No. ______

In the Supreme Court of the United States

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,
PETITIONER

v.

TEXAS ENTERTAINMENT ASSOCIATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING

The parties to the proceedings are those listed on the cover.

APPLICATION FOR AN EXTENSION OF TIME

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of this Court, applicant respectfully requests a 30-day extension of time—to and including Monday, March 14, 2022—within which to file a petition for a writ of certiorari in this case to review the disposition of the United States Court of Appeals for the Fifth Circuit. The panel opinion, issued on August 19, 2021, is attached as Exhibit A and may also be found reported at 10 F.4th 495 (5th Cir. 2021). The Fifth Circuit denied the petition for rehearing en banc on November 12, 2021. That order is unreported and a court-filed copy is attached as Exhibit B. The petition for a writ of certiorari is presently due February 10, 2022. This application is made 10 days before that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This request is unopposed.[*]

1. This case presents important and recurring questions involving the interpretation of the Tax Injunction Act, 28 U.S.C. § 1341, which forbids federal courts from enjoining "the assessment, levy or collection of any tax under State law" when state-court remedies are adequate. The lower courts are in disarray over what constitutes a "tax" within the meaning of this language. In broad terms, lower courts agree that "taxes" cannot be enjoined but regulatory "fees" can be enjoined. The distinction between "taxes" and "fees," however, has rendered the lower courts hopelessly split.

[*] Pursuant to Rule 29.6 of the Rules of this Court, no corporate disclosure statement is required.

2. This case squarely implicates the disagreement. It involves a challenge concerning a $5-per-patron charge on businesses that serve alcohol to patrons of adult entertainment. The charge is a classic tax: it is imposed by the State legislature rather than regulators, applies generally to the sexually oriented business tax base, and raises public revenue for community purposes, not to cover the costs of collecting the charge or any other administrative expense. The Texas Legislature chose to generate important public funding from a tax base associated with rape and sexual assault. Like taxes on alcohol and cigarettes, such commonplace levies seek both to deter certain activity and to collect revenue when deterrence fails.

The Fifth Circuit nevertheless concluded that the charge was not a "tax" within the meaning of the Tax Injunction Act because it "serves a regulatory purpose." Exhibit A at 11. That reasoning conflicts squarely with the Second and Seventh Circuits, which hold that a regulatory purpose cannot render a tax susceptible to federal jurisdiction under the Tax Injunction Act. And among the lower courts' approaches to distinguishing taxes from regulatory fees, the Fifth Circuit's regulatory-purpose test is a clear outlier.

3. The confusion is exacerbated, and the importance of this Court's review underscored, by the fact that "taxes that seek to influence conduct are nothing new." *NFIB v. Sebelius*, 567 U.S. 519, 567 (2012). Exactions often have regulatory aims and revenue-generating features, like taxes on alcohol, tobacco, drugs, or gambling. If these exactions become regulatory fees because they also serve regulatory purposes, then the protections of the Tax Injunction Act are significantly diminished. Because the Tax Injunction Act is a jurisdictional statute, clear boundaries are of paramount importance. Only this Court's

intervention can provide the requisite clarity without miring states, taxpayers, and the courts in lengthy jurisdictional disputes.

4. This case is an ideal vehicle for resolving the tension the Fifth Circuit's decision creates with the other Circuits in construing the Tax Injunction Act. The tax-versus-fee distinction is squarely presented and dispositive. The Fifth Circuit held that the charge "is a fee, not a tax, and the [Tax Injunction Act] does not bar federal court jurisdiction." Exhibit A at 12. There are no factual or procedural complications standing in the way of the Court's review of that clear holding. This case is also of critical importance to the State of Texas and its ability to raise important public revenue without burdening a broader tax base that does not contribute to the ills of rape and sexual assault.

5. A 30-day extension is necessary because lead and assisting counsel for applicant are experiencing substantial briefing and oral argument obligations overlapping with the preparation of the petition for certiorari, including: *Texas v. Commissioner of Internal Revenue*, No. 21-379 (U.S.) (Reply Brief in Support of a Petition for a Writ of Certiorari filed November 22, 2021); G*rassroots Leadership, Inc. v. Texas Department of Family and Protective Services*, No. 19-0092 (Tex.) (Response Brief filed December 1, 2021); *Hearn v. McCraw*, No. 21-130 (U.S.) (Brief in Opposition filed December 3, 2021); *Thomas v. Lumpkin*, No. 21-25226 (U.S.) (Brief in Opposition filed December 7, 2021); *Haaland v. Brackeen*, No. 21-376 (U.S.), *Cherokee Nation v. Brackeen*, No. 21-377 (U.S.), and *Brackeen v. Haaland*, No. 21-380 (U.S.) (Consolidated Brief in Opposition filed December 8, 2021); *Jim Olive Photography v. University of Houston*, No. 21-735 (U.S.) (Brief in Opposition due January 7, 2022); *Prible v. Lumpkin*, No. 20-70010 (5th Cir.) (argued December 6, 2021); *Green v. Lumpkin*, No. 20-70021 (5th Cir.) (argument set for January 18, 2022);

Hegar v. Health Care Services Corp., No. 21-0080 (Tex.) (argument set for February 3, 2022).

In addition, counsel and their support staff anticipate reduced availability due to the upcoming Christmas and New Year holidays.

