No. 21-1258

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.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Texas Entertainment Association, Inc. successfully challenged the constitutionality of a state administrative rule implemented by Petitioner, Texas's Comptroller. The Comptroller's rule change interpreted statutory text to expand the reach of an assessment imposed on a narrow class of companies operating in a disfavored industry. Petitioner now seeks to revisit a threshold jurisdictional issue under the Tax Injunction Act (TIA), 28 U.S.C. § 1341. The United States Court of Appeals for the Fifth Circuit found that the assessment in question is a "fee," not a "tax," thus the TIA does not apply. The question presented is: whether an assessment, whose primary purpose is to disincentivize certain conduct and raises *de minimus* revenue, is a "tax," as Petitioner maintains, or a "fee," as the Fifth Circuit held?

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INTRODUCTION

In October 2016, Petitioner, the Comptroller of Public Accounts of the State of Texas ("Comptroller"), promulgated an administrative rule, defining the word "clothing" in a state law that imposed a fee on "sexually oriented businesses," so as to expand the statute's reach. Respondent, the Texas Entertainment Association, Inc. ("TEA"), is an association of businesses affected by the rule change, which was made retroactive.

After losing multiple challenges to the constitutionality of its rule change, the Comptroller now seeks to nullify the federal courts' merits-determination by entreating this Court to find a jurisdictional bar that does not apply, based on a "circuit split" that does not exist. The Comptroller twists a noncontroversial phenomenon—that different cases involve different sets of operative facts—to suggest a circuit split. Yet what the TIA cases demonstrate is that the federal courts have, for decades, been successfully and consistently identifying the facts relevant to determining whether a given assessment is best characterized as a "fee" or a "tax." This Court should decline to devote space on its docket to addressing what is a thinly veiled quest for a "mulligan."

STATEMENT OF THE CASE

I. Facts and Procedural History

A. State action precipitating the underlying litigation

This lawsuit arises from a rule change that Texas's Comptroller promulgated in 2016. The rule change redefined the word "nude" found in a state law that had been enacted in 2007, which the state legislature characterized as a "Fee Imposed on Certain Sexually Oriented Businesses." TEX. BUS. & COM. CODE §§ 102.051-.056 (the "SOB Fee"). The Texas legislature included the SOB Fee in Title 5 of Texas's Business and Commerce Code, which is styled "Regulation of Businesses and Services."

The SOB Fee imposes a $5 per-patron, per-entry charge on establishments that qualify as "sexually oriented businesses" because they feature "live nude" entertainment or performance for an audience of two or more and allow for the on-premises consumption of alcohol. TEX. BUS. & COM. CODE § 102.051(2). The SOB Fee statute 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)(A)-(B).

The statute also required SO Businesses to "record daily in the manner required by the comptroller the number of customers admitted to the business[,]" and these records were to be "available for inspection

and audit on request by the comptroller." *Id.* § 102.052(b).

Money raised from the SOB Fee is deposited in a "sexual assault program fund." *Id.* § 102.054; TEX. GOV'T CODE § 420.008. That is, the fees are not deposited into the state's general coffers, nor are they to be used to benefit the public at large. The sources of revenue for this fund are expressly described as "fees and fines." TEX. GOV'T CODE § 420.008(b). In addition to the SOB Fee, "[t]he fund consists of: (1) fees and fines collected" from convicted sex offenders and "(2) administrative penalties collected under" a section of Texas's Education Code related to furthering policies to curb sexual harassment, sexual assault, dating violence, and stalking. *Id*. (citing TEX. CODE CRIM. PROC. ART. 42A.653; TEX. GOV'T CODE § 508.189; TEX. EDUCATION CODE § 51.258). The legislature is authorized "to appropriate money deposited to the credit of the fund **only** to" discrete functions, including appropriations to "the comptroller, **for the administration of the fee imposed on sexually oriented businesses**[.]" TEX. GOV'T CODE § 420.008(c)(10) (emphasis added).

After the SOB Fee statute's enactment, many adult cabarets opted to cease featuring nude entertainment and instead required female performers to wear opaque latex clothing over their breasts and to don shorts; these establishments became known as "Latex Clubs." *See* App35a-36a.

Nine years after the SOB Fee statute was enacted, the Comptroller changed the status quo in October

2016, redefining the word "nude" via administrative fiat. 41 TEX. REG. 8341, 8511-13. The new rule defined what clothing is ("[a] garment used to cover the body, or a part of the body, typically consisting of cloth or a cloth-like material") and what clothing is *not* ("[p]aint, latex, wax, gel . . . and other substances applied to the body in a liquid or semi-liquid state"). 34 TEX. ADMIN. CODE § 3.722(a)(1). This new "Clothing Rule" was leveraged against Latex Clubs, assessing them with putatively delinquent fees dating back to 2008. App43a-44a.

B. Proceedings in the District Court

On June 19, 2017, the TEA filed the underlying lawsuit in the Western District of Texas, challenging the Clothing Rule as violating the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. ROA.12-23.

