No. 24-881

In the Supreme Court of the United States

GEORGIA ASSOCIATION OF
CLUB EXECUTIVES, INC.,

Petitioner,

v.

GEORGIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement contained in the petition for a writ of certiorari remain accurate.

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REPLY BRIEF FOR PETITIONER

The primary reason for this Court to grant certiorari is obvious: there are two inconsistent lines of First Amendment precedent.

One rule, which this Court has repeatedly reaffirmed in cases like *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), is that a content-neutral justification cannot transform a facially content-discriminatory enactment into a content-neutral one. The other rule, stated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is that even a facially content-discriminatory regulation can be treated as a content-neutral "time, place, and manner restriction" and evaluated under intermediate scrutiny, so long as it is *justified* without reference to content.

Not only are the rules themselves in conflict, but the boundary between the rules is also unclear, so each rule cannot easily be confined to its own domain. Moreover, because governments can always think up some content-neutral rationale for any censorious policy, the current expansive use of *City of Renton* threatens to undermine the salutary rule of *Reed*.

This is not some idiosyncratic view. Various federal circuit judges have said the same. *See, e.g.*, *Wacko's Too, Inc. v. City of Jacksonville*, 134 F.4th 1178, 1198 (11th Cir. 2025) (Newsom, J., concurring) ("fatal disconnect between the logic of *Renton* and *Reed*"); *Free Speech Coalition, Inc. v. Attorney General*, 825 F.3d 149, 173 (3d Cir. 2016) (Rendell, J., dissenting) ("two diametrically opposed Supreme Court precedents"). And since the cert petition was filed in this case, three separate groups of *amici* have reaffirmed that this inconsistency exists and is problematic. Two

organizations with considerable First Amendment expertise, the Foundation for Individual Rights and Expression and the First Amendment Lawyers Association, write that "the persistence of the Court's 'content-neutral justification' doctrine injects troubling and unnecessary ambiguity into First Amendment jurisprudence by blurring the line between content-based and content-neutral regulations." FIRE/FALA brief at 7. Twenty-two scholars, who have collectively authored a substantial body of First Amendment scholarship, write that "the line dividing content-based laws and content-neutral regulations has never been entirely clear" and that, "[i]n recent years, that line has become even blurrier." First Amendment Scholars' brief at 2. And pro-life organizations and scholars—who care primarily about the effect of the content-neutral justification doctrine on abortion-clinic buffer-zone laws—clearly recognize that this doctrinal problem cuts across different issue areas, and write that the expansive use of the *City of Renton* doctrine undermines the "consistency [of] First Amendment jurisprudence." Pro-Life brief at 9.

That there is no *direct* split of authority on the *precise* issue raised here does not negate the overall inconsistency in First Amendment doctrine and the blurriness in the respective domains of *Reed* and *City of Renton*.

This inconsistency can be resolved while still leaving governments with ample leeway to regulate adult entertainment. As the petition explained, "[t]here are at least three ways that this Court could clarify the doctrine." Cert. Pet. at 5. This Court could overrule *City of Renton*. Or it could retain *City of Renton* but limit it to its original zoning and land-use context. Or

it could retain *City of Renton* but clarify that it is limited to the regulatory context and should not be extended to taxation. *See* Cert. Pet. at 6-7; *see also id.* at 24-30 (giving reasons why *City of Renton* is especially ill-suited to taxation). Regardless of how this Court resolves that issue, governments would always be able to face intermediate scrutiny if they act in a content-neutral way—instead of discriminating against particular content, as Georgia did here. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (regulating public nudity); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (same); *Bushco v. Utah State Tax Commission*, 225 P.3d 153 (Utah 2009) (taxing businesses whose employees provide services while nude).

Moreover, this is an ideal vehicle for this Court to address this question, because this tax is facially and obviously content discriminatory, and the Georgia Supreme Court reached the merits without any troublesome procedural problems. Respondent argues strenuously that this tax is content-neutral and seeks aid from *Leathers v. Medlock*, 499 U.S. 439 (1991), and *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), but those cases are of no help, for one simple reason: Respondent persists in mischaracterizing this tax as merely a tax on nude dancing.