6. A 30-day extension would not work any meaningful prejudice on any party. The mandate from the Fifth Circuit has already been issued in this case, so the requested extension would not delay the issuance of the mandate. If this Court grants the petition, this Court would likely hear oral argument in fall or winter of 2022 and issue its opinion in the October 2022 term regardless of whether an extension is granted.

7. Accordingly, good cause exists for this motion and applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including Monday, March 14, 2022 (to account for the weekend date on which the 30-day extension would fall).

8. Applicant's counsel has conferred with William X. King, counsel for respondent Texas Entertainment Association, Inc., who indicated via email on December 14, 2021, that the relief requested in this application is unopposed.

Respectfully submitted.

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DECEMBER 15, 2021

Exhibit A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2021
Lyle W. Cayce
Clerk

No. 20-50262

Texas Entertainment Association, Incorporated,

Plaintiff—Appellee,

versus

Glenn Hegar, *Comptroller of Public Accounts of the State of Texas, in his official capacity*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
No. 1:17-CV-594

Before Stewart, Higginson, and Wilson, *Circuit Judges*.

Cory T. Wilson, *Circuit Judge*:

The Texas legislature enacted a "sexually oriented business" fee (SOBF) in 2007, imposing a $5-per-customer charge on businesses that serve alcohol in the presence of "nude" entertainment. The SOBF went into effect on January 1, 2008. To avoid this fee, many establishments that featured traditional nude dancing modified their practices to require that dancers wear shorts and opaque latex over their breasts. These establishments became known colloquially as "latex clubs."

Eight years later, the Texas Comptroller promulgated a rule that clarified the definition of "nude" under the SOBF statute to apply to dancers who wear opaque latex over their breasts (the Clothing Rule). As a result, the latex clubs became subject to the SOBF. On their behalf, the Texas Entertainment Association (TEA) brought suit against Glenn Hegar in his official capacity as Comptroller of Public Accounts of the State of Texas, challenging the Clothing Rule on First Amendment, due process, and equal protection grounds.

The district court granted partial summary judgment to TEA on its First Amendment freedom of expression claim and its claim that the Clothing Rule violated due process. After a two-day bench trial, the court held that the Clothing Rule was not overbroad in violation of the First Amendment, but that it violated the Equal Protection Clause of the Fourteenth Amendment. The Comptroller appeals.

I.

In 2007, the Texas legislature enacted a statute authorizing the SOBF, and the law became effective on January 1, 2008. Under the statute, "sexually oriented businesses" are required to pay a fee of $5 per customer admitted to the business. A "sexually oriented business" is defined as "a nightclub, bar, restaurant, or similar commercial enterprise that: (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and (B) authorizes on-premises consumption of alcoholic beverages . . . ." TEX. BUS. & COM. CODE § 102.051(2). The statute itself defines "nude" 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.* § 102.051(1). "Clothed" and "clothing" are not defined in the statute.

After its passage, TEA challenged the SOBF statute in Texas state court. In 2011, the Texas Supreme Court held that the statute was constitutional. That court concluded that there was evidence to support that the SOBF statute was enacted to combat the harmful secondary effects of nude dancing in the presence of alcohol, and thus was not content based, and proceeded to explain that the statute passed intermediate scrutiny under the First Amendment. *Combs v. Tex. Ent. Ass'n, Inc.*, 347 S.W.3d 277, 287–88 (Tex. 2011).

In response to the SOBF's enactment, several nude dancing establishments changed their practices to require their dancers to wear opaque latex breast coverings and shorts, in order legally to avoid the new SOBF. And these establishments, dubbed "latex clubs," avoided the SOBF for over eight years, until October 2016, when the Texas Comptroller proposed to amend the Texas Administrative Code to "include a definition of clothing that conforms to the commonly understood meaning of the term" in order "to memorialize the [C]omptroller's existing interpretation of what constitutes clothing." In January 2017, the Texas Comptroller promulgated the Clothing Rule, amending the Texas Administrative Code to limit "clothing" to exclude "[p]aint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state[.]" 34 TEX. ADMIN. CODE § 3.722(a)(1). This new definition subjected latex clubs to the SOBF, and the Comptroller instituted proceedings to collect the fee both prospectively, and retroactively to 2008.

TEA challenged the Clothing Rule in federal district court, asserting constitutional violations of the First Amendment, due process, and equal protection. In response, the Comptroller filed a motion to dismiss asserting that: (1) TEA's claims were barred by the Tax Injunction Act (TIA), (2) the court should dismiss TEA's lawsuit based on principles of comity, (3) the

Comptroller was immune from suit under the Eleventh Amendment, and (4) TEA lacked standing to sue.

The magistrate judge issued a report and recommendation in response to the motion to dismiss, recommending that that the district court deny the Comptroller's jurisdictional challenges but dismiss TEA's claims for damages. The magistrate judge determined that the TIA did not divest the court of jurisdiction, because the SOBF is a fee and not a tax, and further rejected the Comptroller's argument that the district court lacked jurisdiction based on comity principles. The magistrate judge further concluded that, under *Ex Parte Young*, the Eleventh Amendment did not bar suit against the Comptroller in his official capacity for prospective injunctive relief, but it did bar TEA's claims for damages. Finally, the magistrate judge concluded that TEA "sufficiently pled associational standing" because TEA pled that "several of its members are subject to the fee," "TEA's goal is to protect the financial interests of its members, which is germane to the purposes of the organization," and that "the nature of the case does not require the affected members to participate as plaintiffs."

