No. 21-___

# In the Supreme Court of the United States

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

*v.*

TEXAS ENTERTAINMENT ASSOCIATION, INC.

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Tax Injunction Act (TIA) bars federal courts from enjoining "the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. But courts are split over distinguishing a "tax" from a regulatory fee that may be challenged in federal court. The Second, Seventh, and Tenth Circuits deem a charge a tax if it raises revenue, even if it serves a regulatory purpose. The Third, Sixth, Eighth, Eleventh, and D.C. Circuits deem a charge a tax if it raises revenue without some corresponding administrative benefit; the First, Fourth, and Ninth Circuits work a similar concern into multifactor tests, which the Seventh Circuit has called into doubt.

The Fifth Circuit exercised jurisdiction over a charge that would be deemed a tax under either of those approaches. Texas imposes a $5-per-customer charge for businesses that combine alcohol and live nude entertainment. Like cigarette excise taxes, this charge increases costs and undisputedly raises public revenue from those who partake. The Fifth Circuit deemed it a fee because it has "a regulatory purpose." Pet. App. 15a.

The lower courts are thus locked into a mature, three-way spilt that only this Court can resolve. Because the TIA is a jurisdictional statute, establishing a clear rule is of paramount importance. The Fifth Circuit's anomalous rule frustrates the uniform application of the TIA and states' sovereign prerogatives in raising revenue.

The question presented is whether, under the TIA, a state revenue measure is a tax if it raises public revenue, notwithstanding a regulatory purpose, as three circuits would hold; if the measure lacks corresponding administrative benefits, as eight circuits would hold; or only if it serves no regulatory purpose at all, as the Fifth Circuit has held.

## PARTIES TO THE PROCEEDING

Petitioner Glenn Hegar, Comptroller of Public Accounts of the State of Texas, was the defendant-appellant in the court of appeals.

Respondent Texas Entertainment Association, Inc., was the plaintiff-appellee in the court of appeals.

## RELATED PROCEEDINGS

*Texas Entertainment Association, Inc. v. Hegar*, No. 1:17-cv-00594-DAE, U.S. District Court for the Western District of Texas. Judgment entered March 6, 2020.

*Texas Entertainment Association, Inc. v. Hegar*, No. 20-50262, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 19, 2021.

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## PETITION FOR A WRIT OF CERTIORARI

The TIA deprives federal courts of jurisdiction to entertain a challenge to a state tax measure. Many levies raise public funding by raising the cost of an activity and influencing its consumption. A classic example would be a so-called "sin tax" on liquor or cigarettes. Indeed, charges that seek "both to deter and to collect revenue when deterrence fails" are commonplace measures for raising state revenue. *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 730 (7th Cir. 2011) (en banc). State revenue measures are thus often intended both to raise public funding and to serve some regulatory purpose. But the lower courts are divided over how to treat mixed-purpose charges under the TIA.

Whether a state charge that raises revenue stops being a "tax" if it raises the costs of an activity for specified public purposes is the subject of a three-way circuit split. The Second, Seventh, and Tenth Circuits treat such charges as taxes. As the Second Circuit recently held, the TIA bars federal jurisdiction when the "primary purpose" of mixed-purpose charges is to "raise revenue." *Ass'n for Accessible Medicines v. James*, 974 F.3d 216, 227 (2d Cir. 2020), *cert. denied sub nom. Healthcare Distrib. All. v. James*, 142 S. Ct. 87 (2021). Other circuits focus tax treatment on whether the charge raises money for public use without providing corresponding benefits for those paying the charge or covering administrative costs. The Fifth Circuit holds that a state's revenue-generating measure loses tax treatment if it serves "a regulatory purpose." Pet. App. 15a. The Fifth Circuit's expansive view of federal jurisdiction makes it an outlier.

Although this Court has not yet considered the issue under the TIA, it has rejected reasoning similar to that embraced by the court below under analogous provisions

applicable to federal laws. This Court's precedent recognizes that taxation can be a deterrent, much like an excise tax on liquor might reduce alcohol consumption. If such exactions become regulatory fees instead of taxes, then the protections that the TIA affords the states would be significantly and improperly diminished. The Fifth Circuit's analysis thus deviates from the federal-state comity principles behind the TIA.

This case provides an ideal vehicle for resolving the conflict, which is squarely presented and dispositive. Because the TIA is a jurisdictional statute, *Hibbs v. Winn*, 542 U.S. 88, 104 (2004), setting "clear boundaries in [its] interpretation" is of paramount importance, *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 11 (2015). Only this Court's intervention can provide the requisite clarity without miring states, taxpayers, and courts in lengthy jurisdictional disputes. Resolving the question presented is critically important to the State of Texas and its ability to raise public revenue from a tax base that contributes to rape and sexual assault—businesses that serve alcohol with live nude entertainment. The question presented will likely recur absent this Court's intervention because "taxes that seek to influence conduct are nothing new." *NFIB v. Sebelius*, 567 U.S. 519, 567 (2012). The Court should grant certiorari.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-31a) is reported at 10 F.4th 495. The findings of fact and conclusions of law of the district court (Pet. App. 32a-56a) are unreported but available at 2020 WL 10895216. The opinion of the district court regarding the parties' motions for summary judgment (Pet. App. 57a-90a) is unreported but available at 2019 WL 13036162. The order of the district court adopting the magistrate judge's report

and recommendation regarding petitioner's motion to dismiss (Pet. App. 91a-93a) is unreported but available at 2018 WL 11353640. The magistrate judge's report and recommendation (Pet. App. 94a-110a) is unreported but available at 2018 WL 718549.

## JURISDICTION

The Fifth Circuit entered judgment on August 19, 2021. Petitioner's timely petition for rehearing en banc was denied on November 12, 2021. This Court extended the deadline for a petition for a writ of certiorari by 30 days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional provisions, TIA provisions, and Texas statutory and regulatory provisions are set forth in the appendix to this brief. Pet. App. 111a-127a.

## STATEMENT

### I. Legal Background

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Despite referencing injunctive actions, the TIA prohibits federal courts from granting declaratory relief in cases involving constitutional challenges to state tax measures. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982). The TIA mirrors its federal analogue, the Anti-Injunction Act (AIA), 26 U.S.C. § 7421. *Direct Mktg.*, 575 U.S. at 8. This Court "assume[s] that words used in both Acts are generally used in the same way." *Id.*

By the time Congress enacted the TIA, this Court had distinguished "taxes" covered by the AIA from "penalties" and "fees" that were not covered by the AIA. This Court recognized that taxes may be enacted for the purpose not only "of obtaining revenue" but also "discouraging [the activities taxed] by making their continuance onerous." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). Such assessments "do not lose their character as taxes because of the incidental motive." *Id.*

This Court cautioned that a charge could lose tax treatment if it had "penalizing features" with "characteristics of regulation and punishment." *Id.* Early precedent clarified that such charges "lack[ed] the quality of a true tax." *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110, 113 (1936). Rather, such charges do not trigger the jurisdictional bar because they are intended to penalize, not raise revenue. *See, e.g.*, *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 391 (1922); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922).

Today, the tax-versus-fee distinction applies "in the same way" as the distinction between taxes that are intended to raise revenue and other charges that are not. *Direct Mktg.*, 575 U.S. at 8. Assessments that merely "defray [an] agency's regulation-related expenses" generally are not considered taxes. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992). For example, bridge and road tolls generally are not taxes because they merely cover the costs of providing those services. *See Am. Trucking Ass'ns v. Alviti*, 944 F.3d 45, 52-53 (1st Cir. 2019); *see also Corr v. Metro. Wash. Airports Auth.*, 740 F.3d 295, 301 (4th Cir. 2014) (distinguishing a road toll from a tax under Virginia law). Charges with a "punitive character" generally are not treated as taxes either. *Dep't of Revenue v. Kurth*

*Ranch*, 511 U.S. 767, 780 (1994); *accord Chamber of Com. v. Edmondson*, 594 F.3d 742, 763 (10th Cir. 2010). That is because such charges are intended to punish something forbidden, rather than raise revenue from something that is merely "discourage[d]." *Kurth Ranch*, 511 U.S. at 782.

## II. Factual Background

**A.** In 2007, the Texas legislature enacted a $5-per-customer charge on businesses that serve alcohol to patrons of live nude entertainment. Tex. Bus. & Com. Code §§ 102.051-.056. Texas law directs the Comptroller to collect the charge from "sexually oriented businesses." *Id.* §§ 102.051(2)(A), .052(b). Whether a business is a "sexually oriented business" depends in relevant part on whether its performers are "nude." *Id.* § 102.051. The definition of "nude" depends on how a performer is "clothed." *Id.* § 102.051(1)(B). A performer is "nude" if her breasts are "visible through less than fully opaque clothing." *Id.*

The charge works like a "sin tax" designed both to raise revenue and discourage socially harmful activity. *Tex. Ent. Ass'n, Inc. v. Combs* (*Combs II*), 431 S.W.3d 790, 798 n.5 (Tex. App.—Austin 2014, pet. denied). Like a cigarette tax, the $5 charge is *not* punitive—it merely "'reduce[s] consumption and increase[s] government revenue.'" *Id.* (quoting *Kurth Ranch*, 511 U.S. at 782). TEA acknowledges, and in fact argued in state court, that "the fee is so small, it is unlikely to have much effect" at strip clubs. *Combs v. Tex. Ent. Ass'n* (*Combs I*), 347 S.W.3d 277, 287 (Tex. 2011).

Money raised from the charge helps the State fund programs that combat rape and sexual assault. *Id.* at 279-80. This Court has long recognized links between live nude dancing (with or without alcohol) and various social

ills, including rape, sexual assault, and other crimes. For instance, Justice Souter's controlling concurrence in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), accepted the state's "assertion that . . . nude dancing…'encourages prostitution, increases sexual assaults, and attracts other criminal activity,'" *id.* at 582 (cleaned up). Accordingly, proceeds from the $5 charge are credited to a State fund earmarked for sexual-assault programs. Tex. Bus. & Com. Code § 102.054.

**B.** TEA challenged the $5 charge almost immediately as violating strip clubs' First Amendment rights. The Texas Supreme Court upheld the charge under the First Amendment, noting its focus on reducing the societal ills of mixing alcohol with nude dancing. *Combs I*, 347 S.W.3d at 287-88.

Some topless clubs took a different tack. Resolved to ply patrons with alcohol without paying the charge, they apply flesh-toned liquid latex to performers' breasts. R.1556. Latex is sponged onto the breasts, allowed to dry, and afterward "peel[ed] off" like a "decal." R.1557. These so-called "latex" clubs maintain that the sponged-on latex provides enough coverage to avoid the $5 charge.

In 2016, after public notice and comment, the Comptroller adopted a rule defining "clothing." 42 Tex. Reg. 219, 219 (2017). The rule's preamble reflects intent that "clothing" bear its ordinary, plain-language meaning. *Id.* Accordingly, "clothing" means "[a] garment used to cover the body, or a part of the body, typically consisting of cloth or a cloth-like material." 34 Tex. Admin. Code § 3.722(a)(1). The definition continues: "[p]aint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing." *Id.*

## III. Procedural History

### A. State and Federal Court

In 2017, an association of self-described latex clubs filed a state administrative-law suit challenging the "clothing" definition's validity. *Hegar v. Tex. BLC, Inc.*, No. 01-18-00554-CV, 2020 WL 4758474, at *3 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, pet. denied). Under Texas law, a rule-validity challenge requires proof that a rule interpreting a statute contravenes statutory text, contradicts statutory objectives, or "imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Id.* at *4. The court of appeals upheld the Comptroller's definition under that standard. *Id.* at *6-8. While the Comptroller's appeal was pending in the present case, the Texas Supreme Court denied Texas BLC's petition for review. Pet. App. 19a n.4.

The same day Texas BLC filed its state-court lawsuit, TEA filed a suit on behalf of latex clubs in federal court. TEA argued that the "clothing" rule violated the First Amendment, due process, and equal protection. R.13-21. TEA's lawsuit did not claim that the $5-charge statute was itself unconstitutional.

The district court ruled that the TIA did not bar federal jurisdiction because the charge was a regulatory fee, not a tax. R.160-73, 188-90. The court also ruled that the "clothing" rule violated equal protection, the First Amendment, and due process insofar as the Comptroller applied it retroactively to businesses that had become latex clubs to avoid the $5 charge. R.902-23, 1172-90.

### B. Court of Appeals

A panel of the Fifth Circuit affirmed in part and reversed in part. The panel correctly reversed the ruling

that the "clothing" rule violated equal protection because other businesses were not similarly situated to "latex" topless clubs. Pet. App. 30a-31a. The latex clubs were similar to "traditional nude dancing establishments" because their "primary purpose remains to showcase erotic dancing with nude (or almost nude) performers." Pet. App. 30a.

The court affirmed the ruling that jurisdiction was not barred by the TIA. Pet. App. 12a-15a. The court acknowledged that, like other taxes, the $5 charge was imposed by state legislators. Pet. App. 14a. The court identified no portion of the charge directed to "defraying regulatory costs." Pet. App. 13a. The court nevertheless found that the charge "serves a regulatory purpose" by "rais[ing] the costs of sexually oriented businesses" and dedicating revenue raised "to a sexual assault program fund, not general revenue." Pet. App. 15a.

The court held further that the rule violated latex clubs' First Amendment rights. Pet. App. 19a-27a. The court explained that if the government's purpose in enacting regulation "'is unrelated to the suppression of expression, then the regulation need only satisfy the less stringent standard' of intermediate scrutiny." Pet. App. 20a (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality op.)). The court, however, found no "evidence that shows that the Comptroller was 'predominantly motivated by . . . the control or reduction of deleterious secondary effects.'" Pet. App. 24a. The court concluded that the definition was "directed at the essential expressive nature of the latex clubs' business, and thus is a content[ ]based restriction" that cannot survive strict scrutiny. Pet. App. 24a-25a.

The court also held that "retroactive imposition" of the charge "via the Clothing Rule" violates due process.

Pet. App. 29a. Ostensibly, "latex clubs had a settled expectation that they would not be subject" to the charge because the Comptroller "took no enforcement action" against them before the "clothing" rule's publication. Pet. App. 28a. Yet the court performed no textual analysis to determine whether the rule, as opposed to the underlying statute itself, gave "legal effect to conduct undertaken before enactment" of the rule. Pet. App. 28a (quoting *United States v. Hemme*, 476 U.S. 558, 569 (1986)).

The Comptroller petitioned for rehearing en banc, which was denied. Pet. App. 1a-2a.

## REASONS FOR GRANTING THE PETITION

The Fifth Circuit's TIA holding conflicts with decisions of three circuits and also conflicts with eight other circuits' approach to distinguishing taxes from fees. In the Fifth Circuit—and nowhere else—federal courts may enjoin a state-imposed charge that undisputedly raises funds for public use if it also "serves a regulatory purpose" because it "raises the costs" of an activity and directs funds to public purposes other than "general revenue." Pet. App. 15a. The result below also flouts this Court's precedent applying analogous distinctions under the AIA and construing the TIA's animating principles.