The Comptroller moved to dismiss the TEA's claims under Rule 12(b)(1) based on several justiciability grounds. The argument relevant here is the Comptroller's contention that the TIA divested the district court of subject-matter jurisdiction. ROA.30-43. However, the Comptroller's only TIA-related argument at that juncture was a bare assertion that the TIA's plain language required a dismissal. ROA.33-36.

The action was referred to a magistrate judge, who noted that the Comptroller had not mentioned the federal test relevant to determining whether the TIA applied; the magistrate judge then ordered supplemental

briefing on whether the SOB Fee "imposes a tax or regulatory fee for purposes of the" TIA. ROA.106-107. In his supplemental briefing, the Comptroller did not suggest that there was any uncertainty or confusion regarding the factors relevant to distinguishing between a "tax" and a "fee" under the TIA. ROA.108-118. Instead, the Comptroller cited settled law, including *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683 (1st Cir. 1992), and argued for a "broad construction" of the word "tax" as the rationale justifying a dismissal under the TIA. ROA.110.

The magistrate judge applied the well-established *San Juan Cellular* factors, considered the SOB Fee's text, legislative history, and purpose, and ultimately concluded that the SOB Fee is a regulatory fee, not a tax. App98a-102a. After conducting a *de novo* review, the district court adopted the magistrate judge's report and recommendation *in toto*. App91a-93a.

Thereafter, the TEA moved for summary judgment on its First Amendment challenges to the Clothing Rule. ROA.205-225.

Simultaneously, the Comptroller moved for summary judgment, arguing that *Younger* abstention precluded consideration of the merits and, alternatively, that the Clothing Rule did not violate the Constitution. Additionally, the Comptroller re-urged his previous TIA argument in a footnote. ROA.440-462.

The district court rejected all of the Comptroller's justiciability arguments, granted summary judgment on the TEA's request for declaratory relief on First

Amendment grounds, and *sua sponte* granted summary judgment to the TEA on Due Process grounds. App57a-90a.

A two-day bench trial followed. App32a. After the TEA presented its case-in-chief, the Comptroller declined to put on any witnesses. No testimony was proffered to rebut evidence of the Clothing Rule's clear purpose, which, as the district court put it, was to bring latex clubs "within the ambit of the $5 fee statute." App36a. Nor did the Comptroller adduce any evidence contravening testimony that, before adopting the Clothing Rule, the Comptroller had treated latex as "covering." App36a-40a. Trial testimony repeatedly and unequivocally demonstrated: that the Clothing Rule was a new policy that the Comptroller sought to apply retroactively; and that the purpose of the Clothing Rule was to further burden disfavored SO Businesses by targeting Latex Clubs.

Presented with an uncontroverted body of evidence demonstrating that the Clothing Rule was promulgated without regard to a governmental interest and that it was sprung on a group of adult cabarets years after they had adjusted their operations specifically to avoid the SOB Fee, the district court entered judgment in the TEA's favor on the First Amendment, Equal Protection, and Due Process challenges to the Clothing Rule. App32a-56a.

C. Proceedings in the Fifth Circuit

The Comptroller appealed his loss to the Fifth Circuit. Neither his opening nor reply brief suggested that any controversy or circuit split existed as to how to conduct a TIA analysis. The Comptroller's principal argument was that the fee-versus-tax issue had already been resolved in previous state-court litigation. The state case upon which the Comptroller relied was *Tex. Ent. Ass'n, Inc. v. Combs*, 431 S.W.3d 790 (Tex. App.—Austin 2014, pet. denied). Yet, as the Fifth Circuit ultimately observed, "the primary question presented in *Combs*" was whether the SOB Fee imposed on SO Businesses "was an occupation tax or a general excise tax"; the Texas court "did not address whether the [SOB Fee] is a tax or a fee for purposes of the TIA." App13a. The Fifth Circuit also noted that, in any event, "[w]hat constitutes a 'tax' for purposes of the [TIA] is a question of federal law," not state law. App13a-14a (citation omitted).

After full briefing, oral argument, and a *de novo* review of all of the justiciability issues, a unanimous panel of the Fifth Circuit affirmed, reversing only the district court's finding of an Equal Protection violation. App9a-31a. The Fifth Circuit affirmed all of the district court's findings and conclusions regarding the Comptroller's justiciability arguments, including the district court's finding that the TIA did not apply. App9a-19a.

In deciding whether the SOB Fee is a fee, not a tax, the Fifth Circuit applied the same basic qualitative factors that other circuits consider in the TIA context.

See App12a-15a (citing and applying, *inter alia*, *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683 (1st Cir. 1992)).

After its loss, the Comptroller petitioned for rehearing en banc. "Because no member of the panel or judge in regular active service" even requested "that the court be polled on rehearing en banc," the petition for rehearing en banc was summarily denied. App1a-2a.

D. Proceedings in this Court

On March 14, 2022, the Texas Attorney General, on the Comptroller's behalf, filed a petition for writ of certiorari. The petition contends that the Fifth Circuit applied some anomalous test when it found that the Clothing Rule effected a fee, not a tax, and thus, per the Comptroller, the Fifth Circuit erroneously concluded that the TIA does not apply. The petition further contends that a "three-way split" exists, with the Fifth Circuit being a further "outlier," as to how federal courts determine whether a state assessment is a "regulatory fee" or a "tax." *See* Pet. at 1-2, 10, 13, 14, 16.