The district court accepted the magistrate judge's report and recommendation in full. In doing so, the district court overruled the Comptroller's objections, denied the Comptroller's motion to dismiss except with respect to TEA's claims for damages, and dismissed TEA's claims for damages without prejudice.

On April 16, 2018, TEA moved for summary judgment on its First Amendment challenges to the Clothing Rule. The Comptroller filed his own motion for summary judgment, invoking *Younger* to argue that the federal court should abstain from hearing TEA's claims and arguing that the

Clothing Rule does not violate the Constitution.[1] The district court granted partial summary judgment to TEA on its First Amendment freedom of expression claim and, sua sponte, on its Fourteenth Amendment due process claim.

In its First Amendment analysis, the district court held that the Clothing Rule was not "content neutral" because the rule was not motivated by the substantial government interest of reducing "the deleterious secondary effects of the establishment[s] to be regulated." The district court explained that the Comptroller "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." The Comptroller contended that he was not required to conduct a new study or rely on new evidence to justify adoption of the Clothing Rule because the Comptroller was "adopting an interpretive rule that simply defined an undefined statutory term." The district court disagreed, concluding that the Clothing Rule was substantive rather than interpretive because it "affects individual rights and obligations" by expanding the number of businesses subject to the SOBF and then retroactively assessing the fee.

As for TEA's due process claim, the district court held that enforcement of the Clothing Rule against latex clubs "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." However, the district court concluded that "when exactly the latex clubs were put on notice" was a fact question to be determined at trial.

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[1] District Judge Lee Yeakel subsequently transferred the case to District Judge David A. Ezra on June 15, 2018, before the district court ruled on the competing motions for summary judgment.

Subsequent to the district court's partial summary judgment, the court conducted a two-day bench trial to resolve: (1) when the latex clubs received notice of the Clothing Rule, and (2) the merits of TEA's overbreadth and equal protection claims. Following trial, the district court issued Findings of Fact and Conclusions of Law that determined that while the Clothing Rule was not overbroad in violation of the First Amendment,[2] its retroactive application prior to October 28, 2016 (when the Comptroller first proposed the Clothing Rule in the Texas Register) violated due process. The district court further found prospective enforcement of the Clothing Rule "violate[d] equal protection and [was] therefore unconstitutional as currently applied."

The Comptroller now appeals the district court's rulings on standing and the TIA and further contends that the district court should have declined to exercise jurisdiction under principles of comity and abstention. The Comptroller additionally appeals the district court's partial summary judgment as to TEA's free expression and due process claims and the ruling in TEA's favor on its equal protection claim following trial.

II.

"We review a grant of summary judgment *de novo*, applying the same legal standards as the district court." *Certain Underwriters at Lloyd's, London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 255 (5th Cir. 2020) (citation omitted). Following a bench trial, "findings of fact are reviewed for clear error and legal issues are reviewed *de novo*." *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011) (internal quotation

[2] TEA does not challenge the district court's holding regarding this claim.

marks omitted) (quoting *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)).

III.

We first address the jurisdictional challenges raised by the Comptroller. The district court concluded that TEA had associational standing to challenge the Clothing Rule and dismissed the Comptroller's other jurisdictional claims. We agree.

A. *Standing*

Typically, in order for litigants to have standing, they must establish that they have suffered a concrete and particularized injury in fact, that there is a causal connection between the injury and conduct in dispute, and that the injury can be redressed by the court with a favorable decision. *See Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 173 (5th Cir. 2018) (per curiam). However, "an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity[.]" *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977).

There are three factors a court should consider in determining if an organization has associational standing: "(a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians & Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Hunt*, 432 U.S. at 343).

Weighing these factors, TEA had standing to bring this action. First, TEA's members would have had standing to challenge the Clothing Rule in their own right. TEA is a Texas corporation whose members consist of forty

adult cabaret establishments with over sixty different locations in Texas. It is uncontested that the individual members of TEA could have challenged the SOBF statute. Further, TEA presented evidence, and the district court found, that the Comptroller sought to enforce the Clothing Rule retroactively against at least one of TEA's member establishments. And there are many other TEA members who had not been subject to enforcement of the $5 fee until after the promulgation of the Clothing Rule. These affected latex clubs have thus suffered a concrete and particularized injury due to the Clothing Rule that a favorable court decision would redress. Therefore, TEA's members would have had standing in their own right.

Second, TEA's purpose is to represent the legal and economic interests of its members. This fact is also uncontested; indeed, the Texas Supreme Court has noted that TEA is "an association representing the interests" of sexually oriented businesses in Texas. *See Combs*, 347 S.W.3d at 279.

Finally, neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit. Although the Comptroller asserts that individual member participation would be necessary in an action for money damages, the district court granted the Comptroller's summary judgment as to TEA's claim for money damages and ruled that TEA was only entitled to declaratory and equitable relief. Injunctive relief "does not make the individual participation of each injured party indispensable to proper resolution[.]" *Hunt*, 432 U.S. at 342-43 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)); *see also Ass'n of Am. Physicians & Surgeons*, 627 F.3d at 549 (holding that an association of doctors had standing to sue for injunctive relief against a board of medical examiners for retaliatory tactics). Here, TEA sought injunctive relief and adduced evidence that its members were affected by the implementation of the Clothing Rule. Further

participation by TEA's members was not necessary, and TEA had associational standing to challenge the Clothing Rule.