The decision below also illustrates the need for clarity that only this Court can provide. The TIA is a jurisdictional statute that protects the states from interference with the vital flow of state revenue. A jurisdictional rule that faults a state's regulatory purpose in one circuit but not in others is untenable. And this case presents the Court with an excellent vehicle to provide the much-needed clarity.

## I. The Fifth Circuit's "Regulatory Purpose" Test Creates a Three-Way Circuit Split and Conflicts with This Court's Precedent.

Courts have long recognized that the "line between a tax and a fee" is "sometimes fuzzy." *Empress Casino*, 651 F.3d at 729. Without clear guidance from this Court, the lower courts have come to "opposite conclusion[s]" in cases involving indistinguishable facts. *Id.* at 730. Here, the Fifth Circuit's analysis creates a three-way split among the lower courts and conflicts with this Court's precedent. The resulting disagreement and confusion warrant review.

### A. The Fifth Circuit's holding conflicts with decisions from the Second, Seventh, and Tenth Circuits.

State exactions often combine "regulatory aims" (Pet. App. 15a) with revenue-generating features. The Fifth Circuit's approach to such charges under the TIA conflicts with published decisions of the Second, Seventh, and Tenth Circuits. In those circuits, TEA's challenge to the administration of Texas's tax laws would have been properly dismissed for want of jurisdiction.

**1.** The Second Circuit recently held that New York's levy on opioid manufacturers was a tax, not a fee. *Accessible Medicines*, 974 F.3d at 226-27. New York imposed a $100 million surcharge on such companies, apportioned by their share of opioid sales, with such funds segregated in an account used to pay for programs related to the opioid crisis. *Id.* at 219-20, 225. The surcharge applied to approximately 97 companies out of millions doing business in New York and was collected by regulators, not tax authorities. *Id.* at 219. But because the revenues were dedicated for "public benefit," instead of benefitting regulated parties, it was a tax. *Id.* at 226. The surcharge

funded "public health initiatives that undoubtedly provide a 'general benefit' to New York residents." *Id.* at 223. And its proceeds were not used to "'defray' the Department of Health's 'costs of regulating' manufacturers and distributors." *Id.* (cleaned up). The Second Circuit rejected the notion that depositing proceeds in a special fund meant the surcharge was a regulatory fee rather than a tax. *Id.* at 226.

This result is irreconcilable with the Fifth Circuit's ruling. According to the court below, the $5-per-patron charge "raise[d] the costs of sexually oriented businesses" and earmarked revenue for "a sexual assault program fund, not general revenue." Pet. App. 15a. But the same would have been true of the opioid surcharge New York earmarked for public-health causes. The Fifth Circuit took no issue with the proposition that the $5-per-patron charge raised funds for public benefit—social programs that support victims of rape and sexual assault—without providing any benefit to strip clubs or their patrons. There is no doubt that the Second Circuit would have held that Texas's charge assessed a tax.

**2.** The decision below also squarely conflicts with the Seventh Circuit's decision in *Empress Casino*, 651 F.3d at 730. In *Empress Casino*, the en banc Seventh Circuit held that an Illinois statute requiring riverboat casinos to give up 3 percent of their revenues to subsidize racetracks was a tax. *Id.* at 733-34. Illinois earmarked the funds for propping up horse gambling at riverboat casinos' expense. *Id.* at 732. Although the charge was intended to discourage riverboat gambling, it did not trigger federal jurisdiction. The court explained that the "only material distinction" under the TIA was "between exactions designed to generate revenue—taxes, whatever the state calls them"—on the one hand, versus

"exactions designed . . . to punish (fines, in a broad sense) rather than to generate revenue (the hope being that the punishment will deter, though deterrence is never perfect and therefore fines generate some state revenues)," as well as "fee[s]" designed to "compensate for a service," on the other hand. *Id.* at 728. Because Illinois's charge did not "fine" any misconduct or impose a "fee" for any service, the Seventh Circuit deemed it a tax. *Id.* at 730.

The Seventh Circuit explained that gambling taxes "are real taxes, not fees. They aim to raise revenue, not cover costs. That the revenue is earmarked for a particular purpose is hardly unusual; think of the social security tax." *Id.* at 731. But under the Fifth Circuit's approach, Illinois's "regulatory aims" (Pet. App. 15a) would have rendered its casino-payment regime a fee. The Fifth Circuit faulted Texas's charge for serving a regulatory purpose of "rais[ing] the costs" of sexually oriented businesses. Pet. App. 15a. Moreover, the charge was earmarked for a particular use. Pet. App. 15a. But as *Empress Casino* makes clear, a charge with those same features would be a "tax" under Seventh Circuit precedent.

Moreover, while the Fifth Circuit attempted to parse whether a regulatory purpose obviated the $5 charge's tax features, *see* Pet. App. 14a-15a, the Seventh Circuit would have held that "such a test [is] inappropriate" altogether, 651 F.3d at 728. The Seventh Circuit explained that "multifactor tests" undermine the necessary "clarity and simplicity in interpreting a forum-selection law." *Id.* As the Seventh Circuit observed, this Court has never "endorsed any multifactor test for applying" the TIA. *Id.*

**3.** The Tenth Circuit has explained that charges fall outside the TIA's jurisdictional bar if they are "designed

to help defray an agency's regulatory expenses." *Hill v. Kemp*, 478 F.3d 1236, 1244-45 (10th Cir. 2007). In *Hill*, then-Judge Gorsuch held for the court that a specialty license plate fee was a "tax" under the TIA because it exceeded "the amount necessary to defray the costs of issuing the plates." *Id.* at 1246. The specialty-plate program increased the cost of buying plates—"approximately two and four times the amount necessary to defray the costs of issuing the plates" depending on the message expressed. *Id.* Only a portion of the fee was allocated to a "Reimbursement Fund to cover administrative costs," with the excess proceeds deposited into funds earmarked for specific public purposes. *Id.* at 1240. Despite raising the costs of obtaining a specialty license plate, the state's charge was a tax because its "primary purpose" was raising "revenue." *Id.* at 1244-45.

The Fifth Circuit brushed these features aside. Like the charge in *Hill*, Texas's $5 charge undisputedly raises public revenue for the State. *See id.* And the court below found no offsetting administrative costs whatsoever, meaning that the $5 charge was even more like a tax than a charge that offset costs of issuing license plates. *See id.* at 1240. Indeed, the district court explicitly found that the revenue raised from the $5 charge "does not go to defray the costs of regulation." Pet. App. 101a. Like raising the cost of buying license plates that bear particular messages, a charge that "raises the costs of sexually oriented businesses" might affect that activity. Pet. App. 15a. But as *Hill* illustrates, dedicating money raised from the charge to public use is the quintessential tax characteristic. The Fifth Circuit's contrary view makes it an outlier.

### B. The Fifth Circuit also split with the First, Third, Fourth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits.

The court below deemed the $5 charge a fee because it served a "regulatory purpose"—"directly" by "rais[ing] the cost" of certain activity and "indirectly" by earmarking proceeds for the State's "sexual assault program fund." Pet. App. 15a (quoting *San Juan Cellular*, 967 F.2d at 685). Unlike the Fifth Circuit, the Third, Sixth, Eighth, Eleventh, and D.C. Circuits view the dispositive consideration as whether a charge covers some administrative benefit. Likewise, the First, Fourth, and Ninth Circuits place mixed-purpose levies on a tax-to-fee spectrum, exercising jurisdiction when a court views the charge as having the attributes of a regulatory fee; they use multifactor tests to consider, in relevant part, whether the ultimate use of the funds covers some administrative benefit. But even among the more expansive approach to federal jurisdiction, the Fifth Circuit's reasoning is an outlier.

**1.** The Third Circuit has indicated that a "revenue raising measure" should be treated as a tax if it is collected in a manner similar to other tax levies. *Robinson Protective Alarm Co. v. City of Phila.*, 581 F.2d 371, 376 (3d Cir. 1978). There, city alarm fees were taxes because the revenue raised did not cover "contractual services owed central alarm station companies." *Id.* Rather, the revenue collected was merely "added to the public fisc." *Id.* Thus, the charge was a tax under the TIA.

The Sixth Circuit similarly held that when a charge's ultimate use is to provide a general public benefit, the assessment is a tax, while an assessment that "provides a more narrow benefit" to regulated entities is likely a fee. *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne*

*Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 838 (6th Cir. 1999). In *American Landfill*, waste-management charges were taxes because they raised funds earmarked for "public purposes benefitting the entire community," including "development of recycling programs, road and public facility maintenance, and emergency services." *Id.* at 839. These purposes "relate[d] directly to the general welfare of the" public and "dedication to a particular aspect of state welfare makes them 'no less general revenue raising levies.'" *Id.* (quoting *Wright v. McLain*, 835 F.2d 143, 145 (6th Cir. 1987)).

The Eighth Circuit held that municipal solid-waste ordinances imposed regulatory fees because they were used to cover the costs of implementing a waste-control program. *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1382-83 (8th Cir. 1997). In this instance, unlike the previous example in *American Landfill*, the challenged charges were intended to regulate compliance with a local waste-disposal regulatory system. *Id.* The charges were not treated as taxes because they merely ensured that the waste-management program could run as intended. *See id.* at 1377-78.

The Eleventh Circuit held that "to the extent the statute challenged is regulatory rather than revenue raising in purpose, the measure does not constitute a tax, and the district court retains jurisdiction." *Am.'s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1328 (11th Cir. 2014) (quoting *Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666, 670 (11th Cir. 1984)). In *Miami Herald*, a federal court could exercise jurisdiction over a newspaper's challenge to a municipal licensing law insofar as the city's law required the applicant to

"comply with applicable municipal laws" as a condition of getting a license to do business in the city. 734 F.2d at 672.

The D.C. Circuit likewise explained that a regulatory fee is one that "raises revenue merely to cover the cost of offering a service to the payers of the fee." *Am. Council of Life Insurers v. D.C. Health Benefits Exch. Auth.*, 815 F.3d 17, 19 (D.C. Cir. 2016). But if, in contrast, the charge benefits a group that is "broader" than the "payer base," then it is a tax. *Id.* at 20. In that case, Congress had vested the Tax Division of the D.C. Superior Court with exclusive jurisdiction over challenges to taxes. *Id.* at 19. The court looked to cases interpreting the TIA to distinguish "taxes" from "fees" because there were no "federal cases interpreting Congress's grant of exclusive jurisdiction to the District's courts." *Id.* at 19-20. TIA cases "confirm[ed] that when benefit and burden do not at least roughly correspond, a charge is a tax." *Id.* at 20. Thus, a charge on insurance policies issued in Washington, D.C. was a tax because insurers "receive no immediate benefit in exchange for their payment of the charge." *Id.* at 21.

These cases stand in sharp contrast to the decision below. Texas's $5 charge does not cover the cost of providing anything to strip clubs or their patrons. Insofar as the charge provides a benefit, the funding of programs that combat rape and sexual assault benefits the public at large. Whatever "regulatory purpose" the $5 charge might serve (Pet. App. 15a), it would be considered a tax in the Third, Sixth, Eighth, Eleventh, or D.C. Circuits because it provides nothing to those who pay it.

**2.** Even among the remaining circuits, the Fifth Circuit's understanding of when a "regulatory purpose" separates a tax from a fee is an outlier. The First Circuit

holds that whether a charge is directed to public purposes is "the most salient factor in the decisional mix." *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 947 (1st Cir. 1997). Then-Chief Judge Breyer, writing for the court in *San Juan Cellular*, took this approach in determining that Puerto Rico's Public Service Commission's telecommunication charge was a fee. 967 F.2d at 685-86. *San Juan* began by observing that "classic" taxes are "imposed by a legislature upon many, or all, citizens" to "raise[] money, contributed to a general fund, and spent for the benefit of the entire community." *Id.* at 685. In contrast, assessments that "raise[] money placed in a special fund to help defray the agency's regulation-related expenses," generally are considered fees, not taxes. *Id.* The court stated that a charge might also be considered a fee if it served a "regulatory purpose[]," such as by "discouraging particular conduct by making it more expensive" or by generating income to "defray the [regulatory] agency's regulation-related expenses." *Id.* But the court ultimately decided the telecommunication charge was a fee because money collected from it was segregated and used to "defray" the operation costs of the regulatory agency that imposed it. *Id.* at 686.

The Fourth Circuit applies a similar analysis through a three-factor test. *GenOn Mid-Atl., LLC v. Montgomery County*, 650 F.3d 1021, 1023 (4th Cir. 2011). The Fourth Circuit considers what entity imposes the charge, what population is subject to the charge, and what purposes are served by funds raised from the charge. *Id.* *GenOn* held that a charge levied on the carbon-dioxide emissions of certain high-volume emitters was not a tax. *Id.* at 1026. In concluding that the carbon charge was a fee, the Fourth Circuit emphasized that the exaction was "punitive," fell on only "one taxpayer," and effectively

could not be passed on to consumers. *Id.* at 1024-25. Moreover, the charge reflected a "two-fold" regulatory program to reduce greenhouse-gas emissions by lowering GenOn's emissions while paying for others to reduce their emissions. *Id.* at 1025.

The Ninth Circuit applies a similar three-factor test. It considers the entity that imposes the assessment, the breadth of the parties subject to the assessment, and the "ultimate use" of the assessment. *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931-32 (9th Cir. 1996). Assessments imposed by a legislature on a broad class of parties and "treated as general revenues and paid into the state's general fund are taxes," while a charge imposed by regulators on a narrow class of parties and "placed in a special fund and used only for special purposes is less likely to be a tax." *Id.* at 932. *Bidart* held that charges on apple producers to support advertising boosting apple consumption were regulatory fees. *Id.* at 933. Funds raised were "placed in a segregated fund, and used only for Commission purposes." *Id.* at 932. The "indirect public benefit" of increased apple consumption did not render the charge a tax because it directly supported services for the payors of the fee. *Id.*

These decisions stand in stark contrast with the Fifth Circuit's approach. The court below acknowledged that the $5 charge was imposed by State legislators (like a tax), but stated further that it was imposed on a "limited scope of activity" (ostensibly, like a fee). Pet. App. 14a. The court then relied on the fact that proceeds from the $5 charge were earmarked for the "sexual assault program" fund. Pet. App. 15a. But that fact, without a corresponding regulatory *cost* to offset, would not trigger federal jurisdiction even in the First, Fourth, or Ninth Circuits.

Instead, the Fifth Circuit invoked a novel view of a "regulatory purpose" under the TIA. Pet. App. 15a (citing *San Juan Cellular*, 967 F.2d at 685). In *San Juan Cellular*, the First Circuit stated that "deliberately discouraging particular conduct by making it more expensive" was characteristic of a regulatory purpose. 967 F.2d at 685 (citing *S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983)). But *Tindal*—which was not a TIA case—involved Congress's commerce power to reduce excess agricultural production, not a state's measure to raise revenue from an activity. 717 F.2d at 887-88. And this illustration of "regulatory purpose[]" was dicta because *San Juan Cellular* ruled on the ground that the telecommunications charge defrayed the cost of performing administrative duties. 967 F.2d at 685-86. By transforming the First Circuit's dicta into its holding, the Fifth Circuit amplified the conflict among the circuits. Indeed, the Second Circuit, which cited the same language from *San Juan Cellular*, reached a result that was diametrically opposed to the decision below. *See, e.g.*, *Accessible Medicines*, 974 F.3d at 222.