The Comptroller's petition relies heavily on a recent Second Circuit decision: *Ass'n for Accessible Medicines v. James*, 974 F.3d 216 (2d Cir. 2020), *cert. denied sub nom. Healthcare Distrib. All. v. James*, 142 S. Ct. 87 (2021) ("*Accessible Medicines*"). In the petition arising from that litigation, it was argued that the Second Circuit was an "outlier" for employing the same basic analysis the Fifth Circuit used in this case. New York's

Attorney General, in her brief in opposition, noted that the Second Circuit had not erred and that its approach to assessing the basic threshold question of whether the TIA applies was consistent with the approach other federal courts have long employed without difficulty. After setting that matter for conference on September 27, 2021, this Court denied certiorari on October 4, 2021—five months before the Comptroller filed the instant petition lodging the same "outlier" argument against the Fifth Circuit. *See* Supreme Court Docket No. 20-1611.[1]

REASONS TO DENY THE PETITION

The TIA, enacted in 1937, provides that "district courts shall not enjoin, suspend or retain 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 (emphasis added). The TIA does not reach cases involving state assessments that are regulatory fees. The Comptroller does not (and cannot) argue that the TIA's text is vague or hopelessly obscure. Instead, the Comptroller suggests complexity where none exists while urging a new approach to TIA-analyses best characterized as a "state-always-wins" rule.

[1] *Available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1611.html (accessed May 5, 2022).

I. The Fifth Circuit Unanimously and Correctly Decided That the TIA Did Not Apply, Utilizing a Well-Established Analytical Approach.

The Comptroller misrepresents the Fifth Circuit's holding entirely, suggesting that the court held that an assessment is a tax only if it "serves no regulatory purpose at all." Pet. at I. From this dubious beginning, the Comptroller then spins a convoluted argument to suggest that the Fifth Circuit's holding was the product of an analysis at odds with the rest of the federal judiciary.

The Fifth Circuit did not employ a novel approach in determining that the Clothing Rule imposed a fee, not a tax, on Latex Clubs. Approximately one-eighth of the Fifth Circuit's opinion is devoted to this simple threshold issue—because the analysis was neither challenging nor strained in light of the obvious fee-like characteristics of the Clothing Rule. App12a-15a. Quoting a seminal First Circuit decision, the Fifth Circuit noted, correctly, that regulatory fees and taxes "exist on 'a spectrum with the paradigmatic fee at one end and the paradigmatic tax on the other.' " App12a (quoting *San Juan Cellular*, 967 F.2d at 685). Then, the Fifth Circuit recited the same premises it has employed for decades in resolving the fee-versus-tax question:

- "[T]he 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."

App13a (quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998) (citations omitted)).[2]

Recognizing that "fees" and "taxes" do not constitute immutable categories, the Fifth Circuit, like federal courts throughout the land, was able to discern the relevant facts and determine where on the fee-tax spectrum the assessment fell, without recourse to sophisticated hermeneutics. Indeed, like the Fifth Circuit, federal courts have consistently followed the template laid down by the First Circuit in the *San Juan Cellular* decision authored by then-Chief-Judge Breyer. *See* App12a; *see also Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (both citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992)).

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[2] *See also Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021) and *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *cert denied sub nom. McDonald v. Firth*, ___ S. Ct. ___, 2022 WL 994346 (April 4, 2022) (both applying the same factors and concluding that the state bar assessments in question were fees, not taxes, thus the TIA did not deprive the federal courts of jurisdiction).

The Fifth Circuit identified the following case-specific facts as relevant to the TIA analysis:

- The SOB Fee was imposed by the state legislature, but the Clothing Rule extending the SOB Fee's reach was promulgated by the Comptroller's office, a state agency. App14a & n.3.
- In enacting the SOB Fee statute, "the Texas legislature used the word 'fee' instead of 'tax' within the statute itself[.]" App14a.
- The SOB Fee affects "a limited scope of activity," *i.e.*, SO Businesses that feature "nude" dancing and alcohol sales, which is not an activity generally indulged in by the "community at large." App14a.
- Per the legislative history, the stated purpose of the SOB Fee statute was "relat[ed] to the imposition and use of a fee on certain sexually oriented businesses and certain programs for the prevention of sexual assault." App14a (quoting H.B. 1751, 80th Leg., 2007 Reg. Sess. (Tex. 2007)).
- The "fee raises the costs of sexually oriented businesses" that fit the statute's parameters. App15a.
- The SOB Fee statute requires the affected businesses "to conform with record-keeping requirements." App15a.
- The funds raised by the SOB Fee "are distributed to a sexual assault program fund, not general revenue." App15a.

Armed with this small set of relevant facts, the Fifth Circuit then employed the following basic principles of statutory construction:

- The words a legislature chooses to use in a statute are not "dispositive," but "the statutory text actually chosen by the legislature is the best yardstick of the legislature's intent." App14a.
- In addition to the statutory text, courts "look principally" at "the circumstances surrounding" the statute's passage. App15a (citation omitted).