B. *Tax Injunction Act*

"Whether the district court was prevented from exercising jurisdiction over the case because of the Tax Injunction Act is a question of subject matter jurisdiction which we review *de novo*." *Washington v. Linebarger, Goggan, Blair, Pena & Sampson, LLP*, 338 F.3d 442, 444 (5th Cir. 2003) (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)). The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The TIA is a "broad jurisdictional impediment to federal court interference with the administration of state tax systems." *Home Builders Ass'n of Miss.*, 143 F.3d at 1010 (internal quotation marks omitted) (quoting *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 326 (5th Cir. 1979)). Whether the TIA precludes federal court jurisdiction in this case is dependent upon whether the SOBF is considered a tax or a regulatory fee. If the $5 levy is a tax, the TIA bars federal court jurisdiction.

"Distinguishing a tax from a fee often is a difficult task" because "the line between a 'tax' and a 'fee' can be a blurry one." *Id.* at 1011 (quotation omitted). Taxes and fees are not categorically mutually exclusive; rather, they exist on "a spectrum with the paradigmatic fee at one end and the paradigmatic tax at the other." *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992)). In *Home Builders Association of Mississippi*, the Fifth Circuit provided three factors to distinguish between a tax and a fee:

> the classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

143 F.3d at 1011 (citations omitted). More succinctly, the court in *Neinast* stated that a fee: "is imposed (1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes." 217 F.3d at 278 (citing *Home Builders Ass'n of Miss.*, 143 F.3d at 1011).

In its motion to dismiss, the Comptroller argued that whether or not the SOBF is a tax or a regulatory fee for the purposes of the TIA is a question that was already determined by a Texas state court. *See Tex. Ent. Ass'n, Inc. v. Combs*, 431 S.W.3d 790, 799 (Tex. App.—Austin 2014, pet. denied) (concluding that the SOBF is a general excise tax rather than an occupation tax). But the primary question presented in *Combs* was whether the SOBF was an occupation tax or a general excise tax because, under the Texas state constitution, at least 25% of revenue generated by occupation taxes must be allotted to public schools. *Id*. at 794. The Texas court of appeals did not address whether the SOBF is a tax or a fee for purposes of the TIA. Regardless, "[w]hat constitutes a 'tax' for purposes of the [TIA] is a question of federal law," and "[t]he label affixed to an ordinance by its drafters has no bearing on the resolution of the question." *Home Builders Ass'n of Miss.*, 143 F.3d at 1010 n.10 (citations omitted). We find the Comptroller's argument unavailing.

Applying the *Neinast* factors, we conclude that the SOBF is a fee, not a tax, such that the TIA does not defeat jurisdiction. It is undisputed that the SOBF was imposed by the legislature.[3] Although we agree with the district court that this fact moved "the assessment on the spectrum closer to a classic tax," it is not dispositive. In enacting the SOBF, the Texas legislature used the word "fee" instead of "tax" within the statute itself, stating that the purpose of the law "relat[ed] to the imposition and use of a fee on certain sexually oriented businesses and certain programs for the prevention of sexual assault." H.B. 1751, 80th Leg., 2007 Reg. Sess. (Tex. 2007). Although labels may not be dispositive, the statutory text actually chosen by the legislature is the best yardstick of the legislature's intent.

Adopting the magistrate judge's recommendation, the district court concluded that text made clear that the SOBF was imposed "solely on sexually[ ]oriented businesses that allow alcohol consumption, as opposed to the public at large." We agree. By its terms, the SOBF could be avoided by simply refraining from allowing the consumption of alcohol in the presence of nude entertainment. Such a limited scope of activity weighs in favor of the SOBF's classification as a fee, not a tax, because the vast majority of the community at large is unaffected by the SOBF. *See Neinast*, 217 F.3d at 278 (noting that a charge is more likely a fee than a tax when it "is imposed only on a narrow class of persons . . . not the public at large").

Finally, the SOBF clearly serves a regulatory purpose. A fee "serve[s] regulatory purposes directly[,] by . . . deliberately discouraging particular conduct by making it more expensive" or indirectly, by "raising money placed in a special fund to help defray the agency's regulation-related

[3] However, we note that the *Comptroller's office*, a state agency, and not the legislature, promulgated the Clothing Rule at issue in this case.

expenses." *San Juan Cellular Tel. Co.*, 967 F.2d at 685. In determining a levy's purpose, courts are "far more concerned with the purposes underlying the [statute] than with the actual expenditure of the funds collected under it." *Home Builders Ass'n of Miss.*, 143 F.3d at 1011–12. To sift this question, courts again "look principally to the language of the [statute] and the circumstances surrounding its passage." *Id.*

Here, the SOBF serves both direct and indirect regulatory aims. The fee raises the costs of sexually oriented businesses that provide an audience of two or more with live nude entertainment and authorizes consumption of alcohol on the premises. TEX. BUS. & COM. CODE § 102.051. The statute additionally requires these businesses to conform with record-keeping requirements. *Id.* § 102.052. And funds raised by the SOBF are distributed to a sexual assault program fund, not general revenue. *Id.* § 102.054.