Even if some version of these frameworks were appropriate, this Court's review is still needed. The Fifth Circuit's reasoning—like that of the First, Fourth, and Ninth Circuits—reflects exactly the sort of multifactor analysis condemned by the en banc Seventh Circuit. Such factors yield a jurisdictional rule that is difficult to administer and detached from the "concern[s] behind the [TIA]." *Empress Casino*, 651 F.3d at 730. Only this Court can provide the needed clarity regarding what factors (if any) turn a "classic" tax into a fee under the TIA. *San Juan Cellular*, 967 F.2d at 685.

### C. The decision below conflicts with this Court's precedent.

The Fifth Circuit's approach flouts nearly a century's worth of this Court's precedent. Under materially identical AIA provisions that animate the TIA, this Court has long treated charges that raise revenue from discouraged activity differently than charges that are fines or penalties on prohibited activity. And if there were any doubt, the comity and federalism concerns animating the TIA militate against federal jurisdiction.

**1.** In construing the AIA, this Court has supplied the same distinction drawn by the majority of courts: a levy retains its tax character even if it also has some regulatory purpose. After all, "[e]very tax is in some measure regulatory" because it "interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States*, 300 U.S. 506, 555 (1937). Thus, "a tax is not any the less a tax because it has a regulatory effect." *Id.* at 556.

This Court draws similar distinctions between taxes and penalties under the AIA. *See United States v. La Franca*, 282 U.S. 568, 572 (1931). A "tax" is "an enforced contribution to provide for the support of government," while a "penalty" is "an exaction imposed by statute as a punishment for an unlawful act." *Id.* "The two words are not interchangeable." *Id.* Rather, this Court distinguished "a tax, whose primary function is to provide for the support of government," from a penalty, which "clearly involves the idea of punishment for infraction of the law." *Lipke*, 259 U.S. at 562. In *NFIB*, for instance, this Court held that an exaction imposed on those without health insurance was a tax, not a penalty, because "citizens may lawfully choose to pay [the charge] in lieu of buying health insurance." 567 U.S. at 568.

Put differently, when the government levies a charge on lawful activity, the relevant purpose is to raise revenue. Fines and penalties, by contrast, are intended to punish and deter violations of the law. The more that people comply with the law, the less revenue will be raised. Taxing lawful activity is different because it raises revenue, even if it also discourages conduct. *See, e.g.*, *Kurth Ranch*, 511 U.S. at 782. But the Fifth Circuit failed to recognize the crucial difference between discouraging an activity and penalizing it.

**2.** The Fifth Circuit also countermanded the TIA's purpose of eliminating federal interference in state fiscal affairs. The TIA must be read in harmony with its underlying principles of comity and federalism. *See Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). The TIA "has its roots in equity practice, in principals of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Id.* Congress enacted the TIA to "transfer jurisdiction . . . to the state courts" without interfering in states' power to assess, levy, and collect taxes. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981). "[F]irst and foremost," the TIA was designed to prohibit federal judicial interference with state tax collection. *Id.* at 522; *see also South Carolina v. Regan*, 465 U.S. 367, 388 (1984) (O'Connor, J., concurring in judgment) (recognizing similar principles codified in analogous federal AIA provisions). These animating principles are even "[m]ore embracive than the TIA." *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 417 (2010). As the "partial codification of the federal reluctance to interfere with state taxation," the TIA must be interpreted in light of these doctrines. *Id.* at 424.

Comity "serves to ensure that 'the National Government, anxious though it may be to vindicate and protect

federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.'" *Id.* at 431 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). Just six years after Congress enacted the TIA, this Court rejected a challenge to Louisiana's unemployment compensation tax on comity grounds, holding that "federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943). Congress and this Court have consistently avoided interference with state tax administration. *See, e.g.*, *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826-27 (1997) (TIA aimed at "confin[ing] federal court intervention in state government"); *Rosewell*, 450 U.S. at 522 n.28 ("The [TIA] was only one of several statutes reflecting congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*"). Congress "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102-03 (1981).

Federalism likewise drives the strong disinclination of federal courts to interfere with state tax administration. *See Tully*, 429 U.S. at 73. Federalism principles reflect a "sensitivity to the legitimate interests of both State and National Governments" and ensure that federal courts do not "unduly interfere" with state affairs. *Younger*, 401 U.S. at 44. Thus, in *Fair Assessment* this Court explained that federalism is one of the reasons that federal courts "refuse to enjoin the collection of state taxes." 454 U.S. at 111.

The Fifth Circuit interfered with these principles by striking down a rule the Texas Comptroller promulgated to facilitate state tax administration. The court frustrated the policy choices the State legislature made when it adopted the $5 charge and tasked the Comptroller with administering it. In *Grace Brethren Church*, this Court cautioned against reading the TIA so as to "defeat[]" its "principal purpose"—"to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." 457 U.S. at 408-09. Congress intended to "divest[] the federal courts of jurisdiction to interfere with state tax administration," *id.* at 409 n.22, and stop "taxpayers who sought to avoid paying their tax bill" through federal litigation, *Hibbs*, 542 U.S. at 105. But the decision below reflects no such solicitude for the Comptroller's duty to administer State revenue measures.

## II. This Case Is an Ideal Vehicle for Resolving the Important Jurisdictional Question.

### A. The conflict of authority is squarely presented and dispositive.

The court below affirmed the exercise of federal jurisdiction under the tax-versus-fee distinction that has divided the lower courts. The proper application of the TIA is therefore jurisdictional and dispositive. *See Direct Mktg.*, 575 U.S. at 15; *Farm Credit Servs.*, 520 U.S. at 825-26; *Grace Brethren Church*, 457 U.S. at 408. If the district court lacked subject matter jurisdiction under the TIA, then the Fifth Circuit had no jurisdiction to affirm the ruling invalidating the challenged rule.

The judgment below cannot be defended on any alternative ground. There is no question that the TIA applies to the type of relief sought by respondent. *See Grace Brethren Church*, 457 U.S. at 411 (TIA applies

equally to declaratory judgment actions and suits for injunctive relief). The TIA applies to constitutional claims like TEA's. *See, e.g.*, *id.* at 415-17 (declining to exempt First Amendment claims from the TIA's reach); *see also Comm'r v. "Americans United" Inc.*, 416 U.S. 752, 759 (1974) (holding that the constitutional nature of claims is of "no consequence" under the AIA). And Texas undisputedly provides a "plain, speedy and efficient remedy" in its courts. 28 U.S.C. § 1341. The Fifth Circuit's error aside, the TIA undisputedly applies.

No other jurisdictional issues would complicate review. In district court, the Comptroller argued that TEA failed to adduce evidence establishing standing and that sovereign immunity barred TEA's suit. The court below rejected these arguments. Pet. App. 9a-11a, 15a-16a. But these alternative arguments merely confirm what the TIA makes plain: the district court lacked subject matter jurisdiction.

Nor would any question of state law pose an obstacle. The constitutionality of the $5 charge was already settled in litigation between the parties in this case when the Texas Supreme Court ruled that the $5 charge does not violate the First Amendment. *Combs I*, 347 S.W.3d at 287-88. The court below believed that the rule challenged in this case brought TEA's constituent latex clubs within the ambit of the $5 charge statute. Pet. App. 26a. But *Combs I* already confirms that this ambit is constitutional. Furthermore, Texas courts have conclusively determined that the Comptroller's rule comports with state law because it does not contravene the statute it administers. *Tex. BLC*, 2020 WL 4758474, at *8. Because *Texas BLC* has been litigated to finality, the proper construction of state law is settled.

Moreover, features that might complicate a tax-versus-fee analysis in some circuits are absent here. The $5 charge was imposed by the Texas Legislature, not by any regulatory authority. *See, e.g.*, *San Juan Cellular*, 967 F.2d at 685 (describing this feature of a "classic tax"). Nor does the $5 charge offset any costs of regulation. *See, e.g.*, *id.* Nor is there any claim that the $5 charge operates as a penalty or fine. The hallmark of a punitive assessment is its linkage to the commission of unlawful activity. *See Kurth Ranch*, 511 U.S. at 781 & n.19; *NFIB*, 567 U.S. at 567. Some courts have suggested that this feature cuts against tax treatment under the TIA. *See, e.g.*, *San Juan Cellular*, 967 F.2d at 685. Here, however, the $5 charge applies to lawful commercial activity that TEA acknowledges will not be significantly impaired by the $5 charge. *Combs I*, 347 S.W.3d at 277. And TEA does not dispute that this charge is passed on to and absorbed by customers who choose to partake in this activity. Thus, even among TIA frameworks that might employ a multifactor analysis, the $5 charge's attributes point toward tax treatment.

**B. The Fifth Circuit's ruling is wrong.**

The Fifth Circuit erred in holding that the $5 charge is not a tax. The Texas Legislature chose to generate public revenue from a tax base associated with rape and sexual assault. The charge undisputedly raises funds for public use. Like taxes on cigarettes, such commonplace levies seek both to deter and to collect revenue when deterrence fails. The charge undisputedly sustains the essential flow of State revenue for public purposes, which would otherwise have to be funded by taxpayers who do not contribute to rape and sexual assault. Consistent with the decisions of every other circuit and this Court's

materially similar AIA analysis, the $5 charge is plainly a tax for the reasons discussed in Part I.

It is immaterial whether the Texas Legislature labeled the charge a tax. As then-Judge Gorsuch explained, "how a state labels an assessment does not resolve the question whether or not it is a tax." *Hill*, 478 F.3d at 1247. "Taxation' is unpopular these days, so taxing authorities avoid the term." *Empress Casino*, 651 F.3d at 730. Numerous courts of appeals have found assessments to be taxes for purposes of the TIA even when they had not been labeled "taxes." *See, e.g.*, *Accessible Medicines*, 974 F.3d at 219-20 ("stewardship payment"); *Empress Casino*, 651 F.3d at 730 ("payment"); *Hill*, 478 F.3d at 1262 ("specialty license plate charges"); *Wright*, 835 F.2d at 144-45 ("contribution").

It is no answer that the Texas Legislature enacted the $5 charge in part to discourage an undesirable activity. *All* taxes discourage consumption of or participation in the item or activity taxed. *See, e.g.*, *Kurth Ranch*, 511 U.S. at 782. The extra cost might dissuade some from partaking altogether. But that is like arguing a cigarette tax is not a tax because a smoker might quit smoking. That reasoning ignores that willing patrons can simply choose to pay a higher price of admission elsewhere.

### C. The Fifth Circuit compounded its jurisdictional error by misapplying the First Amendment and due process.

The Fifth Circuit compounded its jurisdictional error by holding that the Comptroller's adoption of a plain-meaning definition of "clothing" was unconstitutional. After the Texas Legislature imposed the $5 charge, taxpayers began to question what was required to be "clothed" under the statute. So, the Comptroller exercised its statutory authority to publish a definition of

"clothing." *See* Tex. Bus. & Com. Code §§ 102.051(1)(B), .056; Tex. Tax Code § 111.002. "Clothing" means "[a] garment used to cover the body, or a part of the body," and specifically excludes liquids applied to the body like "latex." 34 Tex. Admin. Code § 3.722(a)(1). The plain meaning of "clothing" reflects that applying substances to conceal body parts will not render a performer "clothed." Tex. Bus. & Com. Code § 102.051(1)(B).

According to the Fifth Circuit, however, strip clubs have First Amendment and due process rights to avoid the charge by applying liquid latex to cover dancers' breasts notwithstanding the plain-meaning definition of "clothing." Even assuming that TEA can sidestep the charge by attacking the rule defining "clothing," the rule satisfied the minimal constitutional protections this Court has afforded to adult entertainment. The Comptroller's rule merely gives effect to Texas's $5 charge statute as written. *See* 42 Tex. Reg. at 219. By invalidating the Comptroller's plain-meaning definition of "clothing," the Fifth Circuit amplified the need for this Court's intervention.

**1.** The Fifth Circuit erred in striking down the plain-meaning definition of the word "clothing" on First Amendment grounds. The Texas Supreme Court already upheld the $5 charge under the First Amendment because it reduced the secondary effects of combining alcohol and adult entertainment. *Combs I*, 347 S.W.3d at 287-88. On its face, a corresponding rule defining "clothing" does not restrict speech or expression. TEA does not ascribe any expressive meaning to the use of liquid latex, which is not "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). The only interest TEA could assert is financial because the $5 charge ostensibly makes latex clubs less

enticing or hampers alcohol sales. But "economic impact" does not trigger First Amendment scrutiny. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring); *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). TEA thus failed to invoke First Amendment rights.

The court departed from these principles by deeming the "clothing" rule a content-based restriction on speech. Pet. App. 27a. In reality, the "clothing" definition is content-neutral on its face, and merely explains that paint-like substances are not "clothing." Its purpose can be "*justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48. It does not apply to "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Indeed, the strip clubs that chose to become "latex" clubs did so a tax-avoidance scheme, not to convey any message. *See* Pet. App. 28a.

Besides, even "illicit" government motives cannot defeat a law that is constitutional. *Renton*, 475 U.S. at 47-48. The Comptroller stated the purpose for the "clothing" rule as intending "to include a definition of clothing that conforms to the commonly understood meaning of the term [clothing]." 42 Tex. Reg. at 219. This Court has long acknowledged the harm of combining alcohol with "sexual performances." *See, e.g.*, *California v. LaRue*, 409 U.S. 109, 118 (1972). The Comptroller relied on the same deleterious effects supporting the $5 charge to support the "clothing" rule. *See* R.904-05. And the Comptroller demonstrated reliance on "the Legislature's manifest purpose" in the "clothing" rule's publication. 42 Tex. Reg. at 223. The government need not produce new evidence to demonstrate negative secondary effects. *See Pap's A.M.*, 529 U.S. at 296-97 (plurality op.).

Thus, even if the "clothing" rule regulated expressive conduct, it is at most subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). *See Barnes*, 501 U.S. at 566. Under *O'Brien*, a law must (1) be within the constitutional power of the government, (2) further an important or substantial governmental interest, (3) provide an asserted governmental interest unrelated to the suppression of free expression, and (4) ensure that any incidental restrictions on alleged First Amendment freedoms is no greater than essential. 391 U.S. at 377.

By erroneously applying strict scrutiny, the Fifth Circuit never applied *O'Brien*. But the "clothing" rule would plainly have satisfied intermediate scrutiny. First, the rule is merely an interpretive definition promulgated under the Comptroller's statutory authority to administer tax statutes. *See* Tex. Bus. & Com. Code § 102.056; Tex. Tax Code § 111.002. Second, there is an important governmental interest in "reducing the secondary effects of adult businesses," *Combs I*, 347 S.W.3d at 288, and managing fiscal operations through taxes, *see Tully*, 429 U.S. at 73. Third, the State's interest is unrelated to free expression: the "clothing" rule describes what the Texas Legislature enacted in the $5-charge statute. Tex. Bus. & Com. Code § 102.051(1)(B); 42 Tex. Reg. at 219. Fourth, any incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of state interests. *Combs I*, 347 S.W.3d at 287-88. The definition of "clothing" restricts no expression because it does not limit what performers can wear, and businesses can avoid the charge by not serving alcohol.

