TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

NO. 03-15-00370-CV

Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising, Appellant

v.

City of Austin, Texas; and Marc A. Ott, being sued in his Official Capacity, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. D-1-GN-12-001211, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

OPINION

(Jun. 15, 2016)

Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising (Reagan) sued the City of Austin and city manager Marc A. Ott, in his official capacity (collectively, the City), alleging that the City's "billboard registration fee" amounts to an unconstitutional occupation tax against Reagan. The trial court signed a final judgment ordering that Reagan take nothing on its claims. In four issues on appeal, Reagan contends that none of its claims were time-barred and that the trial court erred in determining that the assessment against Reagan was a proper regulatory fee.

Because we conclude that a prior federal-court ruling precluded relitigation of whether the assessment was a regulatory fee or a tax and that none of Reagan's claims are time-barred, we will reverse the trial court's judgment and render judgment in Reagan's favor in part and remand for the consideration of attorney's fees.

BACKGROUND[1]

Reagan owns and operates billboards in the Austin area. The City regulates these billboards and requires them to be registered. Before amending its regulations in 2008-2009, the City assessed a "billboard registration fee" of $220 per billboard every two years (an effective rate of $110 per year). After the amendments, the City collected an assessment of $200 per billboard per year, although the City could not point to anything it had done by way of a study, budget, or survey to determine the costs associated with the City's registration program.

In 2009, Robert Rowan, a City employee, analyzed the $200 billboard assessment. In an email sent to his superiors in November 2009, Rowan concluded that an assessment of $140 would be "a more reasonable fee" and would "close the gap between the revenue and expenditures of running this program." Daniel Cardenas, another City employee, later conducted a study concluding that $242 per year was the proper assessment.

[1] Unless otherwise noted, all facts recited herein are undisputed.

After communicating with his superior, Cardenas raised his estimate to $352 per year. In 2012, the City lowered the assessment to $190 per year.

Reagan, under protest, paid the $200 billboard assessment each year from 2009 to 2012 and the $190 assessment each year for 2013 and 2014. In April 2010, Reagan sued the City in federal district court, Judge Lee Yeakel presiding, challenging the constitutionality of the billboard assessment. After Reagan filed suit, the City retained a consulting firm to conduct a study of the billboard assessment. This firm concluded that "the cost of service for administering the billboard registration fee is $190." Meanwhile, Reagan retained its own consultant, who determined that the assessment should be about $43 per year.

On November 30, 2011, following a bench trial, Judge Yeakel issued a final judgment dismissing Reagan's suit without prejudice for lack of jurisdiction. In his findings of fact and conclusions of law, Judge Yeakel concluded that the City's billboard assessment is a "tax" for purposes of the Tax Injunction Act (TIA) and, therefore, the court lacked subject-matter jurisdiction over Reagan's suit. Under the TIA, federal courts lack subject-matter jurisdiction to "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." *See* 28 U.S.C. § 1341; *Washington v. Linebarger, Goggan, Blair, Pena & Sampson, LLP*, 338 F.3d 442, 444 (5th Cir. 2003). On December 29, 2011, the City filed a motion for new trial, which Judge Yeakel denied by an order signed on February 6, 2012.

On April 25, 2012, Reagan filed this suit in the Travis County district court (the trial court). At the ensuing bench trial, Reagan argued that Judge Yeakel's determination that the billboard assessment is a tax was "res judicata" and barred relitigation of whether the assessment is a tax or a regulatory fee. Reagan further argued that, because the assessment is a tax, and because the State of Texas does not levy a tax on the outdoor advertising business, the City's billboard assessment violates the Texas Constitution by levying a tax that exceeds one half of the tax levied by the State on the same business. *See* Tex. Const. art. VIII, § 1(f) ("The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the State for the same period on such profession or business."). Reagan sought a declaration under the Uniform Declaratory Judgments Act that the billboard assessment is an unconstitutional tax, damages under 42 U. S.C. § 1983 consisting of "the portion of the fees paid under duress that are unconstitutionally excessive," and attorney's fees.[2] The City responded that Judge Yeakel's ruling that the assessment is a tax for purposes of the TIA does not control the question of whether the assessment is a tax under the Texas Constitution and that it is not a tax

---

[2] Although Reagan's live pleading advanced other theories and causes of action, on appeal Reagan argues only that the billboard assessment violates article VIII, section 1(f).

because it is reasonably related to the cost of billboard regulation. The City also argued that any claims Reagan might have arising from the assessments it paid in 2009 and 2010 were barred by the statute of limitations.

In its final judgment signed on March 31, 2015, the trial court ordered that Reagan take nothing on its claims. The court also issued findings of fact and conclusions of law, in which it found that "[t]he activities performed for the billboard registration program are related to the program" and that "[t]he fee is based on the City's costs for actual activities performed." The trial court also concluded that "Judge Yeakel's ruling based on the [TIA] is not res judicata as to this suit," that "[t]here is a reasonable relationship between the amount of the fee and the City's costs," that "[t]he primary purpose of the fee, in light of the ordinance that authorizes the fee as a whole, is for regulation," and that "[t]he City's fee is reasonable and constitutional." Finally, the court concluded that "Reagan's claims for fees paid in August of 2009 and March of 2010 are time-barred." This appeal followed.

DISCUSSION

Statute of Limitations

In its third issue on appeal,[3] Reagan contends that the trial court erred in concluding that claims arising

---

[3] We address Reagan's limitations argument first given its threshold nature.

from the assessments it paid in 2009 and 2010 are time-barred.

Reagan's claims are governed by a two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a); *Lowenberg v. City of Dall.*, 168 S.W.3d 800, 801 (Tex. 2005) (per curiam). Because Reagan paid its assessments for 2009 and 2010 in March 2010 or before and filed this suit in April 2012, more than two years later, its claims for these years are barred unless the statute of limitations was tolled. Reagan argues that a savings clause tolled the statute of limitations because Reagan filed its federal action within the limitations period and then filed this suit in state court within 60 days from the time the federal court's judgment dismissing Reagan's claims for lack of jurisdiction became final. Reagan relies on the tolling provision set forth in section 16.064 of the Texas Civil Practice and Remedies Code, which states the following:

> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if: (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

Tex. Civ. Prac. & Rem. Code § 16.064(a).

In response, the City points out that the federal court signed its judgment dismissing Reagan's claims on November 30, 2011, and Reagan filed this suit on April 25, 2012, more than 60 days later. The City argues that because Reagan did not file this suit within 60 days after the federal court signed its judgment, section 16.064 does not toll the statute of limitations and Reagan's claims are untimely. Whether section 16.064 tolled the statute of limitations is a question of law we review de novo. *See Brown v. Fullenweider*, 135 S.W.3d 340, 342 (Tex. App. – Texarkana 2004, pet. denied); *see also First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008) ("The construction of a statute is a question of law we review de novo.").

Section 16.064's first requirement is met because the court in which Reagan originally filed this action dismissed the case for lack of jurisdiction. *See* Tex. Civ. Prac. & Rem. Code § 16.064(a)(1). Therefore, we must determine whether Reagan filed its state-court action within 60 days of the date when the federal court's judgment "bec[ame] final." *See id.* § 16.064(a)(2). As the Texas Supreme Court has recognized, whether a judgment is considered "final" depends on the context. *See Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 78 (Tex. 2014) ("We assess a judgment's finality differently, depending upon the context."); *Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988) ("[T]he term 'final,' as applied to judgments, has more than one meaning."). We are not aware of any precedent from the Texas Supreme Court or from this Court deciding when a federal district court's judgment becomes final for purposes of section 16.064 when, as here, neither party appeals the judgment. *See Vale v. Ryan*, 809 S.W.2d 324, 327 (Tex. App. – Austin 1991, no writ) ("We do not address the question of when a disposition becomes final for purposes of section 16.064 where, for example, a district-court dismissal for lack of jurisdiction is later affirmed on appeal.") (italics removed).[4]

The statute's use of "becomes final" suggests that a judgment is not always final for purposes of the savings clause the instant the judgment is signed or rendered. Otherwise, the legislature would have specifically provided that the tolling period begins on the day the first court signs the judgment. The legislature knows how to use the signing and rendition of a

---

[4] The City relies heavily on *Ruiz v. Austin Independent School District*, No. 03-02-00798-CV, 2004 WL 1171666 (Tex. App. – Austin May 27, 2004, no pet.) (mem. op.). In *Ruiz*, this Court explained that the plaintiffs' claims were time-barred unless a tolling provision applied. *Id.* at *4. The Court then discussed section 16.064 and concluded, "Even with the benefit of this tolling statute, however, the Ruizes failed to satisfy the statute of limitations, for their second lawsuit was not filed until seventy-nine days after the federal court dismissed the first lawsuit." *Id.* While the Court arguably treated section 16.064's 60-day period as beginning when the federal court signed its judgment dismissing the first suit, nothing in the opinion indicates that the litigants contested the date of the judgment's finality. Moreover, there is no indication of whether either party filed any post judgment motions in the federal court, and there is no explanation of why the judgment became final less than 79 days after being signed.

judgment as statutory reference points,[5] but did not choose to do so here.

We need not decide in this case precisely when a federal district court's judgment becomes final for purposes of section 16.064, because here Reagan unquestionably refiled in state court within the statutory timeframe. The federal court denied the City's motion for new trial on February 6, 2012. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be

---

[5] *See* Tex. Elec. Code § 232.014(b) ("To be timely, an appellant's bond, affidavit, or cash deposit for costs of appeal must be made not later than the fifth day after the date the district court's judgment in the contest *is signed*.") (emphasis added); Tex. Fam. Code § 201.111(a) (providing that referring court shall take action "[n]ot later than the 10th day after the date an associate judge's proposed order or judgment recommending a finding of contempt *is signed*") (emphasis added); *id.* § 201.318(b) ("the date an order or judgment by the referring court *is signed* is the controlling date for the purposes of appeal to or request for other relief from a court of appeals or the supreme court") (emphasis added); Tex. Fin. Code § 304.005(a) ("postjudgment interest on a money judgment of a court in this state accrues during the period beginning on the date the judgment *is rendered* and ending on the date the judgment is satisfied") (emphasis added); Tex. Prop. Code § 24.0052(a) ("the tenant may appeal the judgment of the justice court by filing with the justice court, not later than the fifth day after the date the judgment *is signed*, a pauper's affidavit") (emphasis added); Tex. Tax Code § 43.04 ("If the court finds that the chief appraiser or appraisal review board failed to comply without good cause, the court shall enter an order requiring the chief appraiser or appraisal review board to comply with the deadline not later than the 10th day after the date the judgment *is signed*.") (emphasis added); *id.* § 111.010(d) ("The state is entitled to interest at the rate of 10 percent a year on the amount of a judgment for the state beginning on the day the judgment *is signed* and ending on the day the judgment is satisfied.") (emphasis added).

filed no later than 28 days after the entry of the judgment."). Reagan then had 30 days in which it could have filed a notice of appeal. *See* Fed. R. App. P. 4(a)(1)(A) ("In a civil case . . . the notice of appeal . . . must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."); *id.* R. 4(a)(4)(A)(v) (providing that if party timely files motion for new trial under Rule 59, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion"). In addition, Reagan still could have filed an additional motion for relief from the federal court's judgment under Rule 60(b). *See* Fed. R. Civ. P. 60(b), (c). We conclude that, for the purposes of section 16.064, the federal court's judgment dismissing Reagan's claims did not become final until at least 30 days from its February 6th order denying the City's motion for new trial.[6] *See Oscar Renda Contracting, Inc. v. H & S Supply Co.*, 195 S.W.3d 772, 776 (Tex. App. – Waco 2006, pet. denied) ("A judgment of dismissal becomes final for purposes of section 16.064 when it disposes of all issues and parties in the case *and the court's power to alter the judgment has*

[6] We note that, in its letter opinion, the trial court announced that the City's affirmative defense of limitations was without merit. The court opined that, "when dismissal by one court begins the running of a deadline to file suit in another court, it only makes sense to begin the deadline when the first court has lost plenary power. Otherwise, a litigant would be required to file suit in the second court while continuing to argue in the first court, perhaps successfully, that the action should remain there." Nevertheless, in its findings of fact and conclusions of law, the trial court concluded, without explanation, that "Reagan's claims for fees paid in August of 2009 and March of 2010 are time-barred."

ended.") (emphasis added); *Vale*, 809 S.W.2d at 326 ("These tolling provisions are remedial in nature and are to be liberally construed."). Therefore, because Reagan filed its state-court suit on April 25, less than 60 days from the time when the federal court's judgment became final, section 16.064 tolled the statute of limitations, and Reagan's claims are not time-barred.

