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STATE “SUBSIDIES” AND UNNECESSARY PUBLIC FUNDING: THE TEXAS LEGISLATURE’S SUCCESSFUL RESTRICTION OF CONSTITUTIONAL RIGHTS IN DEPARTMENT OF TEXAS v. TEXAS LOTTERY COMMISSION

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STATE “SUBSIDIES” AND UNNECESSARY PUBLIC FUNDING: THE TEXAS LEGISLATURE’S SUCCESSFUL RESTRICTION OF CONSTITUTIONAL RIGHTS IN DEPARTMENT OF TEXAS v. TEXAS LOTTERY COMMISSION

Tyler Dever*  
INTRODUCTION

In the gambling-prohibited state of Texas, “charitable bingo” is an exception to the rule. The Texas Constitution renders most forms of gambling illegal. However, in 1980, the Texas voters amended their constitution to permit specific groups to participate in and host bingo. This Amendment led to the passage and implementation of the Bingo Enabling Act (the “Act”). So, while most forms of gambling, such as table games and slot machines, are still illegal in the state, the Act allows licensed charitable organizations to host bingo games, in which donors can play with hopes of winning cash prizes. The cash accumulated through bingo games provides revenue for the organization hosting the event.

The Texas Lottery Commission has referred to the bingo program as a subsidy, which allows it to restrict the use of bingo funds. The Texas government, however, does not allocate any money towards these organizations. Instead, it’s the organizations’ own fundraising efforts which generate the funds.

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1 See TEX. CONST. of 1845, art. VII, § 17.
2 TEX. CONST. § 47, cl. (b) (1980) (“The Legislature by law may authorize and regulate bingo games conducted by a church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs.”).
4 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 421 reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013) (“The Commission….contends that the charitable bingo program is a state subsidy…”).
5 Id. at 428-29 (Stewart, J., dissenting) (“the bingo program in Texas is wholly distinguishable from [a subsidy] simply because no public monies or “spending” by the state are involved.”).
The list of organizations that can apply for licenses under the Act is limited, but includes entities such as fraternal orders, veteran groups, and religious organizations. For example, the Veterans of Foreign Wars of the United States (“VFW”) is licensed under the Act to host bingo events within the State of Texas.

The Amendment, which allowed for the creation of the Act, requires that any granted bingo license be conditioned on the licensed organization’s use of bingo proceeds solely for that organization’s “charitable purpose.” The Act further prohibits licensed organizations from using any of their bingo proceeds for lobbying or various other types of political activity. Is this restriction on free speech constitutional under the First Amendment? Does the statute illegally deprive licensed organizations of their constitutional protections? In Dep’t of Texas v. Texas Lottery Commission (“Texas Lottery”), the plaintiffs asserted the later and sued the Texas Lottery Commission (the “Commission”) alleging that the funding restrictions are unconstitutional. The Fifth Circuit Court of Appeals however, sided with the state and upheld the Act’s disputed provisions.

This Note argues that the Act’s political advocacy restrictions are unconstitutional as applied to the Plaintiffs in Texas Lottery. This Note discusses government subsidies,
occupational licenses, and the doctrine of unconstitutional conditions. It then analyzes the charitable organizations’ First Amendment rights in light of the challenged Act. Although this Note argues against the majority’s upholding of the Act, it will also present flaws in the plaintiffs’ argument for injunction and explain why the court may have ruled in favor of the state.

Part I begins with a quick background of the case and the issue presented, and then furnishes a history of gambling in Texas, relevant portions of the Bingo Enabling Act, and applicable Internal Revenue Code sections regarding the charities’ tax-exempt status. Next it will cover the First Amendment, the unconstitutional conditions doctrine and corresponding case law, the standard for a facial unconstitutional challenge, and the doctrine of strict scrutiny. It will finish with standard definitions of government subsidies and how this definition plays into current jurisprudence, as well as within this case.

Part II presents an analysis of the specified doctrines and precedents as they apply to the facts of this case and the Act. Finally, Part II discusses the flaws in the majority’s opinion and ends with suggestions for the Texas Legislature or Texas Courts to effectively address this issue.

I. BACKGROUND

A. Dep’t of Texas v. Texas Lottery Commission

In *Texas Lottery*, the VFW, along with twelve other charitable groups, all holding bingo licenses, brought suit against the State of Texas and the Commission, claiming that the restrictions imposed under the Bingo Enabling Act infringed on their First Amendment right to

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12 *Id.* at 421.
13 Amvets Department of Texas, Inc.; Amvets Post 52, Inc.; Amvets Post 52, Auxiliary, Inc.; The Great Council of Texas, Improved Order of Redman; Redmen War Eagle Tribe No. 17; Redman Tribe No. 21 Geronimo; Redman Ramona Council No. 5; The Institute for Disability Access, Inc.; Temple Elks Lodge No. 138; Bryan Lodge No. 859; Austin Lodge No. 201; Anna Fire and Rescue, Inc..
The charities moved for summary judgment. The District Court for the Western District of Texas, interpreting the United States Supreme Court’s opinion in *Citizens United v. Federal Elections Commission*, concluded that the challenged provisions were facially unconstitutional under the First Amendment because the provisions burdened political speech and failed to satisfy strict scrutiny. Furthermore, the district court “concluded that the provisions violate the unconstitutional conditions doctrine because they require, as a condition of participating in the State's charitable bingo program, that charities not exercise their right to engage in political speech.” With these conclusions, the district court granted summary judgment and ordered a permanent injunction to prohibit the enforcement of the challenged sections. On appeal, the Fifth Circuit reversed and held that the statutory provisions were both permissible and valid.

The underlying issue centers on the classification of the bingo program. Specifically, the issue is whether the charities’ bingo-generated funds can properly be considered a government subsidy even though the text of the Act never refers to them in such a manner. The different classification of the funds impacts the state’s ability to restrict their use. While the government has been allowed to attach certain restrictions on government provided funds,

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14 *Texas Lottery*, 727 F.3d at 418.
15 *Id.* at 417.
17 *Texas Lottery*, 727 F.3d at 419.
18 *Id.* at 421.
19 *Id.* at 418.
20 The Court also addressed the issue of standing and held that the charities have standing to bring their claim. *Id.* at 421. The standing issue will not be discussed in this note.
21 *Id.* at 425.
22 See *id.*; see also *id.* at 426 (Stewart, J., dissenting).
23 See generally TEX. OCC. CODE ANN. §2001 (West).
24 See infra Part (I)(B)(3).
similar restrictions on government provided benefits, such as the granting of a license to conduct business, have often not been allowed.25

Three specific provisions in the Act restrict licensed charities’ use of their bingo-generated funds.26 The charities claim that two of these provisions are unconstitutional.27 So, the essential question concerns whether this program is a government subsidy or an attempt by the government to unconstitutionally control the charities’ business revenue.

