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.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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By holding that Texas levied a "fee" (rather than a tax) on businesses that combine alcohol and live nude entertainment, the Fifth Circuit contravened this Court's precedent—and the principles—animating the Tax Injunction Act ("TIA"). Pet. 20-23. The $5-per-customer charge falls squarely within the type of "tax" suit that Congress channeled to state courts. *Id.* at 23-26. Because it raises public revenue to fight sexual assault, it would not lose "tax" treatment even if it also had some regulatory purpose. *Id.* at 20.

The regulatory-purpose dispute is a clean legal question that has divided the lower courts and, as respondent concedes (at 14), dispositively conferred federal jurisdiction below in a way it would not have elsewhere. Per respondent (at 11), the TIA poses no confusion because courts invoke a generally stated, multifactor test announced by then-Chief-Judge Breyer in *San Juan Cellular Telephone Co. v. Public Service Commission*, 967 F.2d 683 (1st Cir. 1992). But the supposed uniformity hides that courts construe the factors in fundamentally conflicting ways. This case is a classic example of the divide on "regulatory purpose": if Texas were in any other circuit, its charge would be deemed a tax. Pet. 10-19.

Review is warranted on this exceptionally important question that has vexed the lower courts, and this case is an optimal vehicle to resolve that question. This Court's review is also warranted because the question presented is jurisdictional and likely to recur. *Id.* at 30-32.

I. The Fifth Circuit Departed from This Court's Precedent and Reached the Wrong Result.

Congress passed the TIA "to limit drastically federal district court jurisdiction." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 826 (1997). Federal

courts do not "interfere with the operation of state tax systems if," as here, "the taxpayer had available an adequate remedy in the state courts." *California v. Grace Brethren Church*, 457 U.S. 393, 412 (1982). The Fifth Circuit nonetheless deemed Texas's charge a fee, which falls outside the TIA, because it "serves a regulatory purpose." Pet. App. 15a. This conflicts with precedent construing the analogous Anti-Injunction Act. Pet. 25-26.

Respondent dismisses this conflict as "construing different statutes involving the distinction between a 'tax' and a 'penalty.'" BIO.23 n.7. But pre-TIA tax treatment animates the TIA (Pet. 20-21), defining what is a tax (in part) by distinguishing between taxes and penalties. *E.g.*, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). Texas's charge falls on the "tax" side of that line. Pet. 21. It funds programs that combat sexual assault and discourages undesired but lawful activity. *Cf., e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 567 (2012). This Court has rejected the idea that charges are not taxes because they discourage activities being taxed. Pet. 4.

Respondent attempts (at 10-11) to overcome this conclusion by insisting that the Fifth Circuit filtered *San Juan Cellular* through *Home Builders Association of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1011-13 (5th Cir. 1998). This argument falters for four reasons.

First, respondent ignores that *Home Builders* deemed a local municipal-development "impact fee" to be a tax, cautioning that a charge is *not* "regulatory in nature because it narrowly defines the purposes for which the collected funds should be spent." *Id.* at 1012. Thus, under *Home Builders*, the $5 charge should have been deemed a tax. Such inconsistency underscores the need for this Court's clarification.

Second, respondent also claims (at 14 n.3) that the Fifth Circuit's regulatory-purpose test comes "straight from *San Juan Cellular* itself." But any statement regarding "regulatory purpose" in *San Juan Cellular* was dicta for the reasons the Comptroller has explained. Pet. 19. Indeed, as discussed below (at II.B.1), respondent cannot identify a *single* other court that applied *San Juan Cellular* like the Fifth Circuit below.

Third, respondent misstates how Texas law works. Respondent admits that Texas's Legislature imposed the charge but says it is a fee (not a tax) because "the Comptroller's office, a state agency," issued the disputed rule "extending" the charge's "reach." BIO.12 (citing Pet. App. 14a & n.3). Like other State taxes, the Comptroller is tasked with collecting the $5 charge and may adopt rules for collecting State revenues. Tex. Bus. & Com. Code § 102.056; Tex. Tax. Code § 111.002(a). But—as respondent does not dispute—those rules cannot *change* the law set by the Texas Legislature. Pet. 7, 24 (citing *Hegar v. Tex. BLC, Inc.*, No. 01-18-00554-CV, 2020 WL 4758474, at *3-8 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, pet. denied)). The Legislature imposed the charge, not the Comptroller or the rule.

