No. 13-38

IN THE

Supreme Court of the United States

677 NEW LOUDON CORP., d/b/a/ NITE MOVES,

Petitioner,

v.

STATE OF NEW YORK TAX APPEALS TRIBUNAL AND JAMIE WOODWARD, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE

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COUNTERSTATEMENT OF QUESTION PRESENTED

The New York Tax Law imposes a sales tax on admission charges to places of amusement, but exempts admission charges for "dramatic or musical arts performances," including "choreographic" performances. The question presented is:

> whether the State properly denied the exemption to the receipts of petitioner's adult entertainment club on the ground that petitioner had failed to prove, as a factual matter, that the receipts — largely charges for "private dances" in private rooms — were for "dramatic or musical arts performances" within the meaning of the tax exemption.

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STATEMENT

The New York State Court of Appeals held that petitioner failed to prove that its strip club qualified for a statutory exemption from New York's generally applicable sales tax on receipts from places of amusement. Pet. App. A1-A9. Specifically, applying long settled principles of New York tax administration, the court held as a matter of fact, Pet. App. A2-A5, that petitioner had not proven that its entertainments were "choreographic" performances for purposes of the sales tax exemption for "dramatic and musical arts performances." N.Y. Tax Law §§ 1101(d), 1105(f)(1) (McKinney Supp. 2013). In light of this finding, the court found "unavailing" petitioner's federal constitutional claim that the failure to exempt it from the broadly applicable amusement tax amounted to a content-based tax on nude dancing that violated the First Amendment. Pet. App. A5.

Although the Court of Appeals did not decide petitioner's First Amendment claim, petitioner now asks this Court to resolve that claim in the first instance, asserting that this Court must settle this hypothetical question to "clarify the law" and prevent "constitutional damage" that might occur in other cases not before the Court. Pet. at 16-17. Contrary to petitioner's claims, nothing about this case merits this Court's review.[1]

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[1]The New York Tax Law specifies that the Tax Appeals Tribunal shall not participate in proceedings for judicial review of its decisions although it is required to be named as a party. *See* N.Y. Tax Law § 2016 (McKinney 2004). Accordingly, this Brief in Opposition is submitted on behalf of respondent Commissioner of Taxation and Finance. Thomas H. Mattox is now Commissioner of Taxation and Finance.

First, the case does not involve an important question of federal law, because the New York Court of Appeals did not decide the constitutional issue presented by petitioner. Instead, the court based its decision on a state law ground, petitioner's failure to meet its burden of proof that it satisfied the criteria for the exemption. Second, even if the Court of Appeals had ruled that the First Amendment permits the State to deny the tax exemption to nude dancing, the decision would not conflict with any decisions of other state high courts or of federal courts of appeal, and would be consistent with this Court's rulings. Third, independent grounds preclude petitioner from obtaining any relief here because petitioner's receipts from adult entertainment are independently subject to New York sales tax under two other tax provisions, neither of which implicates petitioner's First Amendment argument. For all these reasons, this Court should deny the petition for certiorari.

A. New York's Sales Tax on Charges For Admission to Places of Amusement and Similar Venues

Petitioner and amici mistakenly suggest that the sales tax provisions in question here are content-based and narrowly targeted at expression. Pet. at 9, Brief of Amici Curiae CMSG Restaurant Group, LLC, et al. ("CMSG Br."), at 5-6. In fact, they are all part of N.Y. Tax Law §§ 1101 and 1105, which, with certain exemptions, broadly impose a sales tax on a wide variety of sales of goods and services in the State. *See* N.Y. Tax Law § 1105 (McKinney Supp. 2013). Three subsections of section 1105 are relevant here.[2] The first, section 1105(f)(1), imposes a sales tax on

[2]The relevant statutory provisions are reprinted as an addendum to this Brief in Opposition.

"[a]ny admission charge" in excess of 10 cents for "any place of amusement," broadly defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided." *Id.*, §§ 1105(f)(1), 1101(d)(10). This tax "applies to a vast array of entertainment including attendances at sporting events, such as baseball, basketball or football games, collegiate athletic events, stock car races, carnivals and fairs, amusement parks, rodeos, zoos, horse shows, arcades, variety shows, magic performances, ice shows, aquatic events, and animal acts." Pet. App. A2. Exempted from taxation under § 1105(f)(1) are admission charges for "dramatic or musical arts performances," defined to include "a live dramatic, choreographic or musical performance." N.Y. Tax Law §§ 1105(f)(1), 1101(d)(5) (McKinney Supp. 2013).

