UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS ENTERTAINMENT ASSOCIATION, INC.,	§	No. 1:17-CV-594-DAE
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
GLENN HEGAR, Comptroller of Public Accounts of the State of Texas,	§	
	§	
	§	
Defendant.	§	

ORDER: (1) DENYING PLAINTIFF'S MOTION TO AMEND (DKT. # 42); (2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. # 31); (3) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DKT. # 34); AND (4) SUA SPONTE GRANTING PLAINTIFF SUMMARY JUDGMENT ITS § 1983 CLAIM AND PARTIAL SUMMARY JUDGMENT ON ITS DUE PROCESS CLAIM

Before the Court are three pending motions: (1) Plaintiff Texas Entertainment Association, Inc.'s ("TEA" or "Plaintiff") Motion for Leave to File First Amended Complaint, filed on May 7, 2018 (Dkt. # 42); (2) Plaintiff's Motion for Summary Judgment, filed on April 16, 2018 (Dkt. # 31); and (3) Defendant Glenn Hegar, the Comptroller of Public Accounts for the State of Texas' ("Comptroller" or "Defendant") Motion for Summary Judgment, also filed on April 16, 2018 (Dkt. # 34). Pursuant to Local Rule CV-7(h), the Court finds this

matter suitable for disposition without a hearing. After careful consideration of the memoranda and exhibits filed in support of and opposition to the motions, the Court—for the reasons that follow—(1) **DENIES** Plaintiff's Motion to File First Amended Complaint (Dkt. # 42); (2) **GRANTS** Plaintiffs' Motion for Summary Judgment (Dkt. # 31); and (3) **GRANTS IN PART AND DENIES IN PART** Defendant's Motion for Summary Judgment (Dkt. # 34). Additionally, the Court sua sponte **GRANTS** summary judgment to Plaintiff on its § 1983 claim and partial summary judgment to Plaintiff of its Due Process claim.

BACKGROUND

TEA brings this suit against the Comptroller, asserting that a "fee"[1] assessed on sexually oriented businesses: (1) is an unconstitutional retroactive law; (2) violates the First Amendment's guarantee of freedom of speech; (3) violates the Fourteenth Amendment's guarantee of equal protection; and (4) violates the Fifth and Fourteenth Amendments' guarantees of due process. (Dkt. # 1 at 5–10.) The contested statute was enacted in 2008 and levies a $5 fee for each customer admitted into a "sexually oriented business." Tex. Bus. & Com. Code § 102.052 [hereinafter "$5 fee statute" or the "statute"]. A "sexually oriented business" is

[1] There is some dispute as to whether the exaction at issue is most properly characterized as a tax or a fee, but as the statute itself refers to it as a fee, the Court will use that term as well.

defined as "a nightclub, bar, restaurant, or similar commercial enterprise" that provides "live nude entertainment or . . . performances" and "authorizes the on-premises consumption of alcoholic beverages." Id. at § 102.051(2). "Nude" is defined as "entirely unclothed" or "clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." Id. at § 102.051(1).

Prior to the filing of this case, and shortly after the law went into effect, TEA and a number of sexually-oriented businesses brought suit in state court challenging the $5 fee statute on First Amendment and state law grounds. The Texas Supreme Court found that the $5 fee statute did not violate the First Amendment. Combs v. Tex. Entm't Ass'n, 347 S.W.3d 277, 288 (Tex. 2011).[2]

As originally filed, the instant case did not challenge the statute itself. Instead, Plaintiff challenged the Comptroller's later-enacted administrative interpretation of the word "clothing," as it relates to the definition of "nude" under the $5 fee statute. (See Dkt. # 1 at 2; see also Dkt. # 23 at 2.) In 2017, the

[2] After remand to consider the state law claims, the Texas Court of Appeals also found the statute did not violate the Texas Constitution. Tex. Entm't Ass'n v. Combs, 431 S.W.3d 790 (Tex. App.—Austin 2014).

Comptroller amended the Texas Administrative Code to define what constituted "clothing" under the $5 fee statute. 42 Tex. Reg. 219.

As presently constituted, "clothing" is defined as "[a] garment used to cover the body, or a part of the body, typically consisting of cloth or a cloth-like material." 34 Tex. Admin Code § 3.722(1)(a). Importantly, the definition goes on to specify that "[p]aint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing." Id.

This administrative amendment, particularly the exclusions from what constitutes clothing, is important to Plaintiff, because after the enactment of the statute, but prior to the administrative amendment, several businesses elected to feature dancers wearing opaque latex covering, to comply with the statute and avoid the $5 fee. (Dkt. # 31-7, Ex. F at 1). Plaintiff alleges that until mid-2015 the Comptroller and the Business Activity Research Team, tasked with administering the statute, did not consider such "latex clubs" to be sexually oriented businesses subject to the $5 fee statute, and as such did not assess the fee against them. (Dkt. # 31 at 7–8.) This all changed in 2015, when the present Comptroller took over. (Dkt. # 31-3, Ex. C[3] at 15.) At that time, the Comptroller determined that latex

[3] Defendant objects to this exhibit as lacking foundation and being irrelevant. (Dkt. # 38 at 2.) But defendant provides no argument in support of this position. The Court overrules Defendant's objections. This evidence is witness testimony concerning the creation, adoption and purposes underlying the amended rule. It is

coverings were not clothing under the $5 fee statute and instituted proceedings to collect the $5 fee against such latex clubs, both prospectively and—Plaintiff asserts—retroactively to 2008, when the statute was first enacted. In 2017, the Comptroller amended the Texas Administrative Code to reflect his determination of what did and what did not constitute clothing under the statute. 42 Tex. Reg. 419.