**2.** Nor does the definition violate due process. The court faulted the Comptroller for giving "a different and more oppressive legal effect" to conduct than imposed by

the statute imposing the $5 charge. Pet. App. 28a (quoting *Hemme*, 476 U.S. at 569). But the Texas courts have determined that this premise does not accurately reflect Texas law. *Tex. BLC*, 2020 WL 4758474, at *8. Rather, the "clothing" rule merely "memorialize[d]" that the $5 charge statute is enforced as written. 42 Tex. Reg. at 219.

The Fifth Circuit stated that due process required prior notice that "latex" clubs' interpretation of the $5 charge was incorrect. Pet. App. 28a-29a. But due process has never required specific notice of how persons may be impacted by laws and this Court "repeatedly has upheld retroactive tax legislation against a due process challenge." *United States v. Carlton*, 512 U.S. 26, 30 (1994). A person need not "be given specific notice of the impact of a new statute on his property before that law may affect his property rights." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). To hold otherwise would effectively "estop[]" government officials from enforcing the law correctly. *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990). And given *Texas BLC*'s determination that the "clothing" rule does *not* expand the $5-charge statute, TEA cannot avoid the statute's plain language. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) (holding that federal interpretations of state law are reviewed de novo).

### D. The question presented is important and likely to recur without this Court's review.

The question presented poses an important jurisdictional issue that only this Court can resolve. The Fifth Circuit's decision squarely conflicts with the decisions of three circuits and with the analytical framework of eight other circuits. *See* Sup. Ct. R. 10(a). The proper interpretation of the TIA poses an important question of federal law that has not been, but should be, settled by this

Court. *See id.* R. 10(c). And the Fifth Circuit decided that issue in a way that conflicts with this Court's precedent interpreting the TIA and analogous AIA principles. *See id.* Delay would not likely yield further development of the question presented because the conflicts among the circuits in distinguishing taxes from fees are already clearly defined. *See supra* Part I.

The decision below is likely to create more confusion absent this Court's intervention. The Fifth Circuit's analysis would vitiate the TIA's protections for any number of state exactions. For instance, if a charge is regulatory because it "raises the costs" for nude entertainment (Pet. App. 15a), the same could be said of garden-variety excise taxes on alcohol or cigarettes. Texas imposes business taxes on other specific industries, such as the tax imposed on cement manufacturers, Tex. Tax Code ch. 181, the tax on utility companies, *id.* ch. 182, and the tax on oil well service providers, *id.* ch. 191. Each of these taxes raise the costs of those types of business enterprises. Even the Texas franchise tax could be said to raise the costs of those businesses deemed "taxable entities" under State law that meet certain revenue thresholds. *See id.* § 171.0002 (defining "taxable entity"); Texas Comptroller, Franchise Tax, https://comptroller.texas.gov/taxes/franchise (last visited March 12, 2022). Any of these taxes could trigger federal jurisdiction under the Fifth Circuit's reasoning.

The court below also volunteered that the sexually oriented business legislation imposes "record-keeping requirements." Pet. App. 15a (citing Tex. Bus. & Com. Code § 102.052). But Texas law imposes record-keeping requirements for *all* its levies. *See* Tex. Tax Code § 111.0041(a). Treating a charge as a fee on this basis thus creates disparity in State tax policy. And the public

costs that the Texas Legislature sought to alleviate must now be borne by a tax base not associated with rape and sexual assault. *See Combs I*, 347 S.W.3d at 280.

The court stated further that the charge was regulatory because it was earmarked for a special fund instead of dedicated for "general revenue." Pet. App. 15a. But in Texas alone, dozens of dedicated "general revenue" accounts hold special funds, totaling billions of dollars that are essential not only for funding programs but also for certifying the State's balanced budget. *See* Tex. Comp. of Pub. Accounts, 86th Leg. Report, *Report on Use of General Revenue Dedicated Accounts* (2019), *available at* https://comptroller.texas.gov/transparency/reports/use-of-general-revenue-dedicated. Even sales taxes collected from specified sources are earmarked for special funds. *See* Tex. Tax Code § 151.801. Treating such ubiquitous charges as regulatory "fees" would seriously undermine the TIA.

Moreover, the current TIA landscape lacks "clear boundaries." *Direct Mktg.*, 575 U.S. at 11. The circuits' various approaches encourage costly disputes over "which court is the right court" to consider a challenge to a state revenue measure. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). A patchwork of jurisdictional rules for federal-court tax challenges is particularly unwieldy in a federal system, where the federal district courts have an "independent obligation" to determine their own subject-matter jurisdiction. *Id.* These burdens are likely to persist without this Court's intervention.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 14, 2022

# APPENDIX

## APPENDIX A

**United States Court of Appeals**
**for the Fifth Circuit**

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No. 20-50262

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TEXAS ENTERTAINMENT ASSOCIATION, INCORPORATED,

*Plaintiff—Appellee*,

*versus*

GLENN HEGAR, *Comptroller of Public Accounts of the State of Texas*, *in his official capacity*,

*Defendant—Appellant.*

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

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ON PETITION FOR REHEARING EN BANC

[Entered Nov. 12, 2021]

Before STEWART, HIGGINSON, and WILSON, *Circuit Judges*.
PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no

member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 AND 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

## APPENDIX B

### United States Court of Appeals for the Fifth Circuit

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

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No. 20-50262

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TEXAS ENTERTAINMENT ASSOCIATION, INCORPORATED,

*Plaintiff—Appellee*,

*versus*

GLENN HEGAR, *Comptroller of Public Accounts of the State of Texas*, *in his official capacity*,

*Defendant—Appellant.*

---

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

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Before STEWART, HIGGINSON, and WILSON, *Circuit Judges*.
Cory T. Wilson, *Circuit Judge*:

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

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

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

## I.

In 2007, the Texas legislature enacted a statute authorizing the SOBF, and the law became effective on January 1, 2008. Under the statute, "sexually oriented businesses" are required to pay a fee of $5 per customer

admitted to the business. A "sexually oriented business" is defined as "a nightclub, bar, restaurant, or similar commercial enterprise that: (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and (B) authorizes on-premises consumption of alcoholic beverages . . . ." TEX. BUS. & COM. CODE § 102.051(2). The statute itself defines "nude" as "entirely unclothed" or "clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." *Id.* § 102.051(1). "Clothed" and "clothing" are not defined in the statute.

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

In response to the SOBF's enactment, several nude dancing establishments changed their practices to require their dancers to wear opaque latex breast coverings and shorts, in order legally to avoid the new SOBF. And these establishments, dubbed "latex clubs," avoided the SOBF for over eight years, until October 2016, when the Texas Comptroller proposed to amend the Texas Administrative Code to "include a definition of clothing that conforms to the commonly understood meaning of the term" in order "to memorialize the [C]omptroller's existing interpretation of what

constitutes clothing." In January 2017, the Texas Comptroller promulgated the Clothing Rule, amending the Texas Administrative Code to limit "clothing" to exclude "[p]aint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state[.]" 34 TEX. ADMIN. CODE § 3.722(a)(1). This new definition subjected latex clubs to the SOBF, and the Comptroller instituted proceedings to collect the fee both prospectively, and retroactively to 2008.

TEA challenged the Clothing Rule in federal district court, asserting constitutional violations of the First Amendment, due process, and equal protection. In response, the Comptroller filed a motion to dismiss asserting that: (1) TEA's claims were barred by the Tax Injunction Act (TIA), (2) the court should dismiss TEA's lawsuit based on principles of comity, (3) the Comptroller was immune from suit under the Eleventh Amendment, and (4) TEA lacked standing to sue.

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

members are subject to the fee," "TEA's goal is to protect the financial interests of its members, which is germane to the purposes of the organization," and that "the nature of the case does not require the affected members to participate as plaintiffs."

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

On April 16, 2018, TEA moved for summary judgment on its First Amendment challenges to the Clothing Rule. The Comptroller filed his own motion for summary judgment, invoking *Younger* to argue that the federal court should abstain from hearing TEA's claims and arguing that the Clothing Rule does not violate the Constitution.[1] The district court granted partial summary judgment to TEA on its First Amendment freedom of expression claim and, sua sponte, on its Fourteenth Amendment due process claim.

In its First Amendment analysis, the district court held that the Clothing Rule was not "content neutral" because the rule was not motivated by the substantial government interest of reducing "the deleterious secondary effects of the establishment[s] to be regulated." The district court explained that the Comptroller "did not conduct or review any studies or make any factual findings about the deleterious secondary effects of entertainment from latex-clad

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

dancers in the presence of alcohol." The Comptroller contended that he was not required to conduct a new study or rely on new evidence to justify adoption of the Clothing Rule because the Comptroller was "adopting an interpretive rule that simply defined an undefined statutory term." The district court disagreed, concluding that the Clothing Rule was substantive rather than interpretive because it "affects individual rights and obligations" by expanding the number of businesses subject to the SOBF and then retroactively assessing the fee.

As for TEA's due process claim, the district court held that enforcement of the Clothing Rule against latex clubs "before they were put on notice that the definition of nudity would be changed or clarified to cover their conduct is harsh and oppressive, and thus violates due process." However, the district court concluded that "when exactly the latex clubs were put on notice" was a fact question to be determined at trial.

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

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

Rule "violate[d] equal protection and [was] therefore unconstitutional as currently applied."

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

## II.

"We review a grant of summary judgment *de novo*, applying the same legal standards as the district court." *Certain Underwriters at Lloyd's, London v. Axon Pressure Prods.* Inc., 951 F.3d 248, 255 (5th Cir. 2020) (citation omitted). Following a bench trial, "findings of fact are reviewed for clear error and legal issues are reviewed *de novo*." *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011) (internal quotation marks omitted) (quoting *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)).

## III.

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

### A. *Standing*

Typically, in order for litigants to have standing, they must establish that they have suffered a concrete

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

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

Weighing these factors, TEA had standing to bring this action. First, TEA's members would have had standing to challenge the Clothing Rule in their own right. TEA is a Texas corporation whose members consist of forty adult cabaret establishments with over sixty different locations in Texas. It is uncontested that the individual members of TEA could have challenged the SOBF statute. Further, TEA presented evidence, and the district court found, that the Comptroller sought to enforce the Clothing Rule retroactively against at least one of TEA's member establishments. And there are many other TEA members who had not been subject to enforcement of the $5 fee until after the promulgation of the Clothing Rule. These affected latex clubs have

thus suffered a concrete and particularized injury due to the Clothing Rule that a favorable court decision would redress. Therefore, TEA's members would have had standing in their own right.

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

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

**B. *Tax Injunction Act***

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

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

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

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

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

question." *Home Builders Ass'n of Miss.*, 143 F.3d at 1010 n.10 (citations omitted). We find the Comptroller's argument unavailing.

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

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

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

it "is imposed only on a narrow class of persons . . . not the public at large").

Finally, the SOBF clearly serves a regulatory purpose. A fee "serve[s] regulatory purposes directly[,] by . . . deliberately discouraging particular conduct by making it more expensive" or indirectly, by "raising money placed in a special fund to help defray the agency's regulation-related expenses." *San Juan Cellular Tel. Co.*, 967 F.2d at 685. In determining a levy's purpose, courts are "far more concerned with the purposes underlying the [statute] than with the actual expenditure of the funds collected under it." *Home Builders Ass'n of Miss.*, 143 F.3d at 1011–12. To sift this question, courts again "look principally to the language of the [statute] and the circumstances surrounding its passage." *Id.*

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

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

### C. *Eleventh Amendment Immunity*

Generally, claims for damages against state officers in their official capacity are barred by the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 169

(1985). However, under *Ex Parte Young*, 209 U.S. 123 (1908), a plaintiff may bring suit for a violation of the Constitution or federal law when it is "brought against individual persons in their official capacities as agents of the state, and the relief sought [is] declaratory or injunctive in nature and prospective in effect." *Aguilar v. Tex. Dep't of Crim. Just.*, 160 F.3d 1052, 1054 (5th Cir. 1998) (citation omitted). This court applies a three-factor test to determine whether a suit falls within the *Ex Parte Young* exception to Eleventh Amendment sovereign immunity. Such a suit must: (1) be brought against state officers acting in their official capacities; (2) seek prospective relief that will redress ongoing conduct; and (3) allege a violation of federal law. *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020).

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

**D. *Abstention & Comity***

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

unpersuaded that the district court erred by exercising its jurisdiction over TEA's claims.

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

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

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

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

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

Here, the Comptroller asserts that district court should have abstained due to the state's interest in administering its tax scheme and because of pending state court litigation concerning whether the Clothing Rule violates the Texas Administrative Procedures Act (APA). We disagree. The claims alleged by TEA rest wholly on rights guaranteed by the federal Constitution. And the Comptroller points to no "difficult [or] unsettled question[] of state law [that] must be resolved" before addressing TEA's claims. *Midkiff*, 467 U.S. at 236. Assuming arguendo that collection of the SOBF, as a fee and as extended by the Clothing Rule, implicates the state's general administration of its tax scheme, that fact in itself does not bring this case within the limited scope of *Pullman* abstention. Similarly, ongoing state actions involving collateral challenges to the Clothing Rule or duplicative federal constitutional claims do not present a

barrier under *Pullman* to the appropriate exercise of federal jurisdiction.[4]

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

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

## IV.

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

### A. *First Amendment*

We first address whether the district court erred in granting TEA summary judgment on its First Amendment freedom of expression claim. As a general matter, the Supreme Court has held that nude dancing

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

constitutes expressive conduct and is given First Amendment protection. *E.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). However, nude dancing as expressive conduct "falls only within the outer ambit of the First Amendment's protection" and is subject to restrictions. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

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

Conversely, content neutral restrictions are generally subject only to intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968)). In the context of nude dancing, the Supreme Court has held that "[i]f the governmental *purpose* in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the less stringent standard" of intermediate scrutiny. *Pap's A.M.*, 529 U.S. at 289 (emphasis added; quotation omitted) (citing *Texas v. Johnson*, 491 U.S. 397, 403 (1989); *O'Brien*, 391 U.S. at

377 (1968)). "For a regulation to be content neutral, the enacting authority must be predominantly motivated by a substantial governmental interest, such as the control or reduction of deleterious secondary effects of the establishment to be regulated." *MD II Ent., Inc. v. City of Dallas*, 935 F. Supp. 1394, 1397 (N.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996) (unpublished; per curiam); *see Pap's A.M.*, 529 U.S. at 301; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986) (applying intermediate scrutiny to a content-neutral restriction on adult film theaters where the district court concluded that the ordinance was "aimed . . . at the *secondary effects* of such theaters on the surrounding community" and "the City Council's '*predominate* concerns' were with [those] secondary effects"); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440–41 (2002) (plurality opinion) (under the "*Renton* framework," the inquiry into "whether a municipal ordinance is content neutral . . . requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech]" (quoting *Renton*, 475 U.S. at 47)).