The second provision, section 1105(f)(3), alternatively imposes the sales tax on "[t]he amount paid as charges of a roof garden, cabaret or other similar place," defined to exclude "a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances." *Id.*, §§ 1105(f)(3), 1101(d)(12).

The third provision, section 1105(d)(i)(1), alternatively imposes the sales tax on "any cover, minimum, entertainment or other charge made to patrons" in an establishment that sells food or beverages for consumption on the premises, excepting those receipts taxed under subdivision f. *See id.*

B. The Proceedings Below

Petitioner operates an adult entertainment establishment where patrons can view women performing in various stages of undress. Petitioner charges its patrons a door admission charge to view stage performances, which include nudity. For an additional fee, patrons can purchase a nude "private dance" which takes place in a small private room. The "private dances" generate most of petitioner's income. Petitioner required patrons to purchase at least two drinks, sold at a substantial markup, and petitioner's receipts from drink sales exceeded its receipts from the door admission charges. During a three-month audit test period, petitioner's receipts from the "private dances," drink sales and door admissions were $321,535, $68,937 and $64,612, respectively. Pet. App. A25.

Petitioner brought this state court proceeding to challenge a decision of the New York State Tax Appeals Tribunal holding that petitioner's door admission and "private dance" charges were subject to sales tax under § 1105(f)(1), §1105(f)(3) and § 1105(d)(i)(1), in the alternative. Pet. App. A22-A58. The Tribunal held that petitioner failed to prove at an administrative hearing that its entertainment consisted of choreographic performances within § 1105(f)(1)'s exemption for "dramatic or musical arts performances." Pet. App. A43-A53. It held that petitioner's charges were alternatively taxable under § 1105(f)(3), because petitioner's drink receipts -- pursuant to a two-drink minimum and exceeding petitioner's door admission charges -- were not "merely incidental" to its entertainment. Pet. App. A53-A55. Finally, the Tribunal held that the charges were alternatively taxable under § 1105(d)(i)(1), because petitioner sold drinks for consumption on the premises. Pet. App. A56-A57.

On judicial review, the New York Appellate Division, Third Judicial Department, confirmed the Tax Appeals Tribunal's determination. Pet. App. A10-A21. With respect to § 1105(f)(1), the court found the petitioner failed to meet the burden of proving that either the "private dances" or the stage performances were choreographed performances within the meaning of the tax exemption. As to the "private dances," the court found a "dearth of evidence" regarding their nature, noting that "[p]etitioner's expert, by her own admission, did not view any of the private dances." Pet. App. A17. As to the stage performances, the court also found insufficient proof that they were choreographed performances within the § 1105(f)(1) exemption. Pet. App. A17-A19. Accordingly, it found petitioner's receipts taxable under § 1105(f)(1).

The court also held that the private dance and door admission charges were alternatively taxable as cabaret receipts under § 1105(f)(3), because petitioner failed to establish that its entertainment was limited to "merely live dramatic or musical arts performances" as required for the exemption contained in the definition relevant to that provision, § 1101(d)(12). In light of these holdings, the court found it unnecessary to decide whether petitioner's drink sales were "merely incidental" to its entertainment (which would also be necessary to qualify the private dance and door admission charges for the exemption under § 1105(f)(3) and § 1101(d)(12)), or whether the charges were alternatively taxable under § 1105(d)(i)(1) (which applies only if and to the extent § 1105(f) does not). The court stressed that "petitioner was denied the requested relief due not to the nature of its business but rather, because of the inadequacy of its proof." Pet. App. A21.

