda v. Premier Communications Network, Inc.*, *supra.*, 56 Cal.App.3d at p. 156.)

The city has shown no particular justification for this tax other than for general revenue purposes; i.e., that these funds would most likely be used for street repairs or to balance the city's budget for the fiscal year 1983-1984. (Cf. *Fox etc. Corp. v. City of Bakersfield, supra.*, 36 Cal.2d at p. 138.) There is no contention that the additional revenue is needed because of the increased use of city services required by virtue of the operation of plaintiffs' theatres, i.e., police protection, street repair or sanitation collection. We conclude that the admissions tax was not necessary to achieve the goal of raising revenue and we agree with the trial court that it presents an impermissible differential burden on plaintiffs' businesses in violation of the First Amendment.

II

(3)Defendants argue that the tax is valid since it imposes a uniform rate for all businesses that charge an admission fee. This contention does *965 not address the constitutional concerns. The gravamen of a differential tax treatment upon protected activity is the threat that discriminatory taxes may be effectively used to censor unpopular expression. (*Minneapolis Star v. Minnesota Comm'r of Rev.*, *supra.*, 460 U.S. at p. 585 [75 L.Ed.2d at p. 304].) The fact that a tax *rate* is uniform does not somehow make it less burdensome on the protected activity. The effect of the tax on other entertainment and amusement businesses is illusory and we must direct our attention to the impact on plaintiffs' theatres alone.

III

(4)Relying on *Minneapolis Star*, defendants assert that a tax is unconstitutional only if it is facially discriminatory. That reliance is misplaced. *Minneapolis Star* simply held on the particular facts of that case, that Minnesota's "use tax" on ink and paper was facially discriminatory against publications. (460 U.S. at p. 581 [75 L.Ed.2d at p. 302].) The court did not hold that the tax must, by its terms, expressly single out plaintiff's protected activity to be held unconstitutional. To the contrary, the Supreme Court reasoned that the issue of differential treatment "invites us to look beyond the form of the tax to its substance," (At p. 586 [75 L.Ed.2d at p. 305].)

Any law which is nondiscriminatory on its face may be applied in such a way as to be unconstitutional. (*Furman v. Georgia* (1972) 408 U.S. 238, 256-257 [33 L.Ed.2d 346, 359-360, 92 S.Ct. 2726]; *People v. Wingo* (1975) 14 Cal.3d 169, 180-181 [121 Cal.Rptr. 97, 534 P.2d 1001].) Specifically, when passing on the constitutionality of state taxing schemes, the courts are always concerned with "the practical operation of the tax, that is, substance rather than form. [Citations.]" (*American Oil Co. v. Neill* (1965) 380 U.S. 451, 455 [14 L.Ed.2d 1, 5, 85 S.Ct. 1130].) Even if the admissions tax, as written, could otherwise pass constitutional muster, the impact of the tax on plaintiffs' theatres is discriminatory and violates the equal protection clause.

Defendants argue that since there is a future possibility that other businesses subject to the tax will begin operations in Pleasant Hill, the tax is not discriminating against plaintiffs. In analyzing the constitutionality of the tax, we cannot ignore the present unfairness and rely only upon a hypothetical situation that *might* save the tax scheme in the future. There is no indication that these other businesses are contemplated or that they will be established at all. 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 *966 it passed the ordinance. The impact of the admissions tax on plaintiffs is just as burdensome as if the statute's language expressly singled out plaintiffs' theatres for special tax treatment. There is sufficient evidence to support the trial court's finding that the admissions tax subjected plaintiffs to an unequal and impermissible tax burden.

182 Cal.App.3d 960, 227 Cal.Rptr. 601
(Cite as: 182 Cal.App.3d 960)

Affirmed.

King, J., and Haning, J., concurred.
The pettion of defendants and appellants for review by the Supreme Court was denied September 25, 1986. Broussard, J., and Reynoso, J., were of the opinion that the petition should be granted. *967

Cal.App.1.Dist.
Festival Enterprises, Inc. v. City of Pleasant Hill
182 Cal.App.3d 960, 227 Cal.Rptr. 601

END OF DOCUMENT

209 Cal.App.3d 245

209 Cal.App.3d 245, 257 Cal.Rptr. 124
(Cite as: 209 Cal.App.3d 245)

United Artists Communications, Inc. v. City of Montclair
Cal.App.4.Dist.

UNITED ARTISTS COMMUNICATIONS, INC., et al., Plaintiffs and Appellants,
v.
CITY OF MONTCLAIR et al., Defendants and Respondents
No. E005085.

Court of Appeal, Fourth District, Division 2, California.
Mar 10, 1989.

SUMMARY

The owners of two movie theaters brought an action for declaratory and injunctive relief claiming that a city's tax on admissions to a broad range of sporting, artistic, and entertainment events impermissibly burdened their U.S. Const., 1st Amend., right to free speech. The trial court declared that the tax was constitutional. (Superior Court of San Bernardino County, No. OCV39705, William P. Hyde, Judge.)

The Court of Appeal reversed with directions. It held that the tax was unconstitutional under U.S. Const., 1st Amend., as applied to the movie theater owners. Despite its broadly worded applicability, the tax fell almost entirely on four businesses, namely, the theaters and two adult bookstores, all of which were engaged in protected speech. (Opinion by McDaniel, J., with Campbell, P. J., and Dabney, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Business and Occupational Licenses § 4--Validity and Construction of Laws--Taxation of Admissions to Entertainment Events--Free Speech Rights of Movie Theater Owners.
A city's tax on admissions to sporting, artistic, and entertainment events was unconstitutional under U.S. Const., 1st Amend., as applied to the owners of two movie theaters. Despite its broadly worded applicability, the tax fell almost entirely on only four businesses, namely, the theaters and two adult bookstores, all of which were engaged in protected speech. That the tax affected a few other city businesses was of no import. Ninety percent of the tax's burden fell on the theaters and bookstores; the other businesses could take measures to avoid the tax, while the theaters and bookstores could not; and the other businesses were also engaging in or likely to engage in protected speech, which was a fact unfavorable to the tax's validity.
[See Cal.Jur.3d, Business and Occupational Licenses, § 25; Am.Jur.2d, Constitutional Law, § 523.]
(2) Constitutional Law § 52--First Amendment--Test for Determining Constitutionality of Statute.
A statute challenged under U.S. Const., 1st Amend., must be tested by its operation and effect.

COUNSEL

Lillick, McHose & Charles, Barry J. London and Michelle M. Marchant for Plaintiffs and Appellants.
Demchuk, Krueger & Robbins and Dennis A. Krueger for Defendants and Respondents.
James K. Hahn, City Attorney (Los Angeles), Pedro B. Echeverria, Richard A. Dawson, Assistant City Attorneys, and Michael L. Klekner, Deputy City Attorney, as Amici Curiae on behalf of Defendants and Respondents.

McDANIEL, J.

United Artists Communications, Inc., Vista Theaters, Inc., and General Cinema Theatre Corporation of California (plaintiffs) have appealed from a judgment in favor of the City of Montclair

(City) and Ned Crutcher, City's director of finance (collectively defendants), which was entered following a trial to the court of plaintiff's action for declaratory and injunctive relief related to the constitutionality of the City's admissions tax. *247

Facts

In October 1986, the City of Montclair passed Ordinance No. 86-630, which added article 5 to chapter 5 of title 3 of the Montclair Municipal Code.

Article 5, known as the "Admissions Tax Law of the City of Montclair," imposes a 6 percent tax[FN1] on the price of "an admission ticket for the privilege of admission to any event held." (§ 3-5.504.)

FN1 Or the integrated sales tax rate applicable in San Bernardino County, whichever is greater.

Events are defined as "motion pictures, theatrical performances, musical performances, operas, athletic contests, exhibitions of art or handicrafts or products, lectures, speeches, fairs, circuses, carnivals, menageries, or any other activity conducted for which an admission ticket is sold for the privilege of viewing such activity." (§ 3-5.503(2).)

[redacted]

The purpose of Ordinance No. 86-630 was declared to be "to raise revenue to assist in covering the cost of providing municipal services required by businesses covered under this article."

The plaintiffs own, operate, and/or serve as managing agents for two movie cinemas located in City. In addition to these cinemas, other businesses in City are potentially subject to the admissions tax: the Holiday Skating Rink, the Laff Stop, the Grand Prix Raceway, four nightclub/restaurants which charge cover charges, and two adult bookstores with viewing booths. At present, however, and as stipulated to by the parties, 90 percent of the admissions tax will be borne by the two movie theaters and the two adult bookstores.

Plaintiffs filed a complaint for declaratory and injunctive relief on the ground that the admissions tax impermissibly burdens their First Amendment rights. Plaintiffs also requested, and were granted, a temporary restraining order against the imposition of the tax, upon condition that they post a bond. *248

Following a hearing on stipulated facts on plaintiffs' request for a preliminary injunction, the trial court determined that tax to be constitutional. The temporary restraining order was dissolved; whereupon judgment was entered in favor of defendants.

Plaintiffs have appealed and assert that Ordinance No. 86-630 impermissibly burdens constitutionally protected activities, without adequate justification, in violation of the rule set out in *Minneapolis Star v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575 [75 L.Ed.2d 295, 103 S.Ct. 1365]. After reviewing the authorities cited by both parties, we agree with plaintiffs that this tax does not pass constitutional muster and accordingly we must reverse the judgment.

Discussion

In *Minneapolis Star v. Minnesota Comm'r of Rev.*, *supra*, 460 U.S. 575 [75 L.Ed.2d 295, 103 S.Ct. 1365] the Minneapolis Star and Tribune Company instituted an action in state court to seek refund of part of certain use taxes it had paid on the cost of ink and paper used to produce its newspaper. The challenged tax provided for a special use tax on the cost of ink and paper used to produce publications which were otherwise exempted from the state's general sales tax. The first $100,000 of such costs in any calendar year was exempted from the use tax. The practical result of this exemption was that (1)

only a very small percentage of publishers paid any tax, and (2) the Minneapolis Sun by itself paid two-thirds of the total tax collected.

The Sun argued that the imposition of the tax violated respectively the First and Fourteenth Amendments' guaranties of freedom of the press and equal protection. The Supreme Court of Minnesota upheld the tax against this federal constitutional challenge, but the United States Supreme Court reversed, holding that the tax violated the First Amendment in two separate ways: (1) by singling out only the press for the special use tax and (2) by targeting, via the $100,000 exemption, only a few members of the press. (460 U.S. at pp. 591-592 [75 L.Ed.2d at pp. 308-309, 103 S.Ct. at p. 1375].)

The fact that there was no evidence that the State of Minnesota had intended to target a given publisher or to restrict free exercise of First Amendment rights was deemed irrelevant by the court. (460 U.S. at pp. 592-593 [75 L.Ed.2d at p. 309, 103 S.Ct. at p. 1376].) Instead, the relevant question was whether Minnesota could show that the discriminatory tax scheme was necessary to serve a compelling state interest which could not be achieved without differential taxation. (460 U.S. at pp. 582-585 [75 L.Ed.2d at pp. 303-305, 103 S.Ct. 1365 at pp. 1370-1372].) Moreover, *249 although the court concluded that Minnesota's interest in raising revenue was "critical," it held that such interest, standing alone, did not justify its special treatment of the press, when it could raise revenue by taxing businesses generally. (460 U.S. at p. 586 [75 L.Ed.2d at p. 305, 103 S.Ct. at p. 1372].)

The holding in *Minneapolis Star* has already been applied by California courts, where they have declared similarly discriminatory city ordinances to be unconstitutional.

In *City of Alameda v. Premier Communications Network, Inc.* (1984) 156 Cal.App.3d 148 [202 Cal.Rptr. 684], the City of Alameda had enacted an ordinance which imposed a business license tax of 3 percent of annual gross receipts on television subscription service businesses and emergency communications systems and alarms. For failure to pay the tax the city filed suit against Premier Communications Network, Inc. (Premier) a multipoint distribution service engaged in the "pay T.V." business. Premier admitted nonpayment, denied liability on the ground that the tax violated the First Amendment, and cross-complained to enjoin enforcement of the ordinance. The trial court entered judgment declaring the ordinance unconstitutional and enjoining its enforcement. On appeal, the First District modified the judgment to declare that the ordinance was unconstitutional as it applied to Premier, and to enjoin its enforcement with respect to Premier only.

To reach this result, the reviewing court first reiterated the basic rule that Premier, "as a disseminator of motion pictures, news, and other information and entertainment programming, engages in conduct protected by the First Amendment guaranties of freedom of speech and press." (*Id.*, at p. 152, to the same effect, see *Schad v. Borough of Mount Ephraim* (1981) 452 U.S. 61, 65 [68 L.Ed.2d 671, 678, 101 S.Ct. 2176]: " Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. [Citations.]".)

The court then considered the structure of the challenged ordinance, which imposed an annual business license tax on 87 types of businesses, using four methods: a flat fee, a per unit fee, a flat fee plus a sum based on the number of employees, and a fee tied to gross receipts. Only four businesses paid fees under the fourth method, i.e., tied to gross receipts: outdoor *250 advertisers, drive-in-theaters, television subscription service businesses, and emergency communications systems or alarms businesses.

Although businesses were subject to the imposition of one of these four methods, the ordinance also provided an *optional* method of taxation - an "in lieu " license fee based on gross receipts - to all but 10 types of businesses. All four businesses whose license fee were tied to gross receipts were excluded from electing to pay the "in lieu" fees, as

were six other businesses; of those six, five paid fees subject to a ceiling, the highest ceiling being $600, and the sixth category of business, persons leasing hotels or office buildings, paid $4 per room. The "in lieu" tax schedule ranged from $.30 per $1,000 to $2.25 per $1,000 of gross receipts, compared to the $30 per $1,000 imposed on Premier.

The court then considered the *practical* result of the tax structure on Premier and concluded that Premier, with annual gross receipts of $210,000, was taxed more harshly than other businesses. More particularly, Premier's business license fee for one year would have been $6,300, whereas another category of business with the same receipts, under the highest level of the "in lieu" tax schedule, would have paid no more than $472.50 ($2.25 per $1,000, or less than one-thirteenth of the 3 percent tax rate imposed on Premier).

After determining that the ordinance created a differential tax burden, the court then reviewed the holding in *Minneapolis Star*; it then concluded, under the teachings of that case, that the business license tax on television subscription service businesses, as applied to Premier, failed to pass constitutional muster because it was differentially burdensome to the press, and because the only interest asserted by the city to justify the differential tax burden was the generation of revenue. The court concluded that this was not a sufficiently compelling interest to justify special treatment of the press.

More recently, in *Festival Enterprises, Inc. v. City of Pleasant Hill* (1986) 182 Cal.App.3d 960 [227 Cal.Rptr. 601], the First District was asked to invalidate an ordinance very similar to the ordinance under review here.

In *Festival Enterprises*, the City of Pleasant Hill had enacted a 5 percent tax on admission fees for events including, but not limited to: "'[b]asketball, softball, baseball, football, or wrestling exhibits, circuses, carnivals, or similar exhibits, ice or roller skating shows, museums, public hall, club room, assembly hall, theater, auditorium or concert hall where any type of entertainment, amusement, concert or performance is given or held, motion picture theaters, horse shows, rodeos, air shows, etc. '" (182 Cal.App.3d p. 962, fn. 1, quoting section 11.28.010 of the Pleasant Hill Municipal *251 Code.) The tax was enacted to provide revenue for needed street repairs and was one of three new taxes designed to fill this need.

Although the ordinance was broadly worded to apply to other forms of entertainment, the theaters owned by Festival Enterprises, Inc., were the *only* businesses which were affected by the tax.

Festival Enterprises, Inc., filed a complaint for declaratory and injunctive relief claiming that Pleasant Hill's admissions tax unconstitutionally interfered with protected free speech and that it violated the proscription of article XIII A, section 4 of the California Constitution (Prop. 13). The trial court found the tax to be an impermissible burden on free speech, in violation of the federal Constitution, and it declined to determine whether the tax also violated the state Constitution.

On appeal, relying on *Minneapolis Star* and its own earlier decision in *City of Alameda* the First District held that the tax, as applied to the theater owners, *did* violate the First and Fourteenth Amendments of the federal Constitution, for the following reasons:

(1) the theater owners were expected to bear the entire impact of the admissions tax, not only currently, but for the foreseeable future;

(2) the admissions tax was not a broadly based tax applicable to businesses in general, but was designed to apply only to amusement and entertainment businesses;

(3) the main interest in imposing the tax was to raise revenues; and

(4) the city did not contend that the operation of the theaters created an additional need for revenue because of increased use of city services. (182 Cal.App.3d at p. 964.)

The City of Pleasant Hills argued that the tax was valid because it imposed a uniform rate for *all*

businesses that charged an admission fee. However, the court gave this argument short shrift, noting that the gravamen of a differential tax treatment upon protected activity is the *threat* that discriminatory taxes may be effectively used to censor unpopular expression. (182 Cal.App.3d at pp. 964-965.) Implicit in its statement was the idea, set forth in *Minneapolis Star*, that a tax which is facially neutral but which actually operates in a discriminatory manner, is not truly neutral or uniform.

This point was reemphasized by the United States Supreme Court in *Acara v. Cloud Books, Inc.* (1986) *252478 U.S. 697 [92 L.Ed.2d 568, 106 S.Ct. 3172], in which the court characterized its earlier decision as follows: "In *Minneapolis Star* ... we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax *had the effect* of singling out newspapers to shoulder its burden. We imposed a greater burden of justification on the State even though the tax was imposed upon a nonexpressive activity, *since the burden of the tax inevitably fell disproportionately - in fact, almost exclusively - upon the shoulders of newspapers exercising the constitutionally protected freedom of the press.*" (478 U.S. at p. 704 [92 L.Ed.2d at p. 576, 106 S.Ct. at p. 3176] italics added.)

(1a) Here, just as in *Minneapolis Star* and *Festival* [illegible] First, as in *Minneapolis Star*, a disproportionate amount of tax (90 percent) is paid by only a few businesses. Second, as plaintiffs here point out, even the other few businesses subject to the tax may avoid it - the roller rink by dropping its admission fee and by instead increasing its skate rental fee, and the nightclubs by dropping their admission fee and instead instituting a minimum drink or dinner charge - whereas plaintiffs, who are bound by distribution agreements, do not have such a readily available means to avoid an admissions tax. Third, at least some of the other businesses subject to the tax, e.g., the nightclub/restaurants, would also appear to be engaged in, or likely to engage in, protected speech, and the fact that they too are among the few businesses actually subject to the tax does not help defendants' position.