Accordingly, we sustain Reagan's third issue.

Issue Preclusion

In its first two issues, Reagan contends that the trial court erred in deciding that the federal court's conclusion that the billboard assessment is a tax did not preclude relitigation of the issue and in holding that the assessment is a constitutional regulatory fee.

Federal law governs the preclusive effect of the federal court's judgment in Reagan's subsequent state-court action. *See Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985) ("Even though the original lawsuit involved both federal and state-related claims, the fact that it took place in federal court requires us to follow the federal law of res judicata."); *Hayes v. Pin Oak Petroleum, Inc.*, 798 S.W.2d 668, 671 (Tex. App. – Austin 1990, writ denied) (per curiam) ("Our analysis of this cause is governed by federal substantive law. Where the earlier judgment was rendered in federal court, we must follow the substantive federal law concerning res judicata and collateral estoppel."). Although the parties use the term "res judicata," (i.e., claim preclusion), the substance of their contentions more precisely concerns a question of issue preclusion – whether the federal court's decision that the billboard assessment constitutes a tax has preclusive effect in state court. The doctrine of issue preclusion "precludes relitigation of only those issues actually litigated in the original action, whether or not the second suit is based on the same cause of action." *Houston Prof'l Towing Ass'n v. City of Hous.*, 812 F.3d 443, 447 (5th Cir. 2016) (internal quotation marks omitted); *see B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302 (2015) ("This Court has long recognized that the determination of a question directly involved in one action is conclusive as to that question in a second suit.") (internal quotation marks omitted); Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

Issue preclusion applies only if four conditions are met:

> First, the issue under consideration in a subsequent action must be identical to the issue litigated in a prior action. Second, the issue must have been fully and vigorously litigated in the prior action. Third, the issue must have been necessary to support the judgment in the prior case. Fourth, there must be no special circumstance that would render preclusion inappropriate or unfair.

State Farm Mut. Auto. Ins. Co. v. LogistiCare Sols., LLC, 751 F.3d 684, 689 (5th Cir. 2014) (quoting *United States v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994)). Whether issue preclusion applies is a question of law we review de novo. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 368-69 (2d Cir. 1997).

We must begin, then, by deciding whether the federal court's determination that the billboard assessment is a tax under the TIA involved an issue of fact or law that is identical to the question of whether the assessment is a tax under article VIII, section 1(f) of the Texas Constitution. In determining whether an assessment is a tax under the TIA, federal courts consider whether the assessment is imposed: (1) by an agency or by the legislature, (2) upon those it regulates or upon the community as a whole, and (3) for the purpose of defraying regulatory costs or for general revenue-raising purposes. *See Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998)); *San Juan Cellular Tel. Co. v. Public Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992). However, federal courts have noted that the third factor, the purpose and use of the assessment, is the "critical factor," especially when the first two factors do not point toward the same conclusion. *See Neinast*, 217 F.3d at 278 ("The third factor, the ultimate use of the funds, thus becomes our critical question."); *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999) ("[T]he critical inquiry focuses on the purpose of the assessment and the ultimate use of the funds."). As the Fourth Circuit has explained:

> It is useful to begin with a look at who imposes, administers, and collects the assessment. An assessment imposed directly by a legislature is more likely to be a tax than one imposed by an administrative agency. If responsibility for administering and collecting the assessment lies with the general tax assessor, it is more likely to be a tax; if this responsibility lies with a regulatory agency, it is more likely to be a fee. But the heart of the inquiry centers on function, requiring an analysis of the purpose and ultimate use of the assessment. If the revenue is paid into the state's (or county's) general fund and provides a general benefit to the public, it sounds like a tax. If, on the other hand, the assessment covers only a narrow class of persons and is paid into a special fund to benefit regulated entities or defray the cost of regulation, it sounds like a fee.

Collins Holding Corp. v. Jasper Cty., S. C., 123 F.3d 797, 800 (4th Cir. 1997) (citations omitted).

Here, in his findings of fact and conclusions of law, Judge Yeakel concluded that the first factor suggested that the billboard assessment is a tax because it was imposed by the City's legislative body and that the second factor suggested that the assessment is a regulatory fee because it was imposed only on billboard owners rather than on the public at large. Turning to the third factor, Judge Yeakel noted that the billboard assessments are deposited into the City's general-revenue fund and that the City has no separate billboard-regulatory fund. He also noted that the parties had presented conflicting evidence at trial concerning whether the assessment was revenue-neutral. Judge Yeakel then made the following findings:

> In reviewing the evidence presented, the Court finds that the record lacks any indication of the City Council's purpose for increasing the [billboard assessment] or the circumstances surrounding the City Council's 2008 passage of the increased amount of the [assessment]. The Court finds that the annual per billboard [assessment] of $200 was set by the City Council, is deposited into the City's general-revenue fund, and is assessed against a narrow class of individuals, billboard owners. Further, given the conflicting evidence presented about the reasonable cost of registering billboards, *the Court finds that the City's [billboard assessment] benefits the entire community rather than only defraying the City's reasonable cost of registering billboards*.

(footnote omitted) (emphasis added). Finally, in a footnote, Judge Yeakel made the following statement:

> Although placing all [billboard-assessment] collections in the City's general-revenue fund does not, standing alone, compel the result that the [assessment] is a tax, it does hamper the City's ability to present persuasive evidence that the [assessment] is not a tax. Placing the collections in the general-revenue fund creates the impression that the

> collections are available to fund all City programs, gives cause to question the City's after-the-fact calculations of the cost of billboard regulation, and blurs the issue of whether the charge is used for the regulation and benefit of the billboard owners.

Judge Yeakel went on to conclude that the billboard assessment is a tax under the TIA and therefore the court lacked subject-matter jurisdiction over Reagan's suit.

We conclude that Judge Yeakel's determination under the third TIA factor that the billboard assessment benefits the entire community rather than only defraying the cost of the City's billboard regulation is identical, for the purposes of issue preclusion, to the question of whether the assessment is a tax under article VIII, section 1(f) of the Texas Constitution. To determine whether an assessment is a tax under article VIII, section 1(f), courts consider whether the primary purpose of the assessment is for regulation or for raising revenue. *See Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997) ("'The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless of the name by which they are designated.'") (quoting *H. Rouw Co. v. Texas Citrus Comm'n*, 247 S.W.2d 231, 234 (Tex. 1952)); *City of Hous. v. Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d 322, 326 (Tex. App. – Houston [14th Dist.] 1994, writ denied) ("To determine whether an exaction authorized by statute or ordinance constitutes an occupation tax or a license fee, the test is whether the primary purpose of the exaction, when the statute or ordinance is considered as a whole, is for regulation or for raising revenue."). In determining the primary purpose of the assessment, "[t]he critical issue is whether the assessment is intended to raise revenue in excess of that reasonably needed for regulation." *Lewellen*, 952 S.W.2d at 461. "To be reasonable, a license fee cannot be excessive nor more than reasonably necessary to cover the cost of granting the license and of exercising proper police regulation, or it must bear some reasonable relationship to the legitimate object of the licensing ordinance." *City of Houston*, 879 S.W.2d at 326-27 (emphasis removed). Therefore, Judge Yeakel's decision that the billboard assessment raised revenue in excess of the reasonable cost of registering billboards and benefitted the entire community is identical to a determination that the assessment is a tax under article VIII, section 1(f). Thus, the first condition of issue preclusion is met here.

Under the second issue-preclusion condition, we must determine whether the issue of the assessment's status was fully and vigorously litigated in the federal-court action. We conclude that it was. There is no dispute that Judge Yeakel conducted a bench trial, which included the presentation of expert testimony concerning the cost of the billboard registration program. Accordingly, we proceed to the third issue-preclusion condition: whether the issue was necessary to support the judgment in the prior case. Here, Judge Yeakel determined that the first two TIA factors cut in different directions. The third factor was therefore dispositive and, indeed, it is the "critical factor" in a TIA analysis. *See Neinast*, 217 F.3d at 278; *Marcus*, 170 F.3d at 1311. We therefore conclude that Judge Yeakel's determination that the billboard assessment raised revenue in excess of the reasonable cost of registering billboards was necessary to support his judgment that the assessment was a tax and that the court lacked subject-matter jurisdiction over Reagan's suit. Finally, under the fourth issue-preclusion condition, we determine that there were no special circumstance that would render preclusion inappropriate or unfair in this instance. Nothing in the record before us indicates that the City was treated unfairly in the federal-court litigation or that it was anything other than a full and active litigant.

Having determined that each of the four issue-preclusion conditions has been satisfied, we conclude that issue preclusion applies and that the federal court's determinations should have precluded relitigation in the trial court of whether the billboard assessment is a tax under article VIII, section 1(f) of the Texas Constitution. We therefore sustain Reagan's first two issues.

Because the City's billboard assessment constitutes a tax on the outdoor advertising business under article VIII, section 1(f), the Texas Constitution provides that it may not exceed half of the tax levied by the State on outdoor advertising. It is undisputed that the State levies no tax on billboards; therefore, the

City's billboard assessment violates the Texas Constitution. An unconstitutional tax is void from its inception, so Reagan would ordinarily be entitled to a refund of the entire amount it paid – an amount to which the parties stipulated. *See Wichita Cty. v. Robinson*, 276 S.W.2d 509, 515 (Tex. 1954) (op. on reh'g) (noting "as a general rule a law held unconstitutional is void from the beginning and was never valid and enforceable at any time"); *Colden v. Alexander*, 171 S.W.2d 328, 335 (Tex. 1943) (noting that statute held to be unconstitutional "is absolutely and utterly void in its entirety" and "can have no effect to accomplish anything"). However, Reagan has specifically prayed for a refund of only $198,450.00, which is less than the full amount of the assessment, and we will therefore render judgment in Reagan's favor for that amount.[7] *See State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008) ("A party generally is not entitled to relief it does not seek.") (citing *Stevens v. Nat'l Educ. Ctrs., Inc.*, 11 S.W.3d 185, 186 (Tex. 2000)).

---

[7] $198,450.00 is the largest refund Reagan has prayed for. We express no opinion on what amount would have been a reasonable and constitutional billboard assessment.

CONCLUSION

Having sustained Reagan's first, second, and third issues,[8] we reverse the trial court's judgment and render judgment that the billboard assessment violates the Texas Constitution and that Reagan recover $198,450.00 from the City. We also remand the cause to the trial court to determine the amount of attorney's fees, if any, to which Reagan is entitled.

/s/ ______________________________
Scott K. Field, Justice

Before Chief Justice Rose,
Justices Pemberton and Field

Reversed and Rendered in Part,
Reversed and Remanded in Part

Filed: June 15, 2016

---

[8] In its fourth issue, Reagan contends that the trial court erred in failing to award Reagan the difference between $190 per sign and the amounts Reagan actually paid in 2009-2012. Because we sustain Reagan's other issues, we need not address this contention. Reagan's fourth issue also contends that the trial court erred in failing to award Reagan attorney's fees. We will remand this cause to the trial court for further consideration of whether Reagan is entitled to attorney's fees under the Uniform Declaratory Judgments Act in light of our opinion. *See* Tex. Civ. Prac. & Rem. Code § 37.009.

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

JUDGMENT RENDERED JUNE 15, 2016

NO. 03-15-00370-CV

Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising, Appellant

v.

City of Austin, Texas; and Marc A. Ott, being sued in his Official Capacity, Appellees

APPEAL FROM THE 200TH DISTRICT COURT OF TRAVIS COUNTY BEFORE CHIEF JUSTICE ROSE, JUSTICES PEMBERTON AND FIELD REVERSED AND RENDERED IN PART; REVERSED AND REMANDED IN PART – OPINION BY JUSTICE FIELD

This is an appeal from the judgment signed by the trial court on March 31, 2015. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the court's judgment. Therefore, the Court reverses the trial court's judgment and renders judgment that the billboard assessment violates the Texas Constitution and that Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising recover $198,450.99 from the City of Austin, Texas. The Court also remands the cause to the trial court to determine the amount of attorney's fees, if any, to which Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising is entitled. Appellees shall pay all costs relating to this appeal, both in this Court and in the court below.

FILE COPY

RE: Case No. 16-0676 DATE: 9/1/2017
COA #: 03-15-00370-CV TC#: D-1-GN-12-001211
STYLE: CITY OF AUSTIN v. REAGAN NAT'L ADVERTISING OF AUSTIN

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Petitioners' Motion Requesting Judicial Notice dismissed as moot.