Respondent seeks to erase the distinction between mere nudity and erotic content, thus denying that there is anything expressive here at all. If this were merely a tax on nude dancing, it would of course be content neutral, and intermediate scrutiny would be appropriate. *But that is not this tax.* This tax is content discriminatory because it hinges on the presence

of sexual movements or movements simulating particular sexual activities. This is not just dance, but dance with particular *content*, which, as this Court has recognized, has an erotic message. One can debate how such erotic dance should be treated, but one cannot dispute that a tax on such dance is content discriminatory.

I. The confusion over the scope of the content-neutral justification rule is real.

Respondent spends considerable space arguing that there is no split of authority. But Petitioner's claim is not that courts have disagreed on the precise question of adult-entertainment taxes; the Georgia Supreme Court's opinion is indeed in agreement with the one court to have considered an arguably similar tax: the Texas Supreme Court in *Combs v. Texas Entertainment Ass'n, Inc.*, 347 S.W.3d 277 (Tex. 2011).[1]

Similarly, whether courts have continued to feel comfortable applying *City of Renton* to "regulations of physical adult entertainment establishments" (even after *Reed*), Br. in Opp. at 15-17, is unimportant. *City of Renton* itself involved adult zoning, and of course lower courts cannot overrule this Court's caselaw. The issue is how far *City of Renton* extends *beyond* the zoning context where it arose. After all, this Court has

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[1] On this point, the State substantially exaggerates the judicial consensus. Unlike in Georgia and Texas, the Utah and Nevada adult entertainment taxes challenged in *Bushco* and in *Deja Vu Showgirls v. Nevada Department of Taxation*, 334 P.3d 392 (Nev. 2014), were not content discriminatory and were thus properly evaluated under intermediate scrutiny. Those cases are thus not relevant to this challenge. The judicial consensus here thus amounts to a grand total of *two* cases.

described *City of Renton* and its progeny as "[o]ur zoning cases." *United States v. Playboy Entm't Gp.*, 529 U.S. 803, 815 (2000). This case is not about zoning or even regulation more generally, but about *taxation*, and this Court has never applied *City of Renton* in a tax context; indeed, applying intermediate scrutiny to a facially content-discriminatory tax simply because the government can identify a content-neutral effect is inconsistent with *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987). *See also* Cert. Pet. at 24-30 (developing at greater length the argument that *City of Renton* does not apply to taxation).

Rather, the core of Petitioner's argument is that the *Reed* and *City of Renton* doctrines are irreconcilable. *Reed* says that a facially content-discriminatory enactment doesn't become content-neutral just because it has a content-neutral justification. *City of Renton* says the opposite: even a facially content-discriminatory regulation can be treated as a content-neutral "time, place, and manner restriction" and evaluated under intermediate scrutiny if it has a content-neutral justification.

Moreover, these two lines of doctrine cannot simply be cabined to their respective domains, because this Court has never clearly stated what those domains are. Though *City of Renton* arose in the adult zoning context, its content-neutral justification principle has been applied in areas far afield from zoning and adult entertainment.

As Petitioner has pointed out, this Court has used the content-neutral justification principle to uphold an abortion-clinic buffer-zone law that discriminated against speech that consisted of "protest, education, and counseling." *Hill v. Colorado*, 530 U.S. 703 (2000).

Respondent finds Petitioner's invocation of *Hill* (Respondent calls it an "obsession") "hard to understand." Br. in Opp. at 2. But it is not only Petitioner that invokes *Hill* in connection with this case. The three separate groups of *amici* supporting this cert petition agree that this case and *Hill* are doctrinally similar because they both rely on the content-neutral justification rule. *See* FIRE/FALA brief at 3, 8, 9, 11; First Amendment Scholars' brief at 5, 7, 8; Pro-Life brief at 8.

That *Hill* "says nothing about the secondary effects doctrine [and] does not even mention those words," Br. in Opp. at 23, is of course irrelevant. *Hill* actually does indirectly rely on *City of Renton*, through its citation of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *Hill*, 530 U.S. at 719 (2000) (citing *Ward*, 491 U.S. at 791 (citing *City of Renton*, 475 U.S. at 47-48)). But more fundamentally, the problem is not the magic words "secondary effects doctrine" but rather the substance of the content-neutral justification rule, of which the secondary effects doctrine is just one manifestation.