Defendants seek to avoid the holdings of *Minneapolis Star* and *Festival Enterprises* by citing *Regan v. Taxation With Representation of Wash.* (1983) 461 U.S. 540 [76 L.Ed.2d 129, 103 S.Ct. 1997], which held, in the context of an equal protection challenge, that the taxpayer bears the burden of demonstrating that a tax classification oppressively discriminates against a particular person or class, and *Times Mirror Co. v. City of Los Angeles* (1987) 192 Cal.App.3d 170 [237 Cal.Rptr. 346], which held that the government may subject the press to generally applicable economic regulations and taxes.

However, the holdings in those cases do not allow or require us to affirm the decision below, as [illegible] (*Near v. Minnesota* (1931) 283 U.S. 697, 708 [75 L.Ed. 1357, 1363, 51 S.Ct. 625, 628], italics added, and see also *Schneider* v. *State* (1939) 308 U.S. 147, 161 [84 L.Ed. 155, 164-165, 60 S.Ct. 146, 151]; *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 68 [68 L.Ed.2d 671, 679-680, 101 S.Ct. 2176, 2182].)

(1b) Therefore, based on the holding of *Minneapolis Star* and *Festival Enterprises, Inc.*, we hold that the tax in question is unconstitutional as applied to plaintiffs.

The judgment is reversed, and the trial court is

209 Cal.App.3d 245, 257 Cal.Rptr. 124
(Cite as: 209 Cal.App.3d 245)

directed to enter judgment declaring Ordinance No. 86-630 unconstitutional as applied to plaintiffs and enjoining its enforcement with respect to them.

Campbell, P. J., and Dabney, J., concurred.
Respondents' petition for review by the Supreme Court was denied May 24, 1989. *254

Cal.App.4.Dist.
United Artists Communications, Inc. v. City of Montclair
209 Cal.App.3d 245, 257 Cal.Rptr. 124

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Westlaw.

779 A.2d 20

172 Vt. 375, 779 A.2d 20
(Cite as: 172 Vt. 375, 779 A.2d 20)

Vermont Soc. of Ass'n Executives v. Milne
Vt.,2001.

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] Constitutional Law 92 ⇐1721

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] Constitutional Law 92 ⇐1491

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] Constitutional Law 92 ⇐1150

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] Constitutional Law 92 ⇐1170

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] Constitutional Law 92 ⇐1721

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] Constitutional Law 92 ⇐1721

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))

Licenses 238 ⇐7(1)

238 Licenses
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] Constitutional Law 92 ⇐1150

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] Constitutional Law 92 ⇐1170

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] Taxation 371 ⇐3602

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] Taxation 371 ⇐3707

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] Constitutional Law 92 ⇐1170

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 CodenotesHeld Unconstitutional2 V.S.A. § 264a

*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

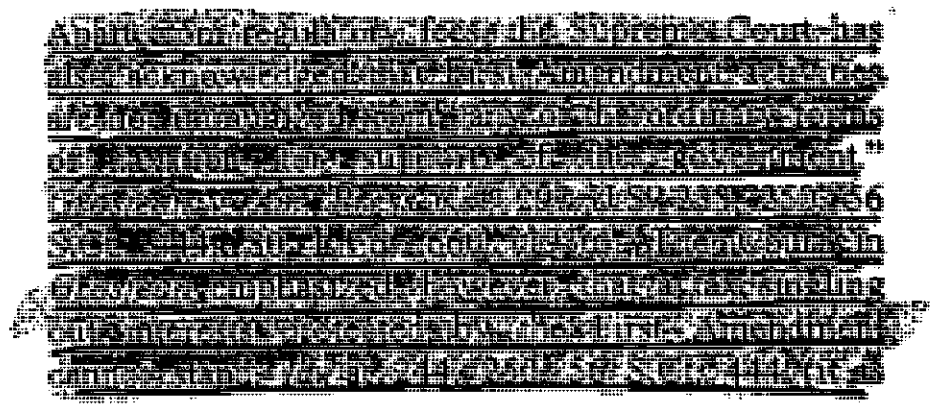
discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). That is the case because " speech concerning public affairs is more than self-expression; it is the essence of self-government. " *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 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.



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 [illegible] the Court, where First Amendment [illegible] that the State's interest [illegible] 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. Board 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 that burdens First Amendment rights is constitutionally suspect and thus subject to heightened scrutiny when it singles out the press, 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 among 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 *Reed v. City of New Orleans,* 593 So.2d 368, 371 (La.1992) (sales and use taxes may be general, applying to all goods, or selective, applying to only one specific commodity).

In the face of seemingly irrefutable evidence that § 264a singles out lobbyists and is distinct from a generally applicable sales tax, the State responds that (1) the lobby tax has some similarities to Vermont's sales tax; (2) most of the allegedly unique features of the lobby tax are also present in various other sales taxes imposed on particular goods such as alcohol and tobacco; (3) the remaining unique features of the lobby tax-such as how and when it is collected-do not result from a difference in the function of the tax, but rather from the practical convenience of incorporating the tax into the framework already established in the lobbyist registration and disclosure law for reporting expenditures.

[11] These arguments are not persuasive. First, the differences between the lobby tax and the sales tax far outnumber the relatively few similarities noted by the State, such as § 264a(c)'s adoption of the enforcement provisions contained in chapter 233 of Title 32. Second, while it may be true that some of the atypical features of the lobby tax are shared by particular sales taxes on special items such as alcohol and tobacco, no sales tax contains all, or even most, of the lobby tax's distinctive **31 features. More importantly, merely because a few specially taxed items share one or two atypical features of the lobby tax does not suggest that the lobby tax is a *generally applicable* sales tax burdening "all businesses." *Minneapolis Star,* 460 U.S. at 583, 103 S.Ct. 1365. Rather it demonstrates the contrary. Generally applicable tax statutes are not subjected to heightened scrutiny because "[w]e 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." *Id.* at 585, 103 S.Ct. 1365. Given this rationale, the lobby tax cannot possibly be considered a tax generally applicable to all Vermonters.

Third, the incorporation of the lobby tax into the framework of the lobbyist registration and disclosure statute could just as easily be construed as demonstrating that § 264a is a unique tax on lobbying, *389 quite apart from any generally applicable sales tax. Indeed, given § 264a's objective of taxing all expenditures ultimately aimed at influencing legislation-whether the expenditure be hiring a lobbyist, inviting a legislator to dinner, renting a room near the Statehouse, or purchasing ballpoint pens-the only possible way to administer the tax is to piggyback it onto the disclosure law. The tax could not be administered as a sales tax because of what is being taxed.

In sum, by statutory definition, the lobby tax is a tax imposed directly on expenditures connected with communications and activities aimed at influencing legislation. The tax is not part of a generally applicable sales tax that applies to a broad range of services, but rather singles out lobbying, a protected First Amendment interest, for special treatment. In fact, the very trigger for the tax is the reporting of expenditures associated with the right to petition the government to redress grievances. As such, heightened scrutiny is warranted. Because the State proffers no government interest apart from the raising of revenue, the tax cannot withstand such scrutiny.

D.

The State insists that because the lobby tax is not directed at any particular viewpoint, it is content-neutral and thus entitled to a presumption of validity. See *Hill v. Colorado,* 530 U.S. 703, 719, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (*principal inquiry* in determining content neutrality

is whether government has regulated speech because of disagreement with message conveyed); *Turner*, 512 U.S. at 643, 114 S.Ct. 2445 (*as general rule*, laws are content-based if they distinguish favored speech from disfavored speech on basis of ideas or views expressed; by contrast, laws are, *in most instances*, content-neutral if they impose burdens on speech without reference to ideas or views expressed). This argument is unavailing.

The Supreme Court has emphasized on several occasions that the First Amendment's hostility to content-based regulations " 'is not limited to restrictions on particular viewpoints, but rather extends to government restrictions on " 'expression because of its message, its ideas, its *subject matter*, or its content.' " ' (emphasis added). *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)); see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (same); see also *Hill*, 530 U.S. at 723, 120 S.Ct. 2480 ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable **32 form of content-based *390 regulation."); *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (statute restricting speech about crime is content-based); *Fed. Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 381, 383-84, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (regulation singling out commercial broadcasters and denying them right to address their chosen audience on "controversial issues of public importance" is content-based).[FN6]

FN6. The dissent cites two cases for the proposition that the Supreme Court in *Leathers* was concerned with taxes that discriminate on the basis of viewpoint rather than subject matter. See 172 Vt. at ----, 779 A.2d at 39-40. Those cases involved differential treatment among various media with respect to a tax exemption, and thus are inapposite here.

See *Arizona Dep't of Revenue v. Great Western Publ'g, Inc.*, 197 Ariz. 72, 3 P.3d 992, 997-98 (Ct.App.1999); *Magazine Publishers of Am. v. Commonwealth*, 539 Pa. 563, 654 A.2d 519, 521-22 (1995).
As the distinguished commentator cited by the dissent stated:
[A] law is content based if its application depends on either the subject matter or the viewpoint expressed. Phrased another way, the requirement that the government be content neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral.... If a law is either a viewpoint or a subject-matter restriction it is deemed to be content based.
E. Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L.Rev. 49, 51 (2000).

But we need not resolve any perceived inconsistency in Supreme Court case law concerning when a law may be deemed content-neutral. (As we emphasized earlier, a [illegible] content-neutral." See *Turner*, 512 U.S. at 640-41, 642, 114 S.Ct. 2445 ([illegible] that singles out First Amendment [illegible] at least [illegible] scrutiny [illegible] unrelated to the content of speech are subjected to an intermediate level of scrutiny"). Taken to its logical conclusion, refusing to subject a tax on political speech to heightened scrutiny unless it disfavored particular viewpoints would allow the State to impose a tax so great that it could effectively destroy the right to petition one's government, as long as the tax burdened all viewpoints equally. That is not the law.

II.

Because our resolution of the instant dispute under

the First Amendment is controlling, we need not address whether § 264a violates the Equal Protection Clause of the Fourteenth Amendment.

*391 III.

Finally, the State argues that the superior court erred in asserting jurisdiction over plaintiffs' claims, except for those of plaintiff Home Builders Association, because those plaintiffs failed to exhaust their administrative remedies by seeking tax refunds before challenging the constitutionality of the lobby tax in the superior court. See 2 V.S.A. § 264a(c) (adopting rights of appeal contained in chapter 233 of Title 32); 32 V.S.A. § 9777(a) (taxpayer may seek hearing before commissioner to challenge assessment of tax); 32 V.S.A. § 9781(a)-(b) (if application is made within three years after payment, commissioner shall refund any tax erroneously, illegally, or unconstitutionally collected; person shall not be entitled to refund determined to be due under § 9777 "where he has had a hearing or an opportunity for a hearing as provided in that section or has failed to avail himself of the remedies therein provided"**33).
The State relies principally upon *Stone v. Errecart,* 165 Vt. 1, 6, 675 A.2d 1322, 1326 (1996), in which this Court stated:
We hold that 32 V.S.A. § 5887 requires that a taxpayer petition for a refund from the Commissioner pursuant to 32 V.S.A. § 5884 before going to superior court. The failure of the taxpayer to exhaust this administrative remedy deprives the superior court of jurisdiction. This is so even if the petition to the Commissioner is futile because the Commissioner is not empowered to grant the relief requested.

We note that, unlike § 5887(a) ("exclusive remedy" of taxpayer with respect to refund of income taxes " shall be the petition for refund provided under section 5884 of this title" and to appeal therefrom as provided in § 5885), § 9781 does not expressly provide that a hearing under § 9777 is the exclusive remedy for challenging the imposition of a tax. But we need not resolve this question at this time. As a result of the parties' agreement, plaintiff Home Builders Association exhausted its administrative remedies and is a party to this appeal. Thus, our decision today is not advisory. There is no reason to address the jurisdictional issue concerning the plaintiffs other than Home Builders Association unless, and until, those plaintiffs actually request, and are denied, a refund of any taxes paid pursuant to § 264a.

Affirmed.
*392 DOOLEY, J., concurring.
Frequently in a 3-to-2 decision of this Court, a justice finds force in both competing arguments and is ultimately persuaded to join one side or the other on relatively narrow considerations. This is such a case. Like the dissent, I am not particularly persuaded by the form of this tax or the fact that it is placed in Title 2 and paid to the Secretary of State or that the revenue goes to a special campaign fund. I would probably uphold a sales tax on the personal services of lobbyists, whatever its form. What persuades me is that the tax involved in this challenge cannot fairly be called either a sales or use tax, a point made by the majority and largely ignored by the dissent. The substance, not the form, of the tax makes it invalid.

Vermont's sales and use tax law defines both sale and use. A sale is a "transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor." 32 V.S.A. § 9701(6). The definition does not include sales of services, even if some tangible personal property is transferred in the process. 32 V.S.A. § 9741(35). Use is "the exercise of any right or power over tangible personal property by the purchaser thereof." 32 V.S.A. § 9701(13). If the *substance* of the lobby tax merely removed the exception for services with respect only to lobbyist services, the State's characterization of the tax as just an extension of the sales tax would be valid. Similarly, if the *substance* of the tax merely expanded the definition of use to include consumption of services to compensate for instances when the sales tax did not reach them, again the State's position would be defensible.

But, in my judgment, the dissent is in error in its central description of the nature of the tax:
First and foremost, the tax on lobbying expenditures indisputably functions like a sales tax, by taxing a sales transaction. Every commercial transaction involves an expenditure and a sale, depending on one's perspective. The tax on expenditures is no different from a tax on sales; **34 there is only one transaction, and it is generally the purchaser who pays the tax.

172 Vt. at ---, 779 A.2d at 37. As the dissent states in the quoted passage, the tax before us is one on "expenditures," not sales or uses. It is a tax on expenditures of both lobbyists and employers of lobbyists. Of course, sales necessarily produce expenditures, even if by exchange *393 or barter, as described in the statutory definition set out above. Expenditures are not necessarily based on sales, however.

The most obvious example is when an employer of a lobbyist directly makes a gift to a legislator. That is clearly a taxable expenditure, but it is neither a sale nor a use. A quick perusal of the website of the Secretary of State shows that many of the taxable expenditures of an employer of a lobbyist are neither sales nor services. For example, if a trade association, which employs a staff lobbyist and mails a newsletter to its members, adds legislators or administrative officials to its mailing list, the costs of the newsletter attributable to discussion of policy issues before the legislative or executive branch is a taxable lobbyist employer expenditure even if the newsletter is produced solely in-house. *Lobbying FAQs: What Constitutes Lobbying?*, Vermont Secretary of State's Home Page, at *http://www.sec.state.vt.us/pubs/lobby/lobfaq1.htm* (last visited Apr. 27, 2001). Indeed, the Secretary of State has opined that inviting legislators to view the Vermont Yankee Nuclear Power Plant for general background information would make any expenses in connection with the trip taxable if Vermont Yankee also employed a lobbyist. *Id.* at *http://www.sec.state.vt.us/pubs/lobby/lobfaq7.htm* (last visited Apr. 27, 2001).

As the majority points out, a tax imposed based on the purpose of an expenditure necessarily crosses all the lines contained in traditional tax categories. For example, advertising services generally remain untaxed, but advertising services intended to influence legislation or administrative rule-making are taxed if sold to an employer of a lobbyist.

For this reason, much of the tax base defined in 2 V.S.A. § 264a(a) will be salaries paid to company or association staff who lobby as part of their jobs. I acknowledge that employees in such circumstances could be said to be selling their services for compensation. This is, however, a large expansion of any concept of sales of services in the current law. The result is a payroll tax on employers on that part of the payroll attributable to lobbying, including presumably a share of the salary of corporate officers and managers whose jobs necessarily include seeking favorable governmental action. I do not think that a broad payroll tax can be fairly viewed as a sales or use tax.

Finally, I note that the repetitive taxation of the same event by this tax is unparalleled in our sales tax. If a lobbyist buys a pen to use in lobbying, the lobbyist pays a sales tax on the purchase. The lobbyist then pays a lobbyist's expenditure tax on the same pen purchase. The lobbyist then bills the client for the lobbyist's expenditures, including *394 the cost of the pen, and the lobbyist's employer pays an additional, third tax on the cost of the same pen. I recognize that double taxation may be unavoidable once a state taxes the sale of services, but triple taxation of the same purchase goes well beyond anything in our sales tax, even broadly defined.

In short, the tax before us is a tax on lobbying and not merely a tax on the services of lobbyists, as it is often described. It will capture some sales of services, but it will capture a lot more than that. It has no analog in our state tax **35 scheme. As explained by the majority, this unique tax on lobbying clearly transcends the lines drawn by the United States Supreme Court 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), and *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991).

MORSE, J., dissenting.
The Court today invalidates a state sales tax on the ground that it impermissibly singles out a class of speakers, lobbyists, in violation of the First Amendment. Although I agree that lobbyists-as a profession specializing in "petition[ing] the Government"-are entitled to First Amendment protection, I do not share the Court's view that the tax impermissibly discriminates against them. U.S. Const. Amend. I. At its core, the lobbyist-expenditure tax functions as a content-neutral extension of Vermont's general sales tax, and therefore presents no First Amendment violation. I respectfully dissent.

The principal basis of the Court's decision is its conclusion that the lobbyist expenditure tax singles out lobbyists and lobbyist-employers for disparate tax treatment. The Court relies upon principles developed in a series of United States Supreme Court decisions dealing with First Amendment challenges to taxes on various segments of the media. In fact, these cases may be interpreted to demonstrate that the tax on lobbyist expenditures is constitutionally inoffensive.

The most recent decision on point is *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). There, cable television operators argued that an Arkansas statute extending the general sales tax to cable services, while maintaining existing exemptions for newspapers and magazines, violated the First Amendment. After reviewing a number of earlier decisions, the Supreme Court reaffirmed the general principle that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Id.* at 447, 111 S.Ct. 1438. The high court then identified three circumstances where this threat may be inferred and the law justified *395 only by a compelling governmental interest: (1) when the tax is so structured as to single out the press for differential tax treatment; (2) when the tax targets a small group of First Amendment speakers; and (3) when the tax is based upon the viewpoint or ideas of the speakers. See *id.* Applying that test to the Arkansas statute, the Supreme Court concluded that it was an extension of the state's generally applicable sales tax, did not impermissibly target a small group of speakers, and was content neutral. Accordingly, the tax was not subject to heightened judicial review.