The two largest organizations on the plaintiffs’ side are the VFW and the Institute for Disability Access (d/b/a ADAPT of Texas) (“ADAPT”). The VFW has dedicated its voice to help secure rights and benefits to veterans for their service.28 Among their many accomplishments, the VFW has “been instrumental in establishing the Veterans Administration, creating a GI bill for the 20th century [and in] the development of the national cemetery system.”29 ADAPT is a national grassroots organization that brings members together in an attempt to secure rights for the disability community.30 Both VFW and ADAPT use political advocacy and lobbying to advance their charitable missions and benefit their members.31 The plaintiffs argue that this Act impedes, rather than promotes, their use of bingo generated funds for their “charitable purpose.”32

The Fifth Circuit held the Act to be a subsidy because it allows a limited group of charities the ability to conduct bingo games in order “to generate extra revenue” and that “this

25 See infra text accompanying note 58; see also infra Part (I)(C)(2).
27 See infra part B, listing the provisions.
29 Id. (The GI bill for the 20th century granted expanded educational benefits to active-duty service members, and members of the Guard and Reserves, fighting in Iraq and Afghanistan.) (G.I. originally stood for “government issue” but was adopted by soldiers in WWII as reference to themselves, and now is commonly used to refer to all veterans).
31 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 418 reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013).
32 Id.
extra revenue is authorized to the limited extent that it is used for the charitable purposes of the organization.”33 The dissent, noted the majority’s confusion between a license and a subsidy, and concluded that the relevant provisions of the Act are unconstitutional.34

B. **History and The Bingo Enabling Act**

Lotteries and lottery-like enterprises had been outlawed in Texas since 1845, and were explicitly prohibited under the Texas Constitution.35 In 1980, the Texas voters amended their constitution to permit charitable bingo.36 This Amendment required that all proceeds from bingo games be spent in Texas for the organization’s “charitable purpose.”37 To implement this Amendment, the Texas Legislature passed the Bingo Enabling Act in 1981, which was codified in the Texas Occupations Code in 1999.38

The Act has similar wording to the Amendment and also requires organizations to use net proceeds from bingo for their organization’s “charitable purpose.”39 Section 2001.454 of the Act describes an organization’s “charitable purpose” as “a cause, deed, or activity” that is consistent with the organization’s tax-exempt status under federal income tax law.40

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33 *Texas Lottery*, 727 F.3d at 424-425.
34 *Id.* at 430 (Stewart, J., dissenting) (“Once the analysis is removed from the “subsidy” realm, then, the unconstitutionality of the Bingo Act’s political advocacy restrictions becomes apparent.”).
35 *See* TEX. CONST. of 1845, art. VII, § 17 (“No lottery shall be authorized by this state; and the buying of lottery tickets within this State is prohibited.”); *see also* TEX. CONST. art. III, § 47 (amended 1980) (“The legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, establishing or existing in other States.”)
36 A law enacted under this subsection must permit the qualified voters of any county, justice precinct, or incorporated city or town to determine from time to time by a majority vote of the qualified voters voting on the question at an election whether bingo games may be held in the county, justice precinct, or city or town. TEX. CONST. art. III, § 47 cl. (b).
37 TEX. CONST. § 47 cl. (b) (1980).
40 TEX. OCC. CODE ANN. § 2001.454 (West) (“Except as otherwise provided by law, the net proceeds derived from bingo...are dedicated to the charitable purpose of the organization only if directed to a cause, deed, or activity consisted with the federal tax exemption to the organization obtained under 26 U.S.C. § 501 and under which the organization qualifies as a nonprofit organization as defined by Section 2001.002.”) *see also* Dep’t of Texas,
“charitable purpose” requirement, the Act excludes from an organization’s activities three types of political speech. The Act specifically states that “[l]icensed . . . organization(s) may not use the net proceeds from bingo, directly or indirectly, to: (1) support or oppose a candidate or slate of candidates for public office; (2) support or oppose a measure submitted to a vote of the people; or (3) influence or attempt to influence legislation.”

Organizations must first obtain a license to participate in the program. Potential organizations include: veterans groups, churches, synagogues, religious societies, volunteer fire departments, non-profit veterans organizations, fraternal organizations, or non-profit organization supporting medical research or treatment programs. The Commission charges licensing fees to applicant organizations, determined by the size of the organization, with organizations generating larger amounts charged at higher rates. For the Commission to properly determine an organization’s fee level, each entity conducting bingo is required to report its proceeds and its use of them to the Comptroller of Public Accounts.

The Act has an additional requirement on top of the license fee and the requirement that the organization use its funds for charitable purposes: charities must also “remit to the commission a fee in the amount of five percent of the amount or value of all bingo prizes

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Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 420-21 reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013) (“[T]he VFW lobbies in support of property tax exemptions for disabled veterans and for veteran entitlement programs offered through the Veterans Administration. [The Court] see[s] no reason why these projects violate the [“charitable purpose”] definition, and the Commission provides no basis to conclude otherwise.”).

44 See TEX. CONST. art. III, § 47, cl. (b); see also TEX. OCC. CODE ANN. § 2001.001.
46 See TEX. CONST. art. III § 47, cl. (c) (“The law enacted by the Legislature authorizing bingo games must include…a requirement that the entities conducting the games report quarterly to the Comptroller of Public Accounts about the amount of proceeds that the entities collect from the games and the purposes for which the proceeds are spent”).
Thus, the non-profit organizations have to pay royalties from each game to the state.48

C. Facial Constitutional Challenges, Unconstitutional Conditions, and Strict Scrutiny

The plaintiffs claim that the statute is facially unconstitutional because it restricts political speech and, as a result, imposes an unconstitutional condition on their ability to participate in the program.49 The plaintiffs therefore assert that the statute fails to satisfy strict scrutiny.50

1. Facially Unconstitutional Standard

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”51 The charities claim that two specific sections of the statute unconstitutionally abridge their freedom of speech and are thus facially unconstitutional.52 “A facial challenge to a legislative act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the act would be valid.”53 The provisions must be found unconstitutional in all applications.54 If a challenger succeeds under a facial challenge, the challenged portion must be stricken from the act.55 The fact “[t]hat the challenged provisions “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.”56

2. Unconstitutional Conditions Doctrine

48 See id.
49 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 418 reh ’g en banc granted, 734 F.3d 1223 (5th Cir. 2013).
50 Id.
51 U.S. CONST. amend. I.
52 Texas Lottery, 727 F.3d at 418 (citing TEX. OCC. CODE ANN. §2001.456 (West)) (“[l]icensed . . . organization(s) may not use the net proceeds from bingo directly or indirectly to: . . . (2) support or oppose a measure submitted to a vote of the people; or (3) influence or attempt to influence legislation.”).
54 See id.
55 Id.
56 Id.
The doctrine of unconstitutional conditions provides that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.\(^{57}\) Although there are exceptions, discussed in the later part of this section, the doctrine has been interpreted to prohibit state actors from “constitutionally condition[ing] the receipt of a benefit . . . on an agreement to refrain from exercising one’s constitutional rights.”\(^{58}\) The unconstitutional conditions doctrine developed to avoid two kinds of activities: (1) “the use of [governmental] funds to discourage people from availing themselves of a constitutional protection”; and (2) “the use of governmental funds in a way that pressures or coerces the exercise of a right.”\(^{59}\)

The majority of cases involving unconstitutional conditions address situations where the government has placed a condition on the receipt of a subsidy and not on an underlying program or service.\(^{60}\) Conditions of this type have the force of prohibiting the recipient from engaging in constitutionally protected conduct outside the bounds of the subsidized program.\(^{61}\)

In *Agency for International Development v. Alliance for Open Society International*,\(^{62}\) the Supreme Court held that federal funding provisions within the United States Leadership Against HIV/AIDS Tuberculosis and Malaria Act of 2003 violated the First Amendment’s free speech protections by placing unconstitutional conditions on the recipients of the funds.\(^{63}\) The Act

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57 AM. JUR. 2D CONSTITUTIONAL LAW §411.
58 R.S.W.W., Inc. v. City of Keego Harbor, 397 F.3d 427, 434 (6th Cir. 2005); see also Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (“Under the well-settled doctrine of unconstitutional conditions . . . the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . . .”).
61 See id.
63 Id. at 2332.
compelled, as a condition of federal funding, the affirmation of a belief that by its nature could not be confined within the scope of the program.64

In *Federal Communications Commission v. League of Women Voters of California*,65 the Court similarly struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including editorializing with nongovernmental funds.66 The Supreme Court noted that this provision was an unconstitutional condition because it leveraged federal funds to regulate the stations’ speech outside the scope of the program by attempting to regulate not just the use of the federally granted funds but also the use of the stations’ private funds.67