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

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

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

based restriction on expression. *MD II Ent.*, 85 F.3d at 624.[5]

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

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

In upholding the ordinance at issue, the court was unpersuaded by the plaintiffs' contentions that the studies on which the City had relied were "irrelevant" because they "did not study whether a change in a dancer's attire from pasties to bikini tops would affect secondary effects," and that "there must be *specific* evidence linking bikini tops to reducing secondary effects." *Id.* at 481 (quoting *Baby Dolls*, 114 F. Supp. 2d 531, 540 (N.D. Tex. 2000)). Instead, the court held that, based on the evidence adduced and considered by the City of Dallas prior to enacting the ordinance at issue, "it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually oriented businesses]." *Id.* at 482 (discussing *Renton*, 475 U.S. at 51–52; *J & B Ent.*, 152 F.3d at 371-72).

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

essential expressive nature of the latex clubs' business, and thus is a content[ ]based restriction." We agree with both the district court's appraisal of the record and the conclusion that it compels.

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

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

And the theory falters in two respects. One, the Comptroller offered no evidence to show that he even considered the data linking the SOBF with adverse secondary effects produced by nude dancing when promulgating the Clothing Rule. Indeed, the principal drafter of the Clothing Rule testified that the Comptroller's "purpose" was exclusively "stated in the Preamble"—which does not reference any secondary effects concerns—and no evidence shows that the Comptroller "consulted, and considered, data and studies concerning the deleterious effects of [sexually

oriented businesses]," *Baby Dolls*, 295 F.3d at 476.[6] If the same data that sustained the SOBF likewise sustain the Clothing Rule, there is nothing in the record before us to substantiate a "reasonable belief" to that effect.

Two, the Comptroller offers no support for the assertion that the Clothing Rule merely "interpreted"—rather than expanded—the reach of the SOBF. Indeed, the Comptroller's contention that the Clothing Rule simply "memorialize[d] the [C]omptroller's existing interpretation of what constitutes clothing" is belied by the parties' behavior since the enactment of the SOBF in 2007. The record includes undisputed evidence that latex clubs only arose in response to the SOBF, expressly in order to avoid the $5-per-customer levy. And the Comptroller knew about the latex clubs' modifications in dancers' attire yet took no action to collect the SOBF from those clubs until *after* the Clothing Rule was promulgated. A witness at trial testified that three enforcement officers came to one of his latex clubs in 2016 and "told him everything was good." Further testimony allowed the district court to conclude that the Comptroller did not have an official policy about the definition of the word "clothing." Thus, if the rule reflected the Comptroller's "existing interpretation" of

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

the operative statute, that interpretation was a closely-guarded (and unenforced) secret for the first eight years of the SOBF's existence.

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

**B. *Due Process***

The district court sua sponte granted partial summary judgment to TEA on its Fourteenth Amendment due process claim, finding that "[t]o the extent [the Comptroller] sought or seeks to enforce the $5 fee statute against latex clubs for conduct undertaken prior to . . . providing notice to such businesses, such an exaction is harsh and oppressive." At trial, the district court determined that the specific date before which retroactive enforcement would be unconstitutional was October 28, 2016, when the Comptroller initially proposed the Clothing Rule, because TEA's members were not put on notice of the Clothing Rule until that date.

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). "While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. For retroactive application of a fee to be unconstitutional, its retroactive application must be "so harsh and oppressive as to transgress . . . constitutional limitation[s]." *United States v. Hemme*, 476 U.S. 558, 568–69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)). In weighing whether retroactive application of a statute violates due process, courts should consider "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." *Id.* at 569.

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

retroactive imposition of the SOBF upon the latex clubs via the Clothing Rule constitutes a violation of due process guaranteed by the Fourteenth Amendment.

**C. *Equal Protection***

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

After a bench trial, the district court held that, under the Clothing Rule, Texas treated latex clubs differently from other similarly situated businesses such as sports bars featuring scantily clad waitresses. Because the regulation at issue concerns a fundamental right, free expression, the district court then applied strict scrutiny in its evaluation of the Clothing Rule. Doing so, the district court determined that "sports bar" establishments are "similarly situated to latex clubs"

because "a latex club with dancing performers who also serve alcohol and a sports bar with scantily-clad bikini attired waitresses doing choreographed dances and exposing part of the buttocks while serving alcohol appear similarly situated for the purposes of an equal protection analysis and would clearly violate the [Clothing Rule]." The district court concluded that latex clubs were treated differently from sports bars because "the Comptroller intended that the [Clothing] Rule bring only latex clubs within the purview of the $5 fee statute and not other similar establishments." The district court further held that the Comptroller failed to meet his burden to assert a narrowly tailored solution to a compelling governmental interest and invalidated the Clothing Rule on equal protection grounds.

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

By contrast, the "bar and grill type establishments" that TEA purports to be similarly situated to its members are fundamentally sports bars and grills,

whose primary purpose centers around food and beverage service, even if some may feature scantily clad waitresses. Likewise, TEA's contention that some artists may wear attire that may not qualify as "clothing" when performing in concerts, body paint competitions, or bodybuilding competitions misses the mark. Again, the purpose of events such as concerts is distinguishable from that of the latex clubs. Concert artists convey expression beyond sexually oriented messages conveyed in an adult cabaret (or a latex club). And the purpose of body paint or bodybuilding competitions is not sexual in nature.

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

**V.**

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

AFFIRMED in part; REVERSED AND RENDERED in part.

## APPENDIX C

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

| | | |
|---|---|---|
| TEXAS ENTERTAINMENT ASSOCIATION, INC., | § | NO. 1:17-CV-594-DAE |
| Plaintiff, | § | |
| vs. | § | |
| GLENN HEGAR, Comptroller of Public Accounts of the State of Texas, *in his official capacity*, | § | |
| Defendant. | § | |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 22 and 23, 2019, the Court held a bench trial in the above-captioned matter. Benjamin Allen, Esq. and William X. King, Esq. appeared at the trial on behalf of Plaintiff Texas Entertainment Association, Inc. ("Plaintiff"). (Dkts. ## 72, 73.) Melissa Hargis, Esq. and Michael Abrams, Esq. appeared at the trial on behalf of Defendant Glenn Hegar, Comptroller of Public Accounts of the State of Texas, *in his official capacity*

("Defendant" or "Comptroller"). (Id.) After trial, the parties submitted written closing arguments. (Dkts. ## 80, 81.)

On June 19, 2017, Plaintiff brought suit against Defendant. (Dkt. # 1.) Plaintiff alleged this was an action for money damages, declaratory judgment, and injunctive relief brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 for violations of Plaintiff's equal protection, due process, and free speech rights. (Id.) The case was transferred to the undersigned on June 15, 2018. (Dkt. # 48.)

On February 27, 2019, this Court issued an order denying Plaintiff's Motion to File First Amended Complaint (Dkt. # 42), granting Plaintiff's Motion for Summary Judgment (Dkt. # 31), and granting in part and denying in part Defendant's Motion for Summary Judgment (Dkt. # 34). (Dkt. # 50.) Additionally, the order sua sponte granted summary judgment to Plaintiff on its § 1983 claim and partial summary judgment to Plaintiff on its Due Process claim. (Id.) The October trial addressed the three remaining issues: due process, overbreadth, and equal protection. (Dkt. # 50 at 38.)

The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because this civil action arises under the Constitution and laws of the United States.[1]

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[1] The Court acknowledges the recent case from the Texas First Court of Appeals related to this matter. Hegar v. Texas BLC, Inc., No. 01-18-00554-CV, 2020 WL 97178, at *5 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020, no pet. h.). There, the First Court insinuated that this Court should have abstained from hearing this case and instead left the matter to the state courts. Id. (citing Younger v. Harris, 401 U.S. 37 (1971)). This Court addressed jurisdictional challenges such as this, including a Younger abstention argument,

The Court has considered the record evidence submitted, made determinations as to relevance and materiality, assessed the credibility of the witnesses, and ascertained the probative significance of the evidence presented. Upon consideration of the above, the Court finds the following facts by a preponderance of the evidence, and in applying the applicable law to such factual findings, makes the following conclusions of law. To the extent any findings of fact as stated may also be deemed to be conclusions of law, they shall also be considered conclusions of law; similarly, to the extent any conclusions of law as stated may be deemed findings of fact, they shall also be considered findings of fact. See Compaq Computer Corp. & Subsidiaries v. C.I.R., 277 F.3d 778, 781 (5th Cir. 2001).

## I. FINDINGS OF FACT

**1.** Plaintiff Texas Entertainment Association, Inc. is a Texas corporation that conducts business throughout Texas. (Dkt. # 1 at 1.)

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in its prior summary judgment Order. (Dkt. # 50 at 10–12.) The Court first found it had jurisdiction over the matter in accordance with Magistrate Judge Austin and Magistrate Judge Yeakel's previous findings on a motion to dismiss in this matter, and it determined that Defendant's "scanty arguments" did not cause it to question the prior judges' rulings on the jurisdiction issue. (Id. at 10.) As to Younger abstention, the Court found such abstention was inappropriate because it did not meet one of the three "exceptional circumstances" to which the Supreme Court has circumscribed application of Younger. (Id. at 11 (citing Sprint Communications, Inc. v. Jacobs, 571 U.S. 69, 82 (2013) ("In short, to guide other federal courts, we today clarify and affirm that Younger extends to the three 'exceptional circumstances' identified in NOPSI, but no further.")).)

**2.** Defendant Glenn Hegar is Comptroller of Public Accounts for the State of Texas and is sued here in his official capacity. (Dkt. # 1 at 1.)

**3.** In 2007, the Texas Legislature introduced a fee on certain sexually oriented businesses that became effective on January 1, 2008 ("$5 fee statute"). Tex. Bus. & Com. Code Ann. § 102.052 (2009). The basis of this dispute is the application and enforcement of this fee and whether or not certain establishments fall within the purview of the statute. Specifically, the dispute concerns the definition of "nude" in the statute, within the context of the fact that the statute defines a sexually oriented business as one that provides live nude entertainment and performances and authorizes the on-premises consumption of alcohol. Tex. Bus. & Com. Code Ann. § 102.051 (2009).

**4.** The $5 fee statute defines "nude" as: (a) entirely unclothed; or (b) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks. Id. Effective January 29, 2017, the Comptroller amended its rules ("Amended Rule") construing the term "sexually oriented business" within the $5 fee statute. The Amended Rule states, "Paint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing." 42 Tex. Reg. 219, amending 34 Tex. Admin. Code § 3.722 (2017). Plaintiff filed this lawsuit shortly after the Amended Rule's effective date.

**5.** Plaintiff, an association, represents member businesses, colloquially called gentleman's clubs or adult cabarets, that state they opted to cease featuring nude entertainment following enactment of the $5 fee statute

and began requiring female dancers to wear opaque latex clothing over their breasts ("latex clubs"). (Dkt. # 80 at 1–2.) Plaintiff argues that Defendant, through the Amended Rule, adopted for the first time a policy that latex clubs provide nude entertainment and therefore are sexually oriented businesses that fall within the purview of the $5 fee statute. (Id. at 2.)

**6.** Ray Langenberg, Special Counsel for the Tax Division of the Comptroller's office, testified that he worked on drafting the Amended Rule and assisted in the crafting of the definition of "clothing." (Dkt. # 82 at 59.) When questioned on the issue of the Amended Rule's purpose, Mr. Langenberg stated that the purpose was stated in the preamble and then invoked attorney-client and deliberative process privilege. (Id. at 82.) The Court stated on the record in trial, and finds again here, that there is no question that the purpose of the Amended Rule was to bring clubs featuring dancers wearing latex as covering ("latex clubs") within the ambit of the $5 fee statute. (Dkt. # 83 at 17–18.)

**7.** Cindy Williams, a former Comptroller auditor with the Business Activities Research team, testified that she issued sexually oriented business fee assessments from 2013 to 2016. (Dkt. # 82 at 105.) Ms. Williams testified that during this time, which is before the Amended Rule went into effect, she took the position that latex covering is not clothing. (Id. at 114.) She further testified that she generally took the position that a liquid substance applied to the body, even if dries later, can never be considered clothing. (Id. at 115.) She stated she relied on a dictionary for her definition of clothing. (Id.) Ms. Williams testified that she does not believe the comptroller had any written guidelines as to what is or is

not clothing under the $5 fee statute during her time as an auditor. (Id.)

**8.** Ms. Williams also testified that she did not recall the definition of clothing being an issue outside of one deposition in which she was questioned about it. (Id.) She also testified that she does not recall whether the Comptroller sent letters to latex clubs specifically regarding the definition of clothing. (Id. at 120.)

**9.** Paul Zavala, also a Comptroller enforcement officer, also testified that he was responsible for enforcing the $5 fee against sexually oriented businesses in the State of Texas prior to the enactment of the Amended Rule. (Dkt. # 82 at 124, 126.) He testified that in a former deposition he had stated, under oath, that in order to be liable for the fee under the statute less than three-fourths of the buttocks had to be covered. (Id. at 132.) However, he testified there was no official guidelines he followed in that regard. (Id. at 133.) He further testified that at that same deposition he stated that a dancer was considered covered if they had painted-on latex that covered the complete areola of the breast. (Id.) This deposition occurred prior to the Amended Rule's enactment. (Id.) However, Mr. Zavala specified at trial that while he considered painted-on latex to be covering he did not consider it to be clothing, as clothing requires a cloth-like material. (Id. at 135, 141.)

**10.** Mr. Zavala further testified that he believed just serving alcohol to customers, without any sort of stage act or lap dance, even if done fully nude, would not be entertainment and, therefore, not assessed the $5 fee. (Dkt. # 83 at 21–22.) He distinguished a dancer being proactively dressed and flirting from an act that is considered entertainment. (Id. at 19.)

**11.** Steve Craft, Plaintiff's corporate representative, testified regarding his personal knowledge of latex clubs and the entertainer's attire. (Id. at 31.) Mr. Craft testified that latex, in its raw form, is a milky liquid substance. (Id. at 34.) Mr. Craft testified that, when applied to a person, the liquid latex is applied with sponges and four coats are put on, which are equivalent to a surgical glove. (Id. at 35.) Mr. Craft testified that the latex had to be peeled off in order to be removed, like a decal. (Id. at 36.) He further testified that the entertainers wear these latex coverings on their breasts and boy shorts, as in cheerleader shorts, covering their entire buttocks. (Id. at 41.) Mr. Craft testified that someone at the club would not be able to see any portion of an entertainer's breasts from the top of the areola down to the bottom and the sides if she were wearing the latex covering. (Id. at 43.)