* * *

CAUSE NO. D-1-GN-12-001211

<table>
<tr><td>REAGAN NATIONAL ADVERTISING INC.
Plaintiff

V.

CITY OF AUSTIN and MARC A. OTT, in his official capacity,
Defendants.</td><td>§
§
§
§
§
§
§
§</td><td>IN THE DISTRICT COURT OF AUSTIN,

TRAVIS COUNTY, TEXAS

200TH JUDICIAL DISTRICT</td></tr>
</table>

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 5, 2015)

STIPULATED FACTS:

1. Jurisdiction and venue is proper in this Court.

2. Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising ("Reagan") is a Delaware corporation doing business in Austin, Travis County, Texas and surrounding areas.

3. The City of Austin, Texas, is a home-rule municipality located in Travis, Hays, and Williamson Counties.

4. Marc A. Ott is the City Manager of the City of Austin.

5. Reagan is in the business of outdoor advertising, which includes the ownership and operation of billboards. Reagan engages in outdoor

advertising within the City of Austin and the surrounding area.

6. Reagan has standing to bring this suit.

7. The City of Austin regulates off-premise signs in Chapter 25-10 of the Austin City Code.

8. Off-premise signs are only allowed if they qualify as a legal non-conforming use.

9. Billboards are off-premise signs.

10. Reagan and its billboards are required to comply with Chapter 25-10 of the Austin City Code.

11. On November 8, 2007, the Austin City Council ("Council") approved Resolution No. 20071108-128 ("Resolution") related to non-conforming off-premise signs (billboards). This Resolution also initiated the code amendment process for billboard regulations.

12. Before the Council amended the City's billboard regulations in June of 2008, the City Code required landowners to register billboards on their land every other year.

13. The registration fee prior to 2009 was $220 per billboard every two years.

14. Austin City Ordinance No. 20080605-076, adopted on June 5, 2008, amended the City's billboard regulations.

15. The Council adopted a registration fee of $200 per billboard per year during the annual budget process for fiscal year 2008-2009.

16. For the years 2009, 2010, 2011, and 2012, the City required billboard owners (rather than landowners) to register their billboards annually and to pay a registration fee of $200 per billboard per year.

17. On April 5, 2012, the Council adopted Ordinance No. 20120405-007, which reduced the registration fee from $200 per billboard per year to $190 per billboard per year.

18. For the years 2013 and 2014, the City required billboard owners to register their billboards annually and to pay a registration fee of $190 per billboard per year.

19. Currently, the City requires billboard owners to pay a registration fee of $190 per billboard per year.

20. The Austin Code Department is responsible for billboard registration.

21. Prior to adopting the $200 per billboard per year fee, the City did not prepare a study, budget, or survey to determine the City's cost to implement the registration program.

22. After the City had implemented the $200 per billboard per year fee, Robert Rowan did an analysis of the costs of the program and sent the November 9, 2009, email reflected in Plaintiff's Exhibit 8.

23. Plaintiff's Exhibits 10 and 11 were prepared by Daniel Cardenas, an Assistant Director of the Austin Code Department (as it existed in

2009), at the request of Willie Rhodes, Mr. Cardenas's Director at the time.

24. Mr. Rhodes asked Mr. Cardenas to analyze the cost to deliver the billboard registration program.

25. The email in Plaintiff's Exhibit 8 was sent prior to the time when Exhibits 10 and 11 were completed.

26. Exhibit 10 reflects Mr. Cardenas's first analysis of the cost to deliver the billboard registration program, which concluded a required fee of $242 per billboard per year. Exhibit 11 reflects his modified analysis after communications with Mr. Rhodes, which concluded a required fee of $352 per billboard per year.

27. When Mr. Cardenas prepared his analysis, he did not review annual budget documents (for the year the fee was amended).

28. The Budget Office, which is part of the City's Financial Services Department, is responsible for monitoring the financial performance for all City departments. It prepares the City's annual budget. Many City departments, including the Solid Waste Services Department and the Austin Code Department, employ individuals that assist the departments with budget and other financial issues.

29. Plaintiff's Exhibits 10 and 11 were prepared without the assistance of the Budget Office and were not provided to the Budget Office.

30. Plaintiff's Exhibit 11 includes the costs to develop a searchable Web presentation for a database of billboard registrations.

31. Plaintiff's Exhibits 10 and 11 do not include references to fees charged by other Texas cities for billboard registration programs.

32. Plaintiff's Exhibits 10 and 11 did not consider fees charged by other Texas cities for billboard registration programs.

33. Plaintiff's Exhibit 11 includes an item, a violation placard placement annual contract, the City did not use or purchase.

34. In April of 2010, Reagan filed a lawsuit, which was styled Civil Action No. 1:10-cv-275, Reagan Nat'l Advertising of Austin, Inc. v. City of Austin et al., in the United States District Court for the Western District of Texas, Austin Division ("Federal Action"), to challenge the constitutionality of the City's billboard registration fee.

35. On November 30, 2011, Judge Lee Yeakel issued a Final Judgment dismissing the Federal Action based on a finding that the Tax Injunction Act applied and the federal court lacked subject matter jurisdiction over the case.

36. On November 30, 2011, Judge Lee Yeakel issued Findings of Fact and Conclusions of Law in the Federal Action in connection with his Final Judgment.

37. On April 25, 2012, Reagan filed the present action.

38. In August of 2009, Reagan tendered a check in the amount of $77,800.00 as payment of the 2009 Registration Fee. This payment was made under protest and was made based on a $200 per billboard per year fee.

39. In March of 2010, Reagan tendered a check in the amount of $75,221.40 as payment of the 2010 Registration Fee. This payment was made under protest and was made based on a $200 per billboard per year fee.

40. In December of 2010, Reagan tendered a check in the amount of $83,400.00 as payment of the 2011 registration fee. This payment was made under protest and was made based on a $200 per billboard per year fee.

41. In December of 2011, Reagan tendered a check in the amount of $81,600.00 as payment of the 2012 registration fee. This payment was made under protest and was made based on a $200 per billboard per year fee.

42. In December of 2012, Reagan tendered a check in the amount of $80,750.00 as payment of the 2013 registration fee. This payment was made under protest and was made based on a $190 per billboard per year fee.

43. In December of 2013, Reagan tendered a check in the amount of $79,610.00 as payment of the 2014 registration fee. This payment was made under protest and was made based on a $190 per billboard per year fee.

44. Robert Rowan's spreadsheet concerning the registration program (attached to the email dated

November 9, 2009 to Dan Cardenas and Matt Christianson – Plaintiff's Exhibit 8) and Dan Cardenas' spreadsheets concerning the registration program (Plaintiff's Exhibits 10 and 11) were created after the Fiscal Year 2009-2010 budget was adopted by the Austin City Council.

45. Registration and regulation program consists of review of billboard records and details, inspection, enforcement, correspondence, legal assistance, financial activities, and data entry.

ADDITIONAL FINDINGS OF FACT:

46. Ms. Whitaker's methodology was to determine the City's salary costs by calculating the average amount of time employees spent on activities related to the billboard registration program and then determine the overhead rates (non-salary costs) allocated by employee based on four cost factors.

47. Ms. Whitaker's study demonstrates that the billboard registration fee covers salary costs, fringe benefits (for employees), direct costs, internal indirect costs, and external indirect costs for each department involved in the billboard registration program.

48. Ms. Whitaker's study found City's cost is $193.46 per sign per year

49. On April 5, 2012, Council found that (A) the City has the authority to regulate billboards; (B) the City's ability to enforce regulations have been hampered; (C) it is necessary to

require registration for effective enforcement of all current nonconforming off-premises sign regulations; (D) registration information must be collected, verified, and on-site inspections should be conducted; and (E) that the City's costs are $190 per sign per year.

50. City Council relied on a "cost of service" study conducted in 2011 and the study is referenced in the ordinance.

51. The activities performed for the billboard registration program are related to the program.

52. The fee is based on the City's costs for actual activities performed.

CONCLUSIONS OF LAW:

1. Reagan's claims for fees paid in August of 2009 and March of 2010 are time-barred.

2. Judge Yeakel's ruling based on the Tax Injunction Act is not res judicata as to this suit.

3. There is a reasonable relationship between the amount of the fee and the City's costs.

4. The primary purpose of the fee, in light of the ordinance that authorizes the fee as a whole, is for regulation.

5. The City's fee is reasonable and constitutional.

SIGNED on May 5, 2015.

/s/ Stephen Yelenosky
JUDGE
STEPHEN YELENOSKY
State District Judge

CAUSE NO. D-1-GN-12-001211

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC. Plaintiff	§ § § §	IN THE DISTRICT COURT OF
V.	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN and MARC A. OTT, in his official capacity, Defendants.	§ § §	200TH JUDICIAL DISTRICT

FINAL JUDGMENT

(Filed Mar. 31, 2015)

On the 15th day of December, 2014, all parties and their counsel appeared for a bench trial in this case. After reviewing the pleadings on file and considering the arguments, witness testimony, evidence, and authority presented, the Court renders this Final Judgment.

IT IS ORDERED, ADJUDGED, AND DECLARED that that Plaintiff's request for declaratory judgment, injunctive relief, and damages is denied and Plaintiff takes nothing. All relief not expressly granted herein is hereby denied. This judgment is final and disposes of all claims and all parties and is appealable.

SIGNED this 31st day of March, 2015.

/s/ Stephen Yelenosky
The Honorable
Stephen Yelenosky
Judge Presiding

Approved as to form only:

/s/ B. Russell Horton
B. Russell Horton
Taline Manassian
GEORGE, BROTHERS, KINCAID & HORTON, L.L.P.

ATTORNEYS FOR PLAINTIFF

/s/ Patricia L. Link
Patricia L. Link
H. Gray Laird
Assistant City Attorneys
City of Austin
Law Department

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

<table>
<tr><td>REAGAN NATIONAL
ADVERTISING OF
AUSTIN, INC. D/B/A
REAGAN NATIONAL
ADVERTISING
PLAINTIFF,

V.

CITY OF AUSTIN,
TEXAS AND
MARC A. OTT,
BEING SUED IN HIS
OFFICIAL CAPACITY,
DEFENDANTS.</td><td>§
§
§
§
§
§
§
§
§
§
§
§
§</td><td>CAUSE NO.
A:10-CA-275-LY</td></tr>
</table>

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Nov. 30, 2011)

BE IT REMEMBERED that on April 1, 2011, the Court called the above styled and numbered cause for bench trial. Plaintiff Reagan National Advertising of Austin, Inc., d/b/a Reagan National Advertising ("Reagan") and Defendants the City of Austin, Texas, and Marc A. Ott, being sued in his official capacity as the City Manager of the City of Austin, (collectively the "City") appeared by counsel. Reagan is in the business of outdoor advertising and owns billboard signs within the City's planning jurisdiction. By this action, Reagan challenges the City's annual Nonconforming Sign

Registration Fee of $200 per billboard, contending that the fee is an unconstitutional tax.[1] Reagan requests that the Court permanently enjoin the City from continuing to charge a billboard-registration fee in excess of $43 and award Reagan a refund of the billboard-registration fees it paid under protest for the years 2009 and 2010. Having carefully considered the evidence presented at trial, the parties' stipulations (Clerk's Document No. 17), the parties' briefing,[2] the applicable law, and the arguments of counsel, the Court will dismiss the action for lack of subject-matter jurisdiction. In so deciding, the Court makes the following findings of fact and conclusions of law.[3]

Joint Stipulations of Fact and Evidence

The parties jointly stipulate that the City regulates billboards, also known as off-premise signs, by

---

[1] In 1984, the City prohibited the construction of new billboards and designated all existing billboards as "nonconforming signs". The Court refers to the Nonconforming Sign Registration Fee as a "billboard-registration fee".

[2] The following briefing is before the Court: Reagan's Trial Brief filed February 25, 2011 (Clerk's Document No. 18); Reagan's Trial Brief Supplement filed March 2, 2011 (Clerk's Document No. 19); the City's Trial Brief filed March 4, 2011 (Clerk's Document No. 20); Reagan's Rebuttal Trial Brief filed March 18, 2011 (Clerk's Document No. 22); and the City's and Reagan's Briefs regarding Tax Injunction Act filed March 31, 2011 (Clerk's Document Nos. 25 & 26).