Moreover, though one might reasonably argue that the foundations of *Hill* are "long-discredited," *City of Austin*, 596 U.S. at 86 (2022) (Thomas, J., joined by Gorsuch and Barrett, JJ., dissenting), *Hill* remains alive and well in the lower courts. Indeed, this Court has seen numerous cert petitions challenging lower court decisions relying on *Hill*. *See, e.g.*, *Bruni v. City of Pittsburgh*, 141 S. Ct. 578 (2021) (mem.) (denying certiorari); *Vitagliano v. County of Westchester*, 144 S. Ct. 486 (2023) (mem.) (denying certiorari); *Reilly v. Harrisburg*, 144 S. Ct. 1002 (2024) (mem.) (denying certiorari); *Coalition Life v. City of Carbondale*, 145 S.

Ct. 537 (2025) (mem.) (denying certiorari). And just earlier this year, in *Blythe v. City of San Diego*, No. 24-cv-02211, 2025 WL 108185 (S.D. Cal. Jan. 14, 2025), a district court upheld a municipal ordinance that was virtually "a carbon copy of the ordinance" in *Hill*. *Id.* at *1.

But enough about *Hill*. Even quite recently—and even aside from the Georgia Supreme Court in this case—lower courts have been applying *City of Renton* to uphold content-discriminatory laws in various other contexts.

For instance, in *Project Veritas v. Schmidt*, 125 F.4th 929 (9th Cir. 2025) (en banc), the Ninth Circuit upheld a ban on nonconsensual recordings that had an exception for recordings of law enforcement personnel performing their official duties. And in *Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024), the Fifth Circuit upheld an ordinance that restricted "public protests and/or demonstrations" in the area around an amphitheater.

It is clear, then, that the Georgia Supreme Court's opinion here, which followed the Texas Supreme Court in extending *City of Renton* to taxation, is part of a pattern. *Reed* and *City of Renton* continue their uncomfortable coexistence. Courts continue to use *City of Renton*'s content-neutral justification rationale to uphold blatantly content-discriminatory laws in a host of disparate areas, going beyond *City of Renton*'s core context of adult zoning, even after this Court has repeatedly reaffirmed the principle that content-neutral justifications cannot save a content-discriminatory enactment.

II. The tax here is plainly content-discriminatory.

A. The content discrimination is obvious on the face of the statute.

A business that serves alcohol becomes subject to this tax if the "entertainment" it presents "consists of nude or substantially nude persons . . . engaged in movements of a sexual nature or movements simulating sexual intercourse" or other activities. Ga. Code Ann. § 15-21-201(1)(A). "[M]ovements of a sexual nature or movements simulating sexual intercourse" are obviously part of the *content* of the entertainment. If a business presenting such content is subject to the tax, but becomes exempt from the tax if it removes the content, the tax is *definitionally* content-based. One can argue over the proper treatment of such a tax, but one cannot argue that it is content neutral.

And yet, this is what Respondent repeatedly does.

Respondent repeatedly, and incorrectly, treats this tax as though it were just a nude dancing tax. On the very first page of its brief, in describing and quoting the statute, Respondent focuses only on nude dancing. Br. in Opp. at 1. Respondent describes this challenge as "premised on the notion that the statute facially targets protected speech because it mentions 'nude or substantially nude persons dancing.'" *Id.* at 27. And nude dancing, Respondent writes, is not inherently expressive. "[T]he Georgia tax does not target or even contemplate any *ideas* expressed by nude dancing (whatever those may be)." *Id.* at 3. "Nude dancing can certainly convey a 'message of eroticism,' *see Barnes*, 501 U.S. at 565, but it can also convey any number of other ideas from disgust to satire." Br. in Opp. at 31.

Respondent suggests that, to the extent there is any tension between *Reed* and *City of Renton*, "the appropriate course would be to correct the original sin and overrule decisions holding that stripping is constitutionally protected expression." *Id.* at 19-20 n.1.

But this is not a tax on nude dancing as such. If it were, the tax would be properly assessed under intermediate scrutiny, because—Respondent is correct to this extent—a tax on nudity would be content-neutral. *See, e.g.*, *City of Erie*, 529 U.S. at 289 (plurality opinion). This is why the Utah Supreme Court was right in *Bushco* to uphold a tax that turned on the presence of nudity.

