No. 21-1258

In The
Supreme Court of the United States

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, IN HIS OFFICIAL CAPACITY,

Petitioner,

v.

TEXAS ENTERTAINMENT ASSOCIATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Amicus Texas Association Against Sexual Assault ("TAASA") respectfully moves for leave to file a brief *amicus curiae* in support of Petitioner, Glenn Hegar, Comptroller of Public Accounts of the State of Texas. Pursuant to Supreme Court Rule 37.2, counsel for TAASA notified both parties on this docket and requested their consent on file. Of those, Petitioner consented; Respondent has not responded to TAASA's request for consent. Despite diligent efforts, counsel for TAASA has been unable to contact the nonresponsive party.

TAASA's brief will be helpful to the Court in its resolution of the petition. TAASA provides a perspective not presented by Petitioner's petition. In particular, TAASA provides background explaining how the funds from the statute-at-issue are used for the public's benefit and provides additional case law demonstrating the clear circuit split that the Fifth Circuit's opinion below has created.

TAASA respectfully requests that the Court grant its motion for leave to file the attached *amicus* brief in support of Petitioner.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

TAASA is a non-profit organization serving the public, committed to ending sexual violence in Texas through education, prevention, and advocacy on behalf of victims. Since its founding in 1982, TAASA has been Texas' statewide sexual assault coalition and is supported by 270 members, comprised of rape crisis centers, advocates, system partners, and survivors. Together, TAASA and its membership work to bring hope, healing, and justice to victims of sexual violence.

Sexual assault is a well-documented public health problem affecting 6.3 million women and men, or 33.2% of adult Texans, over their lifetime. *See*, *e.g.*, INSTITUTE ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, HEALTH & WELL-BEING: TEXAS STATEWIDE SEXUAL ASSAULT PREVALENCE STUDY (Aug. 2015). Many courts, including this Court, have repeatedly recognized the existence of negative secondary effects of adult entertainment businesses, especially those associated with alcohol consumption. *See*, *e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Combs v. Tex. Ent. Ass'n, Inc.*, 347 S.W.3d 277, 287 (Tex. 2011) *cert. denied*, 132 S. Ct. 1146 (Jan. 23, 2012). In an effort to

[1] The parties received timely notice of this brief under Rule 37.2(a). Petitioner has consented to the filing of this brief. Respondent has not responded to *amicus's* request for consent. Pursuant to Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

address this growing problem, the Texas Legislature enacted the sexually oriented business fee ("SOBF") statute, which mandates that sexually oriented businesses that combine live nude dancing with alcohol pay a $5 charge for each entry by each customer. Tex. Bus. & Comm. Code §§ 102.051-056; 34 Tex. Admin. Code § 3.722.

The Legislature has directed that the money collected from sexually oriented businesses be substantially spent on programs—such as TAASA—that combat sexual assault and provide services and support to the public. The SOBF provides TAASA, and its member rape crisis centers, critical funding to serve sexual assault survivors and engage in community outreach and education about sexual violence. Even with the inclusion of SOBF funds, however, rape crisis centers struggle to meet the growing demand for services.

Eliminating the important funding stream flowing from the SOBF would decimate rape crisis centers' efforts to serve survivors. TAASA's primary goal in supporting the passage and enforcement of the SOBF to all sexually oriented businesses is to maintain vital services for sexual assault survivors in Texas. The SOBF is an essential component to providing services for the public, and our state's efforts to combat sexual violence will be materially and significantly impaired if the Court strikes down the interpretation of "clothing" under the SOBF.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

After the Texas Legislature enacted the SOBF in 2007, Respondent Texas Entertainment Association, Inc. ("TEA" or "Respondent") immediately challenged the fee intended to combat the secondary effects from the combination of alcohol and live nude entertainment, such as sexual assault. After years of litigation, the Texas Supreme Court upheld the SOBF as comporting with the First Amendment because it reduced those secondary effects. *Combs*, 347 S.W.3d at 288 (Tex. 2011).