Leathers, unfortunately, provided little practical guidance or principled framework through which to judge the validity of other taxing or regulatory schemes, such as that presented here, and subsequent case law, while suggestive, has not substantially advanced the analysis. See, e.g., *Department of Revenue v. Magazine Publishers of Am.*, 604 So.2d 459, 461-62 (Fla.1992) (on remand for reconsideration in light of *Leathers*, court held that tax on retail sales of secular magazines did not single out press for special tax treatment, but unconstitutionally discriminated on basis of content); *Magazine Publishers of Am. v. Commonwealth*, 539 Pa. 563, 654 A.2d 519, 523 (1995) (statute deleting sales and use tax exemption for magazines but retaining exemption for newspapers did not constitute prohibited special tax); *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 410 S.E.2d 652, 655 (1991) **36 (municipal utility tax on cable television service was generally applicable tax, notwithstanding fact that it applied to only one company).

[redacted] exempted retail sales of periodicals. Like most such schemes, the use tax augmented the sales tax by eliminating any tax incentive for Minnesota residents to acquire goods in other states in order to avoid the sales tax. See *id.* at 577, 103 S.Ct. 1365. In 1971, the use tax component was amended to impose a tax on the cost of paper and ink products consumed in producing a publication. Thus, as the Supreme Court noted, "[i]nk and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail." *Id.* at 578, 103 S.Ct. 1365. In 1974, the legislature amended the statute again to exempt the first $100,000 worth of ink and paper consumed by

a publication in any calendar year. The result was that only eleven publishers in the state, including the plaintiff, incurred a tax liability in 1974.

*396 The Supreme Court invalidated both the underlying paper and ink tax and the tax as amended to exempt the first $100,000 in costs. The Court's rationale was two-fold. First, it noted that the paper and ink tax was a "special tax that applie[d] only to certain publications protected by the First Amendment." *Id.* at 581, 103 S.Ct. 1365. Although a use tax ordinarily serves to complement a sales tax by eliminating the incentive to make major purchases out of state, the use tax on paper and ink served no such function. It "applie[d] to all uses, whether or not the taxpayer purchased the ink and paper in-state, and it applie[d] to items exempt from the sales tax," although in general items exempt from the Minnesota sales tax were not subject to a use tax. *Id.* at 582, 103 S.Ct. 1365. Thus, the Court observed, " [b]y creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment." *Id.* Such differential treatment, the Court concluded, " suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585, 103 S.Ct. 1365.

In addition, the Court concluded that the paper and ink tax violated the First Amendment "not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* at 591, 103 S.Ct. 1365. The effect of the $100,000 exemption was that only a handful of publishers paid any tax, and the Court held that a tax so tailored "that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 592, 103 S.Ct. 1365.

As commentators have noted, the rule in *Minneapolis Star*-and by extension in *Leathers*, which expressly cited and relied on *Minneapolis Star*-is that the Supreme Court will infer a censorial purpose, even in the absence of evidence of such a purpose-where the challenged tax differs so substantially in form or function from other state taxes that it can be said to single out the media for discriminatory treatment. See R. Bezanson, *Political Agnosticism, Editorial Freedom, and Government Neutrality Toward the Press: Observations on Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 72 Iowa L.Rev. 1359, 1369 (1987) ("the [Minnesota] tax was differential because its *form* was different"); **37 Note, *Leathers v. Medlock: The Supreme Court Changes Course on Taxing the Press*, 49 Wash. & Lee L.Rev. 1053, 1072 (1992) (the *Leathers* test looks to "the structure of the tax" to see if it violates the prohibition on censorship). " The conclusive weight placed on form," one author has observed, *397 serves a core value of the First Amendment by ensuring government neutrality toward the press. Bezanson, *supra*, at 1369-70.

Assessed in light of these principles-and contrary to this Court's conclusion-the lobbying expenditure tax is *not* so different in form or function from Vermont's general sales tax that it requires heightened judicial review. First and foremost, the tax on lobbying expenditures indisputably functions like a sales tax, by taxing a sales transaction. Every commercial transaction involves an expenditure and a sale, depending on one's perspective. The tax on expenditures is no different from a tax on sales; there is only one transaction, and it is generally the purchaser who pays the tax. See 32 V.S.A. § 9778.

The Court also asserts that the lobbyist-expenditure tax differs from the general sales tax because it was incorporated into the framework of the lobbyist registration and disclosure statute. The fact that the Legislature borrowed the terminology and provisions of an existing regulatory scheme requiring disclosure and reporting of lobbying " expenditures," 2 V.S.A. § 264, does not alter the essential *form* of the tax. Indeed, unlike the tax in *Minneapolis Star*, which the Supreme Court noted was "without parallel" in Minnesota's taxing scheme, 460 U.S. at 582, 103 S.Ct. 1365, the tax on lobbying expenditures is essentially nothing more than an extension of the existing Vermont sales tax to an additional service provider. In this regard, it is also noteworthy that the Legislature imposed the identical tax rate (five percent) on lobbying

expenditures as that imposed under the general sales tax, and expressly incorporated into the lobbying tax the general sales tax provisions relating to collection, enforcement, penalties, and appeal. See 2 V.S.A. § 264a(a), (c).

The Court identifies other formal distinctions between the general sales tax and the tax on lobbying expenditures. Upon examination, however, none appears to be significant. For example, the tax on lobbying expenditures is codified in a different statutory provision from the general sales tax. Yet, the same is true of other sales taxes, including those applicable to motor vehicles, 32 V.S.A. § 8903, rooms and meals, *id.* § 9241, malt beverages and spiritous liquors, 7 V.S.A. §§ 421, 422, and fuel, 23 V.S.A. §§ 3003, 3106.

The Court also notes that each of the aforementioned taxes is expressly exempt from the state's generally applicable sales tax. See 32 V.S.A. § 9741. This is hardly surprising, however, since an exemption is necessary to prevent sales of items such as fuel or alcoholic beverages from falling within the general sales tax on property sold at retail. The absence of a broad-based sales tax on *398 services renders such an exemption for the tax on lobbying expenditures unnecessary.

Additionally, the Court observes that sales taxes are generally paid to the Department of Taxes, while the tax on lobbying expenditures is paid to the Secretary of State for deposit into a special campaign fund. Again, the point is hardly compelling, as numerous other sales taxes are paid into special funds. See, e.g., 23 V.S.A. §§ 3015(7), 3106(d) (portion of fuel tax paid into Petroleum Cleanup Fund and wildlife fund); 32 V.S.A. § 8912 (sales and use tax on motor vehicles paid into Transportation Fund); see also *Magazine Publishers,* 654 A.2d at 524-25 (court rejected **38 claim that Pennsylvania sales tax singled out press for special tax treatment because revenues from sales tax on magazines were paid into special Public Transportation Assistance Fund).

The Court notes further that the forms and payment schedule for the lobbyist-expenditure tax differ from the general sales tax. There is no uniform schedule for the payment of sales taxes to the state; some, like the tax on lobbying expenditures, have specific schedules. See, e.g., 23 V.S.A. § 3108 (fuel tax due on 25th of month); 32 V.S.A. § 9243 (rooms and meals tax due monthly or quarterly). The requirement of forms specific to the product or service taxed is also not uncommon. See, e.g., 7 V.S.A. § 421(c) (forms for reporting alcoholic beverage sales volume).

The Court also notes that the lobbying-expenditure tax may result in some double taxation. The acquisition of office materials, for example, may be subject to the general sales tax upon purchase, and later form a component of lobbying expenditures subject to taxation. Again, however, this does not render the lobbyist-expenditure tax *structurally* distinct from the sales tax. Indeed, as the State correctly points out, some double taxation is inevitable when the general sales tax is extended to a "service." Thus, "telecommunications service" is subject to the Vermont sales tax, 32 V.S.A. § 9771(5), although the provider may also pay a sales tax on the purchase of components, such as office supplies, used in providing the service.

Finally, the Court relies heavily on the fact that, apart from the lobbyist-expenditure tax, the general sales tax does not extend to any other "personal or professional" service. 172 Vt. at ---, 779 A.2d at 29. The Court's reliance, once again, is misplaced. That the Legislature chose to extend the sales tax to lobbying but not other personal or professional services does not demonstrate that it is *functionally* different from the general sales tax. As the Supreme Court in *Leathers* *399 observed, " [i]nherent in the power to tax is the power to discriminate in taxation." 499 U.S. at 451, 111 S.Ct. 1438. Thus, *Leathers* upheld a sales tax on cable television services, notwithstanding the fact that no other segment of the media, including newspapers, magazines, and satellite broadcast television, was subject to the tax at that time. There, as here, the tax was imposed on other types of services, including utility and telecommunications, see *id.* at 447, 111 S.Ct. 1438, but the mere fact that it was not imposed on any *similar* media services did not differentiate it in any

constitutionally significant way.

This point was brought home by the Supreme Court in its subsequent decision in *Turner Broadcasting System, Inc. v. Federal Communications Commission,* 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). There, in rejecting a claim that certain regulations applicable only to cable television triggered strict scrutiny review, the Court observed:
It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others. In *Leathers v. Medlock,* 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), for example, we upheld against First Amendment challenge the application of a general state tax to cable television services, even though the print media and scrambled satellite broadcast television services were exempted from taxation. As *Leathers* illustrates, the fact that a law singles out a certain medium, or even the press as a whole, "is insufficient by itself to raise First Amendment concerns." *Id.* at 452, 111 S.Ct. 1438.

Id. at 660, 114 S.Ct. 2445.

The Court's holding ultimately suggests that the easy constitutional "fix" is simply **39 to conform certain procedural externalities of the lobbyist-expenditure tax to the general sales tax.
The legal web spun by the Legislature was functionally suitable; it simply lacked a certain purity of design. When all is said and done, what matters apparently is not the Legislature's straightforward intent to capture additional revenue through a generally applicable lobbyist-expenditure tax; nor the virtual absence of any evidence of a legislative intent to inhibit plaintiffs' freedom to speak and petition the government; nor even the existence of similar sales taxes on other services involving expression, such as telecommunications and printing. What matters is form, or appearance, and that-as this case vividly illustrates-is plainly in the eye of the beholder.

*400 The concurring opinion implies that the tax on lobbying expenditures constitutes a rare exception to the general sales tax on tangible personal property rather than services. In fact, Vermont's general sales tax applies to utility services, fabricating and printing services, amusements, and telecommunication services. See 32 V.S.A. § 9771(2)-(5). The concurring opinion also suggests that the lobbyist tax fails because expenditures may include more than sales. The argument, which plaintiffs did not raise, is hardly dispositive, as most expenditures are sales, and any other taxable transaction may be treated as the equivalent.
Although the concurring opinion characterizes this as a difference in "substance," I am not persuaded that it is anything more than a minor difference in form.

Thus, the tax on lobbying expenditures does not represent a "special tax" requiring heightened constitutional review. Because it concluded otherwise, the trial court failed to address the two remaining criteria for strict scrutiny identified in *Leathers:* whether the tax targets a small group of speakers, and whether it discriminates on the basis of the speaker's viewpoint. As explained below, the lobbyist-expenditure tax does not offend either of these additional criteria.

In focusing on the number of speakers subject to the challenged tax, the *Leathers* Court cited *Minneapolis Star,* which involved fewer than a dozen newspapers subject to the tax, and *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), where the Court invalidated a sales tax scheme that taxed two or three magazines of general circulation and exempted all trade, sports and professional journals. By way of contrast, the tax in *Leathers* affected approximately 100 cable companies, and the Court concluded that the extension of the Arkansas sales tax "hardly resembles a 'penalty for a few.' " 499 U.S. at 448, 111 S.Ct. 1438 (quoting *Minneapolis Star,* 460 U.S. at 592, 103 S.Ct. 1365). Here, similarly, the tax on lobbying expenditures, which resulted in tax payments in 1998 by approximately 213 employers of lobbyists, or sixty percent of the total number of registered lobbyist employers, cannot be said to target an impermissibly small number of speakers.

Nor does the tax on lobbying expenditures require

strict scrutiny on the basis of "viewpoint" discrimination. As noted, *Leathers* held that a tax will trigger heightened review under the First Amendment "if it discriminates on the basis of the content of taxpayer speech." 499 U.S. at 447, 111 S.Ct. 1438. Although *Leathers* did not specifically define what it meant by "content" discrimination, several courts and commentators have concluded that the Court was concerned with taxes that discriminate *401 on the basis of ideas or viewpoint, not on the basis of subject matter. See, e.g., **40*Arizona Dep't of Revenue v. Great Western Publishing, Inc.*, 197 Ariz. 72, 3 P.3d 992, 997 (Ct.App.1999) (rejecting argument that *Leathers* broadly prohibited any tax discriminating among publications on basis of content, concluding instead that "[g]enuine 'content-based' discrimination" must be based on "particular ideas or viewpoints"); *Magazine Publishers,* 654 A.2d at 523 (rejecting magazine trade group's claim that newspaper exemption from general sales tax discriminated on basis of "content" merely because it required reference to definition of newspaper as publication "containing matters of general interest and reports of current events"); Note, *supra,* at 1062 n. 58 ("Justice O'Connor in *Leathers* expresses concern about censorship which implies viewpoint distinctions."). But cf. *Department of Revenue,* 604 So.2d at 461-62 (invalidating sales tax scheme that subjected magazines to sales tax but exempted newspapers on ground that statute required tax department to evaluate contents of publication to determine whether it was entitled to exemption)..

The distinction is important, for the Court has defined content-based classifications in a variety of ways, and not always consistently. See E. Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application,* 74 S. Cal. L.Rev. 49, 51 (2000) (noting distinction between " viewpoint-neutral" standard, which prohibits regulations that discriminate on basis of "the ideology of the message," and " subject-matter-neutral" requirement, which prohibits laws "based on the topic of the speech"); G. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. Chi. L.Rev. 81, 83-84 (1978) (providing general background on content-based classifications and discussion of standards of content review). Subject-matter restrictions have been upheld in some contexts. See, e.g., *Burson v. Freeman,* 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (upholding restriction on campaigning activity near polling places); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 302-04, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding ordinance prohibiting political advertisements on buses, while permitting commercial advertisements). Viewpoint restrictions are invariably invalidated, as they pose "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner,* 512 U.S. at 641, 114 S.Ct. 2445.

Justice O'Connor, writing for the majority in *Leathers,* repeatedly expressed the Court's concern with taxes that discriminate on the basis of the targeted speaker's *ideas* or *views.* That concern was *402 expressed in a variety of ways throughout the opinion, as follows: "[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints," 499 U.S. at 447, 111 S.Ct. 1438; "a tax on a small number of speakers runs the risk of affecting only a limited range of views," *id.* at 448, 111 S.Ct. 1438; "[t]his is not a tax structure that resembles a penalty for particular speakers or particular ideas." *Id.* at 449, 111 S.Ct. 1438. We thus agree with those authorities who have concluded-as one author has written-that "[t]he *Leathers* Court ... focused on viewpoint-based and idea-based discrimination instead of distinctions of form, frequency, or even subject-matter." Note, *supra,* at 1080.

It has not gone unnoticed that the Supreme Court's emphasis in *Leathers* on viewpoint discrimination marked a subtle but nonetheless distinct departure from language in earlier decisions, notably *Ragland,* which had invalidated a sales tax because it exempted certain periodicals **41 based on their subject matter. See *Ragland,* 481 U.S. at 229, 107 S.Ct. 1722. In *Leathers,* however, the Court " underwent a shift ... in viewing the First

Amendment as more concerned with viewpoint censorship and less with mere content distinction." Note, *supra,* at 1060 n. 49. This emphasis on viewpoint discrimination is particularly noticeable in the Court's subsequent decision in *Turner.* There, in rejecting a challenge by cable television operators to FCC requirements that they carry local broadcast stations, the Court observed:

We have said that the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." ...

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.... By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

Turner, 512 U.S. at 642-43, 114 S.Ct. 2445 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

Thus understood, the tax on lobbying expenditures is content-neutral within the meaning of *Leathers.* Although the tax applies to expenditures related to a particular subject, i.e., lobbying for the purpose of influencing legislative or administrative action, see *4032 V.S.A. § 261(9)(A), it draws no distinctions on the basis of the viewpoint or ideas to which such activities are directed. As the court in *Brown* observed, upholding Pennsylvania's extension of the sales tax to lobbyists' services, "[t]he tax applies to all lobbyists who sell their services at retail without regard to the ideas or the content of the speech advanced by any particular lobbyist." *Brown v. Commonwealth,* 155 Pa.Cmwlth. 197, 624 A.2d 795, 797-98 (1993); see also *Kimbell v. Hooper,* 164 Vt. 80, 82, 665 A.2d 44, 45-46 (1995) (observing that nothing in lobbying disclosure act " attempts to censor particular messages or points of view").

In sum, the tax on lobbying expenditures does not meet any of the criteria identified by the Supreme Court as requiring application of the most demanding level of constitutional scrutiny. Absent such constitutional concerns, the question turns solely on whether the lobbyist expenditure tax is rationally related to a legitimate governmental purpose. See *Regan v. Taxation With Representation,* 461 U.S. 540, 549-51, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983).