The tax here depends not merely on whether the dancing is nude, but also on whether it contains particular sexually oriented movements. And it is this content that, as this Court has correctly noted, conveys an erotic message. *See, e.g.*, *Barnes*, 501 U.S. at 570-71; *City of Erie*, 529 U.S. at 293, 296 (plurality opinion).

B. Respondent wrongly argues that *Leathers v. Medlock* supports the constitutionality of this tax.

Because Respondent fails to come to grips with this aspect of the tax, many of its arguments simply fail.

Respondent suggests that the tax is valid, based on *Leathers*. *Leathers* involved a state tax that treated newspapers and magazines differently from cable television. This Court upheld the tax because it discriminated among *speakers*, and such a tax "is only constitutionally suspect in certain circumstances," 499 U.S. at 444—for instance, "if it discriminates on the basis

of the content of taxpayer speech," *id.* at 447. *But that precisely describes this tax.*

Respondent denies that this is such a tax.

First, it writes (wrongly treating the tax as though it were just about nude dancing), the statute "refers to nude dancing not to single out any particular message, but rather just to *describe* strip clubs." Br. in Opp. at 27. But this is irrelevant: if a tax refers to particular content, and a government defends the tax by arguing that the tax isn't meant to single out that content but only to describe the set of people who produce that content, everyone would recognize this as just a fancy way of saying "content discrimination."

Second, the statute has other subsections that apply to other sorts of businesses, such as lingerie modeling studios or erotic massage parlors. *Id.* But this is irrelevant: those other sections were not the subject of the Georgia Supreme Court appeal or of this petition. A tax can have all sorts of subsections that are constitutionally unproblematic, but this does nothing to help the one subsection that is unconstitutional.

Third, Respondent writes (again, wrongly treating the statute as just about nude dancing), the tax applies only to the combination of nude dancing with commercial activity and alcohol. *Id.* at 28. But this is irrelevant: a business that serves alcohol is subject to the tax if it has certain content, and becomes exempt from the tax if it removes that content—which makes the tax definitionally content-discriminatory.

Respondent writes that "[t]he statute demonstrates that the State went out of its way to avoid targeting any protected expression for taxation." *Id.* at

27-28. Considering that the Legislature chose to impose a tax that explicitly depends on a specific type of content, the opposite of that statement seems closer to the truth.

C. Respondent wrongly argues that *City of Austin v. Reagan National Advertising* makes this tax content neutral.

Respondent makes the astounding argument that this facially content-discriminatory tax is actually *facially content neutral*. *Id.* at 29.

To make this argument, Respondent relies on *City of Austin*. It is true that *City of Austin* rejected the most extreme facial approach, under which "*any* examination of speech or expression inherently triggers heightened First Amendment concern." 596 U.S. at 73. In that case, a sign code regulated advertising for things located on different premises than the sign more heavily than advertising for things located on the same premises. This may seem content-based, because one can't tell whether a sign contains on-premises or off-premises advertising without reading it. But, this Court wrote, this sign code was nonetheless considered content neutral: "Unlike the sign code at issue in *Reed*," the code "[did] not single out any topic or subject matter for differential treatment." *Id.* at 71. The code's focus on a neutral factor like location made it different from codes turning on "[a] sign's substantive message," embodying, for instance, "content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations." *Id.*

Thus, even while this Court upheld that particular code, it reaffirmed that the facial approach still applies when a policy turns on *substantive content*.

But that is precisely this case. The tax here facially depends on the *erotic subject matter*. *See, e.g.*, *Barnes*, 501 U.S. at 570-71 (noting that nude dancing conveys an "erotic message"); *City of Erie*, 529 U.S. at 293, 296 (plurality opinion). And thus, the *Reed* approach is unaffected here.

CONCLUSION

The contradiction between *Reed* and *City of Renton* is real. If both of these cases are good law, their respective domains are ill-defined. The tax here is plainly content discriminatory, and Respondent's efforts to argue otherwise stem from a fundamental mischaracterization of the tax. This case is an ideal vehicle for this Court's consideration.

This Court should grant the petition for certiorari.

Respectfully submitted,

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