Unsuccessful with its first attack on the SOBF, Respondent now tries to sidestep the $5 fee by converting the "traditional topless club" into "latex clubs."[2] These latex clubs, however, contribute to the same secondary effects, thus requiring the Comptroller to make clear that latex liquid is simply not "clothing." 34 Tex. Admin. Code § 3.722(a)(1) (the "Clothing Rule"). Lawsuits were filed in both state court and federal court challenging the constitutionality of the Clothing Rule (even though it is a mere amendment to the original SOBF). The first court of appeals in Texas held that the Clothing Rule is consistent with the SOBF and did not contravene the original statute. Thus, SOBF as a whole was upheld as valid in Texas state court.

[2] Latex clubs apply a liquid latex substance to obscure performers' bare breasts, which dries in place into a covering about as thin as a surgical glove and peels off like a decal.

Because the SOBF is a tax on sexually oriented businesses, the Western District of Texas should have never heard this case. The Tax Injunction Act ("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. There is no dispute that Respondent had a plain, speedy, and efficient remedy in the courts of Texas; Respondent just does not like how the state court resolved the dispute. The Western District of Texas should have found that the TIA precludes federal court review of the SOBF. Instead, the district court improperly expanded its jurisdictional reach and found the amendment unconstitutional, resulting in conflicting state and federal court opinions as to whether the amendment is valid. The Fifth Circuit panel below affirmed, finding that the SOBF serves both direct and indirect regulatory aims. The panel's decision violates the basic principles of federalism by enlarging the federal court's limited power over the state of Texas's rights to autonomy.

The Fifth Circuit's expanded view of the TIA created a circuit split that this Court should resolve. As an initial matter, the multifactor test used by the Fifth and other circuits is unreliable because of the different ways that each circuit applies the test, and how the test has resulted in conflicting conclusions within the Fifth Circuit. Instead, the Court should hold that the simple test used in the Second, Seventh, and Tenth Circuits is the appropriate way to determine whether a

federal district court has jurisdiction. Second, even if the Court concludes the multifactor test is appropriate, the Fifth Circuit's application of the test on the SOBF conflicts with many circuits, including the Fifth Circuit's own precedent. Therefore, the Court should hold the Fifth Circuit wrongly applied the test on the SOBF and hold that it did not have jurisdiction to hear the case.

The district court's impermissible reach in reviewing this case ended in a result that the TIA attempts to prevent: federal district courts should not enjoin state law taxes where a plain, speedy, and efficient remedy may be had in state court. TAASA respectfully requests the Court grant the Comptroller's petition for a writ of certiorari.

ARGUMENT

A. The Fifth Circuit's Multifactor Test Is Inappropriate and Creates a Circuit Split that Should Be Reviewed by the Court.

Jurisdictional tests, such as the TIA, should be clear and simple to apply. 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 quotations omitted) (quoting *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 326 (5th Cir. 1979)). A multifactor test complicates the TIA and allows courts to

impermissibly expand federal jurisdiction over state laws that should be left to state courts to determine validity.

The Supreme Court has previously used a simple test to determine whether a statute is a tax or a fee under the TIA. For example, the Court analyzed a law 100 years ago that required an employer "to pay the government one-tenth of his entire net income in the business for a full year," if that employer employs at least one child under a certain age. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 35-36 (1922). The questions the Court asked were whether the law "impose[s] a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?" *Id.* at 36. The Court held, at least in part, that the law was not a tax because it was not "proportioned in any degree to the extent or frequency of the departures," meaning that an employer had to pay one-tenth of his entire net income whether he employed 500 children or one child for one hour. *Id.* In other words, the Court held the charge was regulatory because its apparent intent was to stop the employment of under-age children by requiring the same payment regardless of the number of children employed. *Id.* at 37. The Court did not need a complex factor test to determine whether the charge was a tax; instead, it asked two simple questions.