Plaintiff filed suit on June 19, 2017, challenging the Comptroller's interpretation and the administrative amendment reflecting it. Plaintiff argues the amended—Defendant would say clarified—interpretation violates the affected businesses' rights to freedom of expression, due process, and equal protection, and that the interpretation is unconstitutionally vague and overbroad. (Dkt. # 1.) One July 14, 2017, the Comptroller moved to dismiss, arguing: (1) TEA's claims were barred by the Tax Injunction Act, 28 U.S.C. § 1341; (2) the Court should dismiss the case on comity grounds; (3) the Comptroller was immune from suit under the 11th Amendment; and (4) TEA lacked standing. (Dkt. # 5.) On March 14, 2018, the Court adopted a Report and Recommendation of the Magistrate Judge, granting in part and denying in part Defendant's motion to dismiss. The Court granted the

---

therefore relevant. Further, Defendant has not adequately demonstrated that the challenged evidence could not be presented in an admissible form. Fed. R. Civ. P. 56(c)(2).

motion as to Plaintiff's claims for monetary damages under the 11th Amendment, but in all other respects denied Defendant's motion. (Dkt. # 23 at 13; Dkt. # 26 at 2–3.)

On April 16, 2018, Plaintiff moved for summary judgment on their First Amendment claim. (Dkt. # 31.) Defendant filed a response in opposition on April 30, 2018. (Dkt. # 37). Plaintiff filed a reply in support on May 7, 2018. (Dkt. # 40.) Defendant also filed evidentiary objections to Plaintiff's summary judgment evidence related to this motion, and Plaintiff filed a response. (Dkts. ## 38, 41). Also on April 16, 2018, Defendant moved for summary judgment on all of Plaintiffs claims. (Dkt. # 34.) Plaintiff filed a response in opposition on April 30, 2018. (Dkt. # 39.) Defendant filed a reply in support on May 14, 2018. (Dkt. # 43.) Defendant again filed evidentiary objections to Plaintiff's summary judgment evidence related to this motion, and Plaintiff filed a response.[4] (Dkts. ## 44, 36.) On May 7, 2018, largely in response to some of the arguments and issues raised in support of and opposition to Plaintiff's summary judgment motion, Plaintiff moved to amend its complaint. (Dkt. # 42.) Defendant responded in

[4] Defendant's evidentiary objections are addressed where relevant.

opposition on May 14, 2018. (Dkt. # 45.) Plaintiff filed no reply. These three motions are currently before the Court and are fully briefed and ripe for review.[5]

LEGAL STANDARD

I. Motion to Amend Complaint

Where, as here, a request to amend is untimely pursuant to the Court's scheduling order, Federal Rule of Civil Procedure 16(b)(4) governs amendment. Filgueira v. U.S. Bank Nat. Ass'n, 734 F.3d 420, 422 (5th Cir. 2013). Rule 16(b)(4) provides that "[a] schedule may be modified only for good cause and with the judge's consent." When amendment is sought untimely, a party "must show good cause for not meeting the deadline before the more liberal standard of Rule 15(a) will apply." Fahim v. Marriott Hotel Servs., Inc., 551 F.3d 344, 348 (5th Cir. 2008). The four factors relevant to a good cause determination under Rule 16(b)(4) are "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." Filgueira, 734 F.3d at 422 (quoting EEOC v. Serv. Temps, Inc., 679 F.3d 323 at 334 (5th Cir. 2012). Whether to grant or deny leave to amend is within the sound discretion of the trial court. Id.

[5] On June 15, 2018, this case was transferred to this Court from the Honorable Lee Yeakel, United States District Judge for the Western District of Texas. (Dkt. # 48.)

II. Motion for Summary Judgment

Summary judgment is proper if "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d

1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

Finally, when, as here, "parties file cross-motions for summary judgment, [the court] review[s] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." Green v. Life Ins. Co. of N. Am., 754 F.3d 324, 329 (5th Cir. 2014) (internal quotation marks omitted) (quoting Duval v. N. Assur. Co. of Am., 722 F.3d 300, 303 (5th Cir. 2013)).

DISCUSSION

As discussed, three motions are currently pending before the Court: Plaintiff's motion to amend (Dkt. # 42); (2) Plaintiff's motion for summary judgment (Dkt. # 31); and (3) Defendant's motion for summary judgment (Dkt. # 34.) Defendant's motion for summary judgment raises arguments that this Court lacks jurisdiction over this action. (Dkt. # 34 at 3–6.) Because it would be

improper for this Court to adjudicate any matters over which it lacks jurisdiction, the Court must first address Defendant's jurisdictional arguments. See, e.g., Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")

III. Jurisdiction and Younger Abstention

Defendant argues first that Court lacks jurisdiction under the Tax Injunction Act, principles of comity, and Eleventh Amendment Immunity. (Dkt. # 34 at 4, 12, 17 n.9.) Defendant here is simply repeating arguments already rejected by Magistrate Judge Austin and Judge Yeakel in connection with his motion to dismiss. (Dkt. # 23, 26.) The Court's rejection of these arguments is thus law of the case. Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983) ("the law of the case doctrine . . . prevents collateral attacks against the court's rulings during the pendency of the lawsuit.") While the law of the case doctrine is a "rule of convenience and utility," not an "inexorable command," "[a] judge should hesitate to undo his own work. Still more should he hesitate to undo the work of another judge." Id. Defendant's scanty arguments do not cause this Court to question the prior ruling in this case on these issues.