The Fifth Circuit then applied the law to the facts to decide the fee-versus-tax question, recognizing that, with this qualitative analysis, "courts are 'far more concerned with the purposes underlying the [statute] than with the actual expenditure of the funds collected under it.'" App15a (quoting *Home Builders Ass'n of Miss.*, 143 F.3d at 1011-12). A "regulatory purpose" suggests a fee; and a regulatory purpose can be furthered 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.'" App15a (quoting *San Juan Cellular*, 967 F.2d at 685).

The Fifth Circuit further recognized that the reach of an assessment matters in making a classification. Here, "the vast majority of the community at large is unaffected by" the SOB Fee or the Clothing

Rule, a fact that "weighs in favor of" classifying the SOB Fee "as a fee, not a tax." App14a.

The Fifth Circuit concluded that the Clothing Rule/SOB Fee "clearly serves a regulatory purpose" of imposing additional burdens on SO Businesses. App15a. As the Fifth Circuit explained, the SOB Fee "serves both direct and indirect regulatory aims," by raising the costs, directly and indirectly, associated with SO Businesses, thereby furthering a regulatory aim.[3] *Id.* Additionally, the money raised from collecting the fees is "distributed to a sexual assault program fund, not [to] general revenue." *Id.*

Because the SOB Fee is imposed on SO Businesses to further a regulatory aim and the resulting funds are applied to support a discrete program, not to enhance the general fisc or provide a benefit to the entire community, the Fifth Circuit affirmed the district court's conclusion that the SOB Fee is "a fee, not a tax, [thus]

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[3] An amicus brief filed in support of the Comptroller suggests that the Fifth Circuit "drastically misapplied the last" *San Juan Cellular* factor by finding that the SOB Fee "'serves both direct and indirect regulatory aims.'" Brief of Texas Association Against Sexual Assault as *Amicus Curiae* in Support of Petitioner ("TAASA Brief") at 18. The amicus purports to be "unaware of any other court conducting this type of analysis for the last factor." *Id.* Yet this language about "direct and indirect regulatory aims" comes straight from *San Juan Cellular* itself. *See San Juan Cellular*, 967 F.2d at 685 (noting that a state assessment "may serve regulatory purposes **directly** by, for example, deliberately discouraging particular conduct by making it more expensive . . . Or, it may serve such purposes **indirectly** by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.") (emphasis added).

the TIA does not bar federal court jurisdiction." App15a.

The Comptroller does not argue that the Fifth Circuit ignored any salient facts or misapplied any basic rules of statutory construction. Instead, the Comptroller has manufactured complexity and inconsistency where none exists.

II. The Comptroller's "Circuit Split" Is a Fabrication.

A. Consistency is the hallmark of cases interpreting the TIA.

For decades, courts asked to resolve the fee-versus-tax question under the TIA, including the Fifth Circuit, have turned to the same precedent: *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683 (1st Cir. 1992). In *San Juan Cellular* itself, the court reported that "[c]ourts have had to distinguish 'taxes' from regulatory 'fees' in a variety of statutory contexts. Yet, in doing so, they have analyzed the legal issues ***in similar ways***." *Id.* at 685 (emphasis added). Courts, before and since *San Juan Cellular*, have consistently looked at the same basic factors to decide whether an assessment is a fee or tax: (1) the entity that imposed the assessment; (2) the population targeted for assessment; and (3) the ultimate allocation or use of the revenues generated by the assessment. *Id.*; *see also* App13a (explaining the facts that indicate a fee and quoting *Home Builders Ass'n of Miss.*, 143 F.3d at 1011).

There is also no debate as to how those factors are weighed: (1) assessments imposed by a legislature are more likely a tax, whereas those imposed by an administrative agency are more likely a fee; (2) the narrower the population targeted, the more likely the assessment is a fee; and (3) the allocation of funds to the general fisc weighs in favor of a tax finding, whereas an allocation to a special fund weighs in favor of a fee finding. *See San Juan Cellular*, 967 F.2d at 685; App12a-13a. This approach to determining where on the spectrum a given assessment lies affords federal courts flexibility, as there is no one-size-fits-all approach that could be employed. The Comptroller's "state-always-wins" rule would mean affording states' unbridled discretion to exploit their legitimate revenue-raising function to engage in regulation that could evade any federal review, no matter how brazenly unconstitutional.

All "[c]ourts facing cases that lie near the middle" of the tax-fee spectrum "have tended (sometimes with minor differences reflecting the different statutes at issue) to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation." *San Juan Cellular*, 967 F.2d at 685; *see also*, *e.g.*, *Hill v. Kemp*, 478 F.3d 1236, 1244-45 (10th Cir. 2007) (explaining that the "primary purpose" for the assessment has been the most important consideration historically and under modern case law; and finding, with "no qualms," that

"the primary purpose" of the state's revenue scheme permitted the court to resolve the fee-versus-tax issue).[4]

If the primary purpose is to raise revenue for the general public, the assessment is likely a tax; if the primary purpose is to regulate, the assessment is likely a fee.