While the unconstitutional conditions doctrine typically involves cases where government funding is at issue, it can also be found in cases involving licenses and permits.68 The Sixth Circuit, relying on Supreme Court precedent, has held that “a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression.”69 This was first expressed in *G & V Lounge, Inc. v. Michigan Liquor Control Communication*,70 where the Sixth Circuit struck down, as an unconstitutional condition, the city’s attempt to condition the plaintiff’s receipt of a liquor license upon the plaintiff’s waiver of its right to free expression.71

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64 *Id.* at 2330 (demanding that funding recipients adopt the Governments views on prostitution and sex trafficking or lose the funds all together).
66 *Id.* at 399-401.
67 *Id.* at 399.
71 *Id.* at 1077.
In *Perry v. Sindermann*, a case concerning the renewal of a college professor’s contract after he spoke negatively about the administration, the Supreme Court stated that “[e]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny [a] benefit for any number of reasons, there are some reasons upon which the government may not rely.” The Court further specified that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” The Supreme Court limited this language in *Rust v. Sullivan*, where it explained that the denial of a benefit by the government is not necessarily equal to the government “insisting that government funds be used for purposes which they were authorized.” The *Rust* Court specifically pointed to the fact that the organizations brought suit under an act authorizing the government to unequivocally fund a program and so allowed the government the ability to attach restrictions to these funds. This ability to attach restrictions on government granted funds arises out of the government’s power to spend for the general welfare.

3. General Welfare

The Spending Clause of the Constitution grants Congress the power “[t]o lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the Common Defense and general welfare of the United States.” The Spending clause has been interpreted to allow the
government to spend for the “general welfare” with almost unlimited bounds. Spending can be in the form of subsidies or tax breaks and tax-exemptions.

The “general welfare” spending power is not limited to the federal government; individual states also have the power to provide for the general welfare, through the use of subsidies or tax-exemptions within their borders. Inherent in the general welfare power is “the authority to impose limits on the use of such funds to ensure [government-granted funds] are used in the manner [the government] intended.” In Alliance for Open Society, the Supreme Court noted that “[a]s a general matter, if a party objects to a condition on the receipt of federal funding its recourse is to decline the funds, this remains true when the objection is that a condition may affect the recipients’ First Amendment rights.” In Justice Scalia’s dissenting opinion, he attempted to confine the doctrine to either coercive conditions or conditions not relevant to the objectives of the program. However, the majority held that Scalia’s bright-line restrictions were too limited. Rather, the court noted the unconstitutional conditions doctrine should attempt to distinguish between “conditions that define the limits of [a] government spending program” and “conditions that seek to leverage funding to regulate speech outside of the contours of the program itself.”

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80 See Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 426 reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013) (Stewart, J., dissenting) (citing Agency for Int’l Dev. v. Alliance for Open Society Int’l, Inc., 133 S.Ct. 2321, 2327-2328 (2013)).
81 See Leathers v. Medlock, 499 U.S. 439, 451 (1991) (citing cases that recognize the broad authority that state legislatures have broad latitude in exercising their spending powers).
83 Id.
84 Id. at 2325-2326 (Scalia, J., dissenting).
85 Id. at 2328.
86 Id.
In *Texas Lottery*, the Commission uses a similar “general welfare” argument to support the legislature’s imposed restrictions on the use of bingo proceeds.\(^8^7\) The Commission gives three reasons why the statute’s political advocacy restrictions are permissible.\(^8^8\) First, to regulate gambling, including “limiting the size of the state’s gambling industry,” second, to combat fraud on Texas’s citizens in the sense that the money goes to the charity advertised not to lobbyists, and third, to protect charities from using their funds for political advocacy and not for the organizations’ charitable purposes.\(^8^9\)

4. **Strict Scrutiny**

A strict scrutiny analysis is applied to laws that present a content-based speech restriction.\(^9^0\) A content-based speech restriction exists when the speech being constrained is defined by its content (i.e. political speech) and the statute seeks to restrict that form of speech.\(^9^1\) In *Citizens United*,\(^9^2\) Justice Kennedy, writing for the majority, stated that “[p]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”\(^9^3\) In its opinion, the Supreme Court chose to employ a strict scrutiny framework in order to protect First Amendment interests.\(^9^4\) Specifically the Court held that “[l]aws that burden political speech are ‘subject to strict scrutiny,’” placing the burden of proof on the government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”\(^9^5\)

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\(^8^7\) See infra Part (II)(A)(3)(a) (discussing the Commission’s argument that the restrictions support the general welfare and the state’s underlying interests).

\(^8^8\) Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 418 reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013) (Stewart, J., dissenting); see also Brief of Appellate, Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 734 F.3d 1223 (5th Cir. 2013) (No. 11-50932) 2013 WL 6228856, at *3.

\(^8^9\) Texas Lottery, 727 F.3d at 418.

\(^9^0\) See infra note 95.


\(^9^3\) Id. at 340.

\(^9^4\) Id.

\(^9^5\) Id. (quoting Wisconsin Right to Life, Inc. v. Federal Election Comm’n, 551 U.S. 410, 464 (2006)); see also 16A AM. JUR. 2D CONSTITUTIONAL LAW § 411 (“Conditions on recipients of government benefits that implicate
law is narrowly tailored if it advances the state’s interest, is not over inclusive, is not under inclusive, and is the least-restrictive alternative.\textsuperscript{96} Whether a state’s interest rises to the level of a “compelling government interest”\textsuperscript{97} must be assessed through the facts of each case.\textsuperscript{98}

5. **Compelling Government Interest**

To assess whether the restriction “furthers a compelling governmental interest,” many courts have employed the *Central Hudson*\textsuperscript{99} test, a test that predominates commercial speech jurisprudence.\textsuperscript{100} While the speech at issue here is political speech, not commercial speech, the test is still worth mentioning because it addresses similar factors and uses a straightforward assessment.\textsuperscript{101} The test has a lower burden that strict scrutiny, but still can be useful in examining the issues here.\textsuperscript{102} The test asks:

1. Does the speech concern lawful activity and is it non-misleading? If the answer is no, and the speech concerns illegal activity or is misleading, the analysis ends.
2. Does the government have a substantial interest in its regulation?
3. Does the regulation directly advance the substantial governmental interest?
4. Does the regulation restrict more speech than necessary to serve the governmental interest?\textsuperscript{103}

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\textsuperscript{96} Republican Party of Minn. v. White, 416 F.3d 738, 750 (8th Cir. 2005) (en banc) (citations omitted).

\textsuperscript{97} See also, BLACK’S LAW DICTIONARY, 7th ed. 1999. (Compelling-state-interest test is “A method for determining the constitutional validity of a law, whereby the government’s interest in the law is balanced against the individual’s constitutional right to be free of the law, and only if the government’s interest is strong enough will the law be upheld.”).

\textsuperscript{98} Republican Party of Minn., 416 F.3d at 750 (“In general, strict scrutiny is best described as an end-and-means test that asks whether the state’s purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest)."


\textsuperscript{100} *Legal Almanac: The First Amendment: Freedom of Speech § 6:5; see also, Greater New Orleans Broad. Ass’n, Inc. v. United States, 527 U.S. 173, 173 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-555 (2001).*

\textsuperscript{101} See *Cent. Hudson,* 447 U.S. at 571.

\textsuperscript{102} *See Lorillard Tobacco,* 533 U.S. at 554 (noting the petitioners urge the court to use a strict scrutiny analysis instead of the *Central Hudson* test).