Defendant next argues the Court should abstain from exercising jurisdiction under the Younger doctrine. (Dkt. # 34 at 4.) Defendant contends the three criteria for Younger abstention derived from Middlesex County Ethics

Commission v. Garden State Bar Association, 457 U.S. 423, 432 (1982), apply, and that therefore the Court should abstain from deciding this case. (Dkt. # 34 at 5–6.) However, the Supreme Court has explicitly rejected the premise that Younger applies whenever those three criteria are satisfied. Sprint Comms., Inc. v. Jacobs, 571 U.S. 69, 81 (2013).

When the Middlesex factors are "divorced from their quasi-criminal context the three Middlesex conditions would extend Younger to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." Id. But "federal courts are obliged to decide cases within the scope of federal jurisdiction." Id. at 72. And such a broad application of the doctrine would violate the "general rule" that "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." Id. Abstention is the "exception, not the rule." Id. at 82 (quoting Hawaii. Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984)).

The Supreme Court, therefore, expressly circumscribed application of the Younger doctrine to three defined "exceptional circumstances": (1) ongoing state criminal prosecutions; (2) civil enforcement closely related to criminal statutes; and (3) civil proceedings involving certain orders uniquely in furtherance of the state court's ability to perform their judicial functions. Id. at 78, 82. Defendant does not explain how the instant case fits into any of the three Younger

categories. And the Court sees no reason to think it does either. Therefore, the Court finds Younger abstention would be inappropriate in this instance.

Having thus resolved Defendant's jurisdictional objections, the Court now turns to the substance of the motions pending before it.

IV. Motion to Amend

Plaintiff seeks leave to amend its complaint to state an as-applied challenge under the First Amendment to the $5 statute itself, as opposed to just the administrative amendment defining "clothing." Plaintiff argues the failure to expressly state such a claim was inadvertent, that its original complaint sets forth the allegations of such a claim, the proposed amendments are minimal, and that Defendant will not be prejudiced by such an amendment. (Dkt. # 42 at 2, 4.) However, Plaintiff's motion will be denied.

First, the amendment Plaintiff requests is barred by judicial estoppel. "[J]udicial estoppel is equitable in nature and can be invoked by a court to prevent a party from asserting a position in a legal proceeding that is inconsistent with a position taken in a previous proceeding. The aim of the doctrine is to protect the integrity of the judicial process." Love v. Tyson Foods, Inc., 677 F.3d 258, 261 (5th Cir. 2012) (internal citations omitted). In determining whether to apply judicial estoppel, Courts look to the following criteria: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly

inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." Id. But judicial estoppel "is not governed by 'inflexible prerequisites or an exhaustive formula for determining [its] applicability,' and numerous considerations 'may inform the doctrine's application in specific factual contexts.'" Id. (quoting New Hampshire v. Maine, 532 U.S. 742, 751 (2001)).

The Court concludes that Plaintiff is judicially estopped from asserting a First Amendment claim against the $5 fee statute because it previously disclaimed any intention to do so. In opposing Defendant's motion to dismiss, TEA expressly asserted that it,

> does not even ask the Court to invalidate or otherwise enjoin enforcement of the $5 Fee Statute *in toto*, let alone find that the statute as enacted by the legislature is unconstitutional (indeed, the Texas Supreme Court has already ruled on that issue). Instead, the TEA asks the Court to declare the Comptroller's interpretation of a single word in the statute unconstitutional. In short, a favorable decision would not transmogrify the Texas Business & Commerce Code or interfere with the legislature's choice to regulate sexually oriented businesses in the manner it has deemed fit.

(Dkt. # 10 at 10.)[6]

[6] In its Rule 26(f) report, TEA also stated that "[t]his is a case about an administrative amendment retroactively changing the way the Comptroller interprets a $5 Fee Statute purporting to tax Sexually Oriented Businesses." Dkt. # 16 at 2.

Plaintiff's current argument that its failure to adequately plead a First Amendment challenge to the statute itself was merely an inadvertent defect is plainly inconsistent with the position it took in responding to Defendant's motion to dismiss. The Court further accepted this representation made by Plaintiff in considering the arguments for and against dismissal and in denying in part Defendant's motion. Finally, Plaintiff has made no argument to this Court as to how such an express representation that is so plainly inconsistent with its current position was inadvertent.

Additionally, under the four Rule 16(b)(4) factors: (1) Plaintiff has failed to adequately explain its failure to timely move for leave to amend; (2) Defendant would suffer prejudice from permitting amendment; and (3) granting a continuance would not cure the prejudice. According to Plaintiff, the underlying facts supporting their amended claim are the same as those supporting their challenge to the administrative amendment. (Dkt. # 42 at 2.) The requested amendment to their complaint is thus not in response to any newly discovered evidence or any intervening change in the law. Everything needed to state the claim they now wish to add was within their possession at the time their original complaint was filed. And Plaintiff presents no argument as to why it failed to make such a claim at that time. Their argument that such failure was mere

inadvertence is also belied by their previously discussed express disavowals of any intention to raise such a challenge.

Moreover, the Report and Recommendation of the Magistrate Judge regarding Defendant's motion to dismiss expressly cognized Plaintiff's original complaint as "not challeng[ing] the statute itself, but rather the Comptroller's limited interpretation of the word 'clothing.'" (Dkt. # 23 at 2.) Plaintiff was thus on notice that the Court did not view Plaintiff's complaint as stating any challenge to the statute itself. Yet Plaintiff did not move to amend at that time, instead waiting three additional months before filing its motion, by which time there was nearly full briefing of motions for summary judgment by both parties.

That Plaintiffs waited until after the cutoff of discovery and after both parties filed and briefed their respective motions for summary judgment also prejudices Defendant in a way a continuance would not cure. Defendant has litigated this case under the belief that Plaintiff was only challenging the administrative amendment related to the definition of the word "clothing," not the statute itself—a belief in large measure inculcated by Plaintiff's previously discussed representations. Allowing Plaintiff's eleventh-hour amendment would require the reopening of discovery so that Defendant has the chance to develop whatever facts and arguments it finds necessary to respond to Plaintiffs new claim and would require extending the deadline for the filing of dispositive motions to

give Defendant an opportunity to present arguments on the new claim. Doing so would only further delay the disposition of this matter.