Thus, we agree with the district court's conclusion that the SOBF is a fee, not a tax, and the TIA does not bar federal court jurisdiction.

C. *Eleventh Amendment Immunity*

Generally, claims for damages against state officers in their official capacity are barred by the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). However, under *Ex Parte Young*, 209 U.S. 123 (1908), a plaintiff may bring suit for a violation of the Constitution or federal law when it is "brought against individual persons in their official capacities as agents of the state, and the relief sought [is] declaratory or injunctive in nature and prospective in effect." *Aguilar v. Tex. Dep't of Crim. Just.*, 160 F.3d 1052, 1054 (5th Cir. 1998) (citation omitted). This court applies a three-factor test to determine whether a suit falls within the *Ex Parte Young* exception to Eleventh Amendment sovereign immunity. Such a suit must: (1) be brought against state officers acting in their official capacities; (2) seek prospective relief that will redress ongoing conduct; and (3) allege a violation

of federal law. *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020).

The district court found that this case fit squarely into the *Ex Parte Young* exception. We agree. TEA sued Hegar in his official capacity as the Comptroller. The injunctive relief sought by TEA will redress ongoing enforcement of the SOBF under the Clothing Rule. Finally, the claims brought by TEA allege violations of the federal Constitution, rather than state law. Therefore, the *Ex Parte Young* exception to the Eleventh Amendment applies to this case, and the district court did not err in exercising jurisdiction.

D. *Abstention & Comity*

The Comptroller contends that the district court erred in exercising jurisdiction, raising a number of arguments centered on the doctrines of abstention, comity, and administrative exhaustion. One of these arguments, exhaustion of administrative remedies, was not properly preserved before the district court, such that we need not reach it. As for the others, we are unpersuaded that the district court erred by exercising its jurisdiction over TEA's claims.

"Jurisdiction existing . . . a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). However, that "virtually unflagging" obligation is not absolute. The Supreme Court has delineated certain circumstances in which federal courts should abstain from exercising jurisdiction, generally deriving from principles of "comity," which includes

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the

> belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

To that end, "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citing *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941)). However, "*Pullman* abstention is limited to *uncertain questions of state law* because '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Id.* (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 813) (emphasis added).

In a similar vein, *Younger* counsels that federal courts should abstain from interfering with states' enforcement of their laws and judicial functions. But "[c]ircumstances fitting within the *Younger* doctrine, [the Supreme Court has] stressed, are 'exceptional' . . . ." *Sprint*, 571 U.S. at 73 (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367–68 (1989)). *Younger* abstention is appropriate only "in three types of proceedings": (1) ongoing state criminal prosecutions, (2) "certain 'civil enforcement proceedings'" that are "in aid of and closely related to [the State's] criminal statutes," and (3) "pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Id.* at 77–78 (quoting *New Orleans Pub. Serv.*, 491 U.S. at 368; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).

Here, the Comptroller asserts that district court should have abstained due to the state's interest in administering its tax scheme and because of pending state court litigation concerning whether the Clothing Rule violates the Texas Administrative Procedures Act (APA). We disagree. The claims alleged by TEA rest wholly on rights guaranteed by the federal

Constitution. And the Comptroller points to no "difficult [or] unsettled question[] of state law [that] must be resolved" before addressing TEA's claims. *Midkiff*, 467 U.S. at 236. Assuming arguendo that collection of the SOBF, as a fee and as extended by the Clothing Rule, implicates the state's general administration of its tax scheme, that fact in itself does not bring this case within the limited scope of *Pullman* abstention. Similarly, ongoing state actions involving collateral challenges to the Clothing Rule or duplicative federal constitutional claims do not present a barrier under *Pullman* to the appropriate exercise of federal jurisdiction.[4]

Likewise, none of the three "exceptional circumstances" for *Younger* abstention apply in this case. Plainly, no claims brought by TEA are criminal in nature, and it is a stretch to say that the Comptroller's promulgation and subsequent efforts to collect the SOBF pursuant to the Clothing Rule were "in aid of [or] closely related to [the State's] criminal statutes." *Sprint*, 571 U.S. at 77–78 (quoting *Huffman*, 420 U.S. at 604). And the resolution of this case has no bearing on Texas state courts' ability to perform their judicial functions.

The district court properly exercised its jurisdiction to decide TEA's claims in this action, and the Comptroller's arguments grounded on principles of abstention and comity do not persuade us otherwise.

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[4] We also note that, since conclusion of briefing on appeal, a Texas court of appeals held that the Clothing Rule does not violate the Texas APA. *See Hegar v. Texas BLC, Inc.*, No. 01-18-00554-CV, 2020 WL 4758474, at *1 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020). The Texas Supreme Court denied review on March 26, 2021.

IV.

Turning to the merits, the Comptroller challenges the district court's First Amendment, due process, and equal protection rulings in favor of TEA. We address each issue in turn.