To suggest a circuit split, the Comptroller reaches back to *Robinson Protective Alarm Co. v. Philadelphia*, 581 F.2d 371, 376 (3d Cir. 1978), a case that predates *San Juan Cellular*. Yet even in that earlier case, the Third Circuit utilized the same basic approach later described in *San Juan Cellular*—looking, in particular,

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[4] *Accord with, e.g.*, *Collins Holding Corp. v. Jasper Cnty.*, 123 F.3d 797, 800 (4th Cir. 1997) (explaining that "the purpose and ultimate use of the assessment" is "the heart of the inquiry"); *Hedgepeth v. Tenn.*, 215 F.3d 608, 612 (6th Cir. 2000) (agreeing that "the predominant factor is the revenue's ultimate use") (quoting *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management Dist.*, 166 F.3d 835, 837 (6th Cir. 1999) (in turn quoting *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) (all citing *San Juan Cellular Tel. Co.*, 967 F.2d at 685)); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 761 (10th Cir. 2010) (explaining that the "purpose" furthered by collecting the money is "the touchstone of our [TIA] inquiry"); *Am. Council of Life Insurers v. D.C. Health Benefits Exch. Auth.*, 815 F.3d 17, 19 (D.C. Cir. 2016) (noting courts interpreting the TIA "have agreed in saying that the basic issue is 'whether the charge is for revenue raising purposes, making it a "tax," or for regulatory or punitive purposes, making it a "fee."'") (quoting *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000)); *Ass'n for Accessible Medicines v. James*, 974 F.3d 216, 222 (2d Cir. 2020) ("In *Entergy*, we focused largely on the third *San Juan Cellular* factor"—*i.e.*, primary purpose—and noting "[o]ur sister circuits appear to agree that this factor is the most significant.").

at the purpose animating the assessment. Because the record in *Robinson Protective Alarm* showed that the funds raised were added to the public fisc, not to a special fund, the assessment was deemed a "tax" within the meaning of the TIA. 581 F.2d at 376.

Notably, courts in the Third Circuit have since relied expressly on *San Juan Cellular* and found consensus in terms of how courts interpret the TIA. *See Nigro v. Philadelphia*, Civil Action No. 10-983, 2010 WL 3419672 (E.D. Penn. Aug. 25, 2010) (noting "[c]ourts considering the issue have distilled three factors helpful in determining whether an assessment is a tax or a fee") (citing *San Juan Cellular*, 967 F.2d at 686-87; *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000); *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management Dist.*, 166 F.3d 835, 837 (6th Cir. 1999); the Fifth Circuit's *Home Builders Ass'n*, 143 F.3d at 1011; *Hager v. City of West Peoria*, 84 F.3d 865, 870 (7th Cir. 1996); *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Circuit 1996)).

Likewise, the Comptroller's reliance on *GenOn Mid-Atlantic, LLC v. Montgomery Cnty.*, 650 F.3d 1021 (4th Cir. 2011) to suggest a circuit split is completely inapt. Like its sister circuits, the Fourth Circuit relied on the *San Juan Cellular* factors to conclude that a charge on carbon-dioxide emissions imposed on a small set of high-volume emitters was a "fee," not a "tax." *Id.* at 1024-26.

Similarly, in *American Landfill*, the Sixth Circuit undertook the same basic analysis and then concluded that a solid waste disposal assessment was a tax because the revenue's ultimate use "serves public purposes benefitting the entire community." 166 F.3d at 839; *see also id.* at 837-39 (repeatedly citing *San Juan Cellular*).

The Comptroller also cites *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 730 (7th Cir. 2011) (en banc) as evidence of disarray among the circuit courts.[5] The Comptroller greatly overstates the significance of *Empress Casino*, with its unique facts, while also suggesting, incorrectly, that it reflects a "circuit split" involving the Second, Seventh, and Tenth Circuits. Pet. at 10-13.

Unlike the present case, *Empress Casino* arose from a RICO action between private parties seeking a private-law remedy; it was not a public-law action against a state or local authority. The plaintiffs alleged that the former governor, Roy Blagojevich, had "bought" statutes that taxed their casinos in order to benefit horse-racing establishments. 651 F.3d at 724-25. *Empress Casino* makes clear that the plaintiffs had *agreed* that the challenged statutes were "taxes." *Id.* at 726. Judge Posner's extended disquisition criticized the use of an "open-ended, multi-factor test" in that *particular* fight over "an exaction ***acknowledged by***

[5] *Empress Casino* properly emphasizes that jurisdictional rules, like the one in the TIA, should be "simple and clear." 651 F.3d at 727. Yet *Express Casino* itself reflects neither simplicity nor clarity.

all to be a 'tax.'" *Id.* at 728 (emphasis added). Since there was *agreement* between the parties, a TIA-analysis had been, in Judge Posner's view, a waste of time. But *Empress Casino* acknowledges that courts generally use the *San Juan Cellular* factors when a legitimate debate exists as to where on "[t]he line between a tax and a fee" a given assessment falls. *Id.* at 729. In *Empress Casino*, the purpose of the assessment was plainly *not* to burden/discourage gambling, as the assessment raised revenue from one type of gambling business and a small percentage of that revenue was reallocated to support a different type of gambling business. The unique facts have no bearing on whether the *San Juan Cellular* factors are generally a helpful tool. Moreover, the *Empress Casino* facts are quite distinguishable from those presented here, which were, as the Fifth Circuit recognized, readily amenable to a *San Juan Cellular* analysis and plainly indicated an agency pursuing a regulatory purpose.