The Fifth Circuit unnecessarily complicated what needs to be a simple and clear test. Indeed, "[t]he Supreme Court has not endorsed ***any*** multifactor test for

applying the [TIA][.]" *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 728 (7th Cir. 2011) (en banc) (emphasis added). "[A]dministrative simplicity is a major virtue in a jurisdictional statute. . . . Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). "[S]uch a test would be inappropriate quite apart from the need for clarity and simplicity in interpreting a forum-selection law." *Empress Casino*, 651 F.3d at 728.

Instead, the Seventh Circuit,[3] similar to this Court's precedent, uses a simple analysis to determine whether a court has jurisdiction under the TIA:

> If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate

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[3] The Second and Tenth Circuits conduct a similar analysis as the Seventh Circuit. *Assoc. for Accessible Medicines v. James*, 974 F.3d 216, 222-23 (2d Cir. 2020) (acknowledging that other circuits use a multifactor test, but finding it unnecessary to adopt such a test); *Hill v. Kemp*, 478 F.3d 1236, 1244 (10th Cir. 2007) ("In other words, a charge fixed by statute for the service to be performed by an officer, where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury of the branch of the government whose officer or officers collect the charge, is not a fee but a tax." (citing 1 Thomas M. Cooley, *The Law of Taxation* 109-10 (4th ed. 1924))).

> revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.

Id. at 728-29. For example, in *Admiral Theatre, Inc. v. Cook Cnty. Dep't of Revenue*, Chicago and Cook County imposed an amusement tax upon any exhibition, performance, presentation or show for entertainment purposes at a tax rate of 9% of admission fees. 534 F. Supp. 3d 929, 931 (N.D. Ill. 2021). The Chicago Municipal Code exempted several types of events from the amusement tax, but explicitly stated that performances conducted at adult entertainment cabarets were subject to the amusement tax. *Id.* at 932. Because the money from the charge went directly to the state's revenue, the court held that the TIA divested the federal court of subject-matter jurisdiction. *Id.* at 932-33.

On the other hand, the Fifth Circuit, similar to the First, Third, Fourth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits, uses a multifactor test, finding 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 purposes of defraying costs, not simply for general revenue-raising purposes." *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (citations omitted). This test has significant issues because it is not applied consistently throughout the courts.

For example, the panel below applied the multifactor test on the SOBF in such a way that it expanded federal jurisdiction even further, which results in a

new split from the remaining circuits that use the multifactor test.[4] Because the funds from the SOBF are partially distributed to a sexual assault program fund, the Fifth Circuit found that the charge is necessarily for a "regulatory purpose." *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 506 (5th Cir. 2021). The Fifth Circuit reasoned that:

> [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 expenses."

Id. (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992)).[5] But unlike

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[4] *Compare Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495 (5th Cir. 2021) *with San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992); *Protective Alarm Co. v. City of Phila.*, 581 F.2d 371, 376 (3d Cir. 1978); *GenOn Mid-Atl., LLC v. Montgomery Cnty.*, 650 F.3d 1021, 1023 (4th Cir. 2011); *Henderson v. Stadler*, 407 F.3d 351, 355 (5th Cir. 2005); *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1382-83 (8th Cir. 1997); *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931-32 (9th Cir. 1996); *McLeod v. Columbia Cnty., GA*, 254 F. Supp. 2d 1340, 1346 (S.D. Ga. 2003) (within the Eleventh Circuit); *Am. Council of Life Insurers v. D.C. Health Benefits Exch. Auth.*, 815 F.3d 17, 19 (D.C. Cir. 2016).