A. *First Amendment*

We first address whether the district court erred in granting TEA summary judgment on its First Amendment freedom of expression claim. As a general matter, the Supreme Court has held that nude dancing constitutes expressive conduct and is given First Amendment protection. *E.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). However, nude dancing as expressive conduct "falls only within the outer ambit of the First Amendment's protection" and is subject to restrictions. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

The first step in a First Amendment inquiry is to determine whether a challenged restriction on speech is either content based or content neutral. That determination dictates the level of scrutiny the challenged restriction must meet in order to pass muster. Content based restrictions on protected First Amendment expression are presumptively unconstitutional and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citations omitted). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citations omitted). Content based restrictions can be "subtle, defining regulated speech by its function or purpose." *Id.*

Conversely, content neutral restrictions are generally subject only to intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968)). In the context of nude dancing, the Supreme Court has held that "[i]f the governmental *purpose* in enacting the

regulation is unrelated to the suppression of expression, then the regulation need only satisfy the less stringent standard" of intermediate scrutiny. *Pap's A.M.*, 529 U.S. at 289 (emphasis added; quotation omitted) (citing *Texas v. Johnson*, 491 U.S. 397, 403 (1989); *O'Brien*, 391 U.S. at 377 (1968)). "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." *MD II Ent., Inc. v. City of Dallas*, 935 F. Supp. 1394, 1397 (N.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996) (unpublished; per curiam); *see Pap's A.M.*, 529 U.S. at 301; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986) (applying intermediate scrutiny to a content-neutral restriction on adult film theaters where the district court concluded that the ordinance was "aimed . . . at the *secondary effects* of such theaters on the surrounding community" and "the City Council's '*predominate* concerns' were with [those] secondary effects"); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440–41 (2002) (plurality opinion) (under the "*Renton* framework," the inquiry into "whether a municipal ordinance is content neutral . . . requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech]" (quoting *Renton*, 475 U.S. at 47)).

The government bears the burden of "produc[ing] *some* evidence of adverse secondary effects produced by . . . adult entertainment in order to justify a challenged enactment using the secondary effects doctrine." *J & B Ent., Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998) (citing *Renton*, 475 U.S. at 51–52). "*Renton* also instructs us that a government must present sufficient evidence to demonstrate 'a link between the regulation and the asserted governmental interest,' under a 'reasonable belief' standard . . . ." *Id.* at 372; *see also Alameda Books*, 535 U.S. at 437, 438-39.

Thus, to determine whether the Clothing Rule is content based or content neutral, we must look to its purpose as substantiated by the record in this case. It is worth reiterating that before us is not a challenge to the SOBF statute itself. The Texas Supreme Court upheld the SOBF on First Amendment grounds in *Combs*, 347 S.W.3d at 287–88 (holding that the SOBF statute was content neutral and determining that it passed intermediate scrutiny). Instead, TEA here challenges the Clothing Rule—to the extent that it expands applicability of the SOBF from only fully nude dancing clubs to latex clubs as well. The district court acknowledged this distinction in granting TEA summary judgment, noting that any claim involving the SOBF statute itself was barred by res judicata.

In its analysis, the district court found indistinguishable *MD II Entertainment*, a case which addressed a City of Dallas ordinance requiring dancers at adult cabarets to wear bikini tops, ostensibly to reduce deleterious secondary effects. 935 F. Supp. at 1396. The district court in *MD II Entertainment* held that the ordinance was unconstitutional because although the City contended that the ordinance was justified for the purpose of curtailing the insidious secondary effects of nude dancing, "the absence of any evidence that the city considered such justifications for [the ordinance] must prove fatal." *Id.* at 1398. This court summarily affirmed, emphasizing that there was "no evidence [that] indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects," such that the ordinance was an unconstitutional content based restriction on expression. *MD II Ent.*, 85 F.3d at 624.[5]

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[5] *Cf. Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 703 F. App'x 929, 931, 935 (11th Cir. 2017) (per curiam) (upholding ban on alcohol in nude dancing establishments where city had "reviewed a robust legislative record detailing the adverse secondary effects of adult-entertainment establishments"); *Schultz v. City of Cumberland*, 228 F.3d 831, 845–48 (7th Cir. 2000) (upholding portions of ordinances limiting hours and prohibiting full

After *MD II Entertainment*, this court addressed a similar ordinance in *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002). *Baby Dolls* concerned a City of Dallas requirement that "female performers . . . wear bikini tops, among other things, in order for those establishments [employing them] to avoid being classified as sexually oriented business[es]" for zoning purposes. 295 F.3d at 474. Applying *Renton*, this court contrasted the absence of evidence in *MD II Entertainment* with the *Baby Dolls* record, noting that the City "consulted, and considered, data and studies concerning the deleterious secondary effects of [sexually oriented businesses]." *Id.* at 476. These studies were extensive and indicated that sexually oriented businesses "have a variety of deleterious secondary effects, including increased crime rates, lowered property values, and the deterioration of community character and quality of life." *Id.* Notably, one study in the *Baby Dolls* record specifically examined the secondary effects of sexually oriented businesses in the City of Dallas itself. *Id.*

In upholding the ordinance at issue, the court was unpersuaded by the plaintiffs' contentions that the studies on which the City had relied were "irrelevant" because they "did not study whether a change in a dancer's attire from pasties to bikini tops would affect secondary effects," and that "there must be *specific* evidence linking bikini tops to reducing secondary effects." *Id.* at 481 (quoting *Baby Dolls*, 114 F. Supp. 2d 531, 540 (N.D. Tex. 2000)). Instead, the court held that, based on the evidence adduced and considered by the City of Dallas prior to enacting the ordinance at issue, "it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of

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nudity because they were "content-neutral restrictions on adult entertainment" based on "a host of studies" and "research on secondary effects" related to reducing crime).

problems associated with other [sexually oriented businesses]." *Id.* at 482 (discussing *Renton*, 475 U.S. at 51–52; *J & B Ent.*, 152 F.3d at 371-72).