A purpose-based analysis is also what is evident in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1382-83 (8th Cir. 1997). The Eighth Circuit found that a waste management services assessment was a fee because its "primary purpose" was "clearly regulatory," promoting compliance with a local waste-disposal regulatory system, and the funds were used to cover costs associated with a waste control program. *Id.* at 1383.

Illustrating yet more consistency, the Ninth Circuit also applies the *San Juan Cellular* factors. *See*, *e.g.*, *Bidart Bros.*, 73 F.3d at 930-33. In *Bidart Brothers*,

the court found that an assessment on certain high-volume apple producers was a fee. *Id.* Relevant facts supporting that conclusion included a mechanism whereby the amount of the assessment could be adjusted by an independent commission and the proceeds were used exclusively to benefit those who paid the assessment, rather than the general public. *See id.* at 931-32.

The facts relevant to a TIA analysis will always be fairly circumscribed; and the approach courts use is a flexible one readily applied "in a variety of statutory contexts." *Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315, 319 n.2 (4th Cir. 2019) (quoting *San Juan Cellular*, 967 F.2d at 685). Formulating a simpler, yet sufficiently flexible, approach to distinguishing taxes from fees is difficult to imagine. But because facts are involved, the analysis cannot be reduced to a rigid formalism. *See id.* (noting that *San Juan Cellular* "merely provides flexible and versatile guidance in assessing where a particular charge sits on the tax-fee continuum."). Some flexibility is paramount because comity is a two-way street: federal courts must respect states' power to tax but are not required to cede all jurisdiction with respect to schemes that primarily regulate conduct.

States sometimes craft assessments that seem to be neither fish (classic fee) nor fowl (classic tax). For instance, in *Hill v. Kemp*, a portion of the assessment obtained from a specialty license plate regime was deemed a tax even though some of the proceeds went to "specific state funds." 478 F.3d 1236, 1245 (10th Cir.

2007). But because the proceeds were to be "variously spread among a wide array of State initiatives," the Tenth Circuit recognized that the "primary purpose" of the assessment was to raise revenue for a wide array of public purposes, the goal of a tax. *Id.* at 1244-45. Also, the assessment did "not purport to 'regulate' anyone by incentivizing or disincentivizing certain forms of conduct" (such as discouraging SO Businesses). *Id.* at 1246. In short, *Hill* does not suggest an approach somehow inconsistent with the Fifth Circuit's, as the Comptroller implies. *See* Pet. at 12-13. Instead, *Hill* reflects attention to the operative fact-pattern in answering a threshold legal question. The key facts in *Hill* are, quite simply, distinguishable from those found in *this* case.

Yet again, *Am.'s Health Ins. Plans. v. Hudgens*, 742 F.3d 1319 (11th Cir. 2014) reflects a wholly consistent approach, not evidence that the Fifth Circuit has "gone rogue." The Eleventh Circuit, like the Fifth Circuit, found the assessment in question to be a fee because its primary purpose was regulatory in nature; and the assessment was not adopted to raise revenue. *Id.* at 1328-29 (relying on *San Juan Cellular* and finding the TIA did not apply); *accord Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666, 670 (11th Cir. 1984) (noting that, "to the extent the statute challenged is regulatory rather than revenue raising in purpose, the measure does not constitute a tax, and the district court retains jurisdiction.") (citing *Mobil Oil Corp. v. Tully*, 639 F.2d 912, 917-18 (2d Cir.1981)).

The Comptroller has taken a truism—that different cases involve different sets of operative facts—and tried to twist that circumstance into some notion of a circuit split.[6] Yet simply reading the TIA case law reveals exceptional *consistency*, over the course of decades, when federal courts are asked to decide the basic question of whether a state's assessment is a "fee" or a "tax" under the TIA.[7]

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[6] The Comptroller's amicus, by contrast, admits that "the Fifth Circuit, similar to the First, Third, Fourth, Sixth, Eighth, and D.C. Circuits, uses a multifactor test"; the amicus simply maintains that the Fifth Circuit misapplied the test. TAASA Brief at 8. In truth, all of the courts have been doing the same basic analysis when asked to decide the fee-versus-tax issue under the TIA.

[7] The Comptroller also tries to scare up support for its baseless argument that the Fifth Circuit is an "outlier" by recourse to this Court's precedents construing different statutes involving the distinction between a "tax" and a "penalty." Pet. at 20-23 (citing, *e.g.*, *Sonzinsky v. U.S.*, 300 U.S. 506, 555 (1937)). These are strawman arguments, as the Comptroller himself notes that no one has argued that the SOB Fee is a "penalty." *See* Pet. at 25 (admitting "Nor is there any claim that the $5 charge operates as a penalty or fine."). The Comptroller's reliance on cases such as *U.S. v. La Franca*, 282 U.S. 568, 572 (1931), Pet. at 20, makes little sense; that case, decided years before the TIA's enactment, involved a determination that the federal government could not collect taxes and related penalties from a restaurant owner because a prior prosecution under the National Prohibition Act barred the subsequent prosecution. Equally perplexing is the Comptroller's reliance on *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994), a case in which this Court found a state's purported "tax" on marijuana growers to be so punitive that it was "the functional equivalent of a successive criminal prosecution" violative of the Double Jeopardy Clause.