The New York Court of Appeals affirmed the Appellate Division's order and held that petitioner's private dance and door admission charges were taxable under § 1105(f)(1). Pet. App. A1-A9. The court "agree[d] with the Appellate Division that petitioner failed to meet its burden of proof that a tax exemption applies to these charges," *i.e.*, petitioner did not demonstrate that "the fees constituted admission charges for performances that were dance routines qualifying as choreographed performances." Pet. App. A2, A4. With respect to the "private dance" charges, the court explained that "none of the evidence presented depicted such performances and petitioner's expert's opinion was not based on any personal knowledge or observation of 'private' dances that happened at petitioner's club." Pet. App. A4. The court held that "petitioner failed to meet the same burden as it pertained to the admission charges for the stage performances." Pet. App. A4. It found that the Tribunal articulated a rational basis for discrediting petitioner's expert's opinion with respect to the stage performances, finding "her testimony was compromised by her opinion that the private performances were the same as the main stage performances despite the fact that she neither observed nor had personal knowledge of what occurred in the private areas." Pet. App. A4-A5. The court declined to extend the § 1105(f)(1) exemption to every act that merely "declares" itself a dance performance without sufficient proof. Pet. App. A5.

Having concluded that the charges were taxable under § 1105(f)(1), the Court of Appeals did not consider whether the charges were alternatively taxable under § 1105(f)(3) and § 1105(d)(i)(1), as the Tribunal had held.

Because the court's decision was based upon petitioner's failure of proof, it found petitioner's constitutional argument to be "unavailing." Pet. App. A5.

REASONS FOR DENYING THE PETITION

The petition for certiorari does not present any issue warranting review by this Court. First, the case does not involve an important question of federal law, because the New York Court of Appeals did not decide the constitutional issue presented by petitioner, but rather held that petitioner failed to prove as a factual matter its entitlement to the "dramatic or musical arts performances" exemption under N.Y. Tax Law § 1105(f)(1). Second, even if the Court of Appeals had ruled that the First Amendment permits the State to deny the tax exemption to nude dancing, the decision would not conflict with any decisions of other state high courts or of federal courts of appeal, and would be consistent with this Court's rulings. Third, independent grounds preclude petitioner from obtaining any relief here. As the Tax Appeals Tribunal held, petitioner's adult entertainment charges are alternatively subject to New York sales tax under two other provisions, which the Court of Appeals did not reach, without regard to whether petitioner's entertainment qualifies as a dramatic or musical arts performance. A decision by this Court in petitioner's favor on the First Amendment issue would amount to an advisory opinion because it would not affect the ultimate outcome of this proceeding. Accordingly, this Court should deny the petition for certiorari.

I. The New York Court of Appeals Ruled Against Petitioner On State Law Grounds Unrelated to Petitioner's First Amendment Claim

The New York Court of Appeals did not decide the constitutional issue that petitioner now asks this Court to decide in the first instance. The Court of Appeals decided that petitioner did not prove as a factual matter that the adult entertainment at its club consists of choreographic performances within the exemption for "dramatic or musical arts performances" in N.Y. Tax Law § 1105(f)(1), and consequently concluded that petitioner's constitutional argument was "unavailing." Pet. App. A5. This Court generally defers to state court factual findings, "even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion). There is no reason to depart from this practice here. The Court of Appeals based its findings on fundamental principles of New York tax administration. Pet. App. A3-A4. The court's application of a state law burden of proof requirement in this state sales tax case does not present an important question of federal law for this Court's resolution.

Under New York law, a taxpayer bears the burden of proving entitlement to a tax exemption, the exemption is construed against the taxpayer, and "if ambiguity or uncertainty occurs, all doubt must be resolved against the exemption." *Matter of Charter Dev. Co. L.L.C. v. City of Buffalo*, 848 N.E.2d 460, 462 (N.Y. 2006). As the Court of Appeals explained below, "none of the evidence" depicted the activities in petitioner's private rooms -- which generated the private dance charges making up most of petitioner's income -- and petitioner's expert admitted that she had not observed any of those

"private dances." Pet. App. A4. The court further held that the Tax Appeals Tribunal had a rational basis for discrediting petitioner's expert, and that petitioner failed to meet its burden of proof with respect to the nature of the stage performances as well. Given the failure of petitioner's proof, petitioner's constitutional claim was deemed "unavailing" by the court, because petitioner had not established the factual predicate, *i.e.*, that its performances were "choreographic," for that claim to be presented. Pet. App. A5.

Thus, the court's decision was not based on the content of petitioner's adult entertainment, but rather on the lack of proof of the nature of that entertainment. The court did not hold that nude performances are ineligible for the exemption for dramatic and musical arts performances, and the court's state law burden of proof holding presents no First Amendment issue. Accordingly, this case presents no important question of federal law warranting this Court's review.