Most assuredly the state's purpose in enacting the tax on lobbying expenditures was to raise revenue to partially fund the Vermont campaign fund. See 2 V.S.A. § 264a(d); 17 V.S.A. § 2856. Raising revenue is a legitimate, if not indeed the principal, purpose of tax legislation. See *In re Property of One Church Street,* 152 Vt. 260, 267, 565 A.2d 1349, 1352 (1989); see also *Quarty v. United States,* 170 F.3d 961, 967 (9th Cir.1999) ("There can be no dispute that the purpose of raising government revenue is a legitimate legislative purpose."); *Blue Cross & Blue Shield v. State,* 779 P.2d 634, 640 (Utah 1989) (in upholding tax on insurer against equal protection claim, court observed that "[t]he first and predominant purpose of the premium income tax is to raise revenue ... This is a legitimate purpose."). In accomplishing this purpose, the Legislature is generally free to tax some groups and not others so long as the classification rests upon a reasonable basis. See **42*General Motors Corp. v. Tracy,* 519 U.S. 278, 311, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (in taxation, more than any other field, legislatures possess greatest freedom of classification); *Regan,* 461 U.S. at 547, 103 S.Ct. 1997 ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); *One Church Street,* 152 Vt. at 265, 565 A.2d at 1351 (in upholding provision for higher taxes on nonresidential property than residential property, Court noted that Vermont Constitution does not " forbid reasonable classifications of property for tax purposes"). Such statutes are presumptively constitutional, and the burden rests upon the party challenging the tax *404 to demonstrate that the classification is invalid. See *Id.* at 270, 565 A.2d at 1354.

The trial court here concluded that the tax on lobbying expenditures violated equal protection by discriminating between organizations and persons that spend money on lobbying and those who lobby

without incurring expenditures. The Legislature nevertheless enjoys broad discretion in creating classifications and distinctions in tax statutes. See *Regan,* 461 U.S. at 547, 103 S.Ct. 1997. Thus, it was within the Legislature's prerogative to distinguish for tax purposes a *commercial* transaction-the expenditure of funds related to lobbying activities-from noncommercial lobbying activity.

The trial court also concluded that the statute impermissibly taxed the class of lobbyists and lobbyist employers who expend funds to influence legislative or administrative action, while omitting others, such as newspapers and magazines, who expend funds for similar purposes. Again, however, the classification was not unreasonable. The state has broad latitude in choosing to tax different trades and professions, see *Allied Stores v. Bowers,* 358 U.S. 522, 526-27, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and a tax scheme, such as that presented here, does not unconstitutionally discriminate "unless it discriminates on the basis of ideas." *Leathers,* 499 U.S. at 450, 111 S.Ct. 1438. As noted earlier, the tax is content neutral, applying to all lobbying expenditures regardless of the viewpoint expressed or represented.

Here-as in *Leathers*-the Legislature has chosen to include a particular class of speakers within the general sales tax. As was also true in *Leathers,* " [n]othing about that choice has ever suggested an interest in censoring the expressive activities" of those subject to the tax. *Id.* at 453, 111 S.Ct. 1438. Indeed, nothing in the record demonstrates that the five percent sales tax poses any real threat-express or implied-to plaintiffs' lobbying activities or freedom of expression. Absent such constitutional concerns, there is no basis to invalidate the tax. I would reverse.

I am authorized to say that Judge CHEEVER joins in this dissent.

Vt.,2001.
Vermont Soc. of Ass'n Executives v. Milne
172 Vt. 375, 779 A.2d 20

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508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, 61 USLW 4587
(Cite as: 508 U.S. 520, 113 S.Ct. 2217)

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah
U.S.Fla.,1993.

Supreme Court of the United States
CHURCH OF THE LUKUMI BABALU AYE, INC. and Ernesto Pichardo, Petitioners,
v.
CITY OF HIALEAH.
No. 91-948.

Argued Nov. 4, 1992.
Decided June 11, 1993.

Church brought action challenging city ordinances dealing with ritual slaughter of animals. The United States District Court for the Southern District of Florida denied relief, 723 F.Supp. 1467, and church appealed. The Court of Appeals for the Eleventh Circuit affirmed, 936 F.2d 586. On certiorari, the Supreme Court, Justice Kennedy, held that: (1) ordinances were not neutral; (2) ordinances were not of general applicability; and (3) governmental interest assertedly advanced by the ordinances did not justify the targeting of religious activity.

Reversed.

Justice Scalia filed an opinion concurring in part and concurring in the judgment in which Chief Justice Rehnquist joined.

Justice Souter filed an opinion concurring in part and concurring in the judgment.

Justice Blackmun filed an opinion concurring in the judgment in which Justice O'Connor joined.

West Headnotes

[1] Constitutional Law 92 ⇐1291

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1291 k. Neutrality. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
Law that is neutral and of general applicability need not be justified by compelling government interest even if law has incidental effect of burdening particular religious practice. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐1291

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1291 k. Neutrality. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
Law which is not neutral and of general applicability must be justified by compelling governmental interest and must be narrowly tailored to advance that interest if it burdens religious practice. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⇐1303

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1302 Free Exercise of Religion
92k1303 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
Protections of free exercise clause pertain if law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⇐1291

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1291 k. Neutrality. Most Cited Cases
(Formerly 92k84.1, 92k84(1))

If object of law is to infringe upon or restrict practices because of their religious motivation, law is not neutral and is invalid unless justified by compelling interest and narrowly tailored to advance that interest. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿1291

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1291 k. Neutrality. Most Cited Cases
(Formerly 92k84.1, 92k84(1))

To determine object of law which burdens religion, court must begin with its text, for minimum requirement of neutrality is that law not discriminate on its face; law lacks facial neutrality if it refers to religious practice without secular meaning discernible from the language or context. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1307

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1302 Free Exercise of Religion
92k1307 k. Neutrality; General Applicability. Most Cited Cases
(Formerly 92k84.1, 92k84(1))

Facial neutrality is not determinative of whether law violates free exercise clause, as that clause extends beyond facial discrimination and forbids subtle departures from neutrality and covert suppression of particular religious beliefs. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿1307

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1302 Free Exercise of Religion
92k1307 k. Neutrality; General Applicability. Most Cited Cases
(Formerly 92k84.1, 92k84(1))

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with requirement of facial neutrality, as free exercise clause protects against governmental hostility which is masked as well as overt. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1328

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1328 k. In General. Most Cited Cases
(Formerly 92k84.5(1))

Ordinances regulating ritual animal sacrifice were not religiously neutral as they used the words "sacrifice" and "ritual," resolutions recited that residents and citizens of the city had expressed their concern that certain religions might propose to engage in practices which were inconsistent with public morals and reiterated the city's commitment to prohibit any and all such acts of any and all religious groups, ordinances defined "sacrifice" so as to exclude almost all killings of animals except for religious sacrifice, ordinances reached few if any killings other than those performed as religious sacrifice by particular church, and ordinances did not deal with hunting, slaughter of animals for foods, eradication of insects and pests, or euthanasia.

[9] Constitutional Law 92 ⚿1290

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1290 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1))

Adverse impact will not always lead to finding of impermissible targeting of religion, as social harm may have been legitimate concern of government for reasons quite apart from discrimination. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General

92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))
Neutrality of law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. U.S.C.A. Const.Amend. 1.

[11] Animals 28 ⇐15

28 Animals
28k15 k. Regulation of Slaughtering. Most Cited Cases

Constitutional Law 92 ⇐1328

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1328 k. In General. Most Cited Cases
(Formerly 92k84.5(1))
Although city ordinance governing slaughterhouses appeared to apply to substantial nonreligious conduct and not be overbroad, it was invalid on First Amendment grounds where it was part of a group of four ordinances which were passed for the purpose of suppressing animal sacrifices performed by church. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⇐1290

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1290 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
All laws are selective to some extent, but categories of selection are of paramount concern when law has incidental effect of burdening religious practices, and inequality results when legislature decides that government interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⇐1306

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1302 Free Exercise of Religion
92k1306 k. Burden on Religion. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
Principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to protection of rights guaranteed by free exercise clause. U.S.C.A. Const.Amend. 1.

[14] Animals 28 ⇐15

28 Animals
28k15 k. Regulation of Slaughtering. Most Cited Cases

Constitutional Law 92 ⇐1310

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1310 k. In General. Most Cited Cases
(Formerly 92k84.5(1))
Ordinances dealing with ritual slaughter of animals were not of general applicability despite claim that they prevented cruelty to animals where they were underinclusive for those ends and failed to prohibit nonreligious conduct endangering the interests in a similar or greater degree than did religious ritual sacrifice. U.S.C.A. Const.Amend. 1.

[15] Animals 28 ⇐15

28 Animals
28k15 k. Regulation of Slaughtering. Most Cited Cases

Constitutional Law 92 ⇐1310

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1310 k. In General. Most Cited Cases
(Formerly 92k84.5(17))
Ordinances intended to prohibit ritual slaughter of animals were not of general applicability despite claim that they were related to city's interest in

public health which was threatened by disposal of animal carcasses in open public places and the consumption of uninspected meat, where they were underinclusive with respect to that interest as they did not deal with consumption of meat or disposal of carcasses by hunters and fishers. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⇐1291

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1291 k. Neutrality. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
Law burdening religious practice, not neutral or of general application, must undergo the most rigorous of scrutiny. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 ⇐1290

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1290 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1))
Law that targets religious conduct for distinctive treatment or advances legitimate governmental interest only against conduct with religious motivation survives strict scrutiny only in rare cases. U.S.C.A. Const.Amend. 1.

[18] Animals 28 ⇐15

28 Animals
28k15 k. Regulation of Slaughtering. Most Cited Cases

Constitutional Law 92 ⇐1310

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1310 k. In General. Most Cited Cases
(Formerly 92k84.5(1))
Ordinances dealing with ritual slaughter of animals did not have compelling governmental interest which would justify their targeting of religious activity despite claims that they dealt with the city's interest in public health and the protection of cruelty to animals. U.S.C.A. Const.Amend. 1.

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.

Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries and are cooked and eaten following all Santeria rituals except**2220 healing and death rites. After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments, Resolution 87-66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87-40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever ... unnecessarily or cruelly ... kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87-52, which defines "sacrifice" as "to unnecessarily kill ... an animal in a ... ritual ... not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts " any licensed [food] establishment" if the killing is otherwise permitted by law; Ordinance 87-71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52; and Ordinance 87-72, which defines "slaughter" as " the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for " small numbers of hogs and/or cattle" when exempted by state law. Petitioners filed this suit under 42 U.S.C. § 1983, alleging violations of their rights under, *inter alia*, the Free Exercise Clause of the First Amendment. Although acknowledging

that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest because any more narrow restrictions would *521 be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed.

Held: The judgment is reversed.

936 F.2d 586, (CA 11 1991) reversed.

Justice KENNEDY delivered the opinion of the Court with respect to Parts I, II-A-1, II-A-3, II-B, III, and IV, concluding that the laws in question were enacted contrary to free exercise principles, and they are void. Pp. 2225-30, 2231-34.

(a) Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. Pp. 2225-26.

(b) The ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice. That this religious exercise has been targeted is evidenced by Resolution 87-66's statements of "concern" and "commitment," and by the use of the words "sacrifice" and "ritual" in Ordinances 87-40, 87-52, and 87-71. Moreover, the latter ordinances' various prohibitions, definitions, and exemptions demonstrate that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. They also suppress much more religious conduct than is necessary to achieve their stated ends. The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as **2221 general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter. Although Ordinance 87-72 appears to apply to substantial nonreligious conduct and not to be overbroad, it must also be invalidated because it functions in tandem with the other ordinances to suppress Santeria religious worship. Pp. 2227-30.

(c) Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief and thereby violates the requirement that laws burdening religious practice must be of general applicability. Ordinances 87-40, 87-52, and 87-71 are substantially underinclusive with regard to the city's interest in preventing cruelty *522 to animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. The city's assertions that it is "self-evident" that killing for food is "important," that the eradication of insects and pests is "obviously justified," and that euthanasia of excess animals "makes sense" do not explain why religion alone must bear the burden of the ordinances. These ordinances are also substantially underinclusive with regard to the city's public health interests in preventing the disposal of animal carcasses in open public places and the consumption of uninspected meat, since neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. Ordinance 87-72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner, and respondent has not explained why the commercial slaughter of "small numbers" of cattle and hogs does not

implicate its professed desire to prevent cruelty to animals and preserve the public health. Pp. 2231-33.

(d) The ordinances cannot withstand the strict scrutiny that is required upon their failure to meet the *Smith* standard. They are not narrowly tailored to accomplish the asserted governmental interests. All four are overbroad or underinclusive in substantial respects because the proffered objectives are not pursued with respect to analogous nonreligious conduct and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. Moreover, where, as here, government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling. Pp. 2233-34.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined, the opinion of the Court with respect to Part II-B, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Parts II-A-1 and II-A-3, in which REHNQUIST, C.J., and STEVENS, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part II-A-2, in which STEVENS, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C.J., joined, *post*, p. ---. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. ---. BLACKMUN, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. ---.

*523 Douglas Laycock, Austin, TX, for petitioners.
Richard G. Garrett, Miami, FL, for respondent.
**2222 Justice KENNEDY delivered the opinion of the Court, except as to Part II-A-2.[FN*]

FN* THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join all but Part II-A-2 of this opinion. Justice WHITE joins all but Part II-A of this opinion. Justice SOUTER joins only Parts I, III, and IV of this opinion.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari. 503 U.S. 935, 112 S.Ct. 1472, 117 L.Ed.2d 616 (1992).

*524 Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments. 723 F.Supp. 1467, 1469-1470 (SD Fla.1989); 13

Encyclopedia of Religion 66 (M. Eliade ed. 1987); 1 Encyclopedia of the American Religious Experience 183 (C. Lippy & P. Williams eds. 1988).

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. 13 Encyclopedia of Religion, *supra*, at 66. The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 *id.*, at 554-556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600-605*525 (1971), and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see *id.*, at 605-612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glassé, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, *supra*, at 456.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. See 723 F.Supp., at 1471-1472; 13 Encyclopedia of Religion, *supra*, at 66; M. Gonzá lex-Wippler, The Santeria Experience 105 (1982).

Santeria adherents faced widespread persecution in Cuba, so the religion and its **2223 rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. See 723 F.Supp., at 1470; 13 Encyclopedia of Religion, *supra*, at 67; M. González-Wippler, Santería: The Religion 3-4 (1989). The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today. See 723 F.Supp., at 1470.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero*, the second highest in the Santeria faith. In April 1987, the Church leased land in *526 the City of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, see 723 F.Supp., at 1477-1478, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. The resolutions and ordinances passed at that and later meetings are set forth in the Appendix following this opinion.

A summary suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87-66, which noted the "concern" expressed by residents of the city " that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87-40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. Fla.Stat. ch. 828 (1987). Among other things, the incorporated state law subjected to criminal punishment "[w]hoever ... unnecessarily or

cruelly ... kills any animal." § 828.12.

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with *527 state law. § 828.27(4). To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida as to whether § 828.12 prohibited "a religious group from sacrificing an animal in a religious ritual or practice" and whether the city could enact ordinances "making religious animal sacrifice unlawful." The attorney general responded in mid-July. He concluded that the " ritual sacrifice of animals for purposes other than food consumption" was not a "necessary" killing and so was prohibited by § 828.12. Fla.Op.Atty.Gen. 87-56, Annual Report of the Atty.Gen. 146, 147, 149 (1988). The attorney general appeared to define "unnecessary" as "done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal." *Id.*, at 149, n. 11. He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict. *Id.*, at 151.

The city council responded at first with a hortatory enactment, Resolution 87-90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices"**2224 and the state-law prohibition. The resolution declared the city policy "to oppose the ritual sacrifices of animals " within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87-52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance *528 contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87-71. That ordinance defined sacrifice as had Ordinance 87-52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87-72, defined "slaughter" as " the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of " small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, *inter alia,* the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief. The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners. 688 F.Supp. 1522 (SD Fla.1988).

After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petitioners'*529 rights under the Free Exercise Clause. 723 F.Supp. 1467 (SD Fla.1989).

(The court rejected as well petitioners' other claims, which are not at issue here.) Although acknowledging that "the ordinances are not religiously neutral," *id.*, at 1476, and that the city's concern about animal sacrifice was "prompted" by the establishment of the Church in the city, *id.*, at 1479, the District Court concluded that the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced, *id.*, at 1479, 1483. The court also found that the ordinances did not target religious conduct "on their face," though it noted that in any event "specifically regulating [religious] conduct" does not violate the First Amendment "when [the conduct] is deemed inconsistent with public health and welfare." *Id.*, at 1483-1484. Thus, the court concluded that, at most, the ordinances' effect on petitioners' religious conduct was "incidental to [their] secular purpose and effect." *Id.*, at 1484.

The District Court proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if **2225 so, to balance the "governmental and religious interests." The court noted that "[t]his 'balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.' " *Ibid.*, quoting *Grosz v. City of Miami Beach*, 721 F.2d 729, 734 (CA 11 1983), cert. denied, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984). The court found four compelling interests. First, the court found that animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. 723 F.Supp., at 1474-1475, 1485. Second, the court found emotional injury to children who witness the sacrifice of animals. *Id.*, at 1475-1476, 1485-1486. Third, the court found compelling the city's interest*530 in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." *Id.*, at 1472-1473, 1486. Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use. *Id.*, at 1486. This legal determination was not accompanied by factual findings.

Balancing the competing governmental and religious interests, the District Court concluded the compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. *Id.*, at 1487. The court also concluded that an exception to the sacrifice prohibition for religious conduct would " 'unduly interfere with fulfillment of the governmental interest' " because any more narrow restrictions-*e.g.*, regulation of disposal of animal carcasses-would be unenforceable as a result of the secret nature of the Santeria religion. *Id.*, at 1486-1487, and nn. 57-59. A religious exemption from the city's ordinances, concluded the court, would defeat the city's compelling interests in enforcing the prohibition. *Id.*, at 1487.

The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion. Judgt. order reported at 936 F.2d 586 (1991). Choosing not to rely on the District Court's recitation of a compelling interest in promoting the welfare of children, the Court of Appeals stated simply that it concluded the ordinances were consistent with the Constitution. App. to Pet. for Cert. A2. It declined to address the effect of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), decided after the District Court's opinion, because the District Court "employed an arguably stricter standard" than that applied in *Smith*. App. to Pet. for Cert. A2, n. 1.

*531 II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress

shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof....*" (Emphasis added). The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981). Given the historical association between animal sacrifice and religious worship, see *supra*, at 2, petitioners' assertion that animal sacrifice is an integral part of their religion " cannot be **2226 deemed bizarre or incredible." *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834, n. 2, 109 S.Ct. 1514, 1518, n. 2, 103 L.Ed.2d 914 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

[1][2] In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore. v. Smith, supra.* Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance *532 that interest. These ordinances fail to satisfy the *Smith* requirements. We begin by discussing neutrality.