\textsuperscript{103} *Cent. Hudson,* 447 U.S. at 566.
Although this test was set forth by the *Central Hudson* Court to invalidate restrictions on advertising by utility companies,\(^{104}\) the *Citizens United* Court used a similar test to invalidate restrictions on corporate campaign funding.\(^{105}\)

In *Republican Party of Minnesota. v. White*,\(^{106}\) the Eight Circuit, on remand from the Supreme Court, described the compelling interest assessment as a means-to-an-ends test, where the compelling government interest, the “ends,” and the “means,” or the regulation in place by the government, are compared to similar regulations enacted to protect “similarly significant threats,” if any.\(^{107}\) The comparison is key because courts assume that “[i]f an interest is compelling enough to justify abridging core constitutional rights, a state will enact [other] regulations that substantially protect that interest from similarly significant threats.”\(^{108}\)

Ultimately, however, whatever assessment is used, the typical understanding is that when statutes contain content-based speech restrictions they are “presumptively invalid,” until proven otherwise.\(^{109}\)

**D. Government Subsidies, Tax-Exemption, and “Occupational Licenses”**

The Commission argues that the bingo program is actually a subsidy, and hence allows them to regulate the use of the funds.\(^{110}\) Even the majority concedes that this “supplemental income stream is accessible by way of license, instead of cash payments or a tax exemption,”\(^{111}\)

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\(^{104}\) *Id.* at 570-571.


\(^{106}\) *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc) (citations omitted).

\(^{107}\) *Id.* at 750.

\(^{108}\) *Id.* (“A clear indicator of the degree to which an interest is “compelling” is the tightness of the fit between the regulation and the purported interest; where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being “compelling.”).

\(^{109}\) *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Republican Party of Minn.*, 536 U.S. at 780 (“[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon ... speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.”).

\(^{110}\) *Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n*, 727 F.3d 415, 421 *reh’g en banc granted*, 734 F.3d 1223 (5th Cir. 2013).

\(^{111}\) *Id.* at 424.
yet they refuse to alter their conclusion that these “licenses” are not actual licenses, but instead are a form of a government subsidy.112

1. License

Black’s Law Dictionary defines “license” as “a revocable permission to conduct some act that would otherwise be unlawful.”113 An associated term, “license fee,” is defined as “a monetary charge imposed by a governmental authority for the privilege of pursuing a particular occupation, business, or activity.”114 Both these terms appear within the Bingo Act in relevant portions.115 Section 2001.507 of the Act refers to the program members as “licensed authorized organization(s)”116; Section 2001.104 enumerates the “licensing fee” fee schedule charged to each organization117; and Section 2001.103 provides the guidelines necessary for “temporary licenses.”118 As the terms appear within the text, they appropriately support their plain meaning. The majority opinion, however, substitutes the common perception of license, with the alternative meaning of “subsidy” to justify their holding.

2. Subsidy

The term subsidy is defined in Black’s Law Dictionary as “a grant, [usually] made by the government, to any enterprise whose promotion is to be considered in the public interest.”119 “Although governments sometime make direct payments (such as cash grants), subsidies are [usually] indirect. They may take the form of research-and-development support, tax breaks, provisions of raw materials at below-market prices, or low-interest loans or low-interest export

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112 Id. at 425.
113 BLACK’S LAW DICTIONARY (9th ed. 2009) (license).
114 Id. (license fee).
115 See generally TEX OCC. CODE ANN. §2001 et al. (The Bingo Enabling Act).
117 Id. at § 2001.104.
118 Id. at § 2001.103.
119 BLACK’S LAW DICTIONARY (9th ed. 2009) (subsidy).
credits guaranteed by a government agency." Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption is considered a subsidy because it 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.

The Commission argues the charitable bingo program is not a license, but rather a state subsidy, provided to benefit qualifying charities. In this way, the Commission claims that the challenged provisions simply “represent a decision by the state not to subsidize political speech.” The Supreme Court has emphasized that a decision not to subsidize speech does not create a penalty on speech. In Reagan v. Taxation with Representation of Washington, the Court held that Congress could “reasonably refuse to subsidize lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax deductible contributions to support their lobbying efforts.” The court explained that this is Congress’s choice not to pay for lobbying.” So, under Reagan, restrictions are constitutional, if the government somehow provided the funds whose use is restricted.

3. Section 501(c)(3) – Tax Exemption

The thirteen plaintiff groups are charitable organizations and fall under the tax-exempt status of the Internal Revenue Code. The plaintiffs receive tax benefits due to their status as

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120 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 429 reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013) (Stewart, J., dissenting) (quoting BLACK’S LAW DICTIONARY).  
121 Id.  
122 Id.  
123 Id. at 421; see also Brief of Appellate, Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 734 F.3d 1223 (5th Cir. 2013) (No. 11-50932) 2013 WL 6228856, at *1.  
124 Texas Lottery, 727 F.3d at 421.  
125 Id. at 424 (citing Regan v. Taxation with Representation of Washington, 461 U.S. 540, 444-46 (1983)).  
127 Id. at 545.  
128 Id. at 546.  
501(c)(3) organizations. To receive this classification, an organization cannot use more than an insubstantial amount of their tax-exempt funds for any sort of political advocacy and lobbying. The insubstantial amount requirement in the IRC is already a restriction placed on the use of charitable funds.

Under Federal Tax law, an organization qualifies for tax-exempt status if it passes both organizational and operational tests described in Treasury Regulation section 1.501(c)(3)-1. Section 501(c)(3) does restrict lobbying activity, but it does not forbid it. The code specifies that an organization operated exclusively for a charitable purpose is allowed to participate in political advocacy as long as it constitutes an insubstantial part of the group’s activities. Treasury Regulation section 1.501(c)(3)-1(c)(1), defines what is meant by “operated exclusively for [a] charitable purpose” as the same type of activities specified in section 501(c)(3) as tax-exempt purposes. The code furthers than “an organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” Neither the charities nor the Commission argue over the charities’ tax-exempt status; however, the Commission does attempt to claim that any lobbying by the charities would disqualify them for tax-exempt status, thus the provisions in the Act are not unconstitutional. However, the plain text of Section 501(c)(3) shows that these organizations, absent the provisions in the Act, would

131 Id.
132 See id. This paper will also stress the difference between an insubstantial amount, as applied under the IRC, and the complete ban applied by the Act, on the use of funds for political advocacy.
133 26 C.F.R. § 1.501(c)(3)–1 (describing 26 U.S.C. § 501(c)(3)).
135 26 U.S.C. § 501(c)(3) (“corporations . . . fund, or foundation, organized and operated exclusively for . . . charitable . . . purposes” which “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.”) (emphasis added).
136 26 C.F.R. § 1.501(c)(3)–1 (“[a]n organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in 501(c)(3).”) (emphasis added).
137 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 418-419, reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013).
be allowed to use the funds for some political activity, contingent on it being an insubstantial part of their total activities.\footnote{See 26 U.S.C. § 501(c)(3) (West). Political activity however, would still need to be conducted in Texas, i.e. lobbying the Texas legislature for greater rights for an organization’s members, thus still satisfying the requirement of 501(c)(3) and the Texas Constitution’s requirement that all bingo generated funds be spent in Texas for the organization’s charitable purpose. Id.; see also TEX. CONST. § 47, cl. (b) (1980).}

II. \textbf{Analysis}

The first problem is the majority’s classification of the bingo program as a subsidy. If it is a subsidy then the state can likely condition the use of the funds, however if it is a license, creating the ability to privately generated funds, just because the state provided the portal of entry into that market, does not necessarily mean that they can put constitutional restrictions on the use of those generated funds. The key distinction is the classification of the Act.

After the classification of the Act is addressed, next is a determination on whether the Act’s restrictions rise to the level of unconstitutional conditions, and an assessment of the Act under the strict scrutiny analysis. This section will address each of the foregoing. This section will also address the structure and text of the Act including an analysis regarding statutory construction.