**12.** Mr. Craft stated that after the Texas Legislature enacted the $5 fee statute there were businesses he was personally associated with that chose to become latex clubs, rather than provide topless entertainment, in order to avoid the $5 fee. (Id. at 37.) Mr. Craft further testified that prior to 2017, when the Amended Rule was enacted, he never had the Comptroller come to any club he was associated with that was a latex club and say that latex does not count as covering. (Id.) In fact, Mr. Craft testified that he had a visit at a latex club from three different enforcement officers in what he guessed was late 2016 who wanted to look at the licenses and they told his general managers that everything looked good. (Id.)

**13.** Mr. Craft also testified that he has never heard of the Comptroller enforcing the statute against businesses other than cabarets. (Id. at 77.) He testified regarding his attendance at a Beyoncé concert at NRG Stadium in Houston. (Id. at 44.) He stated that during her

performance her buttocks were exposed, alcohol was being served, there was an audience of two or more people, and she gave a live performance. (Id.) He testified that, under his perspective, Beyoncé was nude under the definitions contained within the statute. (Id.) Mr. Craft also testified regarding a SuicideGirls event in Houston on April 29, 2017, after the enactment of the Amended Rule. (Id. at 46.) He testified regarding a picture of their performance and stated that the performers were topless with electrical tape covering their nipples and wearing underwear that left their buttocks exposed. (Id. at 45.) He further testified he was familiar with Warehouse Live, where they performed, and that they serve alcohol, have audiences of two or more people, and provide live entertainment. (Id. at 47–48.)

**14.** Mr. Craft testified that the Amended Rule provides that the Comptroller will presume that a business is a sexually oriented business if the business holds itself out as a sexually oriented business, which may include how they portray themselves on social media. (Id. at 57.) To that effect, Mr. Craft testified regarding his knowledge of Tight Ends Sports Bar & Grill. (Id. at 56.) He testified that he had been to Tight Ends, that they serve alcoholic beverages to two or more persons, and the women there are dressed in a state of nudity under the $5 fee statute. (Id.) He further testified regarding their Instagram page, which features pictures of a waitress holding beer with portions of her breasts revealed. (Id. at 56–57.) He also testified that when he had gone to Tight Ends he witnessed the waitresses sitting and talking with, and in his opinion entertaining, the customers. (Id. at 59.)

**15.** Mr. Craft also testified regarding his experience at Knockout Sports Bar & Grill, which serves alcohol to two or more people and has waitresses that would be

considered nude under the statute. (Id. at 64.) He stated that his friend, Eric Langan, paid $20 to have his picture taken with one of the waitresses, similar to paying $20 for a dance at a topless club. (Id. at 67.) Mr. Craft testified that the whole concept of these two establishments, and other similar ones, was to serve food and alcohol and have pretty girls that are friendly and that sit down and talk to patrons. (Id. at 71.) Mr. Craft testified that at these establishments certain songs will come on and the waitresses will do a choreographed dance, sometimes on the bar or on a table, and the waitresses will sometimes bring viewers from the crowd up with them. (Id.)

**16.** Mr. Craft testified that back in early 2017, he was associated with establishments such as those described above, namely Sports City and Sneaky Pete's, and the Comptroller did not assess either one of them the $5 fee. (Id. at 77.) He further stated that the Comptroller had not assessed the $5 fee against any similar sports bar and grill type entity in the administrative proposals for decisions he had reviewed. (Id.) Mr. Craft testified that, in his wide involvement with clubs, businesses, sports bars, adult cabarets and non-adult cabarets throughout Texas, he did not know of any entity other than an adult cabaret to whom the $5 fee had been assessed. (Id. at 78.)

**17.** Finally, Mr. Craft testified regarding JAI Dining Services Odessa II, Inc. in Odessa, TX, which is an adult cabaret. (Id. at 81 .) He stated that the entertainers attire themselves in boy shorts, latex, and bikini tops. (Id. at 82.) He stated that they wear both the latex and then the bikini top over the latex as a second layer of defense in case the bikini top moves around. (Id. at 83.) Mr. Craft testified that the Comptroller had assessed Odessa II with fees under the $5 fee statute in the sum of hundreds of thousands of dollars. (Id. at 84.) He testified that Odessa

II asked for a redetermination from an administrative judge, who determined it was not a sexually oriented business during the assessment period, which included both before and after the Amended Rule went into effect. (Id. at 84–85.) He testified that the Comptroller adopted the administrative judge's finding on July 15, 2019. (Id. at 85.)

II. CONCLUSIONS OF LAW

**A. Whether retroactive enforcement of the $5 fee statute as construed by the Amended Rule violates due process**

**1.** For retroactive application of the $5 fee statute, as construed through the Amended Rule, to be unconstitutional its "retroactive application" must be "so harsh and oppressive as to transgress . . . constitutional limitation[s]." United States v. Hemme, 476 U.S. 558, 568 (1986). One of the relevant circumstances for courts to consider is "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." Id. at 569. Notably, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

**2.** This Court's February 2019 summary judgment order found that to the extent the Comptroller intended to or did enforce the Amended Rule to business conduct that occurred before he noticed his intention to modify the definition of nudity under the $5 fee statute such enforcement gave, without notice, a different and more oppressive legal effect to conduct previously undertaken and was thus harsh and oppressive. (Dkt. # 50 at 31.) In

its Order, the Court noted that there is undisputed evidence in the record that the latex clubs presented dancers wearing latex specifically to avoid enforcement of the $5 fee against them and were reassured the use of latex coverings allowed them to comply with the statute and avoid the fee. (Id. at 33.) Accordingly, the Court denied Defendant's motion for summary judgment on Plaintiff's due process claim. (Id.)

**3.** Plaintiff urges that the first time the Comptroller gave notice to businesses that its office did not consider latex-clad performers to be "clothed" was in the October 28, 2016, issue of the Texas Register when the proposed Amended Rule was published. (Dkt. # 80 at 10.) Defendant counters that the plain language of the $5 fee statute is clothing dependent, and therefore, provided fair notice and does not implicate due process retroactivity concerns. (Dkt. # 81 at 4.) Defendant points to the language of the October 28, 2016 Texas Register statement, which stated that the Amended Rule "is a proper construction of the statute and articulates what has always been the law." (Id. at 6.) They characterized what Plaintiff calls lack of notice as confusion among businesses between coverage-dependent local ordinances and the clothing-dependent $5 fee statute. (Id.)

**4.** The testimony elicited at trial made clear that there was a lack of official policy at the Comptroller's office regarding whether latex was clothing. Ms. Williams herself testified that in making the determination whether latex was or was not clothing that she consulted a standard dictionary. (Dkt. # 82 at 115.) Furthermore, Mr. Craft testified that three enforcement officers came to one of his latex clubs in late 2016 and told him everything was good. (Dkt. # 83 at 37.) Accordingly, the question for the Court is whether the language of the

statute was clear enough that Plaintiff should have been on notice that entertainers in latex would still be considered nude under the statute.

**5.** In its summary judgment Order, the Court stated, "The Comptroller's attempt to enforce the fee against these business for conduct undertaken before they were put on notice that the definition of nudity would be changed or clarified to cover their conduct is harsh and oppressive, and thus violates due process." (Dkt. # 50 at 33.) Defendant presented nothing at trial beyond relying on the language of the statute. (Dkt. # 81 at 7 ("The statute itself provided sufficient notice to business operates of what is or is not 'nude' when it was passed in 2007.").) [2] Plaintiff presented at trial two witnesses that demonstrated the latex clubs had reason to be confused whether the $5 fee statute applied to them or not. Plaintiff also presented evidence that these businesses became latex clubs, as opposed to remaining traditional topless clubs, specifically to avoid the $5 fee, further indicating they were not aware they would still be considered subject to the fee.[3] (Id. at 33.)

**6.** Accordingly, the Court finds that the $5 fee, as Defendant seeks to enforce it retroactively before the October 28, 2016 notice, violates due process because the

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[2] The Court notes that if this were the case why did the Comptroller see the need to amend the rule to ostensibly include latex coverings.

[3] The Court further notes that whether latex is clothing or not is genuinely unclear in today's fashion age. Recently, Kim and Kourtney Kardashian, two leading style influencers, were recently spotted in Paris wearing head-to-toe latex that Kim revealed was "fresh off the runway." Yahoo! Lifestyle, https://www.yahoo.com/lifestyle/kim-kourtney-kardashian-twinned-head- 123200791.html (last visited Mar. 5, 2020).

businesses were not put on notice it applied to them. The Court enjoins enforcement of the Amended Rule prior to October 28, 2016.

**B. Whether the $5 fee statute became overbroad following the enactment of the Amended Rule**

**1.** Facial overbreadth adjudication is an exception to traditional rules of practice and should be employed sparingly. Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex., 295 F.3d 471, 482 (5th Cir. 2002) (citing Broadrick v. Oklahoma, 413 U.S. 601, 613, 615 (1973)). "[W]here conduct and not merely speech is involved,…the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. "[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (quoting Broadrick, 413 U.S. at 601, 612–615).

**2.** In Baby Dolls Topless Saloons, the Fifth Circuit ruled on whether an amended definition of "specified anatomical areas" in a city's sexually oriented business ordinance was overbroad because it could operate to classify a number of "mainstream" businesses as sexually oriented businesses. Baby Dolls Topless Saloons, 295 F.3d at 482. However, prior to the Fifth Circuit's consideration of the matter, the city amended the ordinance to specifically remove adult theaters, i.e. theaters, auditoriums, concert halls, etc. featuring live entertainment, from the ordinance's purview. Id. As such, the Fifth Circuit only considered whether the amended definition operated to classify "mainstream" movie

theaters and video stores as "adult" motion picture theaters and video stores. Id.

**3.** Here, the issue is whether the statute, when applied through the Amended Rule, is impermissibly overbroad, including a consideration as to whether it could operate to classify many mainstream entertainment options, such as a Beyoncé concert at NRG Stadium, as a sexually oriented business.

**4.** Plaintiff urges that the Amended Rule is impermissibly overbroad. (Dkt. # 80 at 12.) Plaintiff argues that assuming the Amended Rule has a plainly legitimate sweep, only for the purposes of the overbreadth claim, that its application to latex clubs falls far outside of it, making it an "impermissible application" beyond the Amended Rule's purpose. (Id.) Plaintiff points to the Texas Supreme Court's explanation that the purpose of the $5 fee statute is directed "not at expression in nude dancing, but at the secondary effects of nude dancing when alcohol is being consumed." (Id. at 13 (quoting Combs v. Texas Entm't Ass'n, Inc., 347 S.W.3d 277, 287–88 (Tex. 2011)).) Plaintiff argues that the Amended Rule targets latex clubs while leaving free from regulation other businesses featuring nude entertainment, as defined by the Amended Rule, and that this definition of clothing impermissibly broadens the $5 fee statute's scope to capture a broad range of businesses without regard to the underlying purpose. (Id.)

**5.** Plaintiff points to a number of situations that demonstrate what it argues is an impermissibly broad scope, such as concerts and performance artists covered in clay-like substances. Id. at 14–15. Plaintiff claims that the testimony at trial showed that the Amended Rule's purpose is to impose the $5 fee on any business featuring expressive entertainment using materials other than cloth

to cover the relevant anatomical areas. (Id. at 15.) Furthermore, Plaintiff asserts that the Comptroller's witness chose to assert privilege as to the Amended Rule's purpose and instead simply directed the Court to the $5 fee statute's preamble. (Id. at 16.) Plaintiff contends that the Court should disregard any argument indicating there was a legitimate government purpose and find there was none. (Id.)

**6.** Defendant states that Plaintiff has not proven that the Amended Rule is overbroad. (Dkt. # 81 at 7.) First, Defendant urges that the Amended Rule, defining clothing, is narrowly tailored to serve compelling state interests. (Id.) Second, it argues that the State of Texas has a substantial interest in ameliorating the negative secondary effects of live nude entertainment performed where alcohol is consumed and in protecting the state fisc. (Id.)

**7.** Defendant points to Baby Dolls Topless Saloons, where the Fifth Circuit held the city zoning ordinance was not overbroad, and argues that the Amended Rule does not even go that far since it does not have a requirement of what a performer may or may not wear. (Id. at 8.) Defendant concludes by arguing Plaintiff has failed to show that the Amended Rule's clothing definition is actually overbroad or that any such overbreadth is substantial. (Id.)

**8.** The Court finds that the Amended Rule is not overbroad. As a preliminary matter, the Court acknowledges Plaintiff's assumption for the purposes of the overbreadth claim that the Amended Rule has a plainly legitimate sweep. (Dkt. # 80 at 12.) Accordingly, the Court confines its analysis only to whether the Amended Rule's sweep is substantially overbroad when judged in relation to that plainly legitimate sweep. In

doing so, it begins its analysis from the mindset, as the Fifth Circuit has reinforced, that overbreadth adjudication is an exceptional remedy to be employed sparingly. Here, the Court finds that any overbreadth of the Amended Rule is not substantial enough to find it impermissibly overbroad.

**9.** The Court acknowledges the intention of the overbreadth doctrine to protect third parties not before the court who desire to engage in legally protected expression but who may refrain from doing so rather than risk persecution or undertake to have the law declared partially invalid. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). However, where conduct and not merely speech is involved, there is the further consideration outlined in Broadrick that the overbreadth be not only real but also substantial as judged in relation to the statute's plainly legitimate sweep. Broadrick, 413 U.S. at 615. "The concept of 'substantial overbreadth' is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984). "In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Id. at 801.

**10.** The Court finds that such a realistic danger is not present here. As to its application to latex clubs, they are a party before the Court and therefore the overbreadth doctrine is not the most appropriate remedy for any violation of their rights, which have been fully adjudicated through other claims. As to its application to potential

third parties' protected conduct that the Amended Rule's sweep could impermissibly compromise, the Court finds that the realistic danger that the Amended Rule will significantly compromise their recognized First Amended protections is not present to the level necessary for a facial invalidation of the statute. The potential danger does not rise to the necessary level to use this remedy that the Fifth Circuit has urged courts should use "sparingly" and "as a last resort." Baby Dolls Topless Saloons, 295 F.3d at 482.

**11.** The $5 fee statute states its application is limited to "a nightclub, bar, restaurant, or similar commercial enterprise" that provides "two or more individuals live nude entertainment or live nude performances" while permitting on-premises consumption of alcoholic beverages. Tex. Bus. & Com. Code Ann. § 102.051 (2009). The Amended Rule's definition of clothing operates within the sphere of the $5 fee statute's application, which the text of the statute limits to a nightclub, bar, restaurant, or similar commercial enterprise. While the Court considers "similar commercial enterprise" to be a bit concerning in its breadth, the Court ultimately finds that this definition limits the application of the $5 fee statute and corresponding Amended Rule sufficiently to save it from Plaintiff's overbreadth challenge. This definition means that an artist putting on an exhibition where they're covered in clay at a museum or a singer doing an album cover covered in whipped cream would not be susceptible to the $5 fee statute.

**12.** The concerning part of the statute is that a performer at a theater or a headline act at NRG Stadium could conceivably fall under the statute under a liberal reading of "similar commercial enterprise," however, this seems an unlikely application of the statute and the Court

doubts the effect of the statute has been to chill those performers protected conduct to the substantial level necessary to find the Amended Rule facially overbroad.