A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. See, *e.g., Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 2370-71, 110 L.Ed.2d 191 (1990) (plurality opinion); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389, 105 S.Ct. 3216, 3225-26, 87 L.Ed.2d 267 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489-90, 86 L.Ed.2d 29 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106-107, 89 S.Ct. 266, 271-72, 21 L.Ed.2d 228 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947). These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

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[3] At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. See, *e.g., Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961) (plurality opinion); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953). Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy*, 476 U.S. 693, 703, 106 S.Ct. 2147, 2154, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.). See J. Story, Commentaries on the Constitution of the United States §§ 991-992 (abridged ed. 1833) (reprint 1987); T. Cooley, Constitutional Limitations 467 (1868) (reprint 1972); *McGowan v. Maryland*, 366 U.S. 420, 464, and n. 2, 81 S.Ct. 1153, 1156, and n. 2, 6 L.Ed.2d 393 (1961) (opinion of Frankfurter, J.); *Douglas v. Jeannette*, 319 U.S. 157, 179, 63 S.Ct. 882, 888, 87 L.Ed. 1324 (1943) (Jackson, J., concurring in result);*533 *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some.

In *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978), for example, we invalidated a State law that disqualified members of the clergy from holding certain public offices, because it " impose[d] special disabilities on the basis of ... religious status," *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 877, 110 S.Ct., at 1599. On the **2227 same principle, in *Fowler v. Rhode Island, supra,* we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service. See also *Niemotko v. Maryland,* 340 U.S. 268, 272-273, 71 S.Ct. 325, 327-28, 95 L.Ed. 267 (1951) . Cf. *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (state statute that treated some religious denominations more favorably than others violated the Establishment Clause).

1

[4][5] Although a law targeting religious beliefs as such is never permissible, *McDaniel v. Paty, supra,* 435 U.S., at 626, 98 S.Ct., at 1327-28 (plurality opinion); *Cantwell v. Connecticut, supra,* 310 U.S., at 303-304, 60 S.Ct., at 903 if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Oregon v. Smith, supra,* 494 U.S., at 878-879, 110 S.Ct., at 1599-1600; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words *534 "sacrifice" and "ritual," words with strong religious connotations. Brief for Petitioners 16-17. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words " sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. See Webster's Third New International Dictionary 1961, 1996 (1971). See also 12 Encyclopedia of Religion, at 556 ("[T]he word *sacrifice* ultimately became very much a secular term in common usage"). The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

[6][7] We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States,* 401 U.S. 437, 452, 91 S.Ct. 828, 837, 28 L.Ed.2d 168 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy, supra,* 476 U.S., at 703, 106 S.Ct., at 2154 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring).

[8] The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words " sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. *535 Resolution 87-66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern **2228 that certain religious may propose

to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

[9] It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan v. Maryland,* 366 U.S., at 442, 81 S.Ct., at 1113-14. See, *e.g., Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879); *Davis v. Beason,* 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890). See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1319 (1970). The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," *Walz v. Tax Comm'n of New York City, supra,* 397 U.S., at 696, 90 S.Ct., at 1425 (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87-71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the *536 primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter, see 723 F.Supp., at 1480. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. Cf. *Larson v. Valente,* 456 U.S., at 244-246, 102 S.Ct., at 1683-84. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas,* not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87-52, which prohibits the "possess [ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is unlike most Santeria sacrifices unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87-52; if the killing is specifically for food but does not occur during the **2229 course of "any type of ritual," it again falls outside the prohibition; and if *537 the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals " specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87-40 incorporates the Florida animal

cruelty statute, Fla.Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing "[w]hoever ... unnecessarily ... kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13-14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. See *id.*, at 22. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. See *Kiper v. State,* 310 So.2d 42 (Fla.App.), cert. denied, 328 So.2d 845 (Fla.1975). Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 884, 110 S.Ct., at 1603. As we noted in *Smith,* in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.,* quoting *Bowen v. Roy,* 476 U.S., at 708, 106 S.Ct., at 2156 (opinion of Burger, C.J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligiousreasons. *538 Thus, religious practice is being singled out for discriminatory treatment. *Bowen v. Roy,* 476 U.S., at 722, and n. 17, 106 S.Ct., at 2164, and n. 17 (STEVENS, J., concurring in part and concurring in result); *id.,* at 708, 106 S.Ct. 2156 (opinion of Burger, C.J.); *United States v. Lee,* 455 U.S. 252, 264, n. 3, 102 S.Ct. 1051, 1059, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment).

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, *McGowan v. Maryland,* 366 U.S., at 520, 81 S.Ct., at 1186 (opinion of Frankfurter, J.), seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

[10] The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.[FN*] If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation **2230 on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Tr. of Oral Arg. 45. See also *id.,* at 42, 48. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's *539 interest in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. See 723 F.Supp., at 1486-1487, and nn. 58-59. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. See, *e.g., Schneider v. State,* 308 U.S. 147, 162, 60 S.Ct. 146, 151-52, 84 L.Ed. 155 (1939).

FN* Respondent advances the additional governmental interest in prohibiting the slaughter or sacrifice of animals in areas of the city not zoned for slaughterhouses, see Brief for Respondent 28-31, and the District Court found this interest to be

> compelling, see 723 F.Supp. 1467, 1486 (SD Fla.1989). This interest cannot justify Ordinances 87-40, 87-52, and 87-71, for they apply to conduct without regard to where it occurs. Ordinance 87-72 does impose a locational restriction, but this asserted governmental interest is a mere restatement of the prohibition itself, not a justification for it. In our discussion, therefore, we put aside this asserted interest.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87-40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"-the method used in kosher slaughter-is approved as humane. See 7 U.S.C. § 1902(b); Fla.Stat. § 828.23(7)(b) (1991); Ordinance 87-40, § 1. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. See 723 F.Supp., at 1472-1473. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

[11] Ordinance 87-72-unlike the three other ordinances-does appear to apply to substantial nonreligious conduct and *540 not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87-72 was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion. We need not decide whether the Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City,* 397 U.S., at 696, 90 S.Ct., at 1425 (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous**2231 statements made by members of the decisionmaking body. *Id.,* at 267-268, 97 S.Ct., at 564-65. These objective factors bear on the question of discriminatory object. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, n. 24, 99 S.Ct. 2282, 2296, n. 24, 60 L.Ed.2d 870 (1979).

That the ordinances were enacted " 'because of,' not merely 'in spite of,' " their suppression of Santeria religious practice, *id.,* at 279, 99 S.Ct., at 2296 is revealed by the events preceding their enactment. Although respondent claimed at oral argument *541 that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, Tr. of Oral Arg. 27, 46, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and

taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. Taped excerpts of Hialeah City Council Meeting, June 9, 1987.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised *542 the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you .. not to permit this Church to exist." The city attorney commented that Resolution 87-66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens ...." *Ibid.* Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

B

[12] We turn next to a second requirement of the Free Exercise Clause, the rule **2232 that laws burdening religious practice must be of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 879-881, 110 S.Ct., at 1600-1601. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 148, 107 S.Ct. 1046, 1053, 94 L.Ed.2d 190 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that *543 the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

[13] The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment

jurisprudence. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-670, 111 S.Ct. 2513, 2518-2519, 115 L.Ed.2d 586 (1991); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201, 110 S.Ct. 577, 588-89, 107 L.Ed.2d 571 (1990); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295 (1983); *Larson v. Valente*, 456 U.S., at 245-246, 102 S.Ct., at 1683-84; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969). In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

[14] Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing-which occurs in Hialeah, see A. Khedouri & F. Khedouri, South Florida Inside Out 57 (1991)-is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87-40 sanctions *544 euthanasia of "stray, neglected, abandoned, or unwanted animals," Fla.Stat. § 828.058 (1987); destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," § 828.073(4)(c)(2); the infliction of pain or suffering "in the interest of medical science," § 828.02; the placing of poison in one's yard or enclosure, § 828.08; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," § 828.122(6)(b), and "to hunt wild hogs," § 828.122(6)(e).

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." Brief for Respondent 21. It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. *Ibid.* According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." *Id.*, at 22. These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

**2233 [15] The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumpti on of uninspected meat, see Brief for Respondent 32, citing 723 F.Supp., at 1474-1475, 1485. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, see 11 Record 566, *545 590-591, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, 723 F.Supp., at 1485, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." Fla.Stat. § 585.88(1)(a) (1991). The asserted interest in inspected meat is not pursued in contexts

similar to that of religious animal sacrifice.

Ordinance 87-72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." See Fla.Stat. § 828.24(3) (1991). Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." *Florida Star v. B.J.F.*, 491 U.S. 524, 542, 109 S.Ct. 2603, 2614, 105 L.Ed.2d 443 (1989) (SCALIA, J., concurring in part and concurring in judgment). This *546 precise evil is what the requirement of general applicability is designed to prevent.

III

[16][17][18] A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S., at 628, 98 S.Ct., at 1328, quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not " water[ed] ... down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S., at 888, 110 S.Ct., at 1605. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

**2234 First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, see *supra*, at 16-18, 21-24, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987).

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible *547 measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F., supra*, 491 U.S., at 541-542, 109 S.Ct., at 2613-14 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-120, 112 S.Ct. 501, 510-11, 116 L.Ed.2d 476 (1991). Cf. *Florida Star v. B.J.F., supra*, at 540-541, 109 S.Ct., at 2612-13; *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-105, 99 S.Ct. 2667, 2671-72, 61 L.Ed.2d 399 (1979); *id.*, at 110, 99 S.Ct., at 2674-75 (REHNQUIST, J., concurring in judgment). As we show above, see *supra*, at 21-24, the ordinances are underinclusive to a substantial extent with respect to each of the

interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

*548 APPENDIX TO OPINION OF THE COURT

City of Hialeah, Florida, Resolution No. 87-66, adopted June 9, 1987, provides:
"WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and
"WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.
"NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
"1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are **2235 inconsistent with public morals, peace or safety."

City of Hialeah, Florida, Ordinance No. 87-40, adopted June 9, 1987, provides:
"WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and
"WHEREAS, Section 828.27, Florida Statutes, provides that 'nothing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty to animals which is identical to the provisions of this Chapter ... except as to penalty.'
"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
*549 "*Section 1.* The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828-'Cruelty to Animals' (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.
"*Section 2.* Repeal of Ordinances in Conflict.
"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.
"*Section 3.* Penalties.
"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.
"*Section 4.* Inclusion in Code.
"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.
"*Section 5.* Severability Clause.
"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judge or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.
"*Section 6.* Effective Date.
"This Ordinance shall become effective when passed by the City Council of the City of Hialeah

and signed by the Mayor of the City of Hialeah."

City of Hialeah Resolution No. 87-90, adopted August 11, 1987, provides:
"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding*550 the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida; and
"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifices is *[sic]* a violation of the Florida State Statute on Cruelty to Animals; and
"WHEREAS, the Attorney General further held that the sacrificial killing of animals other than for the primary purpose of food consumption is prohibited under state law; and
"WHEREAS, the City of Hialeah, Florida, has enacted an ordinance mirroring state law prohibiting cruelty to animals.
"NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
"*Section 1.* It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, FLorida *[sic]*. Any individual or organization **2236 that seeks to practice animal sacrifice in violation of state and local law will be prosecuted."

City of Hialeah, Florida, Ordinance No. 87-52, adopted September 8, 1987, provides:
"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida; and
"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifice, other than for the primary purpose of food consumption, is a violation of state law; and
*551 "WHEREAS, the City of Hialeah, Florida, has enacted an ordinance (Ordinance No. 87-40), mirroring the state law prohibiting cruelty to animals.
"WHEREAS, the City of Hialeah, Florida, now wishes to specifically prohibit the possession of animals for slaughter or sacrifice within the City of Hialeah, Florida.
"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
"*Section 1.* Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6-8 ' Definitions' and 6-9 'Prohibition Against Possession Of Animals For Slaughter Or Sacrifice', which is to read as follows:
"Section 6-8. Definitions
"1. Animal-any living dumb creature.
"2. Sacrifice-to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.
"3. Slaughter-the killing of animals for food.
"Section 6-9. Prohibition Against Possession of Animals for Slaughter Or Sacrifice.
"1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.
"2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.
"3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically *552 raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.
"*Section 2.* Repeal of Ordinance in Conflict.
"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.
"*Section 3.* Penalties.
"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both,

in the discretion of the Court.
"*Section 4.* Inclusion in Code.
"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.
"*Section 5.* Severability Clause.
"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgement or decree of a court of competent jurisdiction, such invalidity or unconstitutionality**2237 shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.
"*Section 6.* Effective Date.
"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah, Florida, Ordinance No. 87-71, adopted September 22, 1987, provides:
"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals *553 within the city limits is contrary to the public health, safety, welfare and morals of the community; and
"WHEREAS, the City Council of the City of Hialeah, Florida, desires to have qualified societies or corporations organized under the laws of the State of Florida, to be authorized to investigate and prosecute any violation(s) of the ordinance herein after set forth, and for the registration of the agents of said societies.
"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
"*Section 1.* For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.
"*Section 2.* For the purpose of this ordinance, the word animal shall mean: any living dumb creature.
"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.
"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violation of this Ordinance.
*554 "*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.
"*Section 6.* Repeal of Ordinances in Conflict.
"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.
"*Section 7.* Penalties.
"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.
"*Section 8.* Inclusion in Code.
"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.
"*Section 9.* Severability Clause.
**2238 "If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences,

paragraphs or sections of this Ordinance.
"*Section 10.* Effective Date.
"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

*555 City of Hialeah, Florida, Ordinance No. 87-72, adopted September 22, 1987, provides:
"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.
"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
"*Section 1.* For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.
"*Section 2.* For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.
"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.
"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violations of this Ordinance.
*556 "*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.
"*Section 6.* This Ordinance shall not apply to any person, group or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.
"*Section 7.* Repeal of Ordinances in Conflict.
"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.
"*Section 8.* Penalties.
"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.
"*Section 9.* Inclusion in Code.
"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of **2239 this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.
"*Section 10.* Severability Clause.
"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.
*557 "*Section 11.* Effective Date.
"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

Justice SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.
The Court analyzes the "neutrality" and the " general applicability" of the Hialeah ordinances in separate sections (Parts II-A and II-B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I

would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only " interrelated," *ante,* 2226, but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a " law ... prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.,* a law excluding members of a certain sect from public benefits, cf. *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978)), see *Bowen v. Roy,* 476 U.S. 693, 703-704, 106 S.Ct. 2147, 2153-54, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment, see *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). But certainly a law that is not of general applicability (in the sense ***558** I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II-A, or "general applicability," Part II-B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II-A.

I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers, i.e.,* whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, see, *e.g., Edwards v. Aguillard,* 482 U.S. 578, 636-639, 107 S.Ct. 2573, 2605-07, 96 L.Ed.2d 510 (1987) (dissenting opinion), and this Court has a long tradition of refraining from such inquiries, see, *e.g., Fletcher v. Peck,* 6 Cranch 87, 130-131, 3 L.Ed. 162 (1810) (Marshall, C.J.); ****2240***United States v. O'Brien,* 391 U.S. 367, 383-384, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968).

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. See, *e.g., United States v. Lovett,* 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). See *Edwards v. Aguillard, supra,* 482 U.S., at 639, 107 S.Ct., at 2607 (SCALIA, J., dissenting). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law ... prohibiting the free exercise [of religion]... ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of ***559** religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

Justice SOUTER, concurring in part and concurring in the judgment.

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object

of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should re-examine the rule *Smith* declared.

I

According to *Smith,* if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not been offended. *Id.,* at 878-880, 110 S.Ct., at 1599-1601. I call this the *Smith* rule to distinguish it from the noncontroversial principle, also expressed in *Smith* though *560 established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of *Smith* to this case, it will help to get the terms in order, for the significance of the *Smith* rule is not only in its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but also in its adoption of a particular, narrow conception of free-exercise neutrality.

That the Free Exercise Clause contains a " requirement for governmental neutrality," *Wisconsin v. Yoder,* 406 U.S. 205, 220, 92 S.Ct. 1526, 1535-36, 32 L.Ed.2d 15 (1972), is hardly a novel proposition; though the term does not appear in the First Amendment, our cases have used it as shorthand to describe, at least in part, what the Clause commands. **2241 See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization of Cal.,* 493 U.S. 378, 384, 110 S.Ct. 688, 693, 107 L.Ed.2d 796 (1990); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 717, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1981); *Yoder, supra,* 406 U.S., at 220, 92 S.Ct., at 1535; *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 792-793, 93 S.Ct. 2955, 2975, 37 L.Ed.2d 948 (1973); *School Dist. of Abington v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844 (1963); see also *McDaniel v. Paty,* 435 U.S. 618, 627-629, 98 S.Ct. 1322, 1328-1329, 55 L.Ed.2d 593 (1978) (plurality opinion) (invalidating a nonneutral law without using the term). Nor is there anything unusual about the notion that the Free Exercise Clause requires general applicability, though the Court, until today, has not used exactly that term in stating a reason for invalidation. See *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953); cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 1372, 75 L.Ed.2d 295 (1983); *Larson v. Valente,* 456 U.S. 228, 245-246, 102 S.Ct. 1673, 1683-1684, 72 L.Ed.2d 33 (1982). [FN1]

FN1. A law that is not generally applicable according to the Court's definition (one that "selective[ly] impose[s] burdens only on conduct motivated by religious belief," *ante,* at 2232) would, it seems to me, fail almost any test for neutrality. Accordingly, the cases stating that the Free Exercise Clause requires neutrality are also fairly read for the proposition that the Clause requires general applicability.

*561 While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. Cf. *Lee v. Weisman,* 505 U.S. 577, 627, 112 S.Ct. 2649, 2676, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring) (considering Establishment Clause neutrality). A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. Cf. McConnell & Posner, An

Economic Approach to Issues of Religious Freedom, 56 U.Chi.L.Rev. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities"). A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[FN2]

FN2. Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] 'reflec[t] ... nothing more than the governmental obligation of neutrality in the face of religious differences.' " *Wisconsin v. Yoder,* 406 U.S. 205, 235, n. 22, 92 S.Ct. 1526, 1543, n. 22, 32 L.Ed.2d 15 (1972) (quoting *Sherbert v. Verner,* 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963)); see also *Lee v. Weisman,* 505 U.S. 577, 627, 112 S.Ct. 2649, 2677, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring). The prohibition law in place earlier this century did in fact exempt "wine for sacramental purposes." National Prohibition Act, Title II, § 3, 41 Stat. 308.