If specific provisions in a statute are unconstitutional, the next necessary assessment is whether the specific provisions are severable, in that the Act can exist without them, or whether the Act in its entirety is unconstitutional. This Section will end with a discussion of the potential severability of the statute.

A. \textit{Should The Bingo Enabling Act Defeat A Constitutional Challenge}

The dissent in \textit{Texas Lottery} asserts that the challenged provisions are facially unconstitutional.\footnote{Texas Lottery, 727 F.3d at 426 (Stewart, J., dissenting).} As aforementioned, a facial challenge requires that there be \textit{no} situation
where the statute can be valid.\textsuperscript{140} To defeat a facial challenge, the Act’s provisions must, on their face, be able to be construed in such a manner that the provisions can be applied to a set of individuals without infringing upon constitutionally protected rights.\textsuperscript{141} Here that standard is met. Each organization has a constitutionally protected First Amendment right and although, under the challenged provisions of the Act, they are prevented in engaging in political speech whether they choose to engage in it or not, they aren’t bared from engaging in political speech outside the program\textsuperscript{142} Not every charity actively engages in political advocacy in order to benefit their members.\textsuperscript{143} Although there are charities that can participate in the program and have no need for political advocacy, the restrictions still apply to them. So, under the Act, while there is no licensed organization to which the challenged provisions would not apply, there is still “set(s) of circumstances” which could allow the Act to defeat a facial challenge, such as engaging in political speech using outside funds.\textsuperscript{144}

Although the majority rejected the plaintiff’s facial challenge, an as-applied constitutional challenge however, would have succeeded due to the circumstances encompassing the specific challengers. An as-applied challenge has a lower burden of proof and does not require as drastic measures, such as striking the challenged portions of the Act.\textsuperscript{145} Not only do these restrictions prevent these organizations for using their generated funds to the fullest ability of their charitable purpose, but the provisions also act as a governmental restriction on a licensed occupation.

1. License v. Subsidy

\textsuperscript{140} See supra Part (I)(C)(1) (discussing requirements for a facial challenge).
\textsuperscript{141} Id.
\textsuperscript{142} See U.S. CONST. amend. I; see infra note. 175.
\textsuperscript{144} See United States v. Salerno, 481 U.S. 739, 745 (1987).
\textsuperscript{145} 16 C.J.S. \textit{CONSTITUTIONAL LAW} § 187 (“[a]n as applied challenge is a claim that the operation of a statute is unconstitutional in a particular case”).
In order for a “tax break” to count as a “subsidy,” it needs to be targeted at some person or action that would otherwise be obligated to pay some tax of general application. An action whose absence would not lead to the default payment of a tax cannot be a subsidy in this sense. Absent the bingo license, these organizations wouldn’t be paying taxes on any bingo revenue, because, as even the majority points out, they wouldn’t have any.

The Court’s ruling rests on interpreting the bingo program as a government subsidy. The majority opinion, however, substitutes the common perception of license, with understood meaning of “subsidy” to justify this holding. As, a subsidy, the Texas legislature would be allowed to restrict the use of these funds, it would simply be the Texas legislature choosing not to pay for lobbying. However, the bingo program is not the state government paying for anything. The funds only filter to the state through the five percent royalty payment the charities pay to the state. In this way, instead of exempting the plaintiffs from paying into a revenue stream, like how a tax-exemption would function, the license creates on that would not otherwise exists. So while the Commission argues that it has simply chosen not to pay for lobbying, they are never supplying the funds in the first place.

The dissent argues correctly that this “subsidy” is more similar to a license than a cash payment or tax-exemption. Additionally, the dissent points out that the Act resembles a revenue-generating arrangement for these charitable organizations and the State, which, through licensing fees and royalty payments charged to the organizations, receives a percentage of each

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146 For example, if the default baseline is that everyone similarly situated to me has to pay a tax, being given an idiosyncratic tax break is a subsidy to the person receiving it.
147 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 424-25, reh’g en banc granted, 734 F.3d 1223 (5th Cir. 2013).
148 Id. at 422-424; see also Brief of Appellee, Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 734 F.3d 1223 (5th Cir. 2013) (No. 11-50932) 2013 WL 6228856, at *8. (“[T]he Bingo Act’s restrictions on the use of bingo proceeds for political advocacy are permissible conditions on a government subsidy.”).
149 See Texas Lottery, 727 F.3d at 426 (Stewart, J., dissenting).
151 See Texas Lottery, 727 F.3d at 426 (Stewart, J., dissenting).
award paid out. The majority makes a minimal attempt to refute this, stating this argument “places form over substance” and seems to only reiterate their opinion that the program is a subsidy.

The disagreement between the majority and the dissenting opinions in the case is based on whether the funds the charitable organizations derive from bingo are or are not a governmental “subsidy.” However, it could equally be argued that because the money is not taxed, that this program shares similarities with subsidy but is instead in the form of a tax exemption. The Supreme Court has many times held that tax-exemptions, similar to subsidies, are a form of governmental funding by decreasing the amount of taxes, which the charities have to pay. This distinction however, is not addressed by the court but, if it was, could be argued that the royalty payments to the state are a form of tax, so that the funds are not actually tax-exempt. Without addressing the distinction between tax-exemptions and subsidies, the conclusion that this program is a “subsidy,” the only explanation the majority provides for its holding.

The majority bases their holding on the basis that just because “this supplemental income stream is accessibly by way of a license, instead of cash payments or a tax-exemption, [it] does not change the fact the bingo program constitutes a government subsidy for participating charities.”

The charities however do not receive funds, in any sense, from the government. “[The] government distributes no government funds or any other largesse, other than the right to engage

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152 Id. at 429 (Stewart, J., dissenting); see also TEX. OCC. CODE ANN. §§2001.104, 2001.502 (West).
153 Texas Lottery, 727 F.3d at 424.
154 Id. at 430 (Stewart, J., dissenting).
155 Taxation With Representation, 461 U.S. at 544 (“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.”).
156 Texas Lottery, 727 F.3d at 424.
in a highly regulated trade.” 157 To be eligible for the program, each charity must apply and pay a licensing fee. 158 After acquiring these licenses the charities then are allowed to conduct bingo games for the purpose of generating “additional revenue.” Additionally, to paying the state an annual licensing fee, the charities must also pay the state five percent of each bingo prize awarded. 159 This is similar to other types of occupational licenses, such as medical licenses. While practicing medicine is illegal without a license, those who qualify and pay for the license are then allowed to conduct that activity. Bingo is not a subsidy from the state, it is an occupational licenses that only the qualified and those willing to pay for it can actively engage in.

Public funds in the normal sense are understood to be monies accumulated in the State’s treasury, through taxes on its citizens. Typical restrictions on state subsidies have been allowed because they are “‘designed to ensure that the limits of the federal program are observed,’ and ‘that public funds [are] spent for the purposes they were authorized’” 160

Here, however the “public funds” at issue here are generated directly from the public playing and participating in bingo events and thus funding the charity, they never pass through the possession of the state. The Lottery Commissions’ own website describes bingo as a “business.” 161 This further emphasizes that the revenue charities realize from bingo does not come from the Texas government, but directly from each charity’s “business” operations.

