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Opinion No. 08-78

Legality of Privilege Tax On Entry of Customers into Adult-Oriented Establishments

QUESTION

Is proposed legislation, House Bill 2676, which would impose a state privilege tax only on adult-oriented establishments for each entry by a customer, defensible in court?

OPINION

The proposed state privilege tax to be imposed only on adult-oriented establishments for each entry by a customer would likely be held unconstitutional.

ANALYSIS

The opinion of this Office has been requested as to the legality of proposed legislation, House Bill 2676, which would amend the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, to impose a "five dollar ($5.00) [state] privilege tax . . . for each entry by each customer admitted to adult cabarets or adult[-]oriented establishments." HB 2676, Section 2(a). "Such tax shall be in addition to all other taxes imposed on any such customer." *Id.* The businesses would be required to record daily the number of customers admitted and remit the tax quarterly to the adult-oriented establishment boards[1] for their respective counties. *Id.*, Sections 2(b) and 3(a). The incidence of the tax would be on the adult-oriented establishment, not the customer, since the businesses would not be required to impose the tax directly on the customers, but would have discretion to determine the manner in which each business derives the money required to pay the tax. *Id.*, Section 2(c). The county adult-oriented establishment boards would remit the tax proceeds to the Treasurer for deposit into a special account created in the State General Fund. *Id.*, Sections 3(b) and 5. "Moneys from such account shall be appropriated solely for the purpose of making grants to public and private agencies for the victims of sexual abuse and victims of domestic violence." *Id.*, Section 5. These grants would be administered by the Division of Resource Development and Support in the Department of Finance and Administration. *Id.*

[1] Typically a county does not have an adult-oriented establishment board unless it has voted, pursuant to Tenn. Code Ann. § 7-51-1120, to make the separate Tennessee Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101, *et seq.*, operative in that county. The Registration Act is effective in a particular county only "upon the contingency of a two-thirds (2/3) vote of the county legislative body. By contrast, the Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.*, applies in all counties.

Courts recognize that non-obscene adult-oriented entertainment falls marginally within the scope of free speech protection. The United States Supreme Court has explained:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. [2]

Young v. American Mini Theaters, Inc., 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452 (1976), *rehearing denied* (subjecting the commercial exploitation of sexually-oriented material to zoning requirements found to be a constitutionally valid time, place or manner regulation under the First Amendment). Further, as noted, *in City of Erie, et al. v. Pap's A.M. d/b/a Kandyland*, 529 U.S. 277, 289, 120 S. Ct. 1382 (2000)(plurality opinion),

> Being " in a state of nudity" is not an inherently expressive condition.. . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think it falls within the outer ambit of the First Amendment's protection.

Traditionally, a governmental regulation of adult-oriented entertainment (which is intended to address generally recognized deleterious secondary effects) is analyzed under intermediate scrutiny to ensure it does not unduly impair the exercise of First Amendment rights. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968). To withstand constitutional scrutiny, then, (1) the [Act or] Ordinance must have been enacted within [the government's] constitutional power; (2) the [Act or] Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech[3]; and (4) the [Act or] Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998)(upheld constitutionality of Tennessee's Adult-Oriented Establishment Act, Tenn. Code Ann. § 7-51-1401, *et seq.)* (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673); *see Deja Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County, Tenn.* 274 F.3d 377, 391-92 (6th Cir. 2001)(applied intermediate scrutiny test in addressing

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[2]Voltaire, referring to a suggestion that the violent overthrow of tyranny might be legitimate, said: "I disapprove of what you say, but I will defend to the death your right to say it."

[3] The Sixth Circuit recognizes that ordinances aimed at regulating adult entertainment businesses may constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998).

constitutionality of Nashville adult-oriented establishment licensing ordinance).[4]

"[A]n ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity. [Such a fee is not excessive, even if it is more than nominal, so long as it is] reasonably related to the expenses incident to the administration of the ordinance." *Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109-10 (6th Cir.1997); *quoted in Deja Vu of Nashville*, 274 F.3d at 395-96. The license and permit fees in Tennessee's Adult-Oriented Establishment Registration Act, at Tenn. Code Ann.§ 7- 51-1118, have been found reasonably related to the cost of administering and enforcing that law and were deemed constitutionally valid.[5]