It does not necessarily follow from that observation, of course, that the First Amendment requires an exemption from Prohibition; that depends on the meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement *562 would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. See generally Laycock, Formal, Substantive, and Disaggregated **2242 Neutrality Toward Religion, 39 DePaul L.Rev. 993 (1990). If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality. [FN3]

FN3. One might further distinguish between formal neutrality and facial neutrality. While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law. Compare *ante,* at 2230-31 (opinion of KENNEDY, J., joined by STEVENS, J.) with *ante,* at 2239-40 (opinion of SCALIA, J., joined by REHNQUIST, C.J.). For present purposes, the distinction between formal and facial neutrality is less important than the distinction between those conceptions of neutrality and substantive neutrality.

Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application. 494 U.S., at 878, 110 S.Ct., at 1599. The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law " neutral on its face," they said, may "nonetheless

offend [the Free Exercise Clause's] requirement *563 for government neutrality if it unduly burdens the free exercise of religion." *Id.*, at 896, 110 S.Ct., at 1609 (opinion of O'CONNOR, J., joined by Brennan, Marshall, and BLACKMUN, JJ.) (internal quotation marks and citations omitted). The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the *Smith* rule, "requir[es] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.*, at 894, 110 S.Ct., at 1608 (emphasis added).

The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable. This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality. It is only "this fundamental nonpersecution principle of the First Amendment [that is] implicated here," *ante*, at 2222, and it is to that principle that the Court adverts when it holds that Hialeah's ordinances "fail to satisfy the *Smith* requirements," *ante*, at 2226. In applying that principle the Court does not tread on troublesome ground.

In considering, for example, whether Hialeah's animal-sacrifice laws violate free-exercise neutrality, the Court rightly observes that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *ibid.*, and correctly finds Hialeah's laws to fail those standards. The question whether the protections of the Free Exercise Clause also pertain if the law at issue, though nondiscriminatory in its object, has the effect nonetheless of placing a burden on religious exercise is not before the Court *564 today, and the Court's intimations on the matter are therefore dicta.

The Court also rightly finds Hialeah's laws to fail the test of general applicability, and as **2243 the Court "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights," *ante*, at 2232, it need not discuss the rules that apply to prohibitions found to be generally applicable. The question whether " there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," *Yoder*, 406 U.S., at 220, 92 S.Ct., at 1535, is not before the Court in this case, and, again, suggestions on that score are dicta.

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," *ante*, at 2222, this is far from a representative free-exercise case. While, as the Court observes, the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *ibid.*, *Smith* was typical of our free-exercise cases, involving as it did a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application.

A

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed *565 the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal

neutrality and general applicability are not sufficient conditions for free-exercise constitutionality:

"In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' " *Thomas*, 450 U.S., at 717 [101 S.Ct., at 1431] (quoting *Yoder*, 406 U.S., at 220 [92 S.Ct., at 1535]).

"[T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Ibid.*

Not long before the *Smith* decision, indeed, the Court specifically rejected the argument that " neutral and uniform" requirements for governmental benefits need satisfy only a reasonableness standard, in part because "[s]uch a test has no basis in precedent." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (internal quotation marks omitted). Rather, we have said, "[o]ur cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.' " *Swaggart Ministries*, 493 U.S., at 384-385, 110 S.Ct., at 692-693 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 (1989)).

Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise: *566 " 'only those interests**2244 of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' " *McDaniel v. Paty*, 435 U.S., at 628, 98 S.Ct., at 1328 (plurality opinion) (quoting *Yoder*, *supra*, 406 U.S., at 215, 92 S.Ct., at 1533). Compare *McDaniel*, *supra*, 435 U.S., at 628-629, 98 S.Ct., at 1328-1329 (plurality opinion) (applying that test to a law aimed at religious conduct) with *Yoder*, *supra*, 406 U.S., at 215-229, 92 S.Ct., at 1533-1540 (applying that test to a formally neutral, general law). Other cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez v. Commissioner*, *supra*, 490 U.S., at 699, 109 S.Ct., at 2149; *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 835, 109 S.Ct. 1514, 1518, 103 L.Ed.2d 914 (1989); *Hobbie v. Unemployment Appeals Comm'n*, *supra*, 480 U.S., at 141, 107 S.Ct., at 1049; *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983); *United States v. Lee*, 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *Thomas*, *supra*, 450 U.S., at 718, 101 S.Ct., at 1432; *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963); and *Cantwell v. Connecticut*, 310 U.S. 296, 304-307, 60 S.Ct. 900, 903-904, 84 L.Ed. 1213 (1940).

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, see 494 U.S., at 881-885, 110 S.Ct., at 1601-1603, I am not persuaded. *Wisconsin v. Yoder*, and *Cantwell v. Connecticut*, according to *Smith*, were not true free-exercise cases but " hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents ... to direct the education of their children." *Smith*, *supra*, 494 U.S., at 881, 882, 110 S.Ct., at 1601, 1602. Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake." *Yoder*, *supra*, 406 U.S., at 221, 92 S.Ct., at 1536. See also *Cantwell*, *supra*, 310 U.S., at 303-307, 60 S.Ct., at 903-905.[FN4] *567 And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid **2245 exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a

hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

FN4. *Yoder,* which involved a challenge by Amish parents to the enforcement against them of a compulsory school attendance law, mentioned the parental rights recognized in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), as *Smith* pointed out. See *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 881, n. 1, 110 S.Ct. 1595, 1601, n. 1, 108 L.Ed.2d 876 (1990) (citing *Yoder,* 406 U.S., at 233, 92 S.Ct., at 1542). But *Yoder* did so only to distinguish *Pierce,* which involved a substantive due process challenge to a compulsory school attendance law and which required merely a showing of " 'reasonable[ness].' " *Wisconsin v. Yoder,* 406 U.S. 205, 233, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972) (quoting *Pierce, supra,* 268 U.S., at 535, 45 S.Ct., at 573). Where parents make a " free exercise claim," the *Yoder* Court said, the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause and discussed at length earlier in the opinion. See 406 U.S., at 233, 92 S.Ct., at 1542; *id.,* at 213-229, 92 S.Ct., at 1532-1540. Quickly after the reference to parental rights, the *Yoder* opinion makes clear that the case involves "the central values underlying the Religion Clauses." *Id.,* at 234, 92 S.Ct., at 1542. The Yoders raised only a free-exercise defense to their prosecution under the school-attendance law, *id.,* at 209, and n. 4, 92 S.Ct., at 1530, and n. 4; certiorari was granted only on the free-exercise issue, *id.,* at 207, 92 S.Ct., at 1529; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause" even against enforcement of a " regulatio[n] of general applicability," *id.,* at 220, 92 S.Ct., at 1535.
As for *Cantwell, Smith* pointed out that the case explicitly mentions freedom of speech. See 494 U.S., at 881, n. 1, 110 S.Ct., at 1601, n. 1 (citing *Cantwell v. Connecticut,* 310 U.S. 296, 307, 60 S.Ct. 900, 905, 84 L.Ed. 1213 (1940)). But the quote to which *Smith* refers occurs in a portion of the *Cantwell* opinion (titled: " *[s]econd,*" and dealing with a breach-of-peace conviction for playing phonograph records, see 310 U.S., at 307, 60 S.Ct., at 905) that discusses an entirely different issue from the section of *Cantwell* that *Smith* cites as involving a "neutral, generally applicable law" (titled: "*[f]irst,*" and dealing with a licensing system for solicitations, see *Cantwell, supra,* 310 U.S., at 303-307, 60 S.Ct., at 903-905). See *Smith, supra,* 494 U.S., at 881, 110 S.Ct., at 1601.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensation*568 systems, see *Frazee, supra; Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1125, 67 L.Ed.2d 624 (1981); and *Sherbert, supra,* "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ' religious hardship' without compelling reason." 494 U.S., at 884, 110 S.Ct., at 1603. But prior to *Smith* the Court had already refused to accept that explanation of the unemployment compensation cases. See *Hobbie, supra,* 480 U.S., at 142, n. 7, 107 S.Ct., at 1049, n. 7; *Bowen v. Roy,* 476 U.S. 693, 715-716, 106 S.Ct. 2147, 2160-2161, 90 L.Ed.2d 735 (1986) (opinion of BLACKMUN, J.); *id.,* at 727-732, 106 S.Ct., at 2166-2169 (opinion of O'CONNOR, J., joined by Brennan and Marshall, JJ.); *id.,* at 733, 106 S.Ct., at 2169 (WHITE, J., dissenting). And, again, the distinction fails to

exclude *Smith:* "If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial." McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U.Chi.L.Rev. 1109, 1124 (1990). *Smith* also distinguished the unemployment compensation cases on the ground that they did not involve "an across-the-board criminal prohibition on a particular form of conduct." 494 U.S., at 884, 110 S.Ct., at 1603. But even Chief Justice Burger's plurality opinion in *Bowen v. Roy,* on which *Smith* drew for its analysis of the unemployment compensation cases, would have applied its reasonableness test only to "denial of government benefits" and not to "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons," *Bowen v. Roy, supra,* 476 U.S., at 706, 106 S.Ct., at 2155 (opinion of Burger, C.J., joined by Powell and REHNQUIST, JJ.); to the latter category of governmental action, it would have applied the test employed in *Yoder,* which involved an across-the-board criminal prohibition and which Chief Justice Burger's opinion treated as an ordinary free-exercise*569 case. See *Bowen v. Roy,* 476 U.S., at 706-707, 106 S.Ct., at 2155-2156; *id.,* at 705, n. 15, 106 S.Ct., at 2155, n. 15; *Yoder,* 406 U.S., at 218, 92 S.Ct., at 1534; see also *McDaniel v. Paty,* 435 U.S., at 628, n. 8, 98 S.Ct., at 1328, n. 8 (noting cases in which courts considered claims for exemptions from general criminal prohibitions, cases the Court thought were " illustrative of the general nature of free-exercise protections and the delicate balancing required by our decisions in [*Sherbert* and *Yoder,*] when an important state interest is shown").

As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879), and *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), see *Smith, supra,* 494 U.S., at 879, 110 S.Ct., at 1600, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds,* which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy, see 98 U.S., at 166 ("polygamy leads to the patriarchal principle, and ... fetters the people in stationary despotism"); *id.,* at 165, 168, has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order." **2246 *Sherbert v. Verner,* 374 U.S., at 403, 83 S.Ct., at 1793; see also *United States v. Lee,* 455 U.S., at 257-258, 102 S.Ct., at 1055-1056; *Bob Jones University,* 461 U.S., at 603, 103 S.Ct., at 2034; *Yoder, supra,* 406 U.S., at 230, 92 S.Ct., at 1540. And *Gobitis,* after three Justices who originally joined the opinion renounced it for disregarding the government's constitutional obligation "to accommodate itself to the religious views of minorities," *Jones v. Opelika,* 316 U.S. 584, 624, 62 S.Ct. 1231, 1251, 86 L.Ed. 1691 (1942) (opinion of Black, Douglas, and Murphy, JJ.), was explicitly overruled in *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943); see also *id.,* at 643-644, 63 S.Ct., at 1187-1188 (Black and Douglas, JJ., concurring).

Since holding in 1940 that the Free Exercise Clause applies to the States, see *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated*570 effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said, detecting in at least the most recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. *Smith, supra,* 494 U.S., at 884-885, 110 S.Ct., at 1603. But even if the Court's commitment were that palid, it would argue only for moderating the language of the test, not for eliminating constitutional scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when in the same period it repeatedly applied the compelling-interest test to require exemptions, even in a case decided the year before *Smith.* See *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 109 S.Ct.

1514, 103 L.Ed.2d 914 (1989).[FN5] In sum, it seems to me difficult to escape the conclusion*571 that, whatever *Smith's* virtues, **2247 they do not include a comfortable fit with settled law.

FN5. Though *Smith* implied that the Court, in considering claims for exemptions from formally neutral, generally applicable laws, has applied a "water[ed] down" version of strict scrutiny, 494 U.S., at 888, 110 S.Ct., at 1605, that appraisal confuses the cases in which we purported to apply strict scrutiny with the cases in which we did not. We did not purport to apply strict scrutiny in several cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches, and the opinions in those cases said in no uncertain terms that traditional heightened scrutiny applies outside those categories.—See *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 107 S.Ct. 2400, 2404, 96 L.Ed.2d 282 (1987) ("[P]rison regulations ... are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"); *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); see also *Johnson v. Robison,* 415 U.S. 361, 385-386, 94 S.Ct. 1160, 1174-1175, 39 L.Ed.2d 389 (1974); *Gillette v. United States,* 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971). We also did not purport to apply strict scrutiny in several cases in which the claimants failed to establish a constitutionally cognizable burden on religious exercise, and again the opinions in those cases left no doubt that heightened scrutiny applies to the enforcement of formally neutral, general laws that do burden free exercise. See *Jimmy Swaggart Ministries v. Board of Equalization of Cal.,* 493 U.S. 378, 384-385, 110 S.Ct. 688, 692-693, 107 L.Ed.2d 796 (1990) ("Our cases have established that [t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden") (internal quotation marks and citation omitted); *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 450, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny" employed in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)); see also *Braunfeld v. Brown,* 366 U.S. 599, 606-607, 81 S.Ct. 1144, 1147-1148, 6 L.Ed.2d 563 (1961) (plurality opinion). Among the cases in which we have purported to apply strict scrutiny, we have required free-exercise exemptions more often than we have denied them. Compare *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.2d 1213 (1940), with *Hernandez v. Commissioner,* 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Bob Jones University v. United States,* 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983); *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). And of the three cases in which we found that denial of an exemption survived strict scrutiny (all tax cases), one involved the government's "

fundamental, overriding interest in eradicating racial discrimination in education," *Bob Jones Univ., supra,* 461 U.S., at 604, 103 S.Ct., at 2035; in a second the Court "doubt[ed] whether the alleged burden ... [was] a substantial one," *Hernandez, supra,* 490 U.S., at 699, 109 S.Ct., at 2149; and the Court seemed to be of the same view in the third, see *Lee, supra,* 455 U.S., at 261, n. 12, 102 S.Ct., at 1057, n. 12. These cases, I think, provide slim grounds for concluding that the Court has not been true to its word.

B

The *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis.* To begin with, the *Smith* rule was not subject to " full-dress argument" prior to its announcement. *Mapp v. Ohio,* 367 U.S. 643, 676-677, 81 S.Ct. 1684, 1703, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). The State of Oregon in *Smith* contended that its refusal to exempt religious peyote use survived the strict scrutiny required by "settled free exercise principles," inasmuch as the State had "a compelling interest in regulating" the practice of peyote use and could not "accommodate the religious practice without compromising*572 its interest." Brief for Petitioners in *Smith,* O.T. 1989, No. 88-1213, p. 5; see also *id.,* at 5-36; Reply Brief for Petitioners in *Smith,* pp. 6-20. Respondents joined issue on the outcome of strict scrutiny on the facts before the Court, see Brief for Respondents in *Smith,* pp. 14-41, and neither party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute. Sound judicial decisionmaking requires "both a vigorous prosecution and a vigorous defense" of the issues in dispute, *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 419, 98 S.Ct. 694, 699, 54 L.Ed.2d 648 (1978), and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument. Cf. *Ladner v. United States,* 358 U.S. 169, 173, 79 S.Ct. 209, 211, 3 L.Ed.2d 199 (1958) (declining to address "an important and complex" issue concerning the scope of collateral attack upon criminal sentences because it had received "only meagre argument" from the parties, and the Court thought it "should have the benefit of a full argument before dealing with the question").

The *Smith* rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case. Justice O'CONNOR reached the same result as the majority by applying, as the parties had requested, " our established free exercise jurisprudence," 494 U.S., at 903, 110 S.Ct., at 1613, and the majority never determined that the case could not be resolved on the narrower ground, going instead straight to the broader constitutional rule. But the Court's better practice, one supported by the same principles of restraint that underlie the rule of *stare decisis,* is not to " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)). While I am not suggesting that the *Smith* Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put *573 into play by the parties, approaches without more the sort of "*dicta* ... which may be followed if sufficiently persuasive but which are not controlling. " *Humphrey's Executor v. United States,* 295 U.S. 602, 627, 55 S.Ct. 869, 873, 79 L.Ed. 1611 (1935); see also **2248*Kastigar v. United States,* 406 U.S. 441, 454-455, 92 S.Ct. 1653, 1661-1662, 32 L.Ed.2d 212 (1972).

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing and argument necessarily lacks precedential weight. Over time, such a decision may become "part of the tissue of the law," *Radovich v. National Football League,* 352 U.S. 445, 455, 77 S.Ct. 390, 395, 1 L.Ed.2d 456 (1957) (Frankfurter, J., dissenting), and may be subject to reliance in a way that new and unexpected decisions are not. Cf. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 854-855, 112 S.Ct. 2791,

2808, 120 L.Ed.2d 674 (1992). *Smith,* however, is not such a case. By the same token, by pointing out *Smith's* recent vintage I do not mean to suggest that novelty alone is enough to justify reconsideration. "*[S]tare decisis,*" as Justice Frankfurter wrote, "is a principle of policy and not a mechanical formula," *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940), and the decision whether to adhere to a prior decision, particularly a constitutional decision, is a complex and difficult one that does not lend itself to resolution by application of simple, categorical rules, but that must account for a variety of often competing considerations.

The considerations of full briefing, necessity, and novelty thus do not exhaust the legitimate reasons for reexamining prior decisions, or even for reexamining the *Smith* rule. One important further consideration warrants mention here, however, because it demands the reexamination I have in mind. *Smith* presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared. *Smith,* indeed, announced its rule by relying squarely upon *574 the precedent of prior cases. See 494 U.S., at 878, 110 S.Ct., at 1600 ("Our decisions reveal that the ... reading" of the Free Exercise Clause contained in the *Smith* rule "is the correct one"). Since that precedent is nonetheless at odds with the *Smith* rule, as I have discussed above, the result is an intolerable tension in free-exercise law which may be resolved, consistently with principles of *stare decisis,* in a case in which the tension is presented and its resolution pivotal.