Applying the same standards to the case at hand, the Comptroller's defense of the Clothing Rule falters for the same reason as did the ordinance at issue in *MD II Entertainment*, and the record before us stands in stark contrast with the evidence considered by the City of Dallas in *Baby Dolls*. The Comptroller does not provide *any* evidence that shows that the Comptroller was "predominantly motivated by . . . the control or reduction of deleterious secondary effects of [latex clubs]" in promulgating the Clothing Rule, *MD II Ent.*, 935 F. Supp. at 1397, or how the Clothing Rule would mitigate such secondary effects. As the district court noted in granting summary judgment, "[b]ecause the Comptroller enacted the amended regulation at issue without reference or concern for mitigating any identified secondary deleterious effects, the [c]ourt is forced to conclude the amendment is directed at the essential expressive nature of the latex clubs' business, and thus is a content[ ]based restriction." We agree with both the district court's appraisal of the record and the conclusion that it compels.

Before the district court, the Comptroller asserted that he "was not required to conduct a new study or rely on any new evidence to justify [the agency's] adoption of a rule because the agency was adopting an interpretive rule that simply defined an undefined statutory term." Thus, the Clothing Rule could properly be justified by evidence substantiating the deleterious effects recognized in connection with the SOBF itself. *See Combs*, 347 S.W.3d at 287 (noting that TEA did not challenge the finding that there was "'persuasive trial evidence supporting a possible link between the business activity subject to the tax and the secondary effects' associated with sexual abuse").

The Comptroller repeats that argument on appeal. But with nothing in the record to support it, his argument remains only a theory.

And the theory falters in two respects. One, the Comptroller offered no evidence to show that he even considered the data linking the SOBF with adverse secondary effects produced by nude dancing when promulgating the Clothing Rule. Indeed, the principal drafter of the Clothing Rule testified that the Comptroller's "purpose" was exclusively "stated in the Preamble"—which does not reference any secondary effects concerns—and no evidence shows that the Comptroller "consulted, and considered, data and studies concerning the deleterious effects of [sexually oriented businesses]," *Baby Dolls*, 295 F.3d at 476.[6] If the same data that sustained the SOBF likewise sustain the Clothing Rule, there is nothing in the record before us to substantiate a "reasonable belief" to that effect.

Two, the Comptroller offers no support for the assertion that the Clothing Rule merely "interpreted"—rather than expanded—the reach of the SOBF. Indeed, the Comptroller's contention that the Clothing Rule simply "memorialize[d] the [C]omptroller's existing interpretation of what constitutes clothing" is belied by the parties' behavior since the enactment of the SOBF in 2007. The record includes undisputed evidence that latex clubs only arose in response to the SOBF, expressly in order to avoid the $5-per-customer levy. And the Comptroller knew about the latex clubs'

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[6] By contrast, in *Baby Dolls*, this court found significant that the City of Dallas—in addition to consulting data and studies—expressly stated its "concerns" in "the Ordinance's preambulary language," with specific references to preventing the "*harmful secondary effects on the surrounding community as the [sexually oriented businesses] currently regulated*" in other provisions of the City's code, as well as the city council's findings that sexually oriented businesses increased "criminal activities" and decreased the "value of surrounding properties" and "quality of life." *Baby Dolls*, 295 F.3d at 480.

modifications in dancers' attire yet took no action to collect the SOBF from those clubs until *after* the Clothing Rule was promulgated. A witness at trial testified that three enforcement officers came to one of his latex clubs in 2016 and "told him everything was good." Further testimony allowed the district court to conclude that the Comptroller did not have an official policy about the definition of the word "clothing." Thus, if the rule reflected the Comptroller's "existing interpretation" of the operative statute, that interpretation was a closely-guarded (and unenforced) secret for the first eight years of the SOBF's existence.

Against this spare record, the Comptroller has not shown that we may properly analyze the Clothing Rule as a content neutral restriction entitled to intermediate scrutiny. Like the district court, we are instead "forced to conclude the [Clothing Rule] is directed at the essential expressive nature of the latex clubs' business, and thus is a content[ ]based restriction" subject to strict scrutiny. Such restrictions are presumptively unconstitutional and may pass constitutional muster only if they are narrowly tailored to serve a compelling state interest. *See Reed*, 576 U.S. at 163. The Comptroller does not present an argument that the Clothing Rule satisfies this high burden, leaving us no cause to disagree with the district court's conclusion that the Clothing Rule fails strict scrutiny under the First Amendment.

B. *Due Process*

The district court sua sponte granted partial summary judgment to TEA on its Fourteenth Amendment due process claim, finding that "[t]o the extent [the Comptroller] sought or seeks to enforce the $5 fee statute against latex clubs for conduct undertaken prior to . . . providing notice to such businesses, such an exaction is harsh and oppressive." At trial, the district court determined that the specific date before which retroactive enforcement would be unconstitutional was October 28, 2016, when the Comptroller

initially proposed the Clothing Rule, because TEA's members were not put on notice of the Clothing Rule until that date.

