

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC.

Plaintiffs,

vs.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Defendants.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345TH JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas  
on 3-28-08  
at 1:35 P.M.  
Amalia Rodriguez-Mendoza, Clerk

JUDGMENT

From March 3, 2008 to March 6, 2008, the Court heard the trial of this cause. After considering the pleadings, the evidence, the arguments of counsel, and the applicable legal authorities, the Court decides as follows:

The Court DENIES Plaintiffs' motions to exclude the opinions of Defendants' experts, Dr. Bell and Dr. George.

The Court holds that Subchapter B of Chapter 47 of the Texas Business and Commerce Code, while furthering laudable goals, violates the First Amendment to the United States Constitution and is therefore invalid.

This subchapter probably must be reviewed as a content-based tax, using strict scrutiny, either because it is "aimed" at what are arguably the primary effects of protected speech, i.e., the effect on the audience of watching nude erotic dancing, or because its "aim," as determined by the use of the bulk of the funds raised by the tax for the Texas health opportunity pool, is to address lack of adequate health insurance, a statewide problem, by singling out business activity

involving expression that, while politically unpopular, is nevertheless protected by the First Amendment. Subchapter B does not pass muster under this standard because Defendants failed to—and conceded that they cannot—meet their burden to show that it is necessary to serve a compelling state interest and narrowly tailored for that purpose.

Even if the subchapter were analyzed as a content-neutral measure aimed at the secondary effects of protected speech, using intermediate scrutiny, it must be held unconstitutional.

If reliance by the Legislature on some pre-enactment evidence of links between the secondary effects addressed by the programs funded by the subchapter's tax and the business activity subject to the tax is a constitutional requirement (as is suggested, but not expressly held, by Supreme Court caselaw), Subchapter B must be held unconstitutional because no evidence indicating that any legislators actually considered any evidence of such links was presented at trial. Tori Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

If pre-enactment evidence is not required, the subchapter must still be held unconstitutional because Defendants, while presenting persuasive trial evidence supporting a link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund, presented no evidence supporting a link between the business activity subject to the tax and the alleged secondary effects addressed by the Texas health opportunity pool. There is no evidence that combining alcohol with nude erotic dancing causes dancers to be uninsured, that any dancer is in fact uninsured, or that any uninsured dancer could qualify for assistance from the fund.

Subchapter B also fails to pass muster under intermediate scrutiny because it is not narrowly tailored. First, only one of the two alleged secondary effects was ever shown to be possibly connected to the combination of nude erotic dancing and the consumption of alcohol. Second, no evidence was presented to show that the amount of the tax is related in any way to the degree to which the taxed business activity contributes to the alleged secondary effects or to the financial cost of that contribution.

For the foregoing reasons, the Court DECLARES that sections 47.051-.056 of the Texas Business and Commerce Code are unconstitutional and invalid. It is therefore unnecessary to reach Plaintiffs' state constitutional claims.

The Court ORDERS that Defendants are PERMANENTLY ENJOINED from assessing or collecting the tax imposed by sections 47.051-.056.

The Court ORDERS, pursuant to section 37.009 of the Texas Civil Practice and Remedies Code and 42 U.S.C. § 1988, that Plaintiffs recover from Defendants their reasonable and necessary attorneys' fees in an amount to be determined by the Court after receiving letters from Plaintiffs and Defendants on this issue. The letters must contain no more than three pages and be filed by April 4, 2008.

SIGNED this 28 th day of March, 2008.



SCOTT H. JENKINS  
JUDGE PRESIDING