While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the *Smith* rule, which should be reviewed in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its origins. As for text, *Smith* did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was "a permissible reading" of the Clause. *Ibid.* Suffice it to say that a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced. "[T]he Free Exercise Clause ..., by its terms, gives special protection to the exercise of religion," *Thomas,* 450 U.S., at 713, 101 S.Ct., at 1429, specifying an activity and then flatly protecting it against government prohibition. The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both.

Nor did *Smith* consider the original meaning of the Free Exercise Clause, though overlooking the opportunity was no unique transgression. Save in a handful of passing remarks, the Court has not explored the history of the Clause since its early attempts in 1879 and 1890, see *Reynolds v. United States,* 98 U.S., at 162-166, and *Davis v. Beason,* 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890), attempts that recent scholarship makes clear were incomplete. See generally McConnell, The Origins and Historical Understanding of Free Exercise of **2249 Religion, *575 103 Harv.L.Rev. 1409 (1990).[FN6] The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent.[FN7]

FN6. *Reynolds* denied the free-exercise claim of a Mormon convicted of polygamy, and *Davis v. Beason* upheld against a free-exercise challenge a law denying the right to vote or hold public office to members of organizations that practice or encourage polygamy. Exactly what the two cases took from the Free Exercise Clause's origins is unclear. The cases are open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws, see *supra,* at 2245-46 (citing cases); that the Clause never protects religious conduct from the enforcement of generally applicable laws, see *Smith,* 494 U.S., at 879, 110 S.Ct., at

1600; or that the Clause does not protect religious conduct at all, see *Yoder,* 406 U.S., at 247, 92 S.Ct., at 1549 (Douglas, J., dissenting in part); McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv.L.Rev. 1409, 1488, and n. 404 (1990)

FN7. See *Engel v. Vitale,* 370 U.S. 421, 425-436, 82 S.Ct. 1261, 1264-1270, 8 L.Ed.2d 601 (1962); *McGowan v. Maryland,* 366 U.S. 420, 431-443, 81 S.Ct. 1101, 1108-1114, 6 L.Ed.2d 393 (1961); *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 8-16, 67 S.Ct. 504, 508-511, 91 L.Ed. 711 (1947); see also *Lee v. Weisman,* 505 U.S. 577, 612-616, 622-626, 112 S.Ct. 2649, 2667, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring); *Wallace v. Jaffree,* 472 U.S. 38, 91-107, 105 S.Ct. 2479, 2507-2516, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting); *School Dist. of Abington v. Schempp,* 374 U.S. 203, 232-239, 83 S.Ct. 1560, 1576-1581, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring); *McGowan v. Maryland, supra,* 366 U.S., at 459-495, 81 S.Ct., at 1153-1172 (Frankfurter, J., concurring); *Everson, supra,* 330 U.S., at 31-43, 67 S.Ct., at 519-525 (Rutledge, J., dissenting).

This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, *supra;* Durham, Religious Liberty and the Call of Conscience, 42 DePaul L.Rev. 71, 79-85 (1992); see also Office of Legal Policy, U.S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 38-42 (1986) (predating *Smith*). There appears to be a strong argument from the *576 Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original " purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. of Abington v. Schempp,* 374 U.S., at 223, 83 S.Ct., at 1572, then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith.*[FN8]

FN8. The Court today observes that " historical instances of religious persecution and intolerance ... gave concern to those who drafted the Free Exercise Clause." *Ante,* at 2226 (internal quotation marks and citations omitted). That is no doubt true, and of course it supports the proposition for which it was summoned, that the Free Exercise Clause forbids religious persecution. But the Court's remark merits this observation: the fact that the Framers were concerned about victims of religious persecution by no means demonstrates that the Framers intended the Free Exercise Clause to forbid only persecution, the inference the *Smith* rule requires. On the contrary, the eradication of persecution would mean precious little to a member of a formerly persecuted sect who was nevertheless prevented from practicing his religion by the enforcement of "neutral, generally applicable" laws. If what drove the Framers was a desire to protect an activity they deemed special, and if "the [Framers]

> were well aware of potential conflicts between religious conviction and social duties," A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 61 (1990), they may well have hoped to bar not only prohibitions of religious exercise fueled by the hostility of the majority, but prohibitions flowing from the indifference or ignorance of the majority as well.

**2250 *577 The scholarship on the original understanding of the Free Exercise Clause is, to be sure, not uniform. See, *e.g.*, Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo.Wash.L.Rev. 915 (1992); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L.Rev. 245 (1991). And there are differences of opinion as to the weight appropriately accorded original meaning. But whether or not one considers the original designs of the Clause binding, the interpretive significance of those designs surely ranks in the hierarchy of issues to be explored in resolving the tension inherent in free-exercise law as it stands today.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.

Justice BLACKMUN, with whom Justice O'CONNOR joins, concurring in the judgment.

The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practice. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion)*578 for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 907, 110 S.Ct. 1595, 1615, 108 L.Ed.2d 876 (1990) (dissenting opinion). The Court, however, applies a different test. It applies the test announced in *Smith,* under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Ante,* at 2226. I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. See 494 U.S., at 908-909, 110 S.Ct., at 1616. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by " showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981). See also *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). A State may no more create an underinclusive statute, one **2251 that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance, the broad scope of the statute is unnecessary to serve the interest, and the statute fails for that reason. In the former situation, the

fact that allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest "of the highest order." *Ibid.* If the State's goal is important enough to prohibit religiously motivated activity, it *579 will not and must not stop at religiously motivated activity. Cf. *Zablocki v. Redhail,* 434 U.S. 374, 390, 98 S.Ct. 673, 683, 54 L.Ed.2d 618 (1978) (invalidating certain restrictions on marriage as " grossly underinclusive with respect to [their] purpose"); *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 285, n. 19, 105 S.Ct. 1272, 1279, n. 19, 84 L.Ed.2d 205 (1985) (a rule excluding nonresidents from the bar of New Hampshire "is underinclusive ... because it permits lawyers who move away from the State to retain their membership in the bar").

In this case, the ordinances at issue are both overinclusive and underinclusive in relation to the state interests they purportedly serve. They are overinclusive, as the majority correctly explains, because the "legitimate govern mental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice." *Ante,* at 2229. They are underinclusive as well, because "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." *Ante,* at 2232. Moreover, the " ordinances are also underinclusive with regard to the city's interest in public health...." *Ante,* at 2233.

When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert v. Verner,* 374 U.S. 398, 402-403, 407, 83 S.Ct. 1790, 1793, 1795, 10 L.Ed.2d 965 (1963) (holding that governmental regulation that imposes a burden upon religious practice must be narrowly tailored to advance a compelling state interest). This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.

Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Ante,* at 2233. In my view, regulation that targets religion in this way, *ipso facto,* fails strict scrutiny. It is for this reason *580 that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, "[t]he First Amendment ... does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith,* 494 U.S., at 894, 110 S.Ct., at 1608 (opinion concurring in judgment).

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. See *ibid.* Because respondent here does single out religion in this way, the present case is an easy one to decide.

A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed *amicus* briefs **2252 on behalf of this interest,[FN*] however, demonstrates that it is not a concern to be treated lightly.

FN* See Brief for Washington Humane Society in support of Respondent; Brief for People for the Ethical Treatment of Animals, New Jersey Animal Rights Alliance, and Foundation for Animal Rights Advocacy in support of Respondent; Brief for Humane Society of the United States, American Humane Association, American Society for the Prevention of Cruelty to Animals, Animal Legal Defense Fund, Inc., and Massachusetts Society for the Prevention

of Cruelty to Animals in support of Respondent; Brief for the International Society for Animal Rights, Citizens for Animals, Farm Animal Reform Movement, In Defense of Animals, Performing Animal Welfare Society, and Student Action Corps for Animals in support of Respondent; and Brief for the Institute for Animal Rights Law, American Fund for Alternatives to Animal Research, Farm Sanctuary, Jews for Animal Rights, United Animal Nations, and United Poultry Concerns in support of Respondent.

U.S.Fla.,1993.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah
508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, 61 USLW 4587

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City of LaDue v. Gilleo
U.S.Mo.,1994.

Supreme Court of the United States
CITY OF LADUE, et al., Petitioners
v.
Margaret P. GILLEO.
No. 92-1856.

Argued Feb. 23, 1994.
Decided June 13, 1994.

Resident sued city for permanent injunction to prohibit city from enforcing ordinance that banned all residential signs but those falling within one of ten exemptions. The United States District Court for the Eastern District of Missouri, 774 F.Supp. 1564, granted resident's motion for summary judgment. Following denial of city's motion to alter or amend judgment, 791 F.Supp. 240, resident filed application for prevailing party attorney fees and expenses. The District Court, 791 F.Supp. 238, granted motion. City appealed. The Court of Appeals, 986 F.2d 1180, affirmed as modified. Certiorari was granted. The Supreme Court, Justice Stevens, held that ordinance violated resident's free speech rights.

Affirmed.

Justice O'Connor filed concurring opinion.

West Headnotes

[1] Constitutional Law 92 ⚿1655

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1655 k. In General. Most Cited Cases
(Formerly 92k90.3)

There are two analytically distinct grounds for challenging constitutionality of municipal ordinance regulating display of signs: one is that measure in effect restricts too little speech because its exemptions discriminate on basis of signs' messages; alternatively, such provisions are subject to attack on ground that they simply prohibit too much protected speech. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⚿1517

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(3))

Regulation of speech may be impermissibly underinclusive: thus, exemption from otherwise permissible regulation of speech may represent governmental attempt to give one side of debatable public question advantage in expressing its views to people; alternatively, through combined operation of general speech restriction and its exemptions, government might seek to select permissible subjects for public debate and thereby to control search for political truth. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚿1661

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1661 k. Residential Signs. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 ⚿602

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k602 k. Billboards, Signs, and Other Structures or Devices for Advertising Purposes. Most Cited Cases
City ordinance banning all residential signs but those falling within one of ten exemptions violated homeowner's right to free speech; although city had concededly valid interest in minimizing visible clutter, it had totally foreclosed venerable means of communication to political, religious, or personal messages. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚿2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(3))
Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, danger they pose to freedom of speech is readily apparent; by eliminating common means of speaking, such measures can suppress too much speech. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿1661

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1661 k. Residential Signs. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 ⚿602

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k602 k. Billboards, Signs, and Other Structures or Devices for Advertising Purposes. Most Cited Cases
City ordinance banning all residential signs but those falling within one of ten exemptions could not be justified as "time, place, or manner restriction," as alternatives such as handbills or newspaper advertisements were inadequate substitutes for important medium that city had closed off; displaying sign from ones' own residence carries message quite distinct from displaying same sign someplace else, residential signs are unusually cheap and convenient form of communication, and audience intended to be reached by residential sign, i.e., neighbors, could not be reached nearly as well by other means. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1780

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)4 Private Property
92k1780 k. In General. Most Cited Cases
(Formerly 92k90.1(1))
Special respect for individual liberty in home has long been part of our culture and our law; that principle has special resonance when government seeks to constrain person's ability to speak there. U.S.C.A. Const.Amend. 1.

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.

An ordinance of petitioner City of Ladue bans all residential signs but those falling within 1 of 10 exemptions, for the principal purpose of minimizing the visual clutter associated with such signs. Respondent Gilleo filed this action, alleging that the ordinance violated her right to free speech by prohibiting her from displaying a sign stating, "For Peace in the Gulf," from her home. The District Court found the ordinance unconstitutional, and the Court of Appeals affirmed, holding that the

ordinance was a "content based" regulation, and that Ladue's substantial interests in enacting it were not sufficiently compelling to support such a restriction.

Held: The ordinance violates a Ladue resident's right to free speech. Pp. 2041-2047.

(a) While signs pose distinctive problems and thus are subject to municipalities' police powers, measures regulating them inevitably affect communication itself. Such a regulation may be challenged on the ground that it restricts too little speech because its exemptions discriminate on the basis of signs' messages, or on the ground that it prohibits too much protected speech. For purposes of this case, the validity of Ladue's submission that its ordinance's various exemptions are free of impermissible content or viewpoint discrimination is assumed. Pp. 2041-2044.

(b) Although Ladue has a concededly valid interest in minimizing visual clutter, it has almost completely foreclosed an important and distinct medium of expression to political, religious, or personal messages. Prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, but such measures can suppress too much speech by eliminating a common means of speaking. Pp. 2044-2045.

(c) Ladue's attempt to justify the ordinance as a "time, place, or manner" restriction fails because alternatives such as handbills and newspaper advertisements are inadequate substitutes for the important medium that Ladue has closed off. Displaying a sign from one's own residence carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means, for it provides information about the speaker's identity, an important component of many attempts to persuade. Residential signs are also *44 an unusually cheap and convenient form of communication. Furthermore, the audience intended to be reached by a residential sign-neighbors-**2040 could not be reached nearly as well by other means. P. 2046.

(d) A special respect for individual liberty in the home has long been part of this Nation's culture and law and has a special resonance when the government seeks to constrain a person's ability to speak there. The decision reached here does not leave Ladue powerless to address the ills that may be associated with residential signs. In addition, residents' self-interest in maintaining their own property values and preventing "visual clutter" in their yards and neighborhoods diminishes the danger of an "unlimited" proliferation of signs. P. 2047.

986 F.2d 1180 (CA8 1993), affirmed.

STEVENS, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, *post,* p. 2047.

Jordan B. Cherrick, for petitioners.
Gerald P. Greiman, for respondent.
Paul Bender, for the United States as amicus curiae, by special leave of the Court.For U.S. Supreme Court briefs, see:1993 WL 639378 (Pet. Brief)1993 WL 639376 (Resp.Brief)
*45 Justice STEVENS delivered the opinion of the Court.
An ordinance of the City of Ladue prohibits homeowners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. The ordinance permits commercial establishments, churches, and nonprofit organizations to erect certain signs that are not allowed at residences. The question presented is whether the ordinance violates a Ladue resident's right to free speech.[FN1]

FN1. The First Amendment provides: "Congress shall make no law ... abridging the freedom of speech, or of the press ...." The Fourteenth Amendment makes this limitation applicable to the States, see *Gitlow v. New York,* 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925), and to their political subdivisions, see *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

I

Respondent Margaret P. Gilleo owns one of the 57 single-family homes in the Willow Hill subdivision of Ladue.[FN2] On December 8, 1990, she placed on her front lawn a 24- by 36-inch sign printed with the words, "Say No to War in the Persian Gulf, Call Congress Now." After that sign disappeared, Gilleo put up another but it was knocked to the ground. When Gilleo reported these incidents to the police, they advised her that such signs were prohibited in Ladue. The city council denied her petition for a variance.[FN3] Gilleo then filed this action under 42 U.S.C. § 1983 against the City, the mayor, and members of the city council, alleging that *46 Ladue's sign ordinance violated her First Amendment right of free speech.

FN2. Ladue is a suburb of St. Louis, Missouri. It has a population of almost 9,000, and an area of about 8.5 square miles, of which only 3% is zoned for commercial or industrial use.

FN3. The ordinance then in effect gave the city council the authority to "permit a variation in the strict application of the provisions and requirements of this chapter ... where the public interest will be best served by permitting such variation." App. 72.

The District Court issued a preliminary injunction against enforcement of the ordinance. 774 F.Supp. 1559 (E.D.Mo.1991). Gilleo then placed an 8.5- by 11-inch sign in the second story window of her home stating, "For Peace in the Gulf." The Ladue City Council responded to the injunction by repealing its ordinance and enacting a replacement.[FN4] Like its predecessor, the new ordinance contains a general prohibition of "signs" and defines that term broadly.[FN5] The **2041 ordinance prohibits all signs except those that fall within 1 of 10 exemptions. Thus, "residential identification signs" no larger than one square foot are allowed, as are signs advertising "that the property is for sale, lease or exchange" and identifying the owner or agent. § 35-10, App. to Pet. for Cert. 45a. Also exempted are signs "for churches, religious institutions, and schools," § 35-5, *id.*, at 41a, "[c]ommercial signs in commercially zoned or industrial zoned districts," § 35-4, *ibid.*, and on-site signs advertising "gasoline filling *47 stations." [FN6] § 35-6, *id.*, at 42a. Unlike its predecessor, the new ordinance contains a lengthy "Declaration of Findings, Policies, Interests, and Purposes," part of which recites that the

FN4. The new ordinance eliminates the provision allowing for variances and contains a grandfather clause exempting signs already lawfully in place.

FN5. Section 35-2 of the ordinance declares that "No sign shall be erected [or] maintained" in the City except in conformity with the ordinance; § 35-3 authorizes the City to remove nonconforming signs. App. to Pet. for Cert. 40a. Section 35-1 defines "sign" as:
"A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word 'sign' shall also include 'banners', 'pennants', 'insignia', 'bulletin boards', 'ground signs', 'billboard', 'poster billboards', 'illuminated signs', 'projecting signs', 'temporary signs', 'marquees', 'roof signs', 'yard signs', 'electric signs', 'wall signs', and 'window signs', wherever placed out of doors in view of the general public or wherever placed indoors as a window sign." *Id.*, at 39a.

FN6. The full catalog of exceptions, each subject to special size limitations, is as follows: "[M]unicipal signs"; "

[s]ubdivision and residence identification" signs; "[r]oad signs and driveway signs for danger, direction, or identification"; " [h]ealth inspection signs"; "[s]igns for churches, religious institutions, and schools " (subject to regulations set forth in § 35-5); "identification signs" for other not-for-profit organizations; signs " identifying the location of public transportation stops"; "[g]round signs advertising the sale or rental of real property," subject to the conditions, set forth in § 35-10, that such signs may "not be attached to any tree, fence or utility pole " and may contain only the fact of proposed sale or rental and the seller or agent's name and address or telephone number; "[c]ommercial signs in commercially zoned or industrial zoned districts," subject to restrictions set out elsewhere in the ordinance; and signs that "identif[y] safety hazards." § 35-4, *Id.*, at 41a, 45a.

"proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children." *Id.*, at 36a.