Fourth, respondent gestures (at 12-14) toward the Fifth Circuit's observations that Texas did not label its charge a "tax" and that "'the vast majority of the community at large is unaffected by" the charge. But the Texas Legislature has defined "tax" to include "a tax, fee, assessment, charge, or other amount that the comptroller is authorized to administer," and uses the terms interchangeably. Tex. Tax Code § 101.003(13). Respondent also ignores States' countless excise taxes narrowly targeting things like alcohol and cigarettes, which burden only those consumers who choose to partake. Pet. 31.

Moreover, faulting the $5 charge's label or reach would conflict with charges deemed taxes elsewhere.

II. This Court Should Resolve Confusion Among the Lower Courts Over TIA Regulatory Purpose.

Respondent claims that courts "have turned to the same precedent[,] *San Juan Cellular*," to determine whether a charge is a tax. BIO.15. Specifically, respondent insists (at 16) that all federal courts hold that:

> (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.

This supposed uniformity ignores that this Court "has not endorsed any multifactor test for applying the [TIA]," and the Seventh Circuit deemed multifactor tests "inappropriate." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 728 (7th Cir. 2011) (en banc).

Moreover, respondent elides the disagreement about the role of *purpose* in its generally worded framework—and specifically what constitutes a charge whose "primary purpose is to raise revenue for the general public" versus one whose "primary purpose is to regulate." BIO.17. "Consistency" is absent. *Contra id.* at 15.

A. The lower courts' divergence requires review.

The question dividing the lower courts is whether a regulatory purpose strips a charge of tax treatment, Pet. (I), not whether a generic set of factors is "generally a helpful tool," BIO.20. As respondent emphasizes, the

Fifth Circuit was "'far more concerned with the purposes underlying the [statute] than with the actual expenditure of the funds collected under it.'" *Id.* at 13 (quoting Pet. App. 15a). And respondent concedes (at 16) that courts have distinguished taxes from fees with at least two different tests: a charge's "ultimate use," (citing then-Chief Judge Breyer's language from *San Juan Cellular*, 967 F.2d at 685), or its "primary purpose" (citing then-Judge Gorsuch's language from *Hill v. Kemp*, 478 F.3d 1236, 1244-45 (10th Cir. 2007)). This divergence alone warrants review because jurisdictional rules like the TIA are supposed to be clear and easily administrable, Pet. 32, to avoid "eating up time and money as the parties litigate" jurisdiction, *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

B. Texas's $5 charge would have been deemed a tax outside the Fifth Circuit.

1. Respondent identifies no other circuit that would have deemed the $5 charge a fee.

Respondent's efforts to avoid courts' divergent fee treatment ring hollow for the simple reason that it cannot identify a single circuit that would have held Texas's $5 charge a fee. In addressing the Third Circuit's decision in *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371 (3d Cir. 1978), respondent maintains that alarm charges were taxes because they "were added to the public fisc, not to a special fund." BIO.18 (citing *Robinson*, 581 F.2d at 376). Respondent contends that the Fourth Circuit deemed a charge a fee because it was "imposed on a small set of high-volume [carbon] emitters." *Id.* (quoting *GenOn Mid-Atlantic, LLC v. Montgomery County*, 650 F.3d 1021, 1024-26 (4th Cir. 2011)). Respondent repeats a similar refrain for cases from the Sixth, Eighth, Ninth, and Eleventh Circuits. BIO.19-22. But money is fungible: a State's method of

funding programs for the public (versus the payer) is irrelevant to the purpose of the funds—which respondent admits (at 13) animated the Fifth Circuit's decision.

2. The Second, Seventh, and Tenth Circuits would reject the Fifth Circuit's regulatory-purpose approach.

The circuits that have squarely addressed the role of regulatory purpose would hold that Texas's $5 charge is a tax—notwithstanding the fact that it raises the costs of mixing alcohol with live nude entertainment. Respondent cannot (and does not try to) parse *which* regulatory purposes fall outside the TIA because doing so would prove the Second, Seventh, and Tenth Circuits correct.