[5] Of note, Respondent has argued in previous proceedings that the $5 per patron fee is so small that it is ineffective (*Combs v. Tex. Ent. Ass'n, Inc.*, 347 S.W.3d 277, 288 (Tex. 2011)), raising a dispute as to whether the SOBF truly discourages consuming beverages at sexually oriented businesses by making it more expensive.

the remaining circuits and the Fifth Circuit's past opinions, the panel below failed to analyze whether the funds from the SOBF cover some administrative benefit, making it a fee. Moreover, there is no evidence that the special fund created for sexual assault programs benefits sexually oriented businesses, and there is no evidence that the fund defrays any agency regulation-related expenses. Ultimately, the panel's finding ignores that a tax "must inevitably involve" incidental restraint and regulation (*Bailey*, 259 U.S. at 36), and mistakenly held that if a charge has any sort of regulatory purpose, then it cannot be a tax.

As mentioned above, the Fifth Circuit's finding contradicts its own previous holdings. For example, in *Henderson v. Stadler*, the Louisiana Secretary of the Department of Public Safety and Corrections was charged with the task of issuing license plates for private passenger vehicles. 407 F.3d 351, 355 (5th Cir. 2005). The Louisiana legislature also permitted the DPS to issue special license plates that could be obtained for an additional charge. *Id.* In many cases, the charges that were collected were distributed ***to organizations determined by the legislature***. *Id.* For example, proceeds from "Choose Life" plates would be distributed to organizations that counsel women to place their children up for adoption. *Id.* This is arguably a fee that at least indirectly "rais[es] money placed in a special fund to help defray the agency's regulation-related expenses." *Tex. Ent. Ass'n*, 10 F.4th at 506 (citations omitted). Yet, the Fifth Circuit held the charges

for these special license plates were a tax under *Neinast*. *Id.* at 360.

First, the fees were directly set by the legislature, even though they were collected by a state agency. *Id.* at 357. Second, even though the specialty plate charges were paid by only some license plate purchasers, the Fifth Circuit held that special assessments imposed on a limited subgroup of the population were TIA "taxes" because their revenue was used for community improvements. *Id.* Finally, the Fifth Circuit held that even though the charges were ***earmarked for special recipient organizations***, it was still for the benefit of the public. *Id.* at 358. This conflicts with the panel's finding below that because the SOBF is earmarked for organizations supporting victims of rape and sexual assault, the SOBF is a fee rather than a tax.

The Fifth Circuit's inconsistent application of the factors shows the unreliability of the test. Instead, the Court should hold that the TIA bars federal jurisdiction simply when a charge is aimed to raise revenue, not to defray administrative costs.

B. Even Under a Multifactor Test, the Fifth Circuit Applied the Factors Wrongly, Creating a Split from the Courts that Use a Multifactor Test, and the Court Should Have Found that the SOBF Is a Tax.

Even if the Court were to find a multifactor test appropriate, the panel's application of the test to the SOBF has created a further split from the circuits that

use the multifactor test. First, the panel below ignored that the Texas state legislature set the $5 per patron fee, not any Texas agency. Second, some courts have held that even if only a subset of the community is subject to a charge, it does not necessarily convert the charge into a fee. Finally, many courts, including the Fifth Circuit, have found that the collection of the funds to a segregated fund can still be a tax so long as it benefits the general public and does not defray an agency's regulatory costs.

1. Under the first factor, the panel's findings conflict with other courts' analyses of this same factor.

As an initial matter, the panel below ignored that the $5 per patron fee was set by the Texas legislature, indicating that it is a tax. Under *Neinast*, the Fifth Circuit held that a fee is imposed and set by an agency, not the legislature. 217 F.3d at 278. The panel below acknowledged the Texas legislature enacted the SOBF, but wrongly held that it was a "fee" because of the use of the word within the statute. *Tex. Ent. Ass'n*, 10 F.4th at 506. Courts, including the Fifth Circuit, have routinely rejected that the use of either the term "tax" or "fee" within the particular statute or ordinance is dispositive. *See*, *e.g.*, *Henderson*, 407 F.3d at 356 ("[W]hat is a 'tax' for purposes of the TIA is a question of federal law on which a state's legislative label has no bearing.") (citing *Home Builders Ass'n of Miss. Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 n.10 (5th Cir.

1998)); *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981).