Finally, Plaintiff's requested amendment would be futile. The Texas Supreme Court has already addressed the First Amendment constitutionality of the $5 fee statute itself in a case involving Plaintiff. See Combs, 347 S.W.3d at 288. Plaintiff's attempted First Amendment challenge to the $5 fee statute is thus barred by res judicata under both issue and claim preclusion. See Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1136 (5th Cir. 1991) ("Preclusion of a previously-litigated issue under the doctrine of offensive collateral estoppel requires that the issue under consideration be identical to the issue previously litigated; that the issue was fully and vigorously litigated in the primary proceeding; that the previous determination of the issue was necessary for the judgment in that proceeding; and that no special circumstances exist that would render preclusion inappropriate or unfair."); Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) ("For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final

judgment on the merits and the same cause of action must be involved in both cases.").[7]

V. Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment only on their First Amendment claim. Plaintiff makes two arguments in support of its position: (1) the amended administrative rule is an impermissible content-based regulation of constitutionally protected expression; and (2) the $5 fee statute itself in an impermissible content-based regulation. (Dkt. # 31 at 8, 13.) As a threshold matter, the Court declines to address Plaintiff's second contention, for the same reasons Plaintiff's motion to amend is denied. Plaintiff did not plead such a claim, nor litigate the case as if it had pled such a claim until moving for summary judgment. See Cutrera v. Bd. of Sup'rs of La. State Univ., 429 F.3d 108, 113 (5th Cir. 1976) (holding that a "claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court"). Moreover, the Texas Supreme Court has already adjudicated the First Amendment constitutionality of the statute itself in a case involving Plaintiff. Any such claim is therefore barred by principles of res judicata.

[7] Because Plaintiff's motion is denied for the reasons discussed, the Court does not address Defendant's argument that amendment would also be futile under the narrow Rooker–Feldman doctrine.

The Court then turns to Plaintiff's First Amendment arguments related to the administrative amendment defining "clothing." Plaintiff first argues the amended rule is content-based and thus presumptively unconstitutional. Plaintiff alternatively argues that even if content neutral, the amended rule does not satisfy intermediate scrutiny under United States v. O'Brien, 391 U.S. 367, 377 (1968), because it does not further a substantial government interest. (Dkt. # 31 at 9–12.)

The Court agrees with Plaintiff and rejects Defendant's arguments to the contrary.[8] First, although nude dancing as expressive conduct "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), "[c]ourts have long recognized nude or partially nude dancing as a form of communicative conduct under the First Amendment." Edge v. City of Everett, 291 F. Supp. 3d 1201, 1205–06 (W.D. Wash. 2017) (citing cases).

---

[8] Defendant's res judicata and Rooker-Feldman arguments based on the Texas Supreme Court's decision in Combs are inapposite. Combs dealt with the First Amendment constitutionality of the $5 fee statute itself. The instant case, however, presents a different issue, namely whether the administrative amendment defining clothing violates the First Amendment. The challenged administrative rule did not even exist at the time Combs was decided, so Combs cannot be held to have settled the issue of its First Amendment constitutionality. See Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2305 (2016) ("[D]evelopment of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.").

Next, the Court finds that MD II Entertainment v. City of Dallas persuasive and controlling. 935 F. Supp. 1395 (N.D. Tex 1995), aff'd, 85 F.3d 624 (5th Cir. 1996). "For a regulation to be content neutral, the enacting authority must be predominantly motivated by a substantial governmental interest, such as the control or reduction of deleterious secondary effects of the establishment to be regulated." Id. at 1397.

The Comptroller argues the government interest motivating the amended rule was combating "the secondary effects of the expression of nude dancing in the presence of alcohol," the same interest approved by the Texas Supreme Court in Combs. (Dkt. # 37 at 5.) But Plaintiff has presented evidence—that has not been directly disputed by Defendant—that "[t]he Comptroller did not adopt the rules based on whether the statute would or would not mitigate and discourage the secondary effects of erotic dancing in the presence of alcohol." (Dkt. # 31-3, Ex. C at 32; see also id. at 38 ("The Comptroller did not rely upon any adverse effects.").) The Comptroller also did not conduct or review any studies or make any factual findings about the deleterious secondary effects of entertainment from latex-clad dancers in the presence of alcohol. (Id. at 14–15.)

Defendant argues he "was not required to conduct a new study or rely on any new evidence to justify its adoption of a rule because the agency was adopting an interpretive rule that simply defined an undefined statutory term[,]"

and therefore he can rely on the deleterious effects recognized in connection with the $5 fee statute itself. (Dkt. # 37 at 5.) But Defendant is wrong on two fronts. First, the amended rule was not a mere interpretive rule. Interpretive rules, unlike legislative rules, are those that "do not have the force and effect of law." Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995). For an administrative regulation to have the force and effect of law it must meet two requirements. First, it must be substantive, meaning it "affects individual rights and obligations." Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)). Second, it must be rooted in a grant of power from the body in whom legislative power is vested, in this case the Texas legislature, meaning the regulations are "issued . . . pursuant to statutory authority and . . . implement [a] statute." Id. at 302–03.