II. The Court of Appeals' Decision Is Consistent With Settled Law

Even if the Court of Appeals had decided the constitutional question that petitioner asks this Court to resolve, and as we explained above that court did not do so, the case would not warrant this Court's review. First, petitioner and amici acknowledge (Pet. at 15, CMSG Br. at 7) that the decisions of other state courts of last resort are consistent with the Court of Appeals' decision, and indeed, this Court has three times denied review of those recent state high court decisions. *See Combs v. Texas Entm't Ass'n,* 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012); *Bushco v. Utah State Tax Comm'n,* 225

P.3d 153 (Utah 2009), *cert. denied*, 131 S. Ct. 455 (2010); *Pooh Bah Enters., Inc. v. County of Cook*, 232 Ill. 2d 463, *cert. denied*, 130 S. Ct. 258 (2009). Moreover, the decision below does not conflict with any decision of a United States Court of Appeals. Finally, petitioner's argument that the decision below is in conflict with this Court's precedents is mistaken. Pet. at 15. Instead, it is petitioner's argument that conflicts with this Court's well-settled First Amendment jurisprudence. The First Amendment does not require the State to exempt adult entertainment from a generally applicable sales tax simply because it has chosen to exempt other forms of entertainment which do not present the negative secondary effects of adult entertainment establishments.

This Court has recognized that tax exemptions and tax deductibility are both "a form of [legislative] subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983). And "it is well established that the government can make content-based distinctions when it subsidizes speech." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188-89 (2007). This is because "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (internal quotation marks omitted). Thus, a "'legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'" *Id. (*quoting *Regan*, 461 U.S. at 549); *see also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358-59 (2009).

New York's sales tax is a tax of broad, general application and, among other things, applies generally to admission charges to places of amusement. If a State declines to grant adult entertainment establishments an exemption from a widely applicable tax, the State has not suppressed or regulated those establishments' speech or infringed their First Amendment rights. Rather, it has simply chosen not to subsidize strip clubs through a tax exemption. Thus, the New York Legislature's decision to subsidize through a tax exemption other forms of entertainment, including "dramatic or musical arts performances," does not trigger a constitutional requirement to subsidize adult entertainment as well. *See Rust*, 500 U.S. at 194 ("Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition.").

This Court's decisions in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 165 (1983), do not support petitioner's argument here, as it contends. Pet. at 9-10. Preliminarily, those cases involved freedom of the press, a core First Amendment right, while nude dancing "falls only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). Moreover, those cases involved taxes that were narrowly targeted at a small number of newspapers, rather than the broadly applicable sales tax in this case. In *Arkansas Writers' Project*, this Court "reaffirmed the rule that selective taxation of the press through the narrow targeting of individual members offends the First Amendment." *Leathers v. Medlock*, 499

U.S. 439, 446 (1991). The tax "target[ed] a small group within the press," falling on at most three publications. 481 U.S. at 229. In *Minneapolis Star*, "the tax singled out the press for special treatment" through a special use tax on paper and ink that also targeted only a small group of newspapers. *Leathers*, 499 U.S. at 445-446. These cases held that, because "[t]he press plays a unique role as a check on government abuse," without a compelling justification, "the government may not exercise its taxing power to single out the press," particularly if the tax "targets a small group of speakers." *Leathers*, 499 U.S. at 447. However, this Court subsequently held in *Leathers* that a generally applicable sales tax scheme without these infirmities could exempt certain members of the press from a tax without violating the First Amendment, because "a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction." *Id.* at 450, 451-453 (legislature had "chosen simply to exclude or exempt certain media from a generally applicable tax" and "a tax scheme does not become suspect simply because it exempts only some speech").

Like the tax at issue in *Leathers*, the New York sales tax has a broad sweep, applying here to places of amusement in general, and "[p]lainly, no specific type of recreation is singled out for taxation." Pet. App. A2. New York has not singled out adult entertainment for sales taxation, which applies to a multitude of goods and services, including admission charges to sporting events, stock car races, carnivals and fairs, amusement parks, rodeos, zoos, horse shows, arcades, variety shows, magic performances, ice shows, aquatic events, and animal acts. Pet. App. A2; *see* N.Y. Comp. Codes R. & Regs. tit. 20, § 527.10. Under this Court's precedents, the State is

not constitutionally required to exempt petitioner's adult entertainment admission charges from this generally applicable tax. Consequently, even if the Court of Appeals had held that adult entertainment was not within the ambit of the tax exemption in section 1105(f)(1) for dramatic or musical arts performances, that decision would be consistent with this Court's First Amendment precedents and would not merit further review.