[3] All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

Chapter 25-10 of the Austin City Code ("Code"). The City's Code Compliance Department is responsible for the registration of billboards. Reagan and its billboards are required to comply with the Code. The City's billboard regulations were amended in June 2008. Pursuant to the amendments, billboard owners pay the City an annual registration fee of $200 per billboard. The amount of $200 was adopted during the Fiscal Year 2009-2010 annual budget process. Before the amendments, the City required landowners on whose property billboards are located, rather than the billboard owners, to register every billboard on their property and pay a registration fee of $220 per billboard every two years. Prior to setting the current annual $200 fee, the City did not conduct or prepare a study, budget, or survey to determine whether an annual $200 fee is a reasonable billboard-registration fee. In August 2009, Reagan tendered a check to the City in the amount of $77,800.00 as its payment of the 2009 billboard-registration fee, and in March 2010, Reagan tendered a check in the amount of $75,221.40 as its payment of the 2010 fee. Reagan made these payments under protest.

Jurisdiction and Venue

The parties also stipulate that Reagan has standing to bring this action and that jurisdiction and venue in this Court are proper.[4] The Court, however, *sua*

---

[4] Venue is proper in this Court as the City is within the Austin Division of the United States District Court for the Western District of Texas and a substantial part of the events or omissions

sponte raised the question of its jurisdiction and solicited briefing from the parties as to the applicability of the Tax Injunction Act ("the Act") to this cause and whether the Act's application would deprive the Court of subject-matter jurisdiction. *See* 28 U.S.C. § 1371 [sic].

The Act prevents federal courts from enjoining, suspending, or restraining the assessment, levy, or collection of any tax under state law, as long as a plain, speedy, and efficient remedy may be had in the courts of that state. *See Neinast v. Texas*, 217 F.3d 275, 277 (5th Cir. 2000). The Act imposes a jurisdictional limitation on federal courts and functions as a broad impediment to federal court interference with the administration of both state and local tax systems. *See Henderson v. Stalder*, 407 F.3d 351, 354-56 (5th Cir. 2005); *Neinast*, 217 F.3d at 277-78; *see also Home Builders Ass'n of Miss., Inc. v. Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Federal courts, therefore, cannot hear suits seeking injunctive or declaratory relief regarding state or local tax systems or suits by taxpayers requesting refunds under such tax systems, if the state courts provide a proper remedy. *See Henderson*, 407 F.3d at 354-56; *Neinast*, 217 F.3d at 277-78; *Home Builders*, 143 F.3d at 1010. Further, the Act cannot be waived. *See United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 328 n.6, 330 (5th Cir. 1979).

Federal courts engage in a bifurcated analysis to determine whether the Act bars jurisdiction over a

---

giving rise to this claim occurred in this district. *See* 28 U.S.C. §§ 1391(b)(1), (2).

state or local tax issue. First, because the Act is implicated exclusively by matters of state and local taxation, the court must decide whether the law at issue imposes a tax or a regulatory fee. *See Home Builders*, 143 F.3d at 1010. Second, in the event the court determines that the fee is a tax, in order to maintain subject-matter jurisdiction over the action, the court must decide that the state court is unable to provide the taxpayer with a plain, speedy, and efficient remedy. *Id.* Therefore, the Act does not divest a federal court of subject-matter jurisdiction if the state or local charge is a regulatory fee or if the charge is a tax and the state-court remedies are inadequate. What constitutes a tax for purposes of the Act is a federal question. *Id.* at 1010 n. 10. The label affixed to a state law or a local ordinance by its drafters has no bearing on the resolution of the question. *Id.*

Tax or regulatory fee

This Court's initial inquiry is whether the City's annual $200 per billboard-registration fee is, for purposes of the Act, a tax or a regulatory fee. Reagan contends that the City's billboard-registration fee is a tax and Texas state courts will provide Reagan with a plain, speedy, and efficient remedy; thus, the Act applies and the Court should dismiss the action without prejudice for lack of subject-matter jurisdiction. The City disagrees and contends that the billboard-registration fee is a proper regulatory fee under the Act, and this Court has jurisdiction over this action.

Determining whether a state or local charge is a tax or a regulatory fee depends on the primary purpose of the charge. If a charge is primarily for raising revenue, it should be considered a tax; however, if the primary purpose of the charge is for regulation, the charge is a fee. *Id.* at 1011. To distinguish a tax from a fee, federal courts consider the following factors: (1) whether the charge is linked to a regulatory scheme; (2) the entity that imposed the charge; and (3) whether revenue generated by the charge is expended for general public purposes or used for regulation and benefit of the parties upon whom the charge was imposed. *See id.* Distinguishing a tax from a regulatory fee often is a difficult task, however workable distinctions emerge from the relevant caselaw. *Id.*

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

Id. (footnotes omitted). As a preliminary matter a court's primary consideration is the purpose underlying the ordinance at issue – what the charge was designed for – rather than the actual expenditure of the funds collected under it. "That is we look principally to the language of the ordinance and the circumstances surrounding its passage." *Id.* at 1011-12.

In *Home Builders*, at issue was whether for purposes of the Act, a municipal-impact-fee ordinance was a tax, and whether the plaintiffs would be required to proceed in Mississippi state court to seek relief regarding its federal claims that the fee was unconstitutional, rather than in federal court. 143 F.3d at 1009. Ultimately, the *Home Builders* court held that, for purposes of the Act, the impact fee was a tax, that Mississippi state courts could provide a speedy and adequate remedy for the plaintiffs, and that the federal district court lacked subject-matter jurisdiction of the action. The *Home Builders* court drew on reasoning in an earlier action, *Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission*, which although not decided in the context of the Act, the court found helpful. 601 F.2d 223, 227-29 (5th Cir. 1979). *Mississippi Power* held that a Nuclear Regulatory Commission Rule that mandated payment of a charge as a precondition to obtaining a license to operate a nuclear facility qualified under the Act as a permissible regulatory fee and was not a tax. *Id.* The *Home Builders* court noted that in *Mississippi Power* the rule imposed a fee because "(1) [the charge] was designed to defray the [regulatory commission's] operating costs, and (2) it did not generate revenues that were intended to provide a benefit for the general public." 143 F.3d at 1011 (citing *Mississippi Power*, 601 F.2d at 228-30).

The *Home Builders* court also considered another of the Circuit's previous opinions regarding a special street improvements assessment that was imposed by a municipality exclusively upon select property owners. *Id.* at 1011 (citing *Tramel v. Schrader*, 505 F.2d 1310, 1315-16 (5th Cir. 1975)). The *Tramel* court held that although the assessment was not levied against the community at large, the Act applied, particularly when considering the Act's purpose of "end[ing] the use of the federal courts to disrupt the collection of local revenues." 505 F.2d at 1316. This Court concludes that the Act compels a broad construction of the term "tax."

The Ordinance

At issue here are portions of Austin City Ordinance No. 20080605-076 ("the Ordinance"), which became effective June 16, 2008. The Ordinance provides *inter alia*, that it "amend[ed] City Code Section 25-10-152 relating to requirements for non-conforming signs and add[ed] a new City Code Section 25-10-237 to impose a penalty for violation of registration requirements."

Part 5 of the Ordinance adds several sections to Subsection (F) of the City Code, Section 25-10-152, including the following:

> (F)(1) This paragraph prescribes registration and identification requirements
>
> > (a) The owner of the sign must register the sign every year with the director
> >
> > (b) the sign owner shall, on a form prescribed by the director, provide

(i) information regarding the sign location, height, size, construction type, materials, setback from property boundaries, and illumination; and

(ii) the name and address of the sign owner

(c) the sign owner shall initially register the sign by August 31, 1999, or withing [sic] 180 days after the date the sign becomes subject to the City's planning jurisdiction, as applicable, and shall pay a registration fee set by separate ordinance

(d) A person who fails to register a sign as required by this paragraph commits an offense

(e) A sign owner is prohibited from relocating a sign if the sign owner is in violation of the registration requirements for any sign owned by that sign owner within the City's jurisdiction

(f) The sign owner shall place identifying markers on the sign as requested by the director. Such markers shall include, but not be limited to, the applicable registration number and measurement points to assist in verifying the height of a sign

(g) A sign owner, in a manner prescribed by the director, provide an

> annual inventory of all signs owned by that sign owner, including but not limited to a description of the sign, the location of the sign, and the owner of the property on which the sign is located
>
> (h) The building official shall notify the property owner of the pending expiration of a sign registration, no earlier than 90 days and no later than 30 days prior to the expiration. The director shall provide the same notice to the sign owner if the inventory required under subsection (f) has been provided

Also, by Part 6 of the Ordinance, Article 12 of City Code Chapter 25-10 (*Sign Regulations*) was amended to include Section 25-10-237, which includes a penalty for failure to register a sign,

> A person who fails to register a sign as required by section 25-10-152(F) commits an offense punishable by a fine of up to $500 per day for each day that the offense continues, and for each sign not registered

Finally, Part 7 of the Ordinance provides:

> The City Manager is directed to create and maintain an accessible online database containing information provided by sign owners as part of the billboard inventory required under Subsection 25-10-152(F) (*Nonconforming Signs*)

The Court first focuses on the evidence presented to determine the purpose underlying the City Council's 2008 change in the amount of the billboard-registration fee and second will consider the factors suggested by *Home Builders*. *See* 143 F.3d at 1010.

Purpose underlying the Ordinance and the three factors

Focusing initially on the purpose and circumstances surrounding passage of the Ordinance, the plain language of the Ordinance at Part 5 provides that Subsection (F) of City Code Section 25-10-152 is amended to read, "the sign owner . . . shall pay a registration fee set by separate ordinance." Ord. Part 5 at (F)(1)(c). No evidence exists in the record as to what the City Council considered or determined when raising the billboard-registration fee or arriving at the $200 annual per billboard amount. Only after the amendments became effective did the City make an effort to evaluate or substantiate the amount. The City's first effort to evaluate the $200 amount is an email with two attached spreadsheets, dated November 9, 2009, from Robert Rowen, a finance person in the City's Solid Waste Services in charge of code compliance, to his supervisors that provides,

> [I]n regards to the current Billboard Registration fee of $200, we were asked to review the current fee and see if we can seriously look at lowering the fee to a more reasonable fee. As a result, this can close the gap between the revenue and expenditures of running this

> program. Just doing a quick overview, we can lower the rate to $140, which would accomplish this goal.

The Court finds lacking any evidence from which to determine the purpose and understand the circumstances that surrounded the City Council's 2008 change from a billboard-registration fee of $220 per billboard every two years to a fee of $200 per billboard every year. Additionally, lacking is any evidence regarding the purpose or circumstances underlying the City Council's original $220 billboard fee payable by the landowners to the City every two years. The Court finds that the plain language of the Ordinance lacks any purpose statement with regard to changing the amount of the billboard-registration fee and the Court finds that the evidence presented fails to shed any light on the purpose behind the City Council's increasing the billboard-registration fee from $220 every two years to $200 every year.

Turning to the *Home Builders* factors, it is established that the Ordinance was passed by the Austin City Council, the legislative body for the City. The City regulates billboards, and there exists no separate agency or commission within the City's governing structure that passes rules with regard [sic] billboards; only the City Council sets the billboard-registration fee. The Court finds that this factor suggests that the billboard-registration fee is a tax.

The City regulates billboards and the fee is imposed only on a narrow class of persons, billboard owners, rather than the public at large. The Court finds that this factor suggests that the $200 billboard-registration fee is a regulatory fee.

With regard to the third factor, whether the revenue generated by the billboard-registration fees is expended for general public purposes or used for the regulation and benefit of the parties upon whom it is imposed to help defray an agency's regulatory expenses, there is no dispute that the billboard-registration fees are deposited into the City's general-revenue fund; there exists no separate billboard-regulatory fund into which the billboard-registration fees could be deposited. The City argues that although all monies collected by the City are first deposited into the general-revenue fund, what is more important here is that the billboard-registration fees are revenue neutral and help defray the costs of the City's billboard regulations. Therefore, argues the City, the revenue generated by the annual billboard-registration fees is not for the benefit of the general public, but is used for billboard regulation. *See Neinast*, 217 F.3d at 278-79.

First, although not at issue in this action, the Court notes that there is no evidence that the previous $220 biannual fee was or was not revenue neutral. With regard to whether the 2008 change to an annual $200 fee per billboard is revenue neutral, the parties put forward quite a lot of evidence. However, all of the evidence related to this issue was developed after the 2008 amendments went into effect; no cost analysis for the registration of billboards was performed before the amendments. The first effort by the City to determine if the annual $200 fee was revenue neutral or defrayed the City's costs of registering billboards was Rowen's November 9, 2009 email, which included spreadsheets and his opinion that the City could "close the gap between the revenue and expenditures of running the [billboard registration] program" and reduce the annual billboard fee to $140 per billboard. Rowen's email notes that he arrived at this number after "doing a quick overview".