By defining the word "clothing" to not cover the latex worn in latex clubs, the Comptroller expanded the application of the fee to businesses not previously taxed, and then tried to recover fees based on that expanded coverage. Further, failure to comply with such a rule made by the Comptroller incurs a per-day fine of $25 to $500. Tex. Tax Code § 111.002(b). The amended rule is thus substantive because it "affects individual rights and obligations." See Chrysler Corp., 441 U.S. at 302. Further, in adopting the amended rule, the Comptroller expressly stated the rule was: (1) adopted under its authority under Texas Tax Code

§ 111.002[9] and Texas Business and Commerce Code § 102.056[10]; and (2) designed to implements the $5 fee statute. 42 Tex. Reg. 223. For these reasons, the Court concludes the amended rule is a legislative rule, not an interpretive one. See Chrysler Corp., 441 U.S. at 302.

But more importantly, such a scenario was exactly faced by the court in MD II Entertainment, and the court rejected an identical argument. MD II Entertainment also dealt with an amendment to regulation of sexually oriented businesses that expanded the meaning of nudity, and thus the application and enforcement of the regulation. 935 F. Supp. at 1396. And in MD II Entertainment, the expanded definition was also enacted "without further study to link the regulated activity to the production of deleterious, substantial secondary effects." Id. Like Defendant in this case, the City of Dallas had also argued that "the amendments are nothing more than the fine tuning of ordinances which have previously passed constitutional scrutiny." Id. at 1397. Thereby, the city sought

---

[9] This provision of the tax code grants the Comptroller authority to "adopt rules . . . for the enforcement of the provisions of this title and the collection of taxes and other revenues."

[10] This provision of the business and commerce code extends the authority vested in the Comptroller under Texas Tax Code § 111.002 to the "administration, payment, collection, and enforcement" of the $5 fee statute.

"to relate the amendment at issue to the constitutionally sound ordinances existing before the amendments." Id.

But the court in MD II Entertainment determined that "[w]hile a city's interest in curbing demonstrated secondary effects produced by certain kinds of sexually oriented businesses has been held sufficient to support certain . . . restrictions," no evidence had been presented "indicat[ing] that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." Id. at 1398. Further, no evidence indicates the drafters of the amendment relied upon any studies indicating the amendment's necessity or effectiveness or any studies or information linking semi-nude dancing to the production of secondary effects linked to fully nude dancing. Id. at 1397–98. The absence of evidence that the city relied on or considered such justifications proved "fatal" to the amendment. Id. Such is also the case here. Because the Comptroller enacted the amended regulation at issue without reference to or concern for mitigating any identified secondary deleterious effects, the Court is forced to conclude the amendment is directed at the essential expressive nature of latex clubs' business, and thus is a content-based restriction. See id. at 1399.

As a content-based restriction, the amended rule is presumptively unconstitutional. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015). Such content-based laws are constitutional only if they are narrowly tailored to serve

compelling state interests. Id. Defendant does not present any argument that the amendment satisfies this standard. (See Dkt. # 37.)

Additionally, even assuming for the sake of argument that the amended rule is content-neutral, the rule does not satisfy intermediate scrutiny under O'Brien. Under the intermediate standard of scrutiny applied to content-neutral laws regulating expressive conduct, for a regulation to be constitutional under the First Amendment it must satisfy four requirements: (1) the regulation must be within the constitutional power of the state; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction of alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest. O'Brien, 391 U.S. at 377.

Plaintiff argues that the administrative rule fails the O'Brien test because it does not further a substantial government interest. This prong of the O'Brien analysis encompasses two distinct questions: (1) "whether there is a substantial government interest . . . i.e. whether the threatened harm is real"; and (2) "whether the regulation furthers that interest." Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 558 –59 (5th Cir. 2006) (quoting Pap's A.M., 529 U.S. at 300). The Comptroller asserts two government interests in support of the amended rule: (1) reducing the secondary effects of adult businesses; and (2) managing

fiscal operations through assessing, administering, and collecting taxes. (Dkt. # 37 at 6.) But as previously discussed, the Comptroller presented no evidence the amended rule actually addresses any secondary deleterious effects, nor did the Comptroller rely on the mitigation of any such deleterious effects in enacting the amendment.

The amended rule also does not serve the second asserted interest. The amended rule expands—or clarifies—the application of the $5 fee statute. It speaks to the imposition of the fee itself; it is not a rule that merely assists in the administration or collecting of an otherwise valid fee or tax. If this asserted interest is sufficiently substantial to justify the amended rule, then any fee or tax furthers a substantial government interest merely by existing, no matter what it seeks to regulate or why. Such expansive and tautological reasoning must be rejected, particularly so where the issues are of a constitutional dimension. See, e.g., Okpalobi v. Foster, 244 F.3d 405, 421 (5th Cir. 2001) (rejecting "tautological reasoning" that "can easily be applied to every statute" as not "serving any real use" is determining the constitutionality of a state statute); see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (concluding that "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected" because "the political constraints that prevent a legislature from passing crippling

taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute”).

For these reasons, the Court concludes the amended rule is an unconstitutional restriction on expressive conduct under the First Amendment. Plaintiffs motion for summary judgment on their First Amendment claim is therefore **GRANTED**. (Dkt. # 31.)

VI. Defendant’s Motion for Summary Judgment

Defendant moves for summary judgment on all of Plaintiff’s claims except for overbreadth. First, Defendant’s motion is denied as to Plaintiff’s First Amendment claim for the same reasons that Plaintiff’s motion was granted on that claim. See Section V, supra. But two additional arguments Defendant raises as to the First Amendment claim require brief further discussion.