157 Id. at 430 (Stewart, J., dissenting).
159 Texas Lottery, 272 F.3d at 429 (Stewart, J., dissenting); see also TEX. OCC. CODE ANN. § 2001.502 (West).
161 Bingo for Beginners: An overview of Charitable Bingo in Texas, Texas Lottery Commission, http://www.txbingo.org/export/sites/bingo/About_Us/Bingo_For_Beginners/ (revised April 20, 2012) (“Bingo is a business—as such, it takes a well-thought-out business plan, professional, detailed and accurate record keeping, employee payroll management and close supervision and the hard work of your members.”).
The Commission asserts that “the challenged provisions in this case do nothing to restrict speech outside the scope of the State’s bingo program.”\textsuperscript{162} It furthers that the “charities are free to participate in the bingo program and engage in political advocacy; they simply must not use bingo proceeds to do so.”\textsuperscript{163} These statements do support the ability to have potential restrictions on the program if it were a subsidy, however they provide no basis for the majority’s holding that the program valid in the context of a state subsidy. When the state provides state funds, it is well established that the state government can also attach regulations to the use of those funds.\textsuperscript{164} However, the state does not provide the funds at issue here.\textsuperscript{165} The Act contains language that reflects the opposite, and rather that the funds are the result of the charities own fundraising abilities.\textsuperscript{166}

While the Court holds that “the [s]tate’s charitable bingo program, established in the Texas Constitution and implemented by the Bingo Act, constitutes a subsidy for participating charities,”\textsuperscript{167} the Court also goes on to explicitly state that it does not hold that commercial occupational licenses are subsidies, or that the government can regulate commercial occupational licenses in the same manner.\textsuperscript{168} So, in essence, the majority disqualifies the bingo program from the typical licensing process and classifying it as a subsidy, a step that is improper and unsupported. They disagree with the charities’ contention that if the state can regulate revenue generated through one form of license, then the Texas government can restrict speech funded by any licensed activity.\textsuperscript{169} Although the majority states that this is not the state regulating licensed

\textsuperscript{162} \textit{Texas Lottery}, 727 F.3d at 425.  
\textsuperscript{163} Id.  
\textsuperscript{165} \textit{TEX OCC. CODE ANN.} §2001.001 \textit{et seq.} (2012).  
\textsuperscript{166} Id.  
\textsuperscript{167} \textit{Texas Lottery}, 727 F.3d 424-425.  
\textsuperscript{168} Id. at 425.  
\textsuperscript{169} Id.
activity and thereby not creating an unconstitutional condition, the statement is misplaced because that is exactly what it being accomplished.

The statute allows the qualified organizations the ability to purchase bingo licenses for scheduled rate. These licenses don’t guarantee a specific appropriation of funds from the government nor do they guarantee that the organization will generate any specific level of revenue. They solely allow license holders the ability to participate in an otherwise illegal activity, similar to liquor license, an entertainment permit, or other form of occupational license. Without the charities own business efforts, they would have no access to these potential additional funds.

2. Unconstitutional Conditions Doctrine

“Political speech is indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation.” Charitable organizations are also corporations, with added tax-exemption benefits. Whereas there are greater restrictions on use of funds for charities compared to for-profit or non-profit corporations, all corporations in general have been held to have the right of free speech. The Supreme Court has continuously held that the denial of a government benefit cannot be predicated on the exercise of a constitutional right. However, conditions that are considered reasonable have been allowed

171 See Texas Lottery, 727 F.3d at 431 (Stewart, J., dissenting).
175 Citizens United, 558 U.S. at 342 (2010).
Courts employ the doctrine of strict scrutiny to assess whether a condition is allowable.

3. Content-based Speech Restrictions and Strict Scrutiny

The speech in question is content based. The statute is only directed at forms of political speech. The Commission attempts to argue that the Act does not include a content-based speech restriction claiming that the restrictions are “content-neutral” and therefore should not be judged under a strict scrutiny standard. However this is an unsupported argument, the Act is only directed towards political speech and the restrictions are only applied towards political speech, no other forms. Laws that include content-based speech restrictions must pass a strict scrutiny analysis in order to be valid. To satisfy strict scrutiny, a law or policy must pass a three-part test: the statute must (a) further a compelling governmental interest, (b) be narrowly tailored, and (c) be the least restrictive means for achieving that interest.

a. Compelling Governmental Interest

To assess whether the restrictions “further a compelling governmental interest,” the four factors under the Central Hudson test, can be used. While restricting political speech from some charitable organizations may serve governmental purpose, there seems to be no evidence

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178 See supra note 52.
179 See id.
180 Brief of Appellate, Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 734 F.3d 1223 (5th Cir. 2013) (No. 11-50932) 2013 WL 6228856, at *3.
181 See supra note 95; see also Playboy Entm’t Group, 529 U.S. at 811 (2000).
182 See supra note 59; see also Playboy Entm’t Group, 529 U.S. at 813 (2000) (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (a content based speech restriction can stand only if it satisfies strict scrutiny)).
184 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 566 (1980); see supra Part (I)(B)(5) (The compelling governmental interest tests assess restrictions on the basis of 5 questions. “(1) Does the speech concern lawful activity and is it non-misleading? If the answer is no, and the speech concerns illegal activity or is misleading, the analysis ends. (2) Does the government have a substantial interest in its regulation? (3) Does the regulation directly advance the substantial governmental interest? (4) Does the regulation restrict more speech than necessary to serve the governmental interest?”).
that outlawing the VFW’s political speech, a main facet of their organizational purpose, adds any benefit to the enumerated government interests presented.\textsuperscript{185}

First, the Supreme Court has recognized that First Amendment protection extends to political speech.\textsuperscript{186} The speech that the organizations wish to engage in is protected speech by the First Amendment, and thus is not unlawful. The state does not claim that the speech itself is unlawful, just that the organizations can’t use their bingo revue to support it.

Second, the Commission asserts multiple reasons why the restrictions under §2001.454 protect “substantial” government interests.\textsuperscript{187} These include: “combating fraud on Texas’s citizens, meaning ‘ensuring that [citizens’] money goes only toward the charity advertised by the bingo hall’ and ‘not lobbyists’” and “protecting charities from squandering bingo revenue on political advocacy as opposed to their ‘charitable purpose.’”\textsuperscript{188}

Third, while these are “substantial” interests, the dissenting opinion asserts that there is difference between “substantial” and “compelling.” And further, “the Commission fails to explain how its interest in regulating gambling translates into a “compelling” interest regulating political speech that may or may not relate to gambling.”\textsuperscript{189} The specific evidence to support these objections is Texas’ discrepancies in regulation for other types of gambling activity.

Lastly, many of the organizations in this suit, including the VFW, lobby for benefits for their members. The Acts prohibitions on the use of these donated funds by their members seems

\textsuperscript{185} Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 420-21 \textit{reh’g en banc granted}, 734 F.3d 1223 (5th Cir. 2013) (“[T]he VFW lobbies in support of property tax exemptions for disabled veterans and for veteran entitlement programs offered through the Veterans Administration.”).


\textsuperscript{187} See Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 432 \textit{reh’g en banc granted}, 734 F.3d 1223 (5th Cir. 2013) (Stewart, J., dissenting); see also Brief of Appellate, Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 734 F.3d 1223 (5th Cir. 2013) (No. 11-50932) 2013 WL 6228856, at *3.

\textsuperscript{188} \textit{Texas Lottery}, 727 F.3d at 432 (Stewart, J., dissenting).