Following Rowen's email, the City requested that Daniel Cardenas, who was employed with the City's Solid Waste Management Department as a scientist and who has no finance or accounting background, prepare a billboard-cost-analysis worksheet. Cardenas prepared a worksheet for the "Billboard Registration Program", which resulted in a "Required Fee/Billboard/Year" of $242. His notes on that worksheet provide, "Fee Provides For: Compliance Inspection of all signs in inventory once every 4 years[;] Inspection of reported violations[;] Administration of sign relocation process[;] Administration of billing and collection[.] Fee Does Not Provide For: Development & Maintenance of an online database." Cardenas also produced a second worksheet for the "Billboard Inventory Maintenance, Monitoring & Enforcement", which resulted in a "Required Fee/Billboard/Year" of $352. The notes on that worksheet provide, "Fee Provides For: Compliance Inspection of all signs in inventory once every 4 years[;] Inspection of reported violations[;] Administration of sign relocation process[;] Administration of billing and collection[;] Development & Maintenance of an online database." Reagan argues that although Cardenas developed these after the fee amount had been set, his worksheets were forward looking costing analyses for all regulations of billboards, not simply billboard registration, and were a wishlist costing approach. Reagan argues that Cardenas's worksheets included items beyond what the Ordinance required with regard to billboard registration, and therefore, fail to reflect what a reasonable fee for billboard registration should be.

Reagan's expert, Erin Anker, a Certified Public Accountant, produced her December 14, 2010 report and opinion. Anker reviewed the depositions, exhibits to the depositions taken in this action, and the Code, particularly Section 25-10-152, and it was her opinion that "the $200 per sign, per year registration fee exceeds the amount reasonably necessary to cover the cost to administer [a billboard registration] program." Further, it was Anker's opinion that the registration cost spreadsheets prepared by Cardenas "do not use a methodology generally accepted for accounting or basic cost analysis." Anker first determined "that the reasonable cost to administer [the City's billboard registration] Program should be between $122 and $146 per sign, per year." She later amended her opinion, due to a calculation error, to a reasonable annual cost of between $130 and $155 per billboard, and then her third opinion, rendered during her deposition, was that the City's reasonable annual cost was approximately $43 per billboard. The City criticizes Anker's opinion as a "guesstimate" and asserts that it is not based on any training or experience of what it costs a governmental entity to administer this type of program.

The City's expert Nickie Whitaker's January 21, 2011 Executive Summary portion of her report and opinion reflects that "the cost of service for administering the billboard registration fee is $190." Whitaker rounded down this number from her actual cost per billboard of $193.46. Reagan criticizes Whitaker's opinion as improper because she evaluated the registration program as it exists rather than what it should or could be under the Ordinance. Reagan suggests that Whitaker's study erroneously assumed that all of the City employees' current activities with regard to billboard registration are reasonably necessary to enforce the Ordinance and that her study fails to address solely what the Ordinance requires for billboard registration. Although not reflected in Whitaker's report, Reagan notes that Whitaker admitted during her deposition that it could be useful to review what comparable jurisdictions charge as billboard-registration fees. Reagan acknowledges that comparable jurisdictions may not exactly compare, however, it is something that could be considered. The evidence includes Fort Worth, Texas's billboard-registration fee of $75 per billboard every three years, and Corpus Christi, Texas's billboard-registration fee of $50 per billboard every year.

In reviewing the evidence presented, the Court finds that the record lacks any indication of the City Council's purpose for increasing the billboard-registration fee or the circumstances surrounding the

City Council's 2008 passage of the increased amount of the fee. The Court finds that the annual per billboard fee of $200 was set by the City Council, is deposited into the City's general-revenue fund,[5] and is assessed against a narrow class of individuals, billboard owners. Further, given the conflicting evidence presented about the reasonable cost of registering billboards, the Court finds that the City's billboard-registration fee benefits the entire community rather than only defraying the City's reasonable cost of registering billboards. Considering the evidence presented and Congress's intent that the Act be a broad impediment to federal courts interfering with the administration of state and local tax systems, the Court holds that the City's annual $200-per billboard registration fee, for purposes of the Act, is a tax.

In light of this holding, in order to maintain jurisdiction over this action, the Court considers whether Texas state courts are unable to provide Reagan a plain, speedy, and efficient remedy. "The inquiry into whether a plain, speedy and efficient remedy exists focuses on whether a state provides a procedural vehicle that affords taxpayers the opportunity to raise their

---

[5] Although placing all billboard-registration-fee collections in the City's general-revenue fund does not, standing alone, compel the result that the fee is a tax, it does hamper the City's ability to present persuasive evidence that the fee is not a tax. Placing the collections in the general-revenue fund creates the impression that the collections are available to fund all City programs, gives cause to question the City's after-the-fact calculations of the cost of billboard regulation, and blurs the issue, of whether the charge is used for the regulation and benefit of the billboard owners.

federal constitutional claims." *See Smith v. Travis Cty. Educ. Dist.*, 968 F.2d 453, 456 (5th Cir. 1992) (citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512-13 (1981)). A state provides a plain, speedy and efficient remedy when it provides taxpayers with a full hearing and judicial determination with ultimate review available in the United States Supreme Court. *Id.* Here, neither party argues that the Texas state courts fail to furnish Reagan a procedural avenue to pursue all of its claims. The Court finds and concludes that Texas state courts provide Reagan a plain, speedy, and efficient remedy for challenging the City's billboard-registration fee. *See Tramel*, 505 F.2d at 1316.

Conclusion

The Court finds that for purposes of the Act, the City's billboard-registration fee is a tax and that the Texas state courts provide Reagan with a plain, speedy, and efficient remedy for challenging the City's billboard-registration fee. The Court concludes that the Act applies and the Court lacks subject-matter jurisdiction over this action. Accordingly, the Court will dismiss this cause without prejudice.[6] The Court will render a separate Final Judgment.

---

[6] The Court notes that the principles of claims preclusion do not bar Reagan from pursing its claims in state court. A dismissal for lack of subject-matter jurisdiction is not a merits determination, and therefore cannot have a *res judicata* effect. *See Home Builders*, 143 F.3d at 1013 (citing *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996)).

SIGNED this 30th day of November, 2011.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

<table>
<tr><td>REAGAN NATIONAL ADVERTISING OF AUSTIN, INC. D/B/A REAGAN NATIONAL ADVERTISING,

PLAINTIFF

V.

CITY OF AUSTIN, TEXAS AND MARC A. OTT, BEING SUED IN HIS OFFICIAL CAPACITY,

DEFENDANTS.</td><td>§
§
§
§
§
§
§
§
§
§
§
§
§</td><td>CAUSE NO. A:10-CA-275-LY</td></tr>
</table>

FINAL JUDGMENT

(Filed Nov. 30, 2011)

BE IT REMEMBERED that on April 1, 2011, the Court called the above styled and numbered cause for bench trial, the parties announced they were ready, the trial proceeded, and concluded later that day. On this date, by separate Findings of Fact and Conclusions of Law, the Court held that the Tax Injunction Act applies and that this Court lacks subject-matter jurisdiction over this action. As nothing remains in this action for the Court to resolve, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that this cause is **DISMISSED WITHOUT PREJUDICE FOR LACK OF JURISDICTION**.

IT IS FINALLY ORDERED that the case is hereby **CLOSED**.

SIGNED this 30th day of November, 2011.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

ORDINANCE NO. <u>20120405-007</u>

AN ORDINANCE AMENDING THE FISCAL YEAR 2011-2012 SCHEDULE OF FEES, FINES, AND OTHER CHARGES (ORDINANCE NO. 20110912-007) TO REDUCE THE FEE FOR BILLBOARD REGISTRATION.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Findings.

(A) The City has the authority, pursuant to its police power and Chapter 216 of the Texas Local Government Code, to regulate non-conforming off-premise signs (commonly referred to as "billboards").

(B) As reflected in Resolution No. 20071108-128, Council previously found that the City's ability to enforce billboard regulations has been hampered. In Ordinance No. 20080605-076, the Council reiterated the City's requirement to register billboards.

(C) The Council finds that it is necessary to require registration of billboards for effective enforcement of all current non-conforming off-premise sign regulations.

(D) The Council finds that billboard registration information must, at a minimum, be collected and verified. The Council further finds, as part of the billboard registration program, that the City should conduct on-site inspections of billboards to verify that the information provided by the registrant is accurate and up-to-date.

(E) At this time, the Council finds that the City's costs are $190 per sign per year. This finding is based on the "cost of service" study completed in 2011 by an outside entity.

PART 2. The 2011-12 Fee Schedule attached as Exhibit "A" to Ordinance No. 20110912-007 is amended to reduce the "Billboard Registration Fee" to $190 for the Code Compliance Department, as follows:

	Approved 2010-11	**Approved 2011-12**	**Change**
Code Compliance Department – General Fund			
Billboard Registration Fee	$200 once a year	$190 [~~200~~] once a year	($10)

PART 3. This ordinance takes effect on April 16, 2012.

PASSED AND APPROVED

§
§
April 5, 2012 § Lee Leffingwell
Lee Leffingwell
Mayor

APPROVED: Karen M. Kennard
Karen M. Kennard
City Attorney

ATTEST: Shirley A. Gentry
Shirley A. Gentry
City Attorney

No. 16-0676

IN THE
SUPREME COURT OF TEXAS

CITY OF AUSTIN, *ET AL.*,

Petitioners,

vs.

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC.,
D/B/A REAGAN NATIONAL ADVERTISING,

Respondent.

ON PETITION FOR REVIEW FROM THE
THIRD COURT OF APPEALS AT AUSTIN

PETITION FOR REVIEW

Anne L. Morgan, City Attorney
Meghan L. Riley,
Chief-Litigation
Patricia L. Link,
Assistant City Attorney
State Bar No. 24041343
patricia.link@
austintexas.gov
CITY OF AUSTIN-LAW DEP'T.
P. O. Box 1546
Austin, Texas 78767-1546
(512) 974-2173;
fax (512) 974-1311

Renea Hicks
LAW OFFICE OF
RENEA HICKS
State Bar No. 09580400
P.O. Box 303187
Austin, Texas 78703-0504
(512) 480-8231
rhicks@renea-hicks.com

ATTORNEYS FOR PETITIONER CITY OF AUSTIN

*   *   *

Statement of the Case

Nature of the case

The dispute is whether a billboard registration fee is an invalid tax under Article VIII, § 1(f), of the Texas Constitution, and, if it is, what refunds, if any, are owed the billboard company.

Trial court

Hon. Stephen Yelenosky, Presiding Judge, 200th Jud. Dist., Travis County

Trial court disposition

Final Judgment on bench trial that billboard company challenging fee take nothing, denying declaratory and injunctive relief and damages. App 1.

Court of appeal parties

Appellant: Reagan National Advertising of Austin, Inc.

Appellees: City of Austin, and Marc Ott in his official capacity as City Manager.

Court of Appeals and Panel

Third Court of Appeals at Austin: Justice Field, joined by Chief Justice Rose and Justice Pemberton

Court of Appeals Disposition

Reversed. *See Reagan National Advertising of Austin, Inc. v. City of Austin*, 2016 WL 339080 (Tex.App. – Austin June 15, 2016). App. 3.

> Rendered: registration fee is invalid tax; refund of assessments for 2009 and 2010 is not time-barred; and $198,450 in refunds awarded. Remanded: amount of attorney fees, if any, to be awarded under Tex. Civ. Prac. & Rem. Code § 37.009.

A motion for *en banc* reconsideration was denied on July 19, 2016.

STATEMENT OF JURISDICTION

The Court has jurisdiction under Section 22.006(a)(6) of the Government Code because an error of law has been committed by the court of appeals that is of such importance to the jurisprudence of the state that it requires correction. The appeals court erred in applying a federal court ruling that the federal Tax Injunction Act deprived it of jurisdiction over Reagan Advertising's challenge to Austin's billboard registration fee to nonetheless operate as issue preclusion in state court on the state law question of whether the fee was a fee or a tax. It is important to the jurisprudence of the state to address the question whether this inversion of the federal statute's federalism purpose is to be the version of federal law applied by Texas courts.

Issues Presented

I. May a federal court decision that it lacks jurisdiction under the federal Tax Injunction Act to decide a challenge to a municipal fee be used offensively in state court to preclusively establish as a matter of law that the municipal fee is an illegal tax under state law?

II. Is the preclusive effect of a federal court judgment on a state law issue in a state court case determined under federal or state law?