First, Defendant argues the amendment defining clothing is merely an interpretive agency rule that by itself taxes nothing. (Dkt. # 34 at 8.) This argument is wrong on two counts. First, the rule is not merely interpretive. The amended definition is meant to have the force of law, as the Comptroller has relied and will rely on it in assessing the $5 fee against businesses that fall within its scope. See Perez, 135 S. Ct. at 1204. Additionally, while the rule itself is just a definition, in connection with the $5 fee statute itself, the amended definition broadens the application of the fee statute to more businesses. By expanding who

is subject to the fee, the amended definition imposes the fee on the businesses it now covers. The functional effect of the amendment therefore is to impose a fee on parties that were previously not subject to it. And the Comptroller has sought to enforce the amended rule as such. (See Dkt. # 39-4, Ex. D; Dkt. # 39-6, Ex. E.)[11]

Second, Defendant argues the amended rule does not restrict any rights to free speech or expression. But by functionally expanding the definition of nudity, the amended rule subjects additional modes of erotic dance to the $5 fee statute. While not per se expressive, when nudity or semi-nudity is "combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and the dancer's acts in going from clothed to nude, as in a strip tease, are integrated into the dance and its expressive function." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991). It follows therefore that what one wears while engaged in erotic performance is similarly communicative, just like all clothing is potentially communicative. See Edge, 291 F. Supp. 3d at 1205–06 (ruling in a case involving G-string and pasty-clad baristas that such attire is

[11] The Comptroller objects to this evidence as irrelevant and lacking foundation. (Dkt. # 44 at 4–6.) The Court overrules these objections. This evidence is relevant at least to the extent it indicates Defendant's attempts to enforce the amended definition of clothing as imposing the fee on an expanded group of businesses, and to do so retroactively. Fed. R. Evid. 401. Defendant also did not produce any argument has to why this evidence cannot be authenticated at trial or the pertinent facts therein otherwise presented in an admissible form, for instance through witness testimony. See Fed. R. Evid. 901, Fed. R. Civ. P. 56(c)(2).

communicative because "it is not the Court's responsibility to comment on taste or decorum, but rather to determine whether Plaintiff's choice of clothing is communicative[,]" and "[c]ourts have long recognized nude or partially nude dancing as a form of communicative conduct under the First Amendment.") (citing cases); see also Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 (5th Cir. 2001) ("The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be understood by those intended to view it."). The amended rule thus burdens expressive conduct.

The Court now turns to Defendant's remaining arguments, relating to Plaintiff's remaining claims.

A. Equal Protection

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against international and arbitrary discrimination, whether occasioned by express terms if a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Defendant argues he is entitled to summary judgment on Plaintiff's equal protection claim because the amended rule applies equally to all, and "there is no evidence that the definition of 'clothing'

[contained in the amended rule] applies differently to those who appear to be similarly situated." (Dkt. # 34 at 12.)

Plaintiff has asserted, however, that the $5 fee statute, as amended or interpreted by the newly enacted definition of clothing, is being enforced in an arbitrary and discriminatory manner. (Dkt. # 39-2, Ex. B[12] at 1–2.) Plaintiff

---

[12] Defendant objects to this declaration as lacking personal knowledge, irrelevant, hearsay, and improper opinion testimony. (Dkt. # 44 at 2–4.) These objections are overruled for the reasons stated in Plaintiff's response to Defendant's objections. (Dkt. # 46 at 3–4.) The statements in the declaration do not lack personal knowledge because the declarant is an officer of some of the clubs subject to the $5 fee statute and is Plaintiff's designated corporate representative. See Fed. R. Evid. 602. The statements are relevant because they concern the prior history of the Comptroller's enforcement of the $5 fee statute and the latex clubs' understanding of whether or not they were considered subject to the statute prior to 2015. See Fed. R. Evid. 401. Whether the statements as made by the declarant are hearsay is not relevant in the summary judgment context, because at this stage "materials cited to support or dispute a fact need only be capable of being 'presented in a form that would be admissible in evidence.'" LSR Consulting, LLC v. Wells Fargo Bank, N.A., 835 F.3d 530, 534 (5th Cir. 2016) (quoting Fed. R. Civ. P. 56(c)(2)). And Plaintiff asserts the substance of the relevant statements can be presented at trial in admissible form either through the declarant's testimony, the testimony of TEA members, or the testimony of Comptroller personnel. (Dkt. # 46 at 4.) The statements are also not improper opinion because they are rationally based on the declarant's perception, are helpful to determining a fact at issue, and are not based on specialized knowledge within the scope of Federal Rule of Evidence 702. Fed. R. Evid. 701. Moreover, Defendant's objections here are more properly suited to the trial context where the disputed evidence in the precise form sought to be admitted can by analyzed in its full context. For evidence to be proper at the summary judgment stage it does not need to be admissible in the exact form presented, but merely capable of being "presented in a form that would be admissible." Fed R. Civ. P. 56(c)(2).

provides witness testimony that the $5 fee statute is not enforced against businesses like music concerts, burlesque shows, and body building competitions, that all serve alcohol and that all would be classified as nude entertainment under the definitions contained in the statute. (Id.) Plaintiff also points out that Defendant refused to answer Plaintiff's requests for admission asking whether the Comptroller ever imposed the $5 fee on such businesses. (Dkt. # 39 at 18.) Whether the Comptroller, without any demonstrable justification, fails to enforce the $5 fee statute against businesses other than nude and latex clubs that similarly fall within the amended rule's definition of nudity is a genuine issue of material fact related to Plaintiff's equal protection claim. See Village of Willowbrook, 528 U.S. at 564 (recognizing a valid equal protection claim exists "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"). Summary judgment in favor of Defendant is thus inappropriate on this claim.[13]

Defendant is therefore not entitled to summary judgment as to Plaintiff's Equal Protection claim.

B. Due Process

[13] The Court does not reach Defendant's Tax Injunction Act related arguments, because, as discussed previously, it has already been determined in this action that the statute imposes a regulatory fee and not a tax. (Dkt. # 23 at 4–7; Dkt. # 26 at 2.)