Instead, the analysis is typically black and white: "[t]he classic 'tax' is imposed by ***legislature***[.]" *San Juan Cellular*, 967 F.2d at 685 (emphasis added). Generally, "[i]f a legislative body sets the rate of a charge and obligates a party to pay, then that entity is generally considered to be the one that imposed the charge." *See*, *e.g.*, *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (finding that a solid waste fee created by the West Virginia legislature was thus "imposed by the West Virginia legislature"); *San Juan Cellular Tel. Co*., 967 F.2d at 686 (finding that the Puerto Rico Public Service Commission, a regulatory agency, imposed a charge because it could determine the periodic rate and prescribe the manner and time that the payments could be made).

As discussed above, the Fifth Circuit previously held that because Louisiana's legislature directed the Louisiana Department of Public Safety and Corrections to issue special license plates and directed which organizations to distribute the charges to, then the first factor weighed in favor of being identified as a "tax" under the TIA. *Henderson*, 407 F.3d at 355. The Fifth Circuit was not persuaded by the argument that the charges should be construed as a fee simply because the legislature labeled it as such. *Id.* at 356.

As another example, the Sixth Circuit analyzed whether Tennessee's $20.50 assessment for disabled parking placards and $3.00 assessment for renewal or

replacement was a tax. *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000). The court determined, under the first factor, the statutory scheme was imposed by the Tennessee legislature, weighing in favor of being identified as a tax. *Id.* at 612.

As another example, in *Mayor & City Council of Baltimore v. Vonage Am. Inc.*, the court swiftly determined that under the first factor, the charge at issue was a tax because it was imposed by municipal ordinance passed by a legislative body, the Baltimore City Council. 544 F. Supp. 2d 458, 464 (D. Md. 2008).

Finally, as another example, in *McLeod v. Columbia Cty., GA*, a county board of commissioners—a legislative body—set a user fee for a storm water charge. 254 F. Supp. 2d 1340, 1346 (S.D. Ga. 2003). For this reason, the Southern District of Georgia held that the storm water charge was a tax, not a fee, under this first factor. *Id.*

These cases, and those listed in Petitioner's petition, are non-exhaustive examples that demonstrate the improper application of the multifactor test by the panel on the SOBF. There is no dispute that the legislature enacted the SOBF and dictated that a $5 per patron fee will be assessed on sexually oriented businesses that serve or allow alcohol on their premises. Thus, the Fifth Circuit wrongly found that the first factor weighed in favor of identifying the SOBF as a fee, instead of a tax, under the TIA.

2. Even though only sexually oriented businesses that offer alcohol on their premises are subject to the SOBF, it is still a tax.

The Texas legislature is capable of taxing only a subset of a business, and its prerogative to do so should not be reviewed by federal courts. Many courts have held that "[s]tanding alone, the fact that an assessment targets only a narrow class of people is not enough to characterize the assessment as a fee." *See, e.g.*, *Wright v. McClain*, 835 F.2d 143, 144-45 (6th Cir. 1987) (holding that fees charged to parolees were taxes for purposes of the TIA); *Hedgepeth*, at 614 (holding that fees charged for handicap placards were taxes for purposes of the TIA).

As discussed above, in *Admiral Theatre*, Chicago and Cook County imposed an amusement tax upon entertainment businesses, and explicitly stated that performances conducted at adult entertainment cabarets were subject to the amusement tax. 534 F. Supp. 3d at 932. The amusement tax did not become a fee simply because it was aimed at specific types of businesses.