Second Circuit. Respondent acknowledges that *Association for Accessible Medicines v. James*, 974 F.3d 216, 227 (2d Cir. 2020), "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)." BIO.25. The "most significant" consideration in the Second Circuit's analysis was that the opioid-addiction services for which the New York charge's proceeds were earmarked "provide a 'general benefit'" to the public. *Accessible Medicines*, 974 F.3d at 222-23 (citation omitted). It made no difference that proceeds were segregated for those programs. *Id.* at 225-26. Because Texas's charge shares these attributes, Pet. 10-11, respondent urges several unavailing counterarguments.

First, respondent cites (at 24-25) New York's defense of the Second Circuit's ruling before this Court, which did not flag the Fifth Circuit as taking an outlier position. But that is unsurprising because, as discussed above (at 2, the Fifth Circuit precedent available at that time indeed suggested that the Fifth Circuit would have

deemed New York's charge (and Texas's charge) a tax. *See Home Builders*, 143 F.3d at 1011-13.

Second, respondent suggests (at 25), that New York's charge serves a more "public" purpose than Texas's. Respondent argues that funds from the $5 charge are "deposited into a special fund that is to be used for *narrow* purposes, not to further the general welfare." BIO.26. This distinction is ephemeral: both charges raise funds to address public health and safety concerns arising from intoxicants (whether opioids or alcohol). Moreover, the role of *public* purpose in the analysis is what has divided the courts and requires this Court's intervention.

Third, respondent contends that New York's charge "'was clearly imposed by the Legislature, which wields the taxing power, and not by a "limited-purpose" agency,' which ordinarily levies fees." *Id.* But this argument favors the Comptroller: the Texas Comptroller is a tax collector, not a limited-purpose agency. *See supra* p. 3. And although the Fifth Circuit noted that the challenged rule was promulgated by the Comptroller (Pet. App. 14a n.3), the court did not fault the Texas Legislature's delegation of tax-administration authority. Likewise, that the Texas Legislature authorized appropriations from the sexual-assault fund to the Comptroller "for the administration of the fee imposed on sexually oriented businesses," Tex. Gov't Code § 420.008(c)(10), is hardly surprising. The Comptroller is the State's tax-collection authority, which costs money. Appropriating money to the Comptroller to cover tax collection is different than administering benefits to payers or covering regulatory costs—for which the district court found the charge provides none. Pet. App. 101a.

Regardless, respondent's distinction fails. The TIA "prohibits federal district courts from enjoining state tax

administration," which respondent sought here. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). Seeking "federal-court relief" from a "tax that state law imposed on them" is "exactly what the TIA was designed to ward off." *Hibbs v. Winn*, 542 U.S. 88, 105 (2004). Respondent "mounted federal litigation to avoid paying state taxes," which "reduce[s] the flow of state tax revenue." *Id.* at 106. The charge is collected by state tax authorities and, as in *Accessible Medicines*, funds programs that the State deems necessary because of payers' conduct. Pet. 10-11.

Fourth, respondent states that "the vast majority of the community at large is unaffected by" the $5 charge, which "rais[es] the costs," of commercial activity. BIO.13-14 (quoting Pet. App. 15a). But the same was true of New York's charge, which burdened only a fraction of companies transacting in New York. Pet. 10-13.

Fifth, respondent argues that New York's law "was subsequently amended," ostensibly removing confusion over the TIA. BIO.26. But *Accessible Medicines* remains binding Second Circuit precedent. Under its test, Texas's charge would be a tax.

Seventh Circuit. Respondent hardly counters that Texas's charge would be a tax under *Empress Casino*, too. Indeed, respondent misstates that Illinois's charge was ***"acknowledged by all*** to be a 'tax.'" *Id.* at 19-20 (quoting *Empress Casino*, 651 F.3d at 728) (alterations respondent's). In reality, the quotation merely described *arguments* about tax treatment. *Empress Casino*, 651 F.3d at 728. The court rejected those arguments, *id.* at 729, and adopted a categorical approach under which courts may not write "behavior-shaping taxes out of the [TIA]," or else the TIA "would have a very limited reach," *id.* at 730. *Contra* BIO.11, 14 (asserting that

"fees" and "taxes" never "constitute immutable categories" and suggesting that a fee is any charge that "further[s] a regulatory aim").