Plaintiff asserts the amended rule is unconstitutionally retroactive because the Comptroller's efforts to exact fees that allegedly accrued prior to the enactment of the amendment violate its right to due process. (Dkt. # 1 at 5.) Defendant argues that the law is not retroactive, or alternatively, even if retroactive, is not unconstitutional because it does not violate the right to due process.

However, Plaintiff has presented evidence that the Comptroller seeks and has sought to apply the amended definition retroactively. First, in propounding the amendment, the Comptroller stated that he intended to enforce the amended rule in all cases currently "pending." 42 Tex. Reg. 223. More importantly, Plaintiff has pointed to at least two enforcement actions undertaken by the Comptroller that sought to charge fees under the amended rule to conduct antedating the enactment of the amended rule. (See Dkt. # 39-4, Ex. D; Dkt. # 39-6, Ex. E.)

Defendant argues that even if retroactive, the amended rule does not violate due process, because it is merely an administrative definition, not a tax itself. But the amended rule expands the application of the $5 fee to conduct that was previously not subject to the fee. Though in a vacuum the amended rule is merely a defintion, in this way the amended rule functionally imposes the fee on all business subject to the new definition.

For retroactive application of such an exaction to be unconstitutional, its "retroactive application" must be "so harsh and oppressive as to transgress . . . constitutional limitation[s]." United States v. Hemme, 476 U.S. 558, 568 (1986). One of the relevant circumstances for courts to consider is "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." Id. at 569. To the extent the Comptroller intends to or does enforce the amended rule to business conduct that occurred before he noticed his intention to modify the definition of nudity under the $5 fee statute, the Court concludes, for the following reasons, that such enforcement gave, without notice, a different and more oppressive legal effect to conduct previously undertaken and is thus harsh and oppressive.

The record indicates that prior to Defendant's tenure as Comptroller, the comptroller's office and related regulatory agencies disavowed that latex clubs fell within the ambit of the $5 fee statute, represented as such to the clubs themselves, and affirmatively avoided imposing the fee on such clubs. (Dkt.

39-5, Ex. D-1 at 8[14]; Dkt. # 31-5, Ex. E at 18[15]; Dkt. # 31-8, Ex. G[16].) Now, the Comptroller seeks to retroactively assess fees in the hundreds of thousands of dollars against businesses that were previously told that the $5 fee statute did not apply to their conduct under the prevailing definition and understanding of the term nudity, for the time period before the amended rule was even propounded for public notice and comment, let alone enacted. (See Dkt. # 39-4, Ex. D; Dkt. # 39-6, Ex. E.) Such retroactive assessment gives a more oppressive legal effect—assessment of the $5 fee—to conduct undertaken prior to the enactment of the

[14] Defendant's evidentiary objection to this deposition is overruled. The witness's testimony is relevant to the Comptroller's practices and procedures prior to the adoption of the amended rule, informing Plaintiff's retroactivity and equal protection claims. The substance of the evidence also would be admissible at least through live testimony, if not also through introduction of the transcript of the witness's deposition.

[15] Defendant's evidentiary objection to this deposition is also overruled. The substance of the evidence would be admissible, at the very least, through live witness testimony.

[16] Defendant's evidentiary objection to this letter is also overruled. This exhibit is relevant to whether the comptroller considered latex clubs subject to the $5 fee and assessed the fee against them prior to adoption of the amended rule. Moreover, this exhibit bears sufficient marks of genuineness, including email addresses, signature blocks and letterhead. Fed. R. Evid. 901(4); see also Marentes v. State Farm Mut. Auto. Ins. Co., 224 F. Supp. 3d 891, 927 (N.D. Cal. 2016). "[T]he objected-to emails and records [could] be presented in a form that is admissible at trial because they will fall either into the business records hearsay exception or will be considered admissions of a party opponent and thus not hearsay." Musket Corp. v. Suncor Energy (U.S.A.) Mktg., Inc., CV H-15-100, 20-16 WL 6704163, at *4 (S.D. Tex. Nov. 15, 2016).

amended rule. And it does so, not just without notice, but in contravention of notice previously given that the latex clubs were not subject to the fee.

There is undisputed evidence in the record that the latex clubs presented dancers wearing latex specifically to avoid enforcement of the $5 fee against them and were reassured the use of latex coverings allowed them to comply with the statute and avoid the fee. (Dkt. # 39-2, Ex. B at 1; Dkt. # 31-8, Ex. G.) The Comptroller's attempt to enforce the fee against these business for conduct undertaken before they were put on notice that the definition of nudity would be changed or clarified to cover their conduct is harsh and oppressive, and thus violates due process. See Hemme, 476 U.S. at 569. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). Defendant is therefore not entitled to summary judgment on to Plaintiff's Due Process claim.

C. Vagueness

"A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." Women's Med. Ctr. of Nw. Hous. v. Bell, 248 F.3d 411, 421 (5th

Cir. 2001.) As discussed in relation to Plaintiff's equal protection claim, Plaintiff has raised a genuine issue of material fact as to the amended rule's propensity to allow arbitrary and discriminatory enforcement. However, "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974). The amended rule plainly spells out that latex is not clothing, and that latex clubs therefore fall within the ambit of the fee statute as providing nude entertainment. Because the conduct TEA sues in connection with, latex covered dancers, is clearly covered by the amended rule, TEA cannot successfully challenge it as unconstitutionally vague. Defendant is therefore entitled to summary judgment on this claim.[17]

D. § 1983 Claims

To prevail under § 1983, Plaintiff must prove: (1) it has been deprived of a right secured by the Constitution or laws of the United States; and (2) the Comptroller acted under color of state law. Doe ex rel Magee v. Covington Cty. Sch. Dist., 675 F.3d 849, 854 (5th Cir. 2012). Defendant argues he is entitled to