**13.** The Court is mindful that the Fifth Circuit and Supreme Court have held that just because one can conceive of an impermissible application of a statute does not render it susceptible to an overbreadth challenge. United States v. Hicks, 980 F.2d 963, 970 (5th Cir. 1992) ("Rather, a party challenging a statute on overbreadth grounds must demonstrate that there is a 'substantial' potential that the overbroad statute will chill third parties' speech." (quoting Broadrick, 413 U.S. at 615)); Vincent, 466 U.S. at 800. While the Court does find that "similar commercial enterprise" renders the $5 fee statute, when applied through the Amended Rule, overly vague, it also finds that Plaintiff has not demonstrated there is a substantial potential that it will chill third parties' speech, with third parties being performers at venues like NRG Stadium in Houston. Plaintiff's argument focused on how the statute could be read to cover them; however, they failed to demonstrate how those parties have had their speech chilled in any way. Furthermore, the Court finds that the third parties Plaintiff exhibited, such as Beyoncé, Jennifer Lopez, and the SuicideGirls, likely have not been subjected to the $5 fee statute.

**14.** Thus, the Court finds that the impermissible applications of the Amended Rule are not sufficiently substantial to deem it facially overbroad when judged in relation to its plainly legitimate sweep.

### C. Whether the Comptroller's enforcement of the $5 fee statute through the Amended Rule violates Equal Protection

**1.** "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms if a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Fifth Circuit has held that a state violates the equal protection clause when it treats one set of persons differently from others who are similarly situated. Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493, 510 (5th Cir. 2001) ("The equal protection guarantee applies to all government actions which classify individuals for different benefits or burdens under the law."). The inquiry as to whether they are similarly situated focuses on whether the plaintiffs are similarly situated to another group for purposes of the challenged government action. Yates v. Stalder, 217 F.3d 332, 334 (5th Cir. 2000).

**2.** "Unless a suspect class or fundamental right is involved, we generally employ the rational basis test in deciding equal protection claims." Wheeler v. Miller, 168 F.3d 241, 252 (5th Cir. 1999). "By contrast, if a classification does target a suspect class or impact a fundamental right, it will be strictly scrutinized and upheld only if it is precisely tailored to further a compelling government interest." Sonnier v. Quarterman, 476 F.3d 349, 368 (5th Cir. 2007). "The Supreme Court has explained that fundamental rights, for equal protection purposes, are such rights as: a right of a uniquely private nature, the right to vote, right of interstate travel and *rights guaranteed by the First Amendment*." Id. at 368, n.16 (emphasis added).

**3.** Plaintiff argues that the Comptroller has failed to provide evidence that it enforced the Amended Rule

against anything other than a latex club or the $5 fee statute against anything but a cabaret. (Dkt. # 80 at 18.) They further urge that the Comptroller has failed to provide any basis for not enforcing the $5 fee statute, as interpreted through the Amended Rule, against a myriad of businesses featuring nude entertainment in the presence of alcohol, namely Beyoncé concerts, SuicideGirls performances, Jennifer Lopez concerts, and waitress entertainers at a variety of sports bar and grill type establishments. (Id.)

**4.** Plaintiff states that they have presented compelling evidence that the Comptroller's enforcement of the $5 fee statute against latex clubs was motivated by an improper purpose, i.e. to regulate and curtail expressive dance. (Id. at 20.) Plaintiff concludes that Defendant cannot demonstrate that the Amended Rule, which affects First Amendment interests, is narrowly tailored to a legitimate objective. (Id. at 22.)

**5.** Defendant asserts that the Amended Rule does not violate equal protection and claims Plaintiff presented no evidence that its members are treated differently than other types of businesses providing live nude entertainment, as the Amended Rule interprets nude. (Dkt. # 81 at 1–2.) Defendant further distinguishes a music concert where the entertainer has no contact with the audience and cheerleaders in a stadium from the types of businesses in question here. (Id. at 2.) Notably, however, Defendant does not address the type of sports bar and grill establishments that Plaintiff also asserts is a similarly situated business.

**6.** Defendant then states that, assuming for the purposes of this argument that the Comptroller did not assess certain types of non-cabaret businesses $5 fees, that it could be due to a "multitude of factors including the

judicious application of limited enforcement resources of the Comptroller, or the prosecution of what the agency deemed to be the most flagrant violators of the law." (Id.) As to purpose, Defendant states that the Amended Rule applies the $5 fee statute, which is "aimed at the negative secondary effects of live nude entertainment performed in the presence of alcohol." (Id. at 3 (citing Combs, 347 S.W.3d at 286–87).) Defendant further urges that preventing sexual assault is a compelling government purpose and the collected fees from the statute are deposited into the sexual assault program fund. (Id. at 4.) Defendant states that discouraging alcohol consumption in the presence of live nude entertainment is necessary to reduce the number of sexual assaults on workers in sexually oriented businesses. (Id.)

**7.** Plaintiff's corporate representative testified at trial that he has been professionally involved with not only adult cabarets, specifically latex clubs in this context, but also with sports bar and grill type establishments. (Dkt. # 83 at 32.) He testified that the Comptroller has not, to his knowledge, accessed the $5 fee against sports bars and grills that meet the definition of a sexually oriented businesses under the Amended Rule, including both those he has been personally involved with and others, even though, according to his testimony, waitresses will perform choreographed dances at certain times and will get on the bar or on a table to do so. (Id. at 32, 71.)

**8.** Mr. Zavala, who worked for the Comptroller, testified that he would not have assessed the $5 fee against an establishment, even if a fully nude waitress was serving alcohol to customers, unless there was a stage performance or lap dance provided. (Dkt. # 83 at 21–22.) Plaintiff points out, in Exhibit 6, that the Comptroller form in fact only provides two concrete options for what

types of performance were observed, stage performance or table dance. (Dkt. # 75-1 at 13.)

**9.** At the summary judgment stage, this Court found that the Amended Rule is an unconstitutional restriction on expressive conduct under the First Amendment. (Dkt. # 50 at 25.) As such, the Court finds that the Amended Rule impacts a fundamental right. Therefore, the Court will apply a strict scrutiny standard and uphold the Amended Rule only if it finds that it is precisely tailored to further a compelling government interest.

**10.** First, the Court finds that the sports bar and grill type establishments discussed at trial are similarly situated to latex clubs. This includes establishments such as Knockout Sports Bar, Tight Ends Sports Bar & Grill, and Ojos Locos Sports Cantina. The management and operation of the two businesses are similar, as is reinforced by the fact that Mr. Craft himself has been professionally involved in both throughout his career. While they are not both car manufacturers, as say Ford and General Motors, a latex club with dancing performers who also serve alcohol and a sports bar with scantily-clad bikini attired waitresses doing choreographed dances and exposing part of the buttocks while serving alcohol appear similarly situated for the purposes of an equal protection analysis and would clearly violate the Amended Rule.

**11.** Furthermore, as noted above, the plain language of the $5 fee statute applies to sports bars and grills with scantily-clad bikini attired waitresses that serve alcohol and perform choreographed dances. Tex. Bus. & Com. Code Ann. § 102.051 (defining a sexually oriented business as a bar or restaurant that provides for an audience of two or more live nude entertainment and authorizes on-premises consumption of article). The statute further

defines nude as entirely unclothed or clothed in a manner that leaves visible through less than fully opaque clothing any portion of the breasts or buttocks. Id. As such, the Court finds that sports bars and grills with bikini-clad waitresses serving alcohol and doing choreographed dances are similarly situated to latex clubs.

**12.** Second, the question becomes whether the State of Texas has treated latex clubs and these sports bars and grills differently. The Court finds that it has, which Defendants barely even argue against. It appears clear that the Comptroller intended that the Amended Rule bring only latex clubs within the purview of the $5 fee statute and not other similar establishments, as further demonstrated by Mr. Zavala's testimony and Plaintiff's Exhibit 6 that show a stage performance or table dance was an expected prerequisite to enforcement even though the statute only requires performance or entertainment. (Dkt. # 75-1 at 13.)

**13.** Defendant instead provides reasons why the two have been treated differently, namely limited state resources and a desire to prosecute the most flagrant violations of the law. In doing so, Defendant cites to Tibbetts, where the Fifth Circuit held that due to limited government resources allowing some tax evaders and tax protestors to elude prosecution is not sufficient to find a differentiation in treatment. United States v. Tibbetts, 646 F.2d 193, 196 (5th Cir. 1981). The Court finds that unpersuasive here. The Fifth Circuit said "there will always be some" who elude prosecution in a scheme as large as nationwide tax collection; that differs from the matter at hand where the State of Texas is enforcing the $5 fee statute, through the Amended Rule, categorically against latex clubs and but not against sports bars and grills. Furthermore, at trial, Defendant provided no

empirical evidence to support the conclusion that it was not enforcing the Amended Rule against sports bars and clubs due to lack of resources.

**14.** Having found that the State of Texas treats latex clubs differently from similarly situated commercial enterprises, the Court turns to the strict scrutiny analysis. As stated above, the Court will uphold the Amended Rule only if it finds that it is precisely tailored to further a compelling government interest. The Court finds it is not. Through the Amended Rule, the $5 fee statute's reach has been expanded to include clubs where the performers are covered to the same extent, and in some cases more, than a bikini-clad waitress is. Accordingly, the focus is on what the performer and waitress are doing. The statute simply states that "live nude entertainment" or "live nude performances" will qualify an establishment as a sexually oriented business, given the other factors also being present.

**15.** The Court finds this is not narrowly tailored to capture only the type of negative secondary effects of live nude entertainment performed in the presence of alcohol that would occur only in a latex club but not in a sports bar of the type described above, which is the stated purpose of the statute. The statute could be read to also incorporate sports bars with dancing bikini-clad waitresses, and the State of Texas's stated interest in reducing the number of sexual assaults on workers in sexually oriented businesses, which is seemingly just as present in those sports bars as in latex clubs. Yet, the State of Texas chooses to only enforce it against a certain class of establishments, namely adult cabarets or specifically latex clubs, which is constitutionally problematic.

**16.** Accordingly, the Court finds that the Amended Rule, and as such the way the $5 fee statute is applied through it, does not survive Plaintiff's equal protection challenge and is therefore, as currently applied, unconstitutional. The Court would note that it may be possible depending upon further amendment of the rule and the drafting of appropriate guidelines as well as uniform enforcement for the issues that give rise to this matter to be cured.

CONCLUSION

For the reasons stated above, the Court finds that: (1) the Amended Rule cannot be retroactively applied to collect $5 fees before establishments were put on notice on October 28, 2016, (2) the Amended Rule is not impermissibly overbroad, and (3) the current enforcement of the $5 fee statute as interpreted through the Amended Rule violates equal protection and is therefore unconstitutional as currently applied. This order constitutes final judgment in this case.

**IT IS SO ORDERED.**

**DATED**: Austin, Texas, March 6, 2020

/s/ *David Alan Ezra*
David Alan Ezra
Senior United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| TEXAS ENTERTAINMENT ASSOCIATION, INC., | § | No. 1:17-CV-594-DAE |
| Plaintiff, | § | |
| vs. | § | |
| GLENN HEGAR, Comptroller of Public Accounts of the State of Texas, | § | |
| Defendant. | § | |

ORDER: (1) DENYING PLAINTIFF'S MOTION TO AMEND (DKT. # 42); (2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. # 31); (3) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DKT. # 34); AND (4) SUA SPONTE GRANTING PLAINTIFF SUMMARY JUDGMENT ITS § 1983 CLAIM AND PARTIAL SUMMARY JUDGMENT ON ITS DUE PROCESS CLAIM

Before the Court are three pending motions: (1) Plaintiff Texas Entertainment Association, Inc.'s ("TEA" or "Plaintiff") Motion for Leave to File First Amended Complaint, filed on May 7, 2018 (Dkt. # 42); (2)

Plaintiff's Motion for Summary Judgment, filed on April 16, 2018 (Dkt. # 31); and (3) Defendant Glenn Hegar, the Comptroller of Public Accounts for the State of Texas' ("Comptroller" or "Defendant") Motion for Summary Judgment, also filed on April 16, 2018 (Dkt. # 34). Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the memoranda and exhibits filed in support of and opposition to the motions, the Court—for the reasons that follow—(1) **DENIES** Plaintiff's Motion to File First Amended Complaint (Dkt. # 42); (2) **GRANTS** Plaintiffs' Motion for Summary Judgment (Dkt. # 31); and (3) **GRANTS IN PART AND DENIES IN PART** Defendant's Motion for Summary Judgment (Dkt. # 34). Additionally, the Court sua sponte **GRANTS** summary judgment to Plaintiff on its § 1983 claim and partial summary judgment to Plaintiff of its Due Process claim.

## BACKGROUND

TEA brings this suit against the Comptroller, asserting that a "fee"[1] assessed on sexually oriented businesses: (1) is an unconstitutional retroactive law; (2) violates the First Amendment's guarantee of freedom of speech; (3) violates the Fourteenth Amendment's guarantee of equal protection; and (4) violates the Fifth and Fourteenth Amendments' guarantees of due process. (Dkt. # 1 at 5–10.) The contested statute was enacted in 2008 and levies a $5 fee for each customer admitted into a "sexually oriented business." Tex. Bus. &

[1] There is some dispute as to whether the exaction at issue is most properly characterized as a tax or a fee, but as the statute itself refers to it as a fee, the Court will use that term as well.

Com. Code § 102.052 [hereinafter "$5 fee statute" or the "statute"]. A "sexually oriented business" is defined as "a nightclub, bar, restaurant, or similar commercial enterprise" that provides "live nude entertainment or…performances" and "authorizes the on-premises consumption of alcoholic beverages." Id. at § 102.051(2). "Nude" is defined as "entirely unclothed" or "clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." Id. at § 102.051(1).

Prior to the filing of this case, and shortly after the law went into effect, TEA and a number of sexually-oriented businesses brought suit in state court challenging the $5 fee statute on First Amendment and state law grounds. The Texas Supreme Court found that the $5 fee statute did not violate the First Amendment. Combs v. Tex. Entm't Ass'n, 347 S.W.3d 277, 288 (Tex. 2011).[2]

As originally filed, the instant case did not challenge the statute itself. Instead, Plaintiff challenged the Comptroller's later-enacted administrative interpretation of the word "clothing," as it relates to the definition of "nude" under the $5 fee statute. (See Dkt. # 1 at 2; see also Dkt. # 23 at 2.) In 2017, the Comptroller amended the Texas Administrative Code to define what constituted "clothing" under the $5 fee statute. 42 Tex. Reg. 219.

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[2] After remand to consider the state law claims, the Texas Court of Appeals also found the statute did not violate the Texas Constitution. Tex. Entm't Ass'n v. Combs, 431 S.W.3d 790 (Tex. App.—Austin 2014).

As presently constituted, "clothing" is defined as "[a] garment used to cover the body, or a part of the body, typically consisting of cloth or a cloth-like material." 34 Tex. Admin Code § 3.722(1)(a). Importantly, the definition goes on to specify that "[p]aint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing." Id.