III. Does the dismissal of a case for lack of jurisdiction become final for purposes of the limitations tolling rule in Section 16.064(a) of the Texas Civil Practice and Remedies Code when the trial court issues its final ruling or when the time to appeal the final ruling expires?

Reasons to Grant Review

The underlying dispute in this case about whether Austin's billboard registration fee is tied to regulatory costs or, instead, an illegal tax implicates important interests of local government. *See, e.g.*, *Central App. Dist. of Rockwall County v. Lall*, 924 S.W.2d 686, 690 (Tex. 1996) (recognizing "important interest that local governments have in a steady revenue stream").

The decision below disrupts and diminishes that stream using an insupportable application of federal law to compel a state law ruling. It adopts the paradoxical rule that a federal court decision about jurisdiction under a federal law designed for the very purpose of keeping federal courts out of the business of deciding state and local revenue matters actually determines one of those issues as a matter of federal law, regardless of what state law might independently say about it.

The Tax Injunction Act, 28 U.S.C. § 1341,[1] is one of the quintessential federalism statutes. Rooted in "principles of federalism," it is the federal government's statutory recognition of "the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin*, 429 U.S. 68, 73 (1976); *see also Arkansas v. Farm Credit Svcs. of Central Ark.*, 520 U.S. 821, 826-27 (1997) (Act "reflects a congressional concern to confine federal court intervention in state government"). And it applies to local governments, too. *See* 17A Wright, Miller, *et al.*, *Federal Prac. & Proc.* § 4237 (3d ed.) ("the courts have held that the Tax Injunction Act applies to local governments").

The decision below turns the federalism principle of the Tax Injunction Act upside down. Under the appeals court's view of inverted-federalism, a state law issue is predetermined by a federal court decision that it could not decide the state law issue. Instead, under the appeals court's rationale, a federal jurisdictional refusal to determine a state law revenue issue becomes a cudgel compelling state courts to succumb on the very issue of state law that the federal court held the

[1] Reproduced App. 6 (1st page)

Tax Injunction Act kept it from deciding. A federal non-decision decided the key state issue for the state court.

This situation presents an important jurisprudential principle of federalism that should be resolved by this Court – a principle made even more important by the fact that it was pronounced as *federal* law. To date, this Court has avoided a determinative pronouncement on whether Texas courts must apply federal or state law principles of issue preclusion in the context of a prior federal court judgment. *See, e.g.*, *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990); *see also John G. and Marie Stella Kenedy Memorial Found. v. Dewhurst*, 90 S.W.3d 268, 288 n.64 (Tex. 2002) (citing *Scharbauer* and stating that state and federal rules for issue preclusion are the same). The Court should take this opportunity to make a definitive pronouncement on the issue that clarifies the rule for lower courts[2] and follows the prevailing view of federal courts that federal law controls in such a situation. *See, e.g.*, *Jackson v. Fie Corp.*, 302 F.3d 515, 529 n.58 (5th Cir. 2002) (federal courts apply federal law to issues of the res judicata and collateral estoppel effect of federal judgments).

---

[2] The appeals court cites *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985), to support the lower court's use of federal law to address the issue preclusion issue. Slip op. at 9. But *Jeanes* was addressing res judicata, and, as to res judicata, this Court *has* held that federal law controls when a prior federal judgment is involved. *Scharbauer*, *supra*, 807 S.W.2d at 718. So far anyway, the same situation does not clearly obtain for issue preclusion.

Also important is clarification of the tolling provision for limitations set out in subsection (2) of Section 16.064(a) of the Civil Practice and Remedies Code. App. 6 (last page). Parties in Texas courts who have turned initially to a court without jurisdiction need clear guidance on the term of the tolling period for limitations purposes in those situations.

* * *

SUMMARY OF THE ARGUMENT

The appeals court misapplied the federal law governing issue preclusion. Three independent reasons support this assertion.

First, the issue decided in the federal court jurisdictional dismissal was not identical – as it necessarily must be – to the issue decided in the state case about the state law question of whether the City's fee was a tax. An exaction or provision that is found to be a "tax" under one law (here, a federal one) can be found not to be a "tax" under a different law (here, a state one). Further, the very standards for assessing the question in the two situations were fundamentally different. The federalism principle that underpins the Tax Injunction Act means that federal court [sic] work on a presumption that they should avoid interfering with state and local revenue matters. There is no similar presumption applicable in the state law situation now before this Court.

Second, the prior decision cannot be preclusive unless it was issued by a "court of competent jurisdiction."

Here, of course, the very basis for the prior federal court decision was that is [sic] *lacked* jurisdiction.

Third, the Supreme Court's *Parklane Hosiery* decision held that issue preclusion cannot be applied offensively – as it was here by the appeals court – if it would work an unfairness on the defending party. One aspect of this fairness requirement is whether the party in the prior action had a reasonable opportunity to appeal the adverse ruling. But the City effectively *won* the federal court ruling. Reagan's claim was dumped out of federal court. The City could not fairly have been expected to appeal its win, especially since the federal court indicated its ruling would not have adverse future effects and Reagan waited until the federal appellate deadlines had run before filing its state court case.

Finally, the appeals court erred in holding that Reagan came within the limitations period in filing for its 2009 and 2010 refunds in state court. Under subsection (2) of Section 16.064(a) of the Civil Practice and Remedies Code, Reagan had until sixty days after the federal ruling "becomes final" to file in state court. The appeals court read "becomes final" to read instead "becomes final and unappealable." But that is inconsistent with the plain words of the statute and clashes with the fact that the legislature uses "final and unappealable" in statutory timelines when it decides to do so.

ARGUMENT

I. Reagan Advertising may not use the federal court's jurisdictional dismissal of its challenge to Austin's billboard registration fee offensively as collateral estoppel on the fee vs. tax issue in state court.

A. The federal law of collateral estoppel applies.

Federal law determines the preclusive effect of a prior federal decision on an issue in a subsequent proceeding. *See Jackson v. Fie Corp.*, *supra*, 302 F.3d at 529 n.58, citing *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 n.4 (5th Cir. 1986); *see also Orjias v. Stevenson*, 31 F.3d 995, 1010 (10th Cir. 1994).[12]

While this Court has not directly decided the issue, *see supra* at 2, the appeals court below applied federal law, and the City agrees that it was right to do so.

B. The basic elements of issue preclusion under federal law are well-established.

The basic elements are relatively well-established, though it needs to be observed that some recitations of the elements are incomplete. Three elements are invariably listed in federal law analysis of issue preclusion:

---

[12] Federal authority is split on whether this rule applies when the prior federal court judgment was in a diversity action. *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997). But Reagan's federal action here was not a diversity action.

> (1) the issue at stake must be identical to the one involved in the prior action;
>
> (2) the issue must have been actually litigated in the prior action; and
>
> (3) the determination of the issue must have been necessary and essential to the judgment in the prior action.

Stripling v. Jordan Produc. Co., LLC, 234 F.3d 863, 868 (5th Cir. 2000). Added to these elements must be two laid down by the Supreme Court of the United States, both of special pertinence in this case.

First, the issue under consideration in the second action must have been actually and necessarily determined by "a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979).

Second, when as here a party is attempting to use the prior determination of an issue offensively, a trial judge should not allow such use in a circumstance that "would be unfair to a defendant." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).[13] This fairness requirement includes a reasonable opportunity to appeal the earlier judgment. *See, e.g.*, *Bell v. Dillard Dep't Stores*, 85 F.3d 1451, 1456 (10th Cir. 1996) ("lack of opportunity to appeal an issue establishes that there has not been a full and fair opportunity to litigate it and

---

[13] *Parklane Hosiery* also indicates that whether to apply offensive collateral estoppel should be a matter of trial court discretion. 439 U.S. at 331. Inconsistely [sic] with *Parklane Hosiery*, the appeals court ruling treats application of issue preclusion as a matter of law. Slip op. at 10.

that, as a result, issue preclusion should not be applied"); *see also B & B Hardware, Inc. v. Hargis Industries*, 133 S.Ct. 1293, 1303 (2015) (identifying "whether appellate review was available" as exception to application of issue preclusion).

C. Federal issue preclusion does not allow the federal dismissal to be used to bar state court litigation of the state law issue of whether the billboard registration fee is a fee or a tax.

The court below was wrong to hold that federal issue preclusion law operated to preclude litigation in state court of the question of whether the billboard registration fee was a fee for the cost of regulatory service or, instead, a tax that is impermissible under Article VIII, § 1(f), of the Texas Constitution. Three reasons support this assertion.

1. The issue at stake in the federal decision was not identical to the one in the state action.

The issue in the federal action was whether the billboard registration fee was a "tax" within the meaning of the federal Tax Injunction Act. The issue in the state court action was whether the billboard registration fee was a "tax" under state law that triggered the prohibition in Article VIII, § 1(f), of the Texas Constitution. These can hardly be said to be "identical" issues. After all, it is well known from recent Supreme Court decisions of some note that something can be a "tax" under one font of law and not be a "tax" under another. *See Nat'l Fed'n of Ind. Business v. Sebelius*, 132 S.Ct. 2566 (2012) (holding that Affordable Care Act provision was not a tax for purposes of federal Anti-Injunction Act, but was a tax for purposes of Congress's taxing power); *see also Henderson v. Stalder*, 407 F.3d 351, 356 (5th Cir. 2005) ("what is a 'tax' for purposes of the TIA is a question of federal law on which a state's legislative label has no bearing").

"Issues are not identical if the second action involves application of a legal standard, even though the factual setting of both suits may be the same." *B & B Hardware*, *supra*, 135 S.Ct. at 1306. The legal standards in the federal action were fundamentally different from the legal standards in the state action. The federal court considering Reagan's federal challenge had to take into account the Tax Injunction Act whose basic thrust is that, where state and local taxes are involved, federal courts are to take a "hands off" approach to exercise of their jurisdiction. "Given the strong background *presumption against interference with state taxation*, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (emphasis added).

This federalism-based presumption does not apply to the state law issue raised by Reagan Advertising. The appeals court indulges in no presumption in favor of the City's assertion that its billboard fee was not a tax, but rather for the cost of regulation. The City received no presumptive leeway for its ordinance and billboard fee structure.

Thus, not only were the statutory and constitutional issues different – and a far cry from "identical" – so were the basic standards of construction and inquiry on the question of when something is considered to be a tax in one context or another. This element of federal issue preclusion is absent here, and the appeals court was wrong to hold otherwise.

2. The fee-as-tax issue was not determined first by a court of competent jurisdiction.

The Supreme Court's decision in *Montana v. United States*, *supra*, firmly establishes that, to operate preclusively, the prior judgment must have been entered by a court of competent jurisdiction. As the Fifth Circuit has explained:

> We examine the prior court's jurisdiction before applying the doctrine of collateral estoppel because we should only bind the present litigants with a past ruling if that ruling was rendered by a court of competent jurisdiction. *See* 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4428 (1981) ("[A] judgment entered by a court lacking subject matter jurisdiction is 'void' and is not entitled to res judicata effect.").

Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999).

It may be that sometimes determining whether the first court had jurisdiction presents a difficult challenge. But that is not so here. The very ruling which Reagan seeks to apply preclusively, and which the appeals court allowed it to do, was a decision that jurisdiction was lacking. The federal court's conclusion that it was making a *jurisdictional* determination was well-grounded in Supreme Court precedent. *See, e.g.*, *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 521 (1981) (Act is "vehicle to limit drastically federal district court jurisdiction").

For this second reason – the prior ruling's foundation in declining jurisdiction – the appeals court erred.

3. The City did not have a reasonable opportunity to appeal the federal court's Tax Injunction Act ruling.

The City was a *defendant* in the federal action. It did not have a claim that was dismissed. Reagan did. The City prevailed in this sense. 10 Wright, Miller *et al.*, *Federal Prac. & Proc.* § 2667 (3d ed.) ("dismissal of action, whether on the merits or not, generally means that the defendant is the prevailing party").

In addition, the federal court went out of its way to emphasize that its ruling would not serve as res judicata in subsequent litigation because it was "not on the merits." RR v.3 (P. Exh. 15 at 14 n.6).

As a prevailing party (even though it did not fully embrace the Tax Injunction Act ruling), Austin faced the general rule that prevailing parties have no standing to appeal. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). Limited exceptions to the general rule are recognized but only if the prevailing party can demonstrate an adverse effect from the judgment in its favor. *Ward v. Santa Fe ISD*, 393 F.3d 599, 603 (5th Cir. 2004).