III. Independent Grounds Preclude Petitioner From Obtaining Relief

Finally, certiorari is also unwarranted because petitioner would not obtain the relief it seeks in this case if it prevailed on the question it presents here. The Tax Appeals Tribunal sustained the tax assessment against petitioner under each of three alternative New York sales tax provisions, and two of them do not depend on whether petitioner's entertainment qualifies as "dramatic or musical arts performances."[3] Because petitioner would owe the disputed tax even if this Court were to rule in its

[3]The New York Appellate Division held that petitioner's receipts were also taxable under § 1105(f)(3) as charges of a cabaret or similar place because petitioner's entertainment was not limited to "merely live dramatic or musical arts performances." N.Y. Tax Law § 1101(d)(12) (defining "roof garden, cabaret or other similar place"). Accordingly, the court did not reach whether petitioner's drink sales were "merely incidental to such performances," *id.*, which is also required for the receipts to be exempted from the § 1105(f)(3) tax. The Appellate Division also did not decide whether petitioner's receipts were taxable under § 1105(d)(i)(1) in the alternative. The Court of Appeals did not decide whether petitioner's receipts were alternatively taxable under § 1105(f)(3) or § 1105(d)(i)(1).

favor, resolution of the question presented would make no difference to the ultimate outcome of this case. For that reason alone, the question does not warrant the Court's review. *See, e.g., DTD Enters., Inc. v. Wells*, 130 S. Ct. 7, 8 (2009) (statement of Kennedy, J., respecting the denial of certiorari) ("procedural obstacle unrelated to the question presented" is a reason to deny certiorari).

As the Tax Appeals Tribunal held, petitioner's charges are also subject to sales tax under N.Y. Tax Law § 1105(f)(3), which imposes tax on the charges of a cabaret or similar place. Pet. App. A53-A55. Even if petitioner's entertainment qualified as "dramatic or musical arts performances," petitioner's charges are not exempt under § 1105(f)(3) because its sales of refreshments were not "merely incidental," § 1101(d)(12), to its entertainment. The Tribunal found that petitioner imposed a two-drink minimum, sold the drinks at a substantial markup, and that petitioner's drink receipts exceeded even its door admission charges. Pet. App. A53-A55. These findings provide a sound basis for the Tribunal's conclusion that petitioner's drink sales were an integral, not incidental, aspect of its business model. Thus, petitioner's charges are taxable under this provision as well.

In addition, the Tribunal held that petitioner's charges are alternatively taxable under N.Y. Tax Law § 1105(d)(i)(1), which imposes tax on the cover, entertainment or other charges of an establishment that sells food or beverages for consumption on the premises -- when the receipts are not taxable under § 1105(f). Pet. App. A56-A57. As with the tax under section 1105(f)(3), this sales tax provision would apply here without regard to whether petitioner's entertainment constitutes dramatic or musical arts performances.

Having held that petitioner's charges were subject to tax under § 1105(f)(1), the Court of Appeals did not reach these alternative bases for the Tribunal's decision. Because petitioner's charges are taxable under these provisions whether or not its entertainment consists of "dramatic or musical arts performances," independent grounds would preclude relief even if petitioner prevailed on its First Amendment claim. Accordingly, certiorari is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

STATUTORY PROVISIONS INVOLVED

N.Y. Tax Law § 1101:

1101. Definitions

* * * *

(d) When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

* * * *

(2) Admission charge. The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor.

(3) Amusement charge. Any admission charge, dues or charge of roof garden, cabaret or other similar place.

(4) Charge of a roof garden, cabaret or other similar place. Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place.

(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.

Addendum

* * * *

(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided.

* * * *

(12) Roof garden, cabaret or other similar place. Any roof garden, cabaret or other similar place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances.

N.Y. Tax Law § 1105:

§ 1105. Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

* * * *

(d) (i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any

cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

* * * *

(f) (1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools.

* * * *

(3) The amount paid as charges of a roof garden, cabaret or other similar place in the state.