B. A recent Second Circuit case, upon which the Comptroller relies heavily, involves a sui generis statutory scheme that no longer exists.

The Comptroller contends that the Fifth Circuit's decision is incompatible with the Second Circuit's decision in *Accessible Medicines*, 974 F.3d 216, thus evidencing a circuit split—indeed, a "three-way circuit split" with the Fifth Circuit constituting a fourth lone wolf. *See* Pet. at 1, 10-19. *Accessible Medicines* itself belies the Comptroller's notion of a "circuit split," with the Second, Seventh, and Tenth Circuits comprising a distinct camp. The Second Circuit's analysis involves the same approach found in decisions emanating from all of the circuits, including the Fifth Circuit.

Accessible Medicines arose from multiple lawsuits challenging a now-defunct New York law that imposed a monetary assessment on the sale of opioids by licensed opioid manufacturers and distributors to raise significant revenue for broad public health initiatives. 974 F.3d at 219. The case involved a threshold dispute as to whether the law amounted to a tax per the TIA. In a recent petition to this Court, the respondent (New York's Attorney General) argued, *inter alia*, that no circuit split exists with respect to interpreting the TIA and that the Second Circuit had made its determination by applying the same test that the Fifth Circuit and its sister courts use; New York's Attorney General further argued that the Second Circuit had done so in a manner consistent with the precedents of both this Court and other circuit courts. *See* James's Brief in

Opposition at 1, 14, Supreme Court Docket No. 20-1611. A review of the Second Circuit's decision supports that characterization.

In *Accessible Medicines*, the Second Circuit explicitly relied on *San Juan Cellular*. *See Accessible Medicines*, 974 F.3d at 222-23 (quoting *San Juan Cellular*, 967 F.2d 683). *Accessible Medicines* resulted in a different finding (that the assessment was a tax) than the Fifth Circuit's finding in *this* case (that the assessment was a fee). The different outcomes are not attributable to the use of different legal tests but to the factually distinguishable assessments involved.

Accessible Medicines involved a law that, during a limited, two-year window, required opioid manufacturers and distributers to make substantial "opioid stewardship payments" that were then placed into a fund to support broad public health initiatives. *Id.* at 223. This tax was akin to assessments imposed on the lawful sales of cigarettes and alcohol. *Id*.

In resolving the fee-versus-tax issue, the Second Circuit noted that "the ultimate allocation or use of the revenues generated by the assessment" furthered "**broad** public health initiatives that undoubtedly provide **a general benefit** to New York residents of a sort often financed by a general tax." *Accessible Medicines*, 974 F.3d at 223 (emphasis added, internal quotation marks omitted). Indeed, the relationship between the funds raised and service of the "**general welfare**" of the state's citizens was key to the Second Circuit's analysis. *Id.* at 224-35 (quoting with approval

Hedgepeth v. Tenn., 215 F.3d 608, 613 (6th Cir. 2000) and the Ninth Circuit's *Bidart Brothers*, 73 F.3d at 932) (emphasis added). The Fifth Circuit, undertaking the same analysis, noted correctly that funds raised by the SOB Fee are, by statute, deposited into a special fund that is to be used for *narrow* purposes, not to further the general welfare.[8] App15a.

The Second Circuit also noted that the opioid stewardship payment "was clearly imposed by the Legislature, which wields the taxing power, and not by a 'limited-purpose' agency," which ordinarily levies fees. *Accessible Medicines*, 974 F.3d at 224. The Fifth Circuit, applying the same analysis, noted that, although the SOB Fee was enacted by the Texas Legislature, the Clothing Rule successfully challenged by the TEA below was promulgated by the Comptroller, an entity in the executive, not the legislative, branch. App14a n.3.

Any ambiguity about whether the short-term payments at issue in *Accessible Medicines* were a "tax" was eliminated when the law was subsequently amended. *See* James's Brief in Opposition, Supreme Court Docket No. 20-1611 at 1. The statutory scheme litigated in *Accessible Medicines* has not only been

[8] Neither the Comptroller nor his amicus, which is a beneficiary of the fund, has acknowledged that the Texas Legislature authorizes using money in the "Sexual Assault Program Fund" only for limited purposes, including allocations to the Comptroller "for the administration of the fee imposed on sexually oriented businesses," *i.e.*, to cover the administrative costs associated with collecting the SOB Fee. TEX. GOV'T CODE § 420.008(c)(10). These facts further demonstrate that the assessment is a regulatory fee, not a tax.

superseded, thereby mooting the debate, it "has no analogue in other States[.]" *Id.*

In sum, the Comptroller's suggestion that the Second Circuit's opinion in *Accessible Medicines* is indicative of a "three-way circuit split," wherein the Second, Seventh, and Tenth Circuits are in one camp, is easily belied by *Accessible Medicines* itself. The Second Circuit supported its analysis by recourse to the same approach found in decisions emanating from all of the circuits, including the Fifth Circuit. *See*, *e.g.*, *Accessible Medicines*, 974 F.3d at 225 (citing favorably the Fifth Circuit's *Home Builders Ass'n of Miss., Inc.*, 143 F.3d at 1012 and other cases as all following the same flexible *San Juan Cellular* approach).