But in the case of the federal Tax Injunction Act dismissal of Reagan's case, the federal court itself told the parties that its ruling would not have future adverse effects because it was not a merits decision. And, in addition, as the discussion in the next section shows, Reagan waited until *after* the deadline for appeal to file its state court action, thereby depriving the City of timely advance notice that Reagan at any rate did not intend to accept the federal court's res judicata observation.

In these circumstances, and for this independent reason, *Parklane Hosiery*'s fairness requirement for application of offensive issue preclusion is sorely absent.

*   *   *

CONCLUSION AND PRAYER

The Court should grant the petition for review and reverse the appeals court judgment on the issues presented and the refund award. It then should remand the case to the appeals court for further proceedings consistent with this Court's opinion and judgment, including the appeals court's consideration as provided in Tex. R. App. Proc. 53.4 of points and issues raised but thus far unaddressed by it.

*   *   *

CAUSE NO. D-1-GN-12-001211

<table>
<tr><td>REAGAN NATIONAL ADVERTISING, OF AUSTIN, INC.,

Plaintiff

v.

CITY OF AUSTIN, TEXAS; MARC A. OTT, being sued in his official capacity

Defendant</td><td>§
§
§
§
§
§
§
§
§
§
§</td><td>IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

200TH JUDICIAL DISTRICT</td></tr>
</table>

PLAINTIFF'S THIRD AMENDED ORIGINAL PETITION

TO THE HONORABLE COURT:

Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising ("Reagan") respectfully files this third amended original petition complaining of the City of Austin, Texas, and Marc A. Ott in his official capacity as City Manager (jointly, "the City"), and would show the following:

I. Nature of the Case

Reagan's complaint arises from the City's improper and unconstitutional taxation of Reagan's outdoor signs.

II. Discovery Control Plan, Level 3

Discovery in this case should be governed under Level 3, under Tex. R. Civ. P. 190.3.

III. Parties

Plaintiff Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising is a Delaware corporation doing business in Austin, Travis County, Texas and surrounding areas.

Defendant City of Austin, Texas, is an incorporated municipality located in Travis County, Texas, and has been served and has filed an answer in this matter.

Defendant Marc A. Ott, who is being sued in his official capacity as City Manager of the City of Austin, is an individual residing in Travis County, Texas, and has been served and has filed an answer in this matter.

IV. Jurisdiction and Venue

The Court has jurisdiction over this lawsuit because it arises under article VIII, section 1(f) of the Texas Constitution. Immunity does not bar a claim brought under article VIII, section 1(f) of the Texas Constitution.

The Court has jurisdiction over this lawsuit because it arises under Texas Constitution article 1, §29. Immunity does not bar a claim brought under article 1, §29 of the Texas Constitution.

The Court has jurisdiction over this lawsuit because it arises under Texas Constitution article 1, §17. Immunity does not bar a claim brought under article 1, §17 of the Texas Constitution.

The Court has jurisdiction over this lawsuit because it arises under the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. § 1983. Immunity does not bar a claim brought under 42 U.S.C. § 1983.

Reagan seeks damages in excess of the minimum jurisdictional limits of this Court.

Further, this lawsuit is not removable to federal court because this claim was previously brought in the Federal District Court for the Western District of Texas, which concluded that it lacked jurisdiction under the Tax Injunction Act.

Venue is proper in Travis County, Texas because a substantial part of the events or omissions giving rise to this claim occurred here. Tex. Civ. Prac. & Rem. Code § 15.002(a)(1).

V. <u>Conditions Precedent</u>

All conditions precedent to recovery have been met or have occurred.

VI. <u>Facts</u>

Reagan is engaged in the Austin and surrounding area in the business of outdoor advertising, which involves the ownership and operation of billboards. Chapter 25-10 of the Austin City Code (the "Sign Code") regulates the local outdoor advertising industry. Reagan is regulated by the Sign Code.

The Sign Code mandates a "Sign Registration Fee" described in Article 12 of the Sign Code. Every sign must be registered annually in order to "install, move, structurally alter, structurally repair, or maintain" the sign. *See* Sign Code §§ 25-10-231, 25-10-152(F). As part of registration, an applicant must pay an annual registration fee for each sign. *See* Sign Code § 2510-233. Currently, the registration fee is two-hundred dollars per sign per year. Failure to register a sign is "an offense punishable by a fine of up to $500 per day for each day that the offense continues, and for each sign that is not registered." Sign Code § 25-10-237.

The City's registration fee is inconsistent with its costs to regulate signs. The revenues derived from the registration fees for off-premise signs are several times higher than the expenses incurred in regulating such signs.

Reagan, as owner of numerous signs throughout Austin, has paid hundreds of thousands of dollars in annual sign registration fees for over its many years of operation. These payments have been made under protest.

In April 2010, Reagan filed suit against the City in Federal District Court for the Western District of Texas, complaining that the registration fee is an improper tax and violates the Texas and United States

Constitutions. On November 30, 2011, the federal district court concluded that it lacked jurisdiction under the Tax Injunction Act and dismissed the case without prejudice. Specifically, the federal district court determined that the registration fee is a tax because it is set by the City Council (and not a separate agency or commission) and is for general public purposes (and not for the regulation or benefit of the outdoor advertising industry). Regarding the registration fee's general public purpose, the court found that the registration fee revenue is deposited into the City's general fund, rather than a separate billboard-regulatory fund, and that the evidence presented concerning the reasonable cost of registering billboards suggested that the registration fee exceeds the cost of regulation and is a tax under the Tax Injunction Act. *See* Exhibit A, Findings of Fact and Conclusions of Law.

The City's sign registration fee is unconstitutional under both the Texas and United States Constitutions. The City has also used the unconstitutional fee as an excuse to deprive Reagan of grandfathered rights. Specifically, the City has denied Reagan a relocation permit to move one of its signs, located at 2901 1/2 East Martin Luther King Boulevard, alleging that the registration fee for the sign had not been paid. However, Reagan had paid the registration fee under protest for the sign in question.

VII. <u>Cause of Action: Unconstitutional and Unauthorized Permit Fees in Violation of Article VIII, Section 1(f) and Article I, Section 29 of the Texas Constitution and the Fourteenth Amendment of the United States Constitution</u>

The inconsistency between the revenues generated by Defendants' permit fees for Reagan's signs and the costs to regulate such signs is illegal. Defendants' so-called registration fees are really nothing more than unauthorized taxes. Specifically, while municipal governments may exact fees to recoup the reasonable costs of their police power regulations, they may not levy occupation or other taxes without express constitutional or legislative authority. Further, if the fee exceeds the reasonable cost of regulation and is primarily for the purpose of raising revenue, it will be characterized as a tax. In this case, the City's registration fee generates several times more income than its reasonable regulation costs. The fee is, therefore, a tax that the City lacks authority to assess.

Consequently, the City has violated article VIII, section 1(f) of the Texas Constitution, which says that cities cannot charge an occupation tax in excess of one-half of the tax levied by the State for the same period on the same profession or business. Because the State does not levy occupation taxes on the outdoor advertising business, the City cannot levy any occupation taxes on the outdoor advertising business.

Furthermore, by unlawfully collecting taxes in violation of the state constitution, the City has violated Reagan's due process rights under both article 1, §29 of the Texas Constitution and the Fourteenth Amendment to the U.S. Constitution. Reagan has been and continues to be unlawfully deprived of property without opportunity to challenge that deprivation and obtain relief. Instead, Reagan is subjected to financial sanctions for non-payment or late payment of registration fees.

Furthermore, using the unconstitutional tax as its justification, the City has deprived Reagan of its right to relocate its signs. Reagan is thus deprived not only of monies collected as improper taxes but also of its vested property right to relocate the sign without opportunity to challenge that deprivation and obtain relief. Consequently, Reagan has lost revenues it would have earned on the sign because the City will not allow it to be relocated. This conduct also violates Reagan's due process rights under article 1, §29 of the Texas Constitution and the Fourteenth Amendment to the U.S. Constitution.

VIII. Cause of Action: 42 U.S.C. § 1983

As described above, by levying an unlawful tax on Reagan, the City has deprived Reagan of its due process rights under the Fourteenth Amendment to the U.S. Constitution. The City's conduct violates 42 U.S.C. § 1983.

Defendant Marc Ott is an employee of the City of Austin and was an employee of the City of Austin when he deprived Reagan of its rights under the Fourteenth Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983.

Defendant Marc Ott was acting under color of the laws and regulations of the State of Texas and the City of Austin when he assessed and charged registration fees against Reagan in excess of the administrative costs of regulating Reagan's outdoor advertising signs. The exercise of this established registration-fee system resulted in the violation of Reagan's right to due process.

Defendant Marc Ott was also acting under color of the laws and regulations of the State of Texas and the City of Austin when he denied Reagan's relocation permit for its sign at 2901 1/2 East Martin Luther King Boulevard. The denial of this permit, which Defendant justified by alleging that Reagan had not paid the unconstitutional registration fee, resulted in violations of Reagan's right to due process.

In depriving Reagan of its constitutional protections, Defendants have acted under color of state law through the actions of Defendant Marc Ott. As such, Defendants are liable for Plaintiff's actual damages under 42 U.S.C. § 1983.

IX. <u>Cause of Action: Regulatory Taking in Violation of Texas Constitution Article 1, § 17</u>

The City has committed a regulatory taking, or inverse condemnation, of Reagan's property, in violation of Texas Constitution article 1, § 17. Reagan owns the sign that was located at 2901 1/2 East Martin Luther King Boulevard and had a grandfathered right to relocate the sign from that location. By denying Reagan its established right to relocate its sign from 2901 1/2 East Martin Luther King Boulevard in reliance on the unconstitutional registration fee, the City has deprived Reagan of all economically viable use of its property and has unreasonably interfered with Reagan's right to use and enjoy its property. *See City of Carrollton v. HEB Parkway S., Ltd.*, 317 S.W.3d 787, 793 (Tex. App. – Fort Worth 2010, no pet.). The City has imposed regulations that interfere with Reagan's use of the property. Specifically, the City's unconstitutional registration fee has interfered with Reagan's use of its sign by depriving Reagan of its right to relocate (and thus use) its sign. The registration fee has thus proximately caused the denial of Reagan's use of the sign. Reagan did not consent to this taking.

Immunity does not bar a claim brought under Texas Constitution article 1, § 17. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998).

X. **Declaratory Judgment**

Pursuant to the Declaratory Judgments Act (DJA), Reagan requests the Court to enter the following declaratory judgment: (1) the City's registration fee is an occupation tax in violation of article VIII, section 1(f) of the Texas Constitution; (2) the registration fees levied against Reagan violate the due process clause of the Texas and United States Constitutions; and (3) the constitutional fee for registration is $115.00 or less. The DJA expressly waives the City's immunity from suit. *See Texas Lottery Comm'n v. First State Bank*, 325 S.W.3d 628, 634-35 (Tex. 2010); *City of Arlington v. Randall*, 301 S.W.3d 896, 908-09 (Tex. App. – Fort Worth 2009, pet. denied) (immunity does not bar declaratory judgment action for violation of Texas Constitution).

XI. **Damages**

The City's unconstitutional and unauthorized assessment and collection of excessive sign registration fees or taxes have deprived Reagan of its constitutionally protected rights, privileges, or immunities. The City, in depriving Reagan of these constitutional protections, has acted under color of state law through the actions of the Austin City Counsel [sic], Austin City Manager, and City of Austin Development Review Department. Specifically, the City has violated Reagan's right to due process under the Fourteenth Amendment to the United States Constitution by assessing unconstitutionally excessive fees and by failing to refund the portion of the fees paid under duress that are unconstitutionally excessive. The City has also violated Reagan's right to due process by taking Reagan's property rights in the Martin Luther King Boulevard sign. As such, the City is liable to the [sic] Reagan under the Civil Rights Act, 42 U.S.C. § 1983 for Reagan's actual damages. Reagan seeks at least a refund of the portion of the fees paid that were unconstitutionally excessive. Immunity does not bar liability for damages under § 1983. 42 U.S.C. § 1983; *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990).

Also, because the City has engaged in a taking of Reagan's property and has violated article 1, § 17 of the Texas Constitution, Reagan is entitled to compensation for the property, as described in § 17(a).

The exact amount of Reagan's damages is difficult to calculate at this time because the appropriate accounting and financial information is within the control of the City. However, Reagan has been damaged in excess of $150,000.00.

XII. <u>Injunctive Relief: Request for Permanent Injunction</u>

Reagan will suffer irreparable injury if Defendants are not enjoined from assessing registration fees and punishing Reagan in the manners described by section 25-10-237 of the Sign Code while this suit is pending.