As another example, Nevada imposed a live entertainment tax, which included the plaintiffs' businesses that operated establishments where "live performance dance entertainment" was provided. *Déjà vu Showgirls of Las Vegas v. Nev. Dep't of Tax'n*, 2006 U.S. Dist. LEXIS 52505, at *2 (D. Nev. 2006). The court found that the plaintiffs were clearly challenging an assessment or collection of a tax under Nevada's state law,

and therefore held that the court had no jurisdiction. *Id.* The tax did not become a fee simply because it was aimed at businesses providing live performance dance entertainment. *Id.*

In *Freenor v. Mayor & Alderman of City of Savannah*, the city of Savannah imposed a preservation fee on all sightseeing tours conducted within the Savannah Historic District. 474 F. Supp. 3d 1312, 1315 (S.D. Ga. 2019). The preservation tour fee was only targeted at tour service businesses. *Id.* at 1330-31. Regardless, the court held that the charge was akin to a tax. *Id.* at 1330-31.

It cannot be that a charge always becomes a fee because only a certain group of businesses or persons are subject to that charge. Instead, the Court should find that the SOBF is a tax, even if only sexually oriented businesses that offer alcohol are subject to it.

3. Directing a charge to a special fund can still be a tax so long as it does not defray an agency's costs of regulation.

Finally, the panel below was wrong when it determined that the SOBF was a fee because the charges were collected for organizations combating sexual assault. Courts have generally found when the funds collected from a charge "are paid into a special fund to ***benefit the regulated entities*** or to ***defray the cost of regulation***," then the charge is more likely a fee. *See*, *e.g.*, *Hedgepeth*, 215 F.3d at 612 (emphases added). There is no evidence in the record that the money

collected from the SOBF benefits sexually oriented businesses that offer alcohol or that the money is used to cover administrative costs of regulation. Thus, on this basis alone, the Court should find that the SOBF is a tax.

As discussed above, the Fifth Circuit itself has found that the funds from a charge that are collected into a dedicated fund for a specific purpose, including distributions to organizations that counsel women to place their children up for adoption, was not enough to turn a tax into a fee. *Henderson*, 407 F.3d at 358. It did not matter that a special recipient received the funds; ultimately, the funds were not used by the Louisiana Department of Public Safety and Corrections to defray costs of issuing specialty license plates and the charge therefore was a tax under the TIA. *Id.*

As another example, in *Freenor*, the city of Savannah enacted a Preservation Fee to raise revenue for the city to complete certain projects that impact tourism. 474 F. Supp. 3d at 1330. The court held that the Preservation Fee was more akin to a general tax because the charges provided a general benefit to the public. *Id.* at 1331. Further, there was no evidence that the fee offset the administrative expenses of any licensing scheme in the tour guide ordinance. *Id.* Thus, the Preservation Fee was a tax under the TIA. *Id.*

As another example, Wyandotte County and Kansas City adopted an occupation tax on outdoor advertising services, such as billboards. *Lamar Co. v. Unified Gov't of Wyandotte Cnty./Kan. City*, 306 F. Supp. 2d

1139, 1140 (D. Kan. 2004). The plaintiff argued that the primary purpose of the charge was to regulate the number and size of billboards in the defendant's jurisdiction. *Id.* at 1144. The plaintiff further argued that the defendant intended to use the revenue from the charge to hire an additional planner in the defendant's planning department. *Id.* at 1150. The defendant submitted evidence that the purpose for hiring an additional planner was in response to an influx of growth and new development, not to further any billboard regulatory scheme. *Id.* at 1150-51. Thus, the occupation tax was a tax under the TIA.

Put simply, the panel below drastically misapplied the last factor when it analyzed the SOBF by finding that it "serves both direct and indirect regulatory aims." *Tex. Ent. Ass'n*, 10 F.4th at 507. TAASA is unaware of any other court conducting this type of analysis for the last factor. Further, the panel below split from other courts' analyses by failing to conduct an analysis to determine whether the funds from the SOBF were used to cover any administrative costs or to benefit the regulated entities. And it could not make such a finding because the funds from the SOBF do no such thing. In order to comport with the Constitution's principles of federalism and to resolve the circuit splits discussed above, the Court should hold that the Fifth Circuit improperly expanded its jurisdiction by allowing review of the SOBF.

CONCLUSION

The Court should grant the Comptroller's petition for a writ of certiorari.

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Respectfully submitted,

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