\textsuperscript{189} \textit{Id.} at 432-433.
more similar to not having the money go toward the charitable purpose of the VFW as many of the members normally consider it.

b. Narrowly tailored

After the underlying state interest is found to be sufficiently compelling, the regulation is then analyzed to assess if is narrowly tailored.190 “A law is narrowly tailored if it advances the state’s interest, is not over inclusive, is not under inclusive, and is the least-restrictive alternative.”191 The dissent points out a key distinction in Texas’s legislature’s regulations on gambling, revealing the under inclusiveness of this restriction.192 “A law’s under inclusiveness — its failure to reach all speech that implicates the interest—may be evidence that an interest is not compelling, because it suggests that the government itself doesn’t see the interest as compelling enough to justify a broader statute.” 193

Similar restrictions on political speech are lacking in other areas within the Texas gambling arena, such as dog and horse track operators.194 Additionally, while the government asserts this interest in curtailing the size of the gambling industry,195 the speech restrictions are not regulations on gambling per se, but are restrictions on the use of funds generated by gambling activities.196 Both of these points undermine the Commission’s claimed governmental

190 Republican Party of Minnesota v. White, 416 F.3d 738, 751 (8th Cir. 2005) (citing EU v. San Francisco County Democratic Central Committee, 489 U.S. 214, 222 (1989) (“Once a state interest is found to be sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest.”)).
191 See supra note 95; see also Republican Party of Minn., 416 F.3d 738 (8th Cir. 2005) (en banc) (citations omitted). The “least restrictive alternative” part of the test will be addressed in section (e).
192 Texas Lottery, 727 F.3d at 432-33 (Stewart, J., dissenting).
194 Id. at 433; Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2420 (1996) (“a law is not narrowly tailored if it fails to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech.”).
195 See supra note 89; see also supra Part (I)(C)(3).
196 Id.
interests in curtailing the size of the gambling industry, and suggest that the statute is not justified.\textsuperscript{197}

c. The Least Restrictive Means

Each aspect of the strict scrutiny assessment can be construed against the statute with the largest prong, relevant to this factor, whether a restriction is the least restrictive means of reaching the result. Here, does the regulation restrict more speech than necessary to serve the governmental interest? Yes. While the state claims that organizations can use other funds for political speech, the state neglects to take into account that some organizations may not have any separate funds.\textsuperscript{198} The majority’s own reasoning holds that the program was created as a way for charitable organizations to \textit{generate} revenue, thereby implying that some charities may not have minimal or no revenue without the Act.\textsuperscript{199} Additionally, the dissent emphasizes “the availability of nonspeech alternatives for regulating the gambling industry, combating fraud, and ensuring the charities use their bingo proceeds for charitable purposes,” thereby providing other options to satisfy the government interests that would not involve a complete ban on charities’ political speech.\textsuperscript{200} These nonspeech alternatives are what “render the Bingo Act’s political advocacy restrictions facially invalid because the speech restrictions are not the least restrictive means to achieve those ends.”\textsuperscript{201}

Furthermore, as seen with the Internal Revenue Code the state can restrict the use of funds “substantially” and still be able to serve the governmental interests it wishes to advance.

\textsuperscript{197} \textit{Texas Lottery}, at 434-35; see also The Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989) (holding that a statute’s underinclusiveness “raises serious doubts” about whether the law in fact serves the government’s asserted interest).
\textsuperscript{198} \textit{Texas Lottery}, 727 F.3d at 424.
\textsuperscript{199} Id. (emphasis added).
\textsuperscript{200} Id. at 435 (Stewart, J., dissenting).
\textsuperscript{201} Id. (citing Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637-38 (1980) (discussing how an unconstitutional statute prohibiting charitable fundraising could have been more narrowly tailored by reasoning that “[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed”)).
B. **Structure and Statutory Construction of the Bingo Enabling Act**

Both the Act’s structure and text support the finding that the Act is not a subsidy, but actually a license. The Bingo Act itself is located within the “Texas Occupational Code.” Which by association links it to other “occupations” and licensed activity. Additionally, the Act specifically falls under Title 13, the subsection for “Sports Amusements, and Entertainment.”

The nosciture a sociies canon of statutory construction provides that similar terms are grouped together. The Bingo program, contained in the section associated with amusement parks, movies, sports, music appears more similar to a license, like the petitioners argue, than a government subsidy. In fact, there is no reference to the term “subsidy” anywhere in Title 13.

The majority’s attempt to distinguish the Bingo program from commercial occupational license is unsupported. The Court cites no case law, no precedent, not even a form of statutory interpretation to provide rationale for this conclusion. It is not just form or substance, but both which distinguish the bingo program from the ordinary concept of a subsidy.

1. **Outright Ban On Political Speech**

History surrounding the Act and its parenting Amendment also take support away from the majority’s opinion. Without this program, some charitable organizations could have minimal or no funds. While the Government contends that organizations are “free to . . . engage in political advocacy,” many of the smaller charitable organizations may have no way of

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203 Id.
204 See generally Nancy Staudt, et. al., *Judging Statutes: Interpretive Regimes*, 38 Loy. L.A. L. Rev. 1909, 1932–34 (2005) (footnotes omitted) (canon of statutory construction describing that a list of similar terms denotes s a category in which other similar terms fit. This by implication excludes unlike terms . . . .).
206 See Texas Lottery, 727 F.3d at 424 (“Here, the State has created a subsidy program where select charities are permitted to engage in a gambling activity in order to raise extra money for their charitable causes”).
207 See generally Texas Lottery, 727 F.3d at 422-425.
208 See supra note 119 (definition of subsidy).
209 See supra Part (I)(B) for description of the Act’s history.
210 Texas Lottery, 727 F.3d at 424.
doing this without bingo revenues. Thus, although the government claims that the organizations can use other self-generated funds for political advocacy, if the charities have no other funds, then this provision acts as an “outright ban” on this type of activity for these organizations.\textsuperscript{211} As expressed in \textit{Citizens United}, statutory provisions that amount to “outright ban[s]” on political speech are the “classic example of censorship” and are unconstitutional.\textsuperscript{212}

In \textit{Citizens United}, the Court held that the Government couldn’t, under the First Amendment, suppress political speech on the basis of the speaker’s corporate identity.\textsuperscript{213} It further stated that “no sufficient governmental interest justifies limits on the political speech of nonprofit . . . corporations.”\textsuperscript{214} There, the Court invalidated a statute prohibiting corporations from making campaign contributions in certain elections. The corporations challenged the statute on both facial and as applied grounds, but the Court only assessed it under the higher, facial, challenge.\textsuperscript{215} Also in \textit{Citizens United}, the Court recognized that, regardless of whether the corporations could form “political action committees” that would be allowed to engage in advocacy on their behalf, the relevant portions of the statute constituted an “outright ban” on corporate speech, and were thus facially unconstitutional.\textsuperscript{216}

Although this “outright ban” may be unconstitutional as applied to certain classes of the charities, the ban does not appear to fulfill the difficult test of a facial challenge.\textsuperscript{217} \textit{Citizens United} found that statute in question was unconstitutional as applied.\textsuperscript{218} The \textit{Citizens United} Court dismissed an alternative count raising a facial challenge to the statute.\textsuperscript{219} The majority

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\textsuperscript{212} \textit{Id.} at 337.  \\
\textsuperscript{213} \textit{Id.} at 365.  \\
\textsuperscript{214} \textit{Id.}  \\
\textsuperscript{215} \textit{Id.}  \\
\textsuperscript{216} \textit{Id.}  \\
\textsuperscript{217} \textit{See supra} note 53; \textit{see also supra} Part (II)(A).  \\
\textsuperscript{218} \textit{Citizens United}, 558 U.S. at 329.  \\
\textsuperscript{219} \textit{Id.}
\end{flushleft}
mentions the “complete ban” of political speech resulting from the statute in *Citizens United*, but dismisses the potentiality of the similar result by agreeing with the Commission that charitable groups are allowed to still participate in political speech, they just can’t use funds directly or indirectly generated from bingo to do it. However, this argument assumes that the charities have other funds, if they don’t, then it appears that the provisions actually do accomplish a “complete ban” on political speech, and are unconstitutional.

2. Tax-Exempt Status

Since section 2001.454 of the Bingo Act requires that the charities use the bingo proceeds for their charitable purpose(s), the use of bingo-generated revenue for political advocacy, absent the restrictions, would be proper as long as the political advocacy was in furtherance of the group’s charitable purpose. The majority explicitly agrees with this. So, in essence, since one of VFW’s largest objectives is to lobby for veterans’ rights, the use of funds for this purpose appears completely consistent with the Act, minus the restrictions at issue.