III. No Cert-Worthy Issue Arises from This Case Involving a State Agency's Rule Change to a Unique, Texas-Specific Statute.

The Comptroller devotes a significant portion of his petition to issues beyond the scope of the Question Presented. *See* Pet. 26-30 (critiquing the Fifth Circuit's merits-determination that the Clothing Rule is unconstitutional). This digression is another effort to conceal the relatively trivial nature of the dispute presented to this Court. Aside from the absence of error or a circuit split, four additional reasons make this case a poor vehicle for any fine-tuning with respect to interpreting the TIA, were such fine-tuning needed.

First, the rule change challenged in the underlying lawsuit (the Clothing Rule) involves little nuance. *See*

SUP. CT. R. 10 (explaining that a petition for a writ of certiorari will be granted only for compelling reasons). The Clothing Rule, extending the SOB Fee to capture Latex Clubs, was overtly regulatory. The Fifth Circuit below, in accord with other federal courts, easily identified the few basic facts relevant to deciding that the challenged assessment was a fee, not a tax. *See* App12a-15a.

Second, the decision below has no broad ramifications or national significance. The Comptroller's attempt to use his rule-making authority to extend the SOB Fee retroactively to a subset of businesses (the Latex Clubs) does not reflect some national trend. The Clothing Rule has no application beyond Texas's SOB Fee statute; and the dispute below involved no more than one state agency's idiosyncratic tactic to capture a small set of businesses who had responded to the agency's initial regulatory actions by changing their practices.

Third, the rule-making function is distinct from the revenue-raising function of the state legislature, such that the Comptroller's purported comity concerns are hardly implicated. The Comptroller's rule-making authority was used to target a subset of an already-narrow class of disfavored businesses to address an exceedingly narrow activity (cabaret dancers' wearing latex covering to conceal their breasts); the resulting Clothing Rule imposed additional burdens on Latex Clubs while raising *de minimus* funds. The Comptroller's Clothing Rule cannot be deemed a meaningful

quest to raise money to support the general fisc.[9] The Comptroller has pointed to no evidence that any state's legitimate power to generate meaningful revenue through taxation would ever be thwarted by the Fifth Circuit's sound recognition that the SOB Fee and the Clothing Rule were crafted to exact fees from a narrow class of businesses as a means to regulate those businesses. The TEA wholeheartedly agrees that states need to be able to generate revenue; but the Fifth Circuit's decision below will have no impact whatsoever on Texas's ability to impose or collect taxes.[10]

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[9] In its eagerness to exhort this Court to get involved, the TAASA misrepresents key facts about the impact of the unconstitutional Clothing Rule. *See* TAASA Brief at 2 (claiming that Texas's "efforts to combat sexual violence" will somehow be "materially and significantly impaired if the Court strikes down the interpretation of 'clothing' " found in the Comptroller's Clothing Rule). The TAASA seems unaware that the parties *agreed* below that the funds raised from the Clothing Rule would be *de minimus*. The TAASA also neglected to note that the "Sexual Assault Program Fund" is supported by "fees and fines" collected from multiple sources other than SO Businesses. TEX. GOV'T CODE § 420.008(b). Finally, the amicus's argument suggests misapprehension of the basic issue presented to this Court, which is only a threshold issue of jurisdiction; the Court is not being asked to "strike down" the SOB Fee, which was not challenged, or even the Clothing Rule, which was the narrow focus of the underlying action. Even if this Court were, for some reason, to grant certiorari, it would not be revisiting the merits of the TEA's successful constitutional challenges.

[10] A brief filed by tax policy organizations incorrectly argues that this is an appropriate case to provide "certainty to litigants" and "safeguard state tax sovereignty." *See* Brief of Amici Curiae the Multistate Tax Commission and Federation of Tax Administrators. The rule change challenged below (the Clothing Rule) was not enacted by a state legislature; moreover, both parties agreed

Fourth, the basic premise of the Comptroller's petition is self-deconstructing. He urges this Court to instruct the Fifth Circuit to respect the dictates of federalism. Yet he turns to inapposite federal cases from this Court involving federal-taxation issues to support his desire for the Court to make new law by declaring all state assessments "taxes," regardless of the facts. *See*, *e.g.*, Pet. at 2-25 (relying, *e.g.*, on *NFIB v. Sebelius*, 567 U.S. 519, 567 (2012)).[11]

The Comptroller's petition does not present any compelling reason for the Court to exercise its discretion and grant certiorari. *See* SUP. CT. R. 10.

below that the Clothing Rule would raise only a *de minimus* amount of revenue.

[11] Similarly, the Comptroller's amicus invokes the inapposite *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 35-36 (1922), a federal tax case decided years before the TIA's enactment. TAASA Brief at 6.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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