[17] Because it does not appear Defendant moved for summary judgment on Plaintiff's overbreadth claim, the Court will not reach the arguments on that issue presented in Plaintiff's response and Defendant's reply. See D'Onofio v. Vacation Publ'ns, Inc., 888 F.3d 197, 210 (5th Cir. 2018) (holding that district courts may not grant summary judgment on issues not raised in a motion for summary judgment without giving the parties notice that it intends to consider summary judgment on that issue and gives them a reasonable time to respond) (citing Fed. R. Civ. P. 56(f)).

summary judgment on Plaintiff's § 1983 claim because there is no evidence TEA or its members have been deprived of any constitutional right simply because a state agency adopted an administrative rule. However, in connection with Plaintiff's motion for summary judgment, the Court has determined that the amended rule violates Plaintiff's First Amendment rights. Further, that violation occurred through the Comptroller acting under the color of state law. The Comptroller propounded the amended administrative rule relating to the definition of clothing pursuant to its statutory authority to "adopt rules . . . for the enforcement of the provisions of this title and the collection of taxes and other revenue." 42 Tex. Reg. 423; Tex. Tax Code § 111.002(a); see also Tex. Bus. & Com. Code § 102.056 (extending the Comptroller's power under the tax code to "the administration, payment, collection, and enforcement" of the $5 fee). Because the two requirements of § 1983 are met in this case, Defendant is not entitled to summary judgment on Plaintiff's § 1983 claim.

Defendant's motion for summary judgment is thus **GRANTED IN PART AND DENIED IN PART**. (Dkt. # 34.)

VII. Sua Sponte Grant of Summary Judgment to Plaintiff on its Due Process and § 1983 Claims

Although Plaintiff did not itself move for summary judgment on these claims, "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she

had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); see also Fed. R. Civ. P. 56(f). Sua sponte summary judgment is proper if there is good reason for the [non-moving party] to suspect that the Court is about to rule on the issue. Kibort v. Hampton, 538 F.2d 90, 91 (5th Cir. 1976). The Fifth Circuit has further noted that when "one party moves for summary judgment the district court, in an appropriate case, may grant summary judgment against the movant, even though the opposite party has not actually filed a motion for summary judgment." Landry v. G.B.A., 762 F.2d 462, 464 (5th Cir. 1985). This result is so because when a party moves for summary judgment on an issue, it is thus on notice that the Court will be considering summary judgment on that issue and had the opportunity to present its best evidence and arguments in its favor at that time. See Barkley, Inc. v. Gabriel Brothers, Inc., 829 F.3d 1030, 1041 (8th Cir. 2016).

For the reasons discussed in denying Defendant's motion on Plaintiff's Due Process claim, see Section VI.B, supra, Plaintiff is entitled to partial summary judgment on that claim. To the extent Defendant sought or seeks to enforce the $5 fee statute against latex clubs for conduct undertaken prior to Defendant providing notice to such businesses, such an exaction is harsh and oppressive because it "gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute" and thus is unconstitutionally

retroactive under the Due Process Clause. See Hemme, 476 U.S. at 568; see also Landgraf, 511 U.S. at 265. However, when exactly the latex clubs were put on notice that the $5 fee statute would be interpreted by the Comptroller to cover their conduct—and thus from what point Due Process would permit the Comptroller to enforce the fee against the latex clubs—is a genuine issue of material fact. This issue is thus inappropriate for disposition at summary judgment and must be determined by the factfinder at trial.

Additionally, for the reasons discussed in denying Defendant's motion on Plaintiff's § 1983 claim, see Section VI.D, supra, Plaintiff is entitled to summary judgment on that claim as well. As previously discussed in this order, the amended rule violates Plaintiff's Free Speech and Due Process rights. See Sections V & VI.B, supra. The amended rule was also propounded under the color of state law. See 42 Tex. Reg. 223. The two requirements of a claim under § 1983 are thus satisfied. See 42 U.S.C. § 1983.

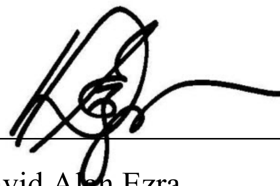
Summary judgment is therefore **GRANTED** as to Plaintiff's Due Process claim to the extent that assessing the fee on the latex clubs for conduct undertaken prior to them receiving notice is unconstitutionally retroactive and **GRANTED** as to Plaintiff's § 1983 claim.

CONCLUSION

For the reasons stated, the Court **DENIES** Plaintiff's motion to Amend. (Dkt. # 31.) The Court **GRANTS** Plaintiff's Motion for Summary Judgment. (Dkt. # 31.) The amended Rule 3.722 as it relates to defining clothing, § 3.722(a)(1), is therefore **DECLARED UNCONSTITUTIONAL** under the First Amendment. Defendant's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. (Dkt. # 34.) Summary judgment is **GRANTED** as to Plaintiff's vagueness claim. In all other respects, Defendant's motion is **DENIED**. Additionally, Plaintiff is **GRANTED** summary judgment as to its § 1983 claim and its Due Process claim on the partial issue that retroactive application of the $5 fee statute to conduct undertaken by the latex clubs prior to them receiving notice that it would be imposed on them in unconstitutional. Plaintiff's Equal Protection and Overbreadth claims, and the issue of when the latex clubs received notice that the $5 fee statute was being interpreted to apply to them survive summary judgment and can proceed to trial.

IT IS SO ORDERED.

DATED: San Antonio, Texas, February 27, 2019.



David Alan Ezra
Senior United States Distict Judge