Under Section 501(c)(3), excessive lobbying by a tax-exempt organization, could result in the revocation of tax-exemption. Section 501(c)(3) expresses that “no substantial part of the activities” of tax-exempt organizations could “attempt to influence legislation.” While the original statute was intended to be more restrictive, Congress settled on this “substantial” clause

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220 Dep’t of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm’n, 727 F.3d 415, 421-22, *reh’g en banc granted*, 734 F.3d 1223 (5th Cir. 2013).
221 *Citizens United*, 558 U.S. at 365.
223 *Texas Lottery*, 727 F.3d at 420 (“it is easy to imagine scenarios where a charity could use political advocacy to advance its charitable purpose in a way consistent with the Act.”); *see also id.* (“The definition shows that the requirement is satisfied so long as bingo proceeds are used for a ‘cause, deed, or activity that is consistent with’ the purpose for which an organization received its federal tax exemption and qualified as a charitable organization under state law.”).
224 *Id.* at 421.
225 4 RELIGIOUS ORGANIZATIONS AND THE LAW § 17:12; *see also Texas Lottery*, 727 F.3d at 420, n. 3 (“The court is aware that 26 U.S.C. § 501 restricts the amount of political advocacy certain nonprofit organizations may engage in to remain eligible for a federal tax exemption.”).
instead. This is a major distinction for the restricting words of the Bingo Enabling Act. While 501(c)(3) organizations may obtain bingo licenses, the difference between the words “no substantial” in the federal statute, and an complete prohibition on the use of funds in the Bingo Act may severely limit charitable organizations to successfully fulfill their charitable purposes. The term “substantial” in the Internal Revenue Code is already a check limiting the organizations use of their funds, which, as is, protects the government’s interest of avoiding the use of citizen’s funds for purposes unrelated to the charity.

If the Commission argued that these proposed changes in the Act would result in regulating difficulties of the organizations engaged in political speech with the prospective bingo proceeds, this would be an unsupported excuse. The Commission currently requires organizations to be audited regularly, so changing the Act would not add any more work than already needed by the committee.

The Court has recognized that a First Amendment protection extends broadly. “Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” Here, many of the charities’ purposes—if not their largest purpose—is to lobbying for the rights of their members. As the Supreme Court has stated, “[t]he civic discourse belongs to the people,

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227 4 RELIGIOUS ORGANIZATIONS AND THE LAW § 17:12 (The original statute was intended to be more restrictive as “to prevent wealthy donors from receiving tax deductions for donations made to further their own personal interests”).
228 See Texas Lottery, 727 F.3d at 421.
229 See supra note 46.
231 Citizens United, 558 U.S. at 343.
232 See Texas Lottery, 727 F.3d at 418.
and the Government may not prescribe the means used to conduct it.” 233 Applying this reasoning, the restriction in the Bingo Enabling Act discourages civic discourse and harms the ability of these charities to properly serve their member’s interests. Thus, the specific provisions, subsection (2) and (3), of Section 2001.456 should be struck down.

C. Severability

If the provisions were struck down as unconstitutional, the remainder of the Act would still hold constitutional muster. Even the majority acknowledged that it could imagine times where a charity could use funds for political advocacy where that advocacy could be considered part of their “charitable purpose.” 234 Under the severability analysis, courts look to the legislative intent behind an act, and whether that intent is conflicted by removing part of the act. 235

The Texas Constitution’s restriction on the use of bingo-generated revenue for an organization’s “charitable purpose,” is sufficiently restricting to allow the Act to exist without the political advocacy restrictions. The majority explained the Act as an exception, established by the State, to allow a limited group of charities to generate extra revenue for their organization’s charitable purpose. 236 If the intent of the state was to allow charities the opportunity to generate extra revenue and thereby benefit their members, then removing the challenged provisions does not alter the legislative intent of the act. 237 The fact that the Act can operate still in accordance with the Texas Constitution and the Act’s original intent provides that

234 Texas Lottery, 727 F.3d at 421.
236 Texas Lottery, 727 F.3d at 424.
this Act can be severable, in that it can exist and have the same purpose without these unconstitutional restrictions created by these provisions.\(^{238}\)

**CONCLUSION**

The political advocacy restriction in the Bingo Enabling Act unconstitutionally conditions the plaintiffs’ ability to partake in the Act. The requirements within the Texas Constitution, that organizations use bingo-generated funds solely for their organizations’ “charitable purpose,” does not foreclose the ability for those organizations to use bingo-generated funds for political advocacy, if that advocacy is insubstantial and part of that organizations charitable purpose. The provisions within the Act, which completely foreclose the ability of these organizations to use any of their bingo-generated revenue on political speech or lobbying, are unconstitutional both facially and as applied to the charities in this case. While the plaintiffs in *Texas Lottery* likely should have brought an as applied challenge, instead of a facial challenge the reasoning behind the majority’s holding that the Bingo program is a subsidy and thus passes constitutional muster is incorrect.

It is plausible that if the majority rested their holding on the classification of the plaintiff organizations as tax-exempt organizations then the statute’s provisions could be valid because a tax-exemption, similar to a subsidy, grants the government power to condition the use of those exempt funds. That, along with evidence that these organizations receive tax-exemptions on bingo-generated funds, evidence not presented in this case, could have been a valid holding.\(^{239}\) However, the majority’s efforts to classify the Act as a subsidy, and through the holding, grant the Texas legislature power to regulate the use of business generated revenue, could lead to unintended consequences. The equating of an occupational license and a government subsidy is

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\(^{239}\) It could also be argued that the Government’s requirement of 5% royalty payments are a tax, and would then lead to an assessment whether this program actually does have a tax, however that was not addressed in this case.
the largest flaw in this case. Either the courts or the legislature need to address the differences between a license to conduct a revenue-generating activity and a government-funded program. In addition to this, in the wake of *Citizens United*, charitable organizations should be able to use funds for political speech as long as they fulfill the requirements of federal tax-exempt status.

This Note does not propose a complete lack of restraint, nor the use of “substantial” funds for political activity, but only equating the Bingo Enabling Act with its parenting amendment and the Federal Income Tax requirements for Section 501(c)(3) status, allowing for some use of charities’ bingo-generated funds for political advocacy. While the Commission attempts to put forth support to sustain a “strict scrutiny” analysis of the Act, the prohibitions involved do not match up with the interests presented. The prohibitions are not the least restrictive means to further the government’s underlying interests, especially when concerning organizations that may not have other revenue, where these provisions could act with the force of a complete ban of political speech.

Changing the statute by striking the challenged provisions, and in turn equating the statute to the Internal Revenue Code would still benefit the organizations’ “charitable purposes.” Moreover, there is no evidence that this change would harm the state by varying any of the Act’s other provisions, including the licensing structure or royalty payments. In addition to continuing

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240 The Bingo Act is a common issue Texas Legislative Debates, and the 83rd session has proposed some changes to the Act. Although no amendments have been approved a Legislative Committee will study charitable bingo. Some of the proposals include: HB 2197 mandates that a 10 member legislative committee review charitable bingo; the committee (which may be appointed later this year) will focus on the following bingo related items: Charitable bingo authorized under Chapter 2001, Occupations Code, and the distribution of charitable bingo revenue, including:
   a. the portion of the total amount of charitable bingo revenue collected by a licensed authorized organization that the organization should be required to use for the charitable purposes of the organization;
   b. any detrimental impact to the organization, or other policy considerations, related to the establishment of mandatory distribution requirements for charitable bingo revenue; and
   c. market-based approaches to conducting and administering bingo operations and revenues that maximize the availability of funds to be used for charitable purposes, *Available at: F:\sf\2013 Legislature\Charitable Bingo\Newsletter re 83rd Leg Session re charitable bingo-redlined-06.28.13 at pg. 3.*
to generate revenue for the state, the revised Act would still support the enumerated state interests that the Commission asserts.