"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). "While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. For retroactive application of a fee 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, 568–69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)). In weighing whether retroactive application of a statute violates due process, courts should consider "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." *Id.* at 569.

As noted above, latex clubs arose specifically to avoid the SOBF. Additionally, the Comptroller knew of the latex clubs' existence for over eight years and took no enforcement action, even to the point of assuring at least one latex club that "everything was good." Indeed, the first time the latex clubs may have known that the Comptroller did not consider latex-clad performers to comply with the definition of "clothing" for purposes of the SOBF was when the proposed Clothing Rule was noticed in the Texas Register on October 28, 2016. Before then, as the district court found, the latex clubs had a settled expectation that they would not be subject to the SOBF. And, "without notice, [the Clothing Rule] [gave] a different and more oppressive legal effect to conduct undertaken before enactment of the [rule]." *Id.* We thus agree with the district court's conclusion that retroactive imposition of the SOBF upon the latex clubs via the Clothing Rule

constitutes a violation of due process guaranteed by the Fourteenth Amendment.

C. *Equal Protection*

"Generally, to establish [a Fourteenth Amendment] equal protection claim the plaintiff must prove that similarly situated individuals were treated differently." *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999) (per curiam) (citation omitted). "Because the clause's protection reaches only dissimilar treatment among similar people, if the challenged government action does not appear to classify or distinguish between two or more *relevant* persons or groups, then the action does not deny equal protection of the laws." *Hines v. Quillivan*, 982 F.3d 266, 272–73 (5th Cir. 2020) (emphasis added; quotation omitted). To determine whether persons or groups are similarly situated, we inquire as to whether they "are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "Once that threshold showing is made, the court determines the appropriate level of scrutiny for our review." *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 468 (5th Cir. 2021).

After a bench trial, the district court held that, under the Clothing Rule, Texas treated latex clubs differently from other similarly situated businesses such as sports bars featuring scantily clad waitresses. Because the regulation at issue concerns a fundamental right, free expression, the district court then applied strict scrutiny in its evaluation of the Clothing Rule. Doing so, the district court determined that "sports bar" establishments are "similarly situated to latex clubs" because "a latex club with dancing performers who also serve alcohol and a sports bar with scantily-clad bikini attired waitresses doing choreographed dances and exposing part of the buttocks while serving alcohol appear similarly situated for the purposes of an equal protection analysis and would clearly violate the [Clothing Rule]."

The district court concluded that latex clubs were treated differently from sports bars because "the Comptroller intended that the [Clothing] Rule bring only latex clubs within the purview of the $5 fee statute and not other similar establishments." The district court further held that the Comptroller failed to meet his burden to assert a narrowly tailored solution to a compelling governmental interest and invalidated the Clothing Rule on equal protection grounds.

We disagree with the district court's threshold determination that latex clubs were treated differently than similarly situated businesses. In a nutshell, latex clubs and the district court's chosen analogues, "sports bar[s] with scantily[ ]clad . . . waitresses," are not "in all relevant respects alike." *Nordlinger*, 505 U.S. at 10. More similar to the latex clubs are traditional nude dancing establishments, which as sexually oriented businesses are subject to the SOBF with or without the Clothing Rule. The record indicates that the latex clubs began as nude dancing establishments and "chose to become latex clubs, rather than provide topless entertainment, in order to avoid the $5 fee." Like traditional nude dancing establishments, latex clubs' primary purpose remains to showcase erotic dancing with nude (or almost nude) performers.

By contrast, the "bar and grill type establishments" that TEA purports to be similarly situated to its members are fundamentally sports bars and grills, whose primary purpose centers around food and beverage service, even if some may feature scantily clad waitresses. Likewise, TEA's contention that some artists may wear attire that may not qualify as "clothing" when performing in concerts, body paint competitions, or bodybuilding competitions misses the mark. Again, the purpose of events such as concerts is distinguishable from that of the latex clubs. Concert artists convey expression beyond sexually oriented messages conveyed in an

adult cabaret (or a latex club). And the purpose of body paint or bodybuilding competitions is not sexual in nature.

None of the examples proffered by TEA or employed by the district court are "in all relevant respects alike" to the latex clubs. *Nordlinger*, 505 U.S. at 10; *see Hines*, 982 F.3d at 272–73. It follows that the district court erred by grounding its equal protection analysis of the Clothing Rule on dissimilar entities, and TEA failed to "prove that similarly situated individuals were treated differently." *Wheeler*, 168 F.3d at 252. We therefore conclude that TEA's equal protection claim lacks merit.

V.

Based on the foregoing, we AFFIRM the judgment of the district court with respect to its jurisdictional, First Amendment, and due process rulings. We REVERSE with respect to its equal protection ruling and RENDER judgment in favor of the Comptroller as to TEA's equal protection claim.

AFFIRMED in part; REVERSED AND RENDERED in part.

Exhibit B

United States Court of Appeals for the Fifth Circuit

No. 20-50262

Texas Entertainment Association, Incorporated,

Plaintiff—Appellee,

versus

Glenn Hegar, *Comptroller of Public Accounts of the State of Texas, in his official capacity*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-594

ON PETITION FOR REHEARING EN BANC

Before Stewart, Higginson, and Wilson, *Circuit Judges*.

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.