Illinois's profit-transfer scheme "pursu[ed] a regulatory purpose" (BIO.20) of favoring horse racing at the expense of casinos. *Empress Casino*, 651 F.3d at 732. But, unlike Texas, Illinois received TIA protection. In the Seventh Circuit, fees include only charges representing "a reasonable estimate of the cost imposed by the [payer]" for regulation. *Id.* at 728. Notably, *Empress Casino* observed that "[t]he First Circuit reached the opposite conclusion" in *San Juan Cellular*. *Id.* at 730.

Tenth Circuit. The Tenth Circuit's ruling in *Hill* also conflicts with the Fifth Circuit's reasoning. *Hill* explained that a specialty-plate charge that exceeded "the amount necessary to defray the costs of issuing the plates" was a tax. 478 F.3d at 1246. That was true even though excess proceeds were earmarked for special-purpose funds. *Id.* at 1240.

Respondent (at 22) calls *Hill* "distinguishable" because the charge's "primary purpose" was "to raise revenue for a wide array of public purposes" and did "not purport to 'regulate' anyone by incentivizing or disincentivizing certain forms of conduct." 478 F.3d at 1244-46. But that distinction underscores the split. For instance, the First Circuit recently explained in *American Trucking Associations v. Alviti*, 944 F.3d 45 (1st Cir. 2019), that certain tolls were fees despite raising revenue to "serve[] the public benefit." *Id.* at 53. Echoing D.C. Circuit reasoning (which respondent never discusses, Pet. 16), the court noted that the "hallmark of a fee is at least a *rough* match between the sum paid and the (broadly defined) benefit provided, as seen from the payer's perspective." *Id.* at 54 n.10 (quoting *Am. Council of Life*

Insurers v. D.C. Health Benefits Exch. Auth., 815 F.3d 17, 19 (D.C. Cir. 2016)).

That at least three circuits approach this issue differently demonstrates the need for review. In opposing review, respondent presents a false choice between clarification and enabling "regulation that could evade any federal review." BIO.16. Under the TIA, "review is ultimately available in this Court" following state-court appeals. *Rosewell*, 450 U.S. at 514 (citing 28 U.S.C. § 1257). And this Court presumes that state agencies "will respect" state-court adjudication of rights. *Grace Brethren Church*, 457 U.S. at 414.

III. Respondent Identifies No Obstacle to Review.

Respondent admits (at 29 n.9) that this is an ideal vehicle to provide much-needed clarity regarding the TIA because the Court need review only the threshold, dispositive jurisdictional question. Pet. 23-24. The only issues respondent raises create no impediment to review.

First, respondent claims that the Clothing Rule was "overtly regulatory" because it "extend[ed] the SOB Fee to capture Latex Clubs." BIO.28. But respondent does not dispute the controlling contrary construction of Texas law settled while this appeal was pending. Pet. 30. Respondent cannot contend that the "Clothing Rule imposed additional burdens on Latex Clubs." BIO.28-29. Likewise, the parties did not "agree[]" that the charge "raise[d] only a *de minimus* [sic] amount of revenue." *Id.* at 29 n.10. Like other "sin taxes," it has minimal effect *on strip clubs* because it is borne by consumers who partake in the activity. Pet. 5; Pet. App. 99a ("[T]his cost can be—and almost certainly is—passed on to the customers.").

Second, respondent contends that the decision below lacks "broad ramifications or national significance."

BIO.28. But States employ countless taxes that could be deemed fees under the Fifth Circuit's approach. Pet. 31-32. And this Court has recognized the conflict between federal courts eager to "vindicate and protect federal rights" and jurisdictional bars. *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 417 (2010).

Third, respondent distinguishes "rule-making" from "the revenue-raising function of the state legislature." BIO.28. Respondent says there is no risk to state revenue because the Comptroller's rule "exact[s] fees from a narrow class of businesses as a means to regulate those businesses." *Id.* at 29. But that would have been true of charges deemed taxes by the Second and Seventh Circuits. Moreover, as then-Judge Gorsuch observed in *Hill*, nothing "suggest[s] that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers." 478 F.3d at 1250.

Fourth, granting certiorari would not mean "declaring all state assessments 'taxes,' regardless of the facts." BIO.30. Case law is replete with assessments that are not taxes because, for example, they have at least some rough correspondence to something benefiting the payer. *Am. Council of Life Insurers*, 815 F.3d at 19-20. The $5 charge, which the district court found offsets *no* regulatory costs, is no such charge. Pet. App. 101a.

CONCLUSION

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

Respectfully submitted.

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