Gilleo amended her complaint to challenge the new ordinance, which explicitly prohibits window signs like hers. The District Court held the ordinance unconstitutional, 774 F.Supp. 1559 (ED Mo.1991), and the Court of Appeals affirmed, 986 F.2d 1180 (CA8 1993). Relying on the plurality opinion in *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Court of Appeals held the ordinance invalid as a "content based" regulation because the City treated commercial speech more favorably than noncommercial speech and favored some kinds of noncommercial speech over others. *48 986 F.2d, at 1182. Acknowledging that "Ladue's interests in enacting its ordinance are substantial," the Court of Appeals nevertheless concluded that those interests were "not sufficiently 'compelling' to support a content-based restriction." *Id.*, at 1183-1184 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991)).

We granted the City of Ladue's petition for certiorari, 510 U.S. 809, 114 S.Ct. 55, 126 L.Ed.2d 24 (1993), and now affirm.

II

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs-just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. See, *e.g.*, **2042*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), we addressed an ordinance that sought to maintain stable, integrated neighborhoods by prohibiting homeowners from placing "For Sale" or "Sold" signs on their property. Although we recognized the importance of Willingboro's objective, we held that the First Amendment prevented the township from "achieving its goal by restricting the free flow of truthful information." *Id.*, at 95, 97 S.Ct., at 1619. In some respects *Linmark* is the mirror image of this case. For instead of prohibiting "For Sale" signs without banning any other *49 signs, Ladue has exempted such signs from an otherwise

virtually complete ban. Moreover, whereas in *Linmark* we noted that the ordinance was not concerned with the promotion of esthetic values unrelated to the content of the prohibited speech, *id.*, at 93-94, 97 S.Ct., at 1618-1619, here Ladue relies squarely on that content-neutral justification for its ordinance.

In *Metromedia,* we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the city of San Diego in the interest of traffic safety and esthetics. The ordinance generally banned all except those advertising " on-site" activities.[FN7] The Court concluded that the city's interest in traffic safety and its esthetic interest in preventing "visual clutter" could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed. 453 U.S., at 511-512, 101 S.Ct., at 2894-2895.[FN8] Nevertheless, the Court's judgment in *Metromedia,* supported by two different lines of reasoning, invalidated the San Diego ordinance in its entirety. According to Justice White's plurality opinion, the ordinance impermissibly discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages. *Id.,* at 514-515, 101 S.Ct., at 2896-2897. On *50 the other hand, Justice Brennan, joined by Justice BLACKMUN, concluded that "the *practical* effect of the San Diego ordinance [was] to eliminate the billboard as an effective medium of communication" for noncommercial messages, and that the city had failed to make the strong showing needed to justify such "content-neutral prohibitions of particular media of communication." *Id.,* at 525-527, 101 S.Ct., at 2902. The three dissenters also viewed San Diego's ordinance as tantamount to a blanket prohibition of billboards, but would have upheld it because they did not perceive "even a hint of bias or censorship in the city's actions" nor "any reason to believe that the overall communications market in San Diego is inadequate." *Id.,* at 552-553, 101 S.Ct., at 2915-2916 (STEVENS, J., dissenting in part). See also **2043*id.,* at 563, 566, 101 S.Ct., at 2921, 2922-2923 (Burger, C.J., dissenting); *id.,* at 569-570, 101 S.Ct., at 2924-2925 (REHNQUIST, J., dissenting).

FN7. The San Diego ordinance defined " on-site signs" as "those 'designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed. ' " *Metromedia, Inc. v. San Diego,* 453 U.S., at 494, 101 S.Ct., at 2885. The plurality read the "on-site" exemption of the San Diego ordinance as inapplicable to non-commercial messages. See *id.,* at 513, 101 S.Ct., at 2895. Cf. *id.,* at 535-536, 101 S.Ct., at 2906-2907 (Brennan, J., concurring in judgment). The ordinance also exempted 12 categories of displays, including religious signs; for sale signs; signs on public and commercial vehicles; and " '[t]emporary political campaign signs.' " *Id.,* at 495, n. 3, 101 S.Ct., at 2886, n. 3

FN8. Five Members of the Court joined Part IV of Justice White's opinion, which approved of the city's decision to prohibit off-site commercial billboards while permitting on-site billboards. None of the three dissenters disagreed with Part IV. See *id.,* at 541, 101 S.Ct., at 2909-2910 (STEVENS, J., dissenting in part) (joining Part IV); *id.,* at 564-565, 101 S.Ct., at 2921-2922 (Burger, C.J., dissenting); *id.,* at 570, 101 S.Ct., at 2924-2925 (REHNQUIST, J., dissenting).

In *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), we upheld a Los Angeles ordinance that prohibited the posting of signs on public property. Noting the conclusion shared by seven Justices in *Metromedia* that San Diego's "interest in avoiding visual clutter" was sufficient to justify a prohibition of commercial billboards, 466 U.S., at 806-807, 104 S.Ct., at 2130 in *Vincent* we upheld the Los Angeles ordinance, which was justified on the same grounds. We rejected the argument that the validity of the city's esthetic interest had been compromised by failing to

extend the ban to private property, reasoning that the "private citizen's interest in controlling the use of his own property justifies the disparate treatment." *Id.*, at 811, 104 S.Ct., at 2132. We also rejected as "misplaced" respondents' reliance on public forum principles, for they had "fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles ... comparable to that recognized for public streets and parks." *Id.*, at 814, 104 S.Ct., at 2133.

[1] These decisions identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in *51 effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. See *Metromedia*, 453 U.S., at 512-517, 101 S.Ct., at 2895-2897 (opinion of White, J.). Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech. See *id.*, at 525-534, 101 S.Ct., at 2901-2906 (Brennan, J., concurring in judgment). The City of Ladue contends, first, that the Court of Appeals' reliance on the former rationale was misplaced because the City's regulatory purposes are content neutral, and, second, that those purposes justify the comprehensiveness of the sign prohibition. A comment on the former contention will help explain why we ultimately base our decision on a rejection of the latter.

III

[2] While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles.[FN9] Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786, 98 S.Ct. 1407, 1420-1421, 55 L.Ed.2d 707 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control ... the search for political truth." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538, 100 S.Ct. 2326, 2333, 65 L.Ed.2d 319 (1980).[FN10]

FN9. Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause. See, *e.g.*, *Carey v. Brown*, 447 U.S. 455, 459-471, 100 S.Ct. 2286, 2289-2296, 65 L.Ed.2d 263 (1980) (ordinance that forbade certain kinds of picketing but exempted labor picketing violated Clause); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98-102, 92 S.Ct. 2286, 2291-2294, 33 L.Ed.2d 212 (1972) (same).

FN10. Of course, not every law that turns on the content of speech is invalid. See generally Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 79 (1978). See also *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S., at 545, and n. 2, 100 S.Ct., at 2237 and n. 2 (STEVENS, J., concurring in judgment).

*52 The City argues that its sign ordinance implicates neither of these concerns, and that the Court of Appeals therefore erred in demanding a "compelling" justification for the exemptions. The mix of prohibitions and exemptions in the ordinance, Ladue maintains, reflects legitimate differences among **2044 the side effects of various kinds of signs. These differences are only adventitiously connected with content, and supply a sufficient justification, unrelated to the City's approval or disapproval of specific messages, for carving out the specified categories from the general ban. See Brief for Petitioners 18-23. Thus, according to the Declaration of Findings, Policies, Interests, and Purposes supporting the ordinance, the permitted signs, unlike the prohibited signs, are unlikely to contribute to the dangers of "unlimited proliferation" associated with categories of signs that are not inherently limited in number.

App. to Pet. for Cert. 37a. Because only a few residents will need to display "for sale" or "for rent" signs at any given time, permitting one such sign per marketed house does not threaten visual clutter. *Ibid.* Because the City has only a few businesses, churches, and schools, the same rationale explains the exemption for on-site commercial and organizational signs. *Ibid.* Moreover, some of the exempted categories (*e.g.*, danger signs) respond to unique public needs to permit certain kinds of speech. *Ibid.* Even if we assume the validity of these arguments, the exemptions in Ladue's ordinance nevertheless shed light on the separate question whether the ordinance prohibits too much speech.

Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination; They may diminish the credibility of the government's rationale for restricting speech in the first place. See, *e.g.*, **53 *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-426, 113 S.Ct. 1505, 1514-1515, 123 L.Ed.2d 99 (1993). In this case, at the very least, the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's esthetic interest in eliminating outdoor signs. Ladue has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.

Under the Court of Appeals' content discrimination rationale, the City might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If, however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it. Moreover, if the prohibitions in Ladue's ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property; she asserts a constitutional right to display an antiwar sign at her own home. Therefore, we first ask whether Ladue may properly *prohibit* Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to *permit* certain other signs. In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, *arguendo*, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination.[FN11]

FN11. Because we set to one side the content discrimination question, we need not address the City's argument that the ordinance, although speaking in subject-matter terms, merely targets the " undesirable secondary effects" associated with certain kinds of signs. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986). The inquiry we undertake below into the adequacy of alternative channels of communication would also apply to a provision justified on those grounds. See *id.*, at 50, 106 S.Ct., at 930.

*54 IV

[3] In *Linmark* we held that the city's interest in maintaining a stable, racially integrated neighborhood was not sufficient to support a prohibition of residential "For Sale" signs. We recognized that even such a narrow sign prohibition would have a deleterious effect on residents' ability to convey important information because alternatives were "far from satisfactory." 431 U.S., at 93, 97 S.Ct., at 1618. Ladue's sign ordinance is supported principally by the City's interest in **2045 minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the interests at stake in *Linmark*. Moreover, whereas the ordinance in *Linmark* applied only to a form of commercial speech, Ladue's ordinance covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.

The impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater

than in *Linmark*. Gilleo and other residents of Ladue are forbidden to display virtually any "sign" on their property. The ordinance defines that term sweepingly. A prohibition is not always invalid merely because it applies to a sizeable category of speech; the sign ban we upheld in *Vincent*, for example, was quite broad. But in *Vincent* we specifically noted that the category of speech in question-signs placed on public property-was not a " uniquely valuable or important mode of communication," and that there was no evidence that "appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression." 466 U.S., at 812, 104 S.Ct., at 2133.

Here, in contrast, Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. *55 Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes.[FN12] They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

FN12. "[S]mall [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate-an impact that money can't buy." D. Simpson, Winning Elections: A Handbook in Participatory Politics 87 (rev. ed. 1981).

[4] Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, *Lovell v. City of Griffin*, 303 U.S. 444, 451-452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938); handbills on the public streets, *Jamison v. Texas*, 318 U.S. 413, 416, 63 S.Ct. 669, 672, 87 L.Ed. 869 (1943); the door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U.S. 141, 145-149, 63 S.Ct. 862, 864-866, 87 L.Ed. 1313 (1943); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164-165, 60 S.Ct. 146, 152, 84 L.Ed. 155 (1939), and live entertainment, *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76, 101 S.Ct. 2176, 2186, 68 L.Ed.2d 671 (1981). See also *Frisby v. Schultz*, 487 U.S. 474, 486, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420 (1988) (picketing focused upon individual residence is " fundamentally different from more generally directed means of communication that may not be completely banned in residential areas"). Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent-by eliminating a common means of speaking, such measures can suppress too much speech.[FN13]

FN13. See Stone, Content-Neutral Restrictions, 54 U.Chi.L.Rev. 46, 57-58 (1987):
"[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others.... To ensure 'the widest possible dissemination of information [,]' [*Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945),] and the 'unfettered interchange of ideas,' [*Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957),] the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression."

**2046 [5] *56 Ladue contends, however, that its ordinance is a mere regulation of the "time, place, or manner" of speech because residents remain free

to convey their desired messages by other means, such as *hand-held* signs, "letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." Brief for Petitioners 41. However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must "leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.

Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade.[FN14] A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed *57 on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

FN14. See Aristotle 2, Rhetoric, Book 1, ch. 2, in 8 Great Books of the Western World, Encyclopedia Brittanica 595 (M. Adler ed., 2d ed. 1990) ("We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided").

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Cf. *Vincent,* 466 U.S., at 812-813, n. 30, 104 S.Ct., at 2132-2133, n. 30; *Anderson v. Celebrezze,* 460 U.S. 780, 793-794, 103 S.Ct. 1564, 1572-1573, 75 L.Ed.2d 547 (1983); *Martin v. City of Struthers,* 319 U.S., at 146, 63 S.Ct., at 865; *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.,* 312 U.S. 287, 293, 61 S.Ct. 552, 555, 85 L.Ed. 836 (1941). Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate.[FN15] Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors,* an audience that could not be reached nearly as well by other means.[FN16]

FN15. The precise location of many other kinds of signs (aside from "on-site" signs) is of lesser communicative importance. For example, assuming the audience is similar, a commercial advertiser or campaign publicist is likely to be relatively indifferent between one sign site and another. The elimination of a cheap and handy medium of expression is especially apt to deter *individuals* from communicating their views to the public, for unlike businesses (and even political organizations) individuals generally realize few tangible benefits from such communication. Cf. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 772, n. 24, 96 S.Ct. 1817, 1831, n. 24, 48 L.Ed.2d 346 (1976) ("Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely").

FN16. Counsel for Ladue has also cited flags as a viable alternative to signs. Counsel observed that the ordinance does not restrict flags of any stripe, including flags bearing written messages. See Tr. of Oral Arg. 16, 21 (noting that rectangular flags, unlike "pennants" and "banners," are

> not prohibited by the ordinance). Even assuming that flags are nearly as affordable and legible as signs, we do not think the mere possibility that another medium could be used in an unconventional manner to carry the same messages alters the fact that Ladue has banned a distinct and traditionally important medium of expression. See, *e.g., Schneider v. State (Town of Irvington),* 308 U.S. 147, 163, 60 S.Ct. 146, 151-152, 84 L.Ed. 155 (1939).

**2047 [6] *58 A special respect for individual liberty in the home has long been part of our culture and our law, see, *e.g., Payton v. New York,* 445 U.S. 573, 596-597, and nn. 44-45, 100 S.Ct. 1371, 1385-1386, and nn. 44-45, 63 L.Ed.2d 639 (1980); that principle has special resonance when the government seeks to constrain a person's ability to *speak* there. See *Spence v. Washington,* 418 U.S. 405, 406, 409, 411, 94 S.Ct. 2727, 2728, 2729-2730, 41 L.Ed.2d 842 (1974) (*per curiam*). Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, see *Cox v. New Hampshire,* 312 U.S. 569, 574, 576, 61 S.Ct. 762, 765, 765, 85 L.Ed. 1049 (1941); see also *Widmar v. Vincent,* 454 U.S. 263, 278, 102 S.Ct. 269, 278-279, 70 L.Ed.2d 440 (1981) (STEVENS, J., concurring in judgment), its need to regulate temperate speech from the home is surely much less pressing, see *Spence,* 418 U.S., at 409, 94 S.Ct., at 2729-2730.

Our decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs. [FN17] It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent "visual clutter" in their own yards and neighborhoods-incentives markedly different from those of persons who erect signs on others' land, in others' neighborhoods, or on public property. Residents' self-interest diminishes the danger of the "unlimited" proliferation of residential signs that concerns the City of Ladue. We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs *59 without harm to the First Amendment rights of its citizens. As currently framed, however, the ordinance abridges those rights.

> FN17. Nor do we hold that every kind of sign must be permitted in residential areas.
>
> Different considerations might well apply, for example, in the case of signs (whether political or otherwise) displayed by residents for a fee, or in the case of off-site commercial advertisements on residential property. We also are not confronted here with mere regulations short of a ban.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice O'CONNOR, concurring.

It is unusual for us, when faced with a regulation that on its face draws content distinctions, to " assume, *arguendo,* the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination." *Ante,* at 2044. With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115-116, 112 S.Ct. 501, 507-508, 116 L.Ed.2d 476 (1991). The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny. See, *e.g., Burson v. Freeman,* 504 U.S. 191, 197-198, 112 S.Ct. 1846, 1850-1851, 119 L.Ed.2d 5 (1992) (plurality opinion); *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 133-135, 112 S.Ct. 2395, 2403-2404, 120 L.Ed.2d 101 (1992); *Simon & Schuster, supra,* at

115-116, 112 S.Ct., at 507-508; *Boos v. Barry,* 485 U.S. 312, 318-321, 108 S.Ct. 1157, 1162-1164, 99 L.Ed.2d 333 (1988) (plurality opinion); *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229-231, 107 S.Ct. 1722, 1727-1729, 95 L.Ed.2d 209 (1987); *Carey v. Brown,* 447 U.S. 455, 461-463, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 98-99, 92 S.Ct. 2286, 2289-2290, 2291-2292, 33 L.Ed.2d 212 (1972).

Over the years, some cogent criticisms have been leveled at our approach. See, *e.g.,* **2048 *R.A.V. v. St. Paul,* 505 U.S. 377, 420-422, 112 S.Ct. 2538, 2563-2564, 120 L.Ed.2d 305 (1992) (STEVENS, J., concurring in judgment); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 544-548, 100 S.Ct. 2326, 2337-2339, 65 L.Ed.2d 319 (1980) (STEVENS, J., concurring in judgment); Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo.L.J. 727 (1980); *60 Stephan, The First Amendment and Content Discrimination, 68 Va.L.Rev. 203 (1982). And it is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. The content distinctions present in this ordinance may, to some, be a good example of this.

But though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests. See *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 52-53, 108 S.Ct. 876, 880-881, 99 L.Ed.2d 41 (1988). On a theoretical level, it reflects important insights into the meaning of the free speech principle-for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. See, *e.g., ante,* at 2043-2044; *Mosley, supra,* 408 U.S., at 95, 92 S.Ct., at 2289-2290; Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L.Rev. 189 (1983). On a practical level, it has in application generally led to seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light.

I would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations. Perhaps this would have forced us to confront some of the difficulties with the existing doctrine; perhaps it would have shown weaknesses in the rule, and led us to modify it to take into account the special factors this case presents. But such reexamination is part of the process by which our rules evolve and improve.

Nonetheless, I join the Court's opinion, because I agree with its conclusion in Part IV that even if the restriction were content neutral, it would still be invalid, and because I do not think Part III casts any doubt on the propriety of our normal content discrimination inquiry.

U.S.Mo.,1994.
City of Ladue v. Gilleo
512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36, 62 USLW 4477

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