There is no adequate remedy at law because Reagan continues to be assessed impermissible taxes. If no injunction is imposed, Reagan must continue to pay the unlawful taxes and thus be deprived of its property, or subjected to punishment and further fines under the Sign Code. No review or protest process is available.

There is a substantial likelihood that Reagan will prevail on the merits because the registration fee exceeds the Defendants' administrative costs of regulating Reagan's outdoor advertising business.

The harm faced by Reagan outweighs the harm that would be sustained by Defendants if an injunction were granted. The registration fee exceeds the amount required by Defendants for regulation of Reagan's outdoor advertising business. Because Reagan has previously paid this impermissible fee, Defendants should already have the money they require for regulation. If an injunction is not granted, Reagan will have to continue paying the unlawful registration fee for each of its billboards every year or be subjected to penalties.

Issuance of an injunction would not adversely affect the public interests because the registration fees exceed the amount Defendants require for regulation. The public's interest in regulation is satisfied because Reagan has already paid amounts in excess of costs of regulation. Furthermore, Reagan is willing to pay a registration fee that reflects reasonable cost to regulate.

Reagan is willing to post a bond in the amount the Court deems appropriate.

Reagan asks the Court to set its application for injunctive relief for a full trial on the issues in this application and, after the trial, to issue a permanent injunction against Defendants.

XIII. Attorneys' Fees

Reagan is entitled to recover reasonable and necessary attorneys' fees pursuant to 42 U.S.C. § 1988. Reagan is also entitled to recover its attorney fees because this is a suit for a declaratory judgment. Tex. Civ. Prac. & Rem. Code § 37.009.

XIV. Jury Demand

Reagan demands a jury and has previously paid the required fee.

XV. Prayer

Reagan requests that Defendants be cited to appear and that upon final hearing of this matter, that the Court enter a declaratory judgment finding that Defendants' sign registration fees are an unconstitutional occupation tax, that the fees levied against Reagan violate the due process clause of the Texas and United States Constitutions, and that a constitutional registration fee is $115 or less. Reagan also requests that the Court permanently enjoin Defendants from continuing to assess registration fees in excess of

$115.00, and asks that the Court set its application for injunction for a full trial on the merits. Reagan further requests that the Court award Reagan full recovery on all of its claims including an award for Reagan's actual damages, including a refund of excessive fees charged, attorneys' fees, pre-judgment interest, post-judgment interest, court costs, and such other and further relief to which it may be entitled.

Respectfully submitted,

/s/ B. Russell Horton

B. Russell Horton
State Bar No. 10014450
Elizabeth von Kreisler
State Bar No. 24047273
Taline Manassian
State Bar No. 24007596
George, Brothers, Kincaid & Horton, L.L.P.
114 West 7th Street, Ste. 1100
Austin, Texas 78701
(512) 495-1400 *telephone*
(512) 499-0094 *facsimile*
rhorton@gbkh.com
evonkreisler@gbkh.com
tmanassian@gbkh.com

ATTORNEYS FOR PLAINTIFF REAGAN NATIONAL ADVERTISING OF AUSTIN, INC.

[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC. d/b/a REAGAN NATIONAL ADVERTISING, Plaintiff	§ § § § § §	CIVIL ACTION NO.: 1:10-cv-275
v.	§	
CITY OF AUSTIN, TEXAS; MARC A. OTT, being sued in his official capacity, Defendants	§ § § § §	

PLAINTIFFS' ORIGINAL COMPLAINT & APPLICATION FOR INJUNCTIVE RELIEF

TO THE HONORABLE COURT:

Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising respectfully files this original petition complaining of the City of Austin, Texas, and would show:

I. Nature of the Case

1. Plaintiff's complaint arises from Defendant's improper and unconstitutional taxation of Plaintiff's outdoor advertising signs.

II. **Parties**

2. Plaintiff Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising ("Reagan") is a Delaware corporation doing business in Austin, Travis County, Texas and surrounding areas.

3. Defendant City of Austin, Texas, is an incorporated municipality located in Travis County, Texas and may be served by serving the mayor, Mayor Lee Leffingwell, at Austin City Hall, 301 W. 2nd St. 2nd Floor, Austin, Texas 78701, or the City Clerk at 301 W. 2nd St. Suite 1120, Austin, Texas 78701. *See* Tex. Civ. Prac. & Rem. Code § 17.024(b).

4. Defendant Marc A. Ott, who is being sued in his official capacity as the City Manager of the City of Austin, is an individual residing in Travis County, Texas and may be served by serving him at his place of employment, Austin City Hall, 301 W. 2nd St. 3rd Floor, Austin, Texas 78701.

III. **Jurisdiction & Venue**

5. The Court has jurisdiction over the lawsuit because the suit arises under the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. § 1983.

6. Venue is proper in this district under 28 U.S.C. § 1391(b)(1) because Defendant City of Austin resides here. Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this claim occurred in this district.

IV. **Conditions Precedent**

7. All conditions precedent to recovery have been met or have occurred.

V. **Facts**

8. Plaintiff is engaged in the Austin and surrounding area in the business of outdoor advertising, which involves the ownership and operation of billboards. Chapter 25-10 of the Austin City Code (the "Sign Code") regulates the local outdoor advertising industry. Plaintiff is regulated by the Sign Code.

9. The Sign Code mandates a "Sign Registration Fee" described in Article 12 of the Sign Code. Every sign must be registered annually in order to "install, move, structurally alter, structurally repair, or maintain" the sign. *See* Sign Code §§ 25-10-231, 25-10-152(F). As part of registration, an applicant must pay an annual registration fee for each sign. *See* Sign Code § 25-10-233. Currently, the registration fee is two-hundred dollars per sign per year. Failure to register a sign is "an offense punishable by a fine of up to $500 per day for each day that the offense continues, and for each sign that is not registered." Sign Code § 25-10-237.

10. Austin's registration fee is inconsistent with its costs to regulate signing. The revenues derived from the registration fees for off-premise signs are several times higher than the expenses incurred in regulating such signs.

11. Plaintiff, as owner of numerous signs throughout Austin, has paid thousands of dollars in annual sign registration fees over its many years of operation.

VI. <u>Cause of Action: Unconstitutional and Unauthorized Permit Fees</u>

12. The inconsistency between the revenues generated by Defendants' permit fees for Plaintiff's signs and the costs to regulate such signs is illegal. Defendants' so-called registration fees are really nothing more than unauthorized taxes. Specifically, while municipal governments may exact fees to recoup the reasonable costs of their police power regulations, they may not levy occupation or other taxes without express constitutional or legislative authority. Further, if the fee greatly exceeds the reasonable cost of regulation and is primarily for the purpose of raising revenue, it will be characterized as a tax. In this case, Defendants' fees generate several times more income than their reasonable regulation costs. The fees are, therefore, taxes that Defendants lack authority to assess.

13. Consequently, Defendants have violated article VIII, section 1(f) of the Texas Constitution, which states that cities cannot charge an occupation tax in excess of one-half of the tax levied by the State for the same period on the same profession or business. Because the State does not levy occupation taxes on the outdoor advertising business, Defendants cannot levy any occupation taxes on the outdoor advertising

business. By unlawfully collecting taxes in violation of the state constitution, Defendants have violated Plaintiff's due process rights under the Fourteenth Amendment to the U.S. Constitution. Plaintiff has been and continues to be unlawfully deprived of property without opportunity to challenge that deprivation and obtain relief. Instead, Plaintiff is subjected to financial sanctions for non-payment or late payment of registration fees.

VII. Cause of Action: 42 U.S.C. § 1983

14. As described above, by levying an unlawful tax on Plaintiff, Defendants have deprived Plaintiff of its due process rights under the Fourteenth Amendment to the U.S. Constitution. Defendants' conduct violates 42 U.S.C. § 1983.

15. Defendant Mark Ott is an employee of the City of Austin and was an employee of the City of Austin when he deprived Plaintiff of its rights under the Fourteenth Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983.

16. Defendant Mark Ott was acting under color of the laws and regulations of the State of Texas and the City of Austin when he assessed and charged registration fees against Plaintiff in excess of the administrative costs of regulating Plaintiff's outdoor advertising signs. The exercise of this established registration fee system resulted in the violation of Plaintiff's right to due process.

VIII. Declaratory Judgment

17. Pursuant to 28 U.S.C. section 2201, Plaintiff requests the Court to enter the following declaratory judgment: (1) the City's sign registration fee is an occupation tax in violation of article VIII, section 1(f) of the Texas Constitution; (2) the registration fees levied against Plaintiff violate the due process clause of the Texas and United States Constitutions; and (3) the constitutional fee for registration is $ 20.00 or less.

IX. Damages

18. Defendants' unconstitutional and unauthorized assessment and collection of excessive sign registration fees or taxes have deprived Plaintiff of its constitutionally protected rights, privileges, or immunities. Defendants, in depriving Plaintiff of these constitutional protections, have acted under color of state law through the actions of the Austin City Counsel [sic], Austin City Manager, and City of Austin Department of Watershed Protection and Development Review Department. As such, Defendants are liable to the Plaintiff under the Civil Rights Act, 42 U.S.C. § 1983 for Plaintiff's actual damages. The exact amount of Plaintiff's damages is difficult to calculate at this time because the appropriate accounting and financial information is within the control of Defendants. However, Plaintiff has been damaged in excess of $150,00.00.

X. <u>Injunctive Relief: Request for Preliminary Injunction</u>

19. Plaintiff will suffer irreparable injury if Defendants are not enjoined from assessing registration fees and punishing Plaintiff in the manners described by section 25-10-237 of the Sign Code while this suit is pending.

20. There is no adequate remedy at law because Plaintiff continues to be assessed impermissible taxes. If no injunction is imposed, Plaintiff must continue to pay the unlawful taxes and thus be deprived of its property, or be subjected to punishment and further fines under the Sign Code. No review or protest process is available.

21. There is a substantial likelihood that Plaintiff will prevail on the merits because the registration fees exceed the Defendants' administrative costs of regulating Plaintiff's outdoor advertising business.

22. The harm faced by Plaintiff outweighs the harm that would be sustained by Defendants if the preliminary injunction were granted. The registration fee exceeds the amount required by Defendants for regulation of Plaintiff's outdoor advertising business. Because Plaintiff has previously paid this impermissible fee, Defendants should already have the money they require for regulation. If the litigation continues for a year or more, Plaintiff will have to continue paying the unlawful registration fee for each of its billboards every year that the litigation continues or be subjected to penalties.

23. Issuance of a preliminary injunction would not adversely affect the public interests because the registration fees exceed the amount Defendants require for regulation. The public's interest in regulation is satisfied because Plaintiff has already paid amounts in excess of the costs of regulation. Furthermore, Plaintiff is willing to pay a registration fee that reflects a reasonable cost to regulate.

24. Plaintiff is willing to post a bond in the amount the Court deems appropriate.

25. Plaintiff asks the Court to set its application for preliminary injunction for hearing at the earliest possible time and, after hearing the request, to issue a preliminary injunction against Defendants.

XI. Injunctive Relief: Request for Permanent Injunction

26. Plaintiff asks the Court to set its application for injunctive relief for a full trial on the issues in this application and, after the trial, to issue a permanent injunction against Defendants.

XII. Attorneys' Fees

27. Plaintiff is also entitled to recover reasonable and necessary attorneys' fees pursuant to 42 U.S.C. § 1988.

XIII. <u>Jury Demand</u>

28. Plaintiff demands a jury and has submitted the required fee along with this petition.

XIV. <u>Prayer</u>

29. Plaintiff requests that Defendants be cited to appear and that upon final hearing of this matter, that the Court enter a declaratory judgment finding that Defendants' sign registration fees are unconstitutional and that the Court preliminarily and permanently enjoin Defendants from continuing to assess such fees in excess of $20.00, and asks that the Court set its application for preliminary injunction for hearing. Plaintiff further requests that the Court award Plaintiff full recovery on all of its claims including an award for Plaintiff's actual damages, attorneys' fees, pre-judgment interest, post-judgment interest, court costs, and such other and further relief to which it may be entitled.

Respectfully submitted,

/s/ B. Russell Horton
B. Russell Horton
State Bar No. 10014450

Elizabeth von Kreisler
State Bar No. 24047273

Kincaid & Horton, L.L.P.
114 West 7th Street, Suite 1100
Austin, Texas 78701
(512) 499-0999
(512) 499-0816 *facsimile*

ATTORNEYS FOR PLAINTIFF
REAGAN NATIONAL ADVERTISING
OF AUSTIN, INC.