The proposed state privilege tax that is the subject of this Opinion, however, differs from these constitutionally valid license fees associated with otherwise valid regulations intended to address deleterious secondary effects generally recognized as associated with adult-oriented establishments. The United States Supreme Court has stated that "[i]t could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional." *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 108, 63 S. Ct. 870 (1943); *see also Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109 (6th Cir. 1997) ("It is equally clear that while the government may not tax the exercise of constitutionally protected activities, it may restrict the exercise of such activities by 'reasonable time, place, and manner regulations . . . .'"). In *Murdock,* an ordinance which required a religious group to pay a flat license fee as a condition to conducting its distribution activities was struck down as unconstitutional because the flat license fee was essentially "a flat tax imposed on the exercise of a privilege granted by the 'Bill of Rights.'" 319 U.S. at 113, 63 S. Ct. at 875. "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Id.* The flat license tax in *Murdock* was

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[4] *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728 (2002)(O'Connor, J.)(applied the intermediate scrutiny test to address validity of a City of Los Angeles zoning provision prohibiting two adult uses per authorized location); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-302, 120 S. Ct. 1382, 1391-98 (2000) (O'Connor, J., with three justices joining, and two justices concurring in the judgment)(applied the *O'Brien* intermediate scrutiny test for constitutional validity when upholding a City of Erie Public Indecency Ordinance, which had the effect of requiring exotic dancers to wear pasties and g-strings); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456 (1991)(plurality); 501 U.S. at 582, 111 S.Ct. at 2468 (Souter, J., concurring)(applied the *O'Brien* intermediate scrutiny test in rejecting a challenge to the constitutionality of Indiana's public indecency statute, which had the effect of requiring dancers at adult-oriented entertainment establishments to wear pasties and a g-string),

[5] *See Angela Kaye Belew, et al. v. Giles County Adult-Oriented Establishment Board, et al.,* No. 1-01-0139 (M.D. Tenn. Sept. 30, 2005); *Paul Friedman, et al. v. Giles County Adult-Oriented Establishment Board, et al,* No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005)(Judge Higgins)(upheld state Registration Act in substantial part); *Herbert L. Odle, d/b/a Sports Club, Inc., et al. v. Decatur County, Tennessee, et al.*, No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Judge Todd) (Order granting Defendants' Motion for Summary Judgment), *aff'd in part*, 421 F. 3d 386, 387-92 (6th Cir.2005) (upheld constitutionality of state Registration Act, while striking local ordinance).

fixed in amount and was unrelated to defraying the expenses of policing the activities in question. *Id.*, 319 U.S. at 113-14, 63 S.Ct. at 875. Noting that "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," the United States Supreme Court has rejected the justification of raising revenue for police services, which is "undoubtedly . . . an important government responsibility," as a justification for a content-based permit fee. *Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123, 135-36, 112 S. Ct. 2395, 2404 (1992). Moreover, "[a] tax based on the content of speech does not become more constitutional because it is a small tax." *Id.*, 505 U.S. at 136, 112 S.Ct. at 2405.

Notably, the First Amendment would not prohibit subjecting the patrons of these establishments to generally applicable taxes without creating constitutional problems. *See generally Minneapolis Star and Tribute Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 581, 103 S. Ct. 1365, 1369 (1983). For example, while the State may tax newspapers, magazines, and books, it may not differentiate among them based on their content. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987); *see also Leathers v. Medlock*, 499 U.S. 439, 447-48, 111 S.Ct. 1438, 1443-44 (1991)("a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech . . . [in light of] the danger of censorship"). Thus, the State could not impose a tax only on books containing sexually-oriented content. Similarly, while the State may tax all places of amusement, it may not tax only venues that feature adult-oriented entertainment, such as erotic dancing.

In the present case, the privilege tax would apply only to patrons of adult-oriented establishments and is not a generally applicable tax, such as a state or local sales tax. The proposed legislation would not create a fee to be utilized for defraying the cost of administrating the Adult-Oriented Establishment Act. Instead it would impose a tax limited to the exercise of First Amendment rights and based on the content of the expression. In light of the foregoing authorities, it is our opinion that a court would find this state privilege tax imposed only on adult-oriented establishments for the entry of each customer to be unconstitutional.

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