This administrative amendment, particularly the exclusions from what constitutes clothing, is important to Plaintiff, because after the enactment of the statute, but prior to the administrative amendment, several businesses elected to feature dancers wearing opaque latex covering, to comply with the statute and avoid the $5 fee. (Dkt. # 31-7, Ex. F at 1). Plaintiff alleges that until mid-2015 the Comptroller and the Business Activity Research Team, tasked with administering the statute, did not consider such "latex clubs" to be sexually oriented businesses subject to the $5 fee statute, and as such did not assess the fee against them. (Dkt. # 31 at 7–8.) This all changed in 2015, when the present Comptroller took over. (Dkt. # 31-3, Ex. C[3] at 15.) At that time, the Comptroller determined that latex coverings were not clothing under the $5 fee statute and instituted proceedings to collect the $5 fee against such latex clubs, both prospectively and—Plaintiff asserts—retroactively to 2008, when the statute was first enacted.

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[3] Defendant objects to this exhibit as lacking foundation and being irrelevant. (Dkt. # 38 at 2.) But defendant provides no argument in support of this position. The Court overrules Defendant's objections. This evidence is witness testimony concerning the creation, adoption and purposes underlying the amended rule. It is therefore relevant. Further, Defendant has not adequately demonstrated that the challenged evidence could not be presented in an admissible form. Fed. R. Civ. P. 56(c)(2).

In 2017, the Comptroller amended the Texas Administrative Code to reflect his determination of what did and what did not constitute clothing under the statute. 42 Tex. Reg. 419.

Plaintiff filed suit on June 19, 2017, challenging the Comptroller's interpretation and the administrative amendment reflecting it. Plaintiff argues the amended—Defendant would say clarified—interpretation violates the affected businesses' rights to freedom of expression, due process, and equal protection, and that the interpretation is unconstitutionally vague and overbroad. (Dkt. # 1.) One July 14, 2017, the Comptroller moved to dismiss, arguing: (1) TEA's claims were barred by the Tax Injunction Act, 28 U.S.C. § 1341; (2) the Court should dismiss the case on comity grounds; (3) the Comptroller was immune from suit under the 11th Amendment; and (4) TEA lacked standing. (Dkt. # 5.) On March 14, 2018, the Court adopted a Report and Recommendation of the Magistrate Judge, granting in part and denying in part Defendant's motion to dismiss. The Court granted the motion as to Plaintiff's claims for monetary damages under the 11th Amendment, but in all other respects denied Defendant's motion. (Dkt. # 23 at 13; Dkt. # 26 at 2–3.)

On April 16, 2018, Plaintiff moved for summary judgment on their First Amendment claim. (Dkt. # 31.) Defendant filed a response in opposition on April 30, 2018. (Dkt. # 37). Plaintiff filed a reply in support on May 7, 2018. (Dkt. # 40.) Defendant also filed evidentiary objections to Plaintiff's summary judgment evidence related to this motion, and Plaintiff filed a response. (Dkts. ## 38, 41). Also on April 16, 2018, Defendant moved for summary judgment on all of Plaintiffs claims. (Dkt. # 34.) Plaintiff filed a response in opposition on

April 30, 2018. (Dkt. # 39.) Defendant filed a reply in support on May 14, 2018. (Dkt. # 43.) Defendant again filed evidentiary objections to Plaintiff's summary judgment evidence related to this motion, and Plaintiff filed a response.[4] (Dkts. ## 44, 36.) On May 7, 2018, largely in response to some of the arguments and issues raised in support of and opposition to Plaintiff's summary judgment motion, Plaintiff moved to amend its complaint. (Dkt. # 42.) Defendant responded in opposition on May 14, 2018. (Dkt. # 45.) Plaintiff filed no reply. These three motions are currently before the Court and are fully briefed and ripe for review.[5]

## LEGAL STANDARD

### I. Motion to Amend Complaint

Where, as here, a request to amend is untimely pursuant to the Court's scheduling order, Federal Rule of Civil Procedure 16(b)(4) governs amendment. Filgueira v. U.S. Bank Nat. Ass'n, 734 F.3d 420, 422 (5th Cir. 2013). Rule 16(b)(4) provides that "[a] schedule may be modified only for good cause and with the judge's consent." When amendment is sought untimely, a party "must show good cause for not meeting the deadline before the more liberal standard of Rule 15(a) will apply." Fahim v. Marriott Hotel Servs., Inc., 551 F.3d 344, 348 (5th Cir. 2008). The four factors relevant to a good cause determination under Rule 16(b)(4) are "(1) the explanation for the failure to timely move for leave to

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[4] Defendant's evidentiary objections are addressed where relevant.

[5] On June 15, 2018, this case was transferred to this Court from the Honorable Lee Yeakel, United States District Judge for the Western District of Texas. (Dkt. # 48.)

amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." Filgueira, 734 F.3d at 422 (quoting EEOC v. Serv. Temps, Inc., 679 F.3d 323 at 334 (5th Cir. 2012). Whether to grant or deny leave to amend is within the sound discretion of the trial court. Id.

II. Motion for Summary Judgment

Summary judgment is proper if "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the

nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

Finally, when, as here, "parties file cross-motions for summary judgment, [the court] review[s] each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." Green v. Life Ins. Co. of N. Am., 754 F.3d 324, 329 (5th Cir. 2014) (internal quotation marks omitted) (quoting Duval v. N. Assur. Co. of Am., 722 F.3d 300, 303 (5th Cir. 2013)).

## DISCUSSION

As discussed, three motions are currently pending before the Court: Plaintiff's motion to amend (Dkt. # 42); (2) Plaintiff's motion for summary judgment (Dkt. # 31); and (3) Defendant's motion for summary judgment (Dkt. # 34.) Defendant's motion for summary judgment raises arguments that this Court lacks jurisdiction over this action. (Dkt. # 34 at 3–6.) Because it would be improper for this Court to adjudicate any matters over which it lacks jurisdiction, the Court must first address Defendant's jurisdictional arguments. See, e.g., Fed. R.

Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")

III. Jurisdiction and Younger Abstention

Defendant argues first that Court lacks jurisdiction under the Tax Injunction Act, principles of comity, and Eleventh Amendment Immunity. (Dkt. # 34 at 4, 12, 17 n.9.) Defendant here is simply repeating arguments already rejected by Magistrate Judge Austin and Judge Yeakel in connection with his motion to dismiss. (Dkt. # 23, 26.) The Court's rejection of these arguments is thus law of the case. Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983) ("the law of the case doctrine . . . prevents collateral attacks against the court's rulings during the pendency of the lawsuit.") While the law of the case doctrine is a "rule of convenience and utility," not an "inexorable command," "[a] judge should hesitate to undo his own work. Still more should he hesitate to undo the work of another judge." Id. Defendant's scanty arguments do not cause this Court to question the prior ruling in this case on these issues.

Defendant next argues the Court should abstain from exercising jurisdiction under the Younger doctrine. (Dkt. # 34 at 4.) Defendant contends the three criteria for Younger abstention derived from Middlesex County Ethics Commission v. Garden State Bar Association, 457 U.S. 423, 432 (1982), apply, and that therefore the Court should abstain from deciding this case. (Dkt. # 34 at 5–6.) However, the Supreme Court has explicitly rejected the premise that Younger applies whenever those three criteria are satisfied. Sprint Comms., Inc. v. Jacobs, 571 U.S. 69, 81 (2013).

When the Middlesex factors are "divorced from their quasi-criminal context the three Middlesex conditions would extend Younger to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest." Id. But "federal courts are obliged to decide cases within the scope of federal jurisdiction." Id. at 72. And such a broad application of the doctrine would violate the "general rule" that "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." Id. Abstention is the "exception, not the rule." Id. at 82 (quoting Hawaii. Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984)).

The Supreme Court, therefore, expressly circumscribed application of the Younger doctrine to three defined "exceptional circumstances": (1) ongoing state criminal prosecutions; (2) civil enforcement closely related to criminal statutes; and (3) civil proceedings involving certain orders uniquely in furtherance of the state court's ability to perform their judicial functions. Id. at 78, 82. Defendant does not explain how the instant case fits into any of the three Younger categories. And the Court sees no reason to think it does either. Therefore, the Court finds Younger abstention would be inappropriate in this instance.

Having thus resolved Defendant's jurisdictional objections, the Court now turns to the substance of the motions pending before it.

IV. Motion to Amend

Plaintiff seeks leave to amend its complaint to state an as-applied challenge under the First Amendment to the $5 statute itself, as opposed to just the administrative amendment defining "clothing." Plaintiff argues the

failure to expressly state such a claim was inadvertent, that its original complaint sets forth the allegations of such a claim, the proposed amendments are minimal, and that Defendant will not be prejudiced by such an amendment. (Dkt. # 42 at 2, 4.) However, Plaintiff's motion will be denied.

First, the amendment Plaintiff requests is barred by judicial estoppel. "[J]udicial estoppel is equitable in nature and can be invoked by a court to prevent a party from asserting a position in a legal proceeding that is inconsistent with a position taken in a previous proceeding. The aim of the doctrine is to protect the integrity of the judicial process." Love v. Tyson Foods, Inc., 677 F.3d 258, 261 (5th Cir. 2012) (internal citations omitted). In determining whether to apply judicial estoppel, Courts look to the following criteria: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." Id. But judicial estoppel "is not governed by 'inflexible prerequisites or an exhaustive formula for determining [its] applicability,' and numerous considerations 'may inform the doctrine's application in specific factual contexts.'" Id. (quoting New Hampshire v. Maine, 532 U.S. 742, 751 (2001)).

The Court concludes that Plaintiff is judicially estopped from asserting a First Amendment claim against the $5 fee statute because it previously disclaimed any intention to do so. In opposing Defendant's motion to dismiss, TEA expressly asserted that it,

> does not even ask the Court to invalidate or otherwise enjoin enforcement of the $5 Fee

> Statute in toto, let alone find that the statute as enacted by the legislature is unconstitutional (indeed, the Texas Supreme Court has already ruled on that issue). Instead, the TEA asks the Court to declare the Comptroller's interpretation of a single word in the statute unconstitutional. In short, a favorable decision would not transmogrify the Texas Business & Commerce Code or interfere with the legislature's choice to regulate sexually oriented businesses in the manner it has deemed fit.

(Dkt. # 10 at 10.)[6]

Plaintiff's current argument that its failure to adequately plead a First Amendment challenge to the statute itself was merely an inadvertent defect is plainly inconsistent with the position it took in responding to Defendant's motion to dismiss. The Court further accepted this representation made by Plaintiff in considering the arguments for and against dismissal and in denying in part Defendant's motion. Finally, Plaintiff has made no argument to this Court as to how such an express representation that is so plainly inconsistent with its current position was inadvertent.

Additionally, under the four Rule 16(b)(4) factors: (1) Plaintiff has failed to adequately explain its failure to timely move for leave to amend; (2) Defendant would suffer prejudice from permitting amendment; and (3) granting a continuance would not cure the prejudice. According to Plaintiff, the underlying facts supporting

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[6] In its Rule 26(f) report, TEA also stated that "[t]his is a case about an administrative amendment retroactively changing the way the Comptroller interprets a $5 Fee Statute purporting to tax Sexually Oriented Businesses." Dkt. # 16 at 2.

their amended claim are the same as those supporting their challenge to the administrative amendment. (Dkt. # 42 at 2.) The requested amendment to their complaint is thus not in response to any newly discovered evidence or any intervening change in the law. Everything needed to state the claim they now wish to add was within their possession at the time their original complaint was filed. And Plaintiff presents no argument as to why it failed to make such a claim at that time. Their argument that such failure was mere inadvertence is also belied by their previously discussed express disavowals of any intention to raise such a challenge.

Moreover, the Report and Recommendation of the Magistrate Judge regarding Defendant's motion to dismiss expressly cognized Plaintiff's original complaint as "not challeng[ing] the statute itself, but rather the Comptroller's limited interpretation of the word 'clothing.'" (Dkt. # 23 at 2.) Plaintiff was thus on notice that the Court did not view Plaintiff's complaint as stating any challenge to the statute itself. Yet Plaintiff did not move to amend at that time, instead waiting three additional months before filing its motion, by which time there was nearly full briefing of motions for summary judgment by both parties.

That Plaintiffs waited until after the cutoff of discovery and after both parties filed and briefed their respective motions for summary judgment also prejudices Defendant in a way a continuance would not cure. Defendant has litigated this case under the belief that Plaintiff was only challenging the administrative amendment related to the definition of the word "clothing," not the statute itself—a belief in large measure inculcated by Plaintiff's previously discussed representations. Allowing Plaintiff's eleventh-hour

amendment would require the reopening of discovery so that Defendant has the chance to develop whatever facts and arguments it finds necessary to respond to Plaintiffs new claim and would require extending the deadline for the filing of dispositive motions to give Defendant an opportunity to present arguments on the new claim. Doing so would only further delay the disposition of this matter.

Finally, Plaintiff's requested amendment would be futile. The Texas Supreme Court has already addressed the First Amendment constitutionality of the $5 fee statute itself in a case involving Plaintiff. See Combs, 347 S.W.3d at 288. Plaintiff's attempted First Amendment challenge to the $5 fee statute is thus barred by res judicata under both issue and claim preclusion. See Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1136 (5th Cir. 1991) ("Preclusion of a previously-litigated issue under the doctrine of offensive collateral estoppel requires that the issue under consideration be identical to the issue previously litigated; that the issue was fully and vigorously litigated in the primary proceeding; that the previous determination of the issue was necessary for the judgment in that proceeding; and that no special circumstances exist that would render preclusion inappropriate or unfair."); Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) ("For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final

judgment on the merits and the same cause of action must be involved in both cases.").[7]

V. Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment only on their First Amendment claim. Plaintiff makes two arguments in support of its position: (1) the amended administrative rule is an impermissible content-based regulation of constitutionally protected expression; and (2) the $5 fee statute itself in an impermissible content-based regulation. (Dkt. # 31 at 8, 13.) As a threshold matter, the Court declines to address Plaintiff's second contention, for the same reasons Plaintiff's motion to amend is denied. Plaintiff did not plead such a claim, nor litigate the case as if it had pled such a claim until moving for summary judgment. See Cutrera v. Bd. Of Sup'rs of La. State Univ., 429 F.3d 108, 113 (5th Cir. 1976) (holding that a "claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court"). Moreover, the Texas Supreme Court has already adjudicated the First Amendment constitutionality of the statute itself in a case involving Plaintiff. Any such claim is therefore barred by principles of res judicata.

The Court then turns to Plaintiff's First Amendment arguments related to the administrative amendment defining "clothing." Plaintiff first argues the amended rule is content-based and thus presumptively unconstitutional. Plaintiff alternatively argues that even if content neutral, the amended rule does not satisfy

[7] Because Plaintiff's motion is denied for the reasons discussed, the Court does not address Defendant's argument that amendment would also be futile under the narrow Rooker–Feldman doctrine.

intermediate scrutiny under United States v. O'Brien, 391 U.S. 367, 377 (1968), because it does not further a substantial government interest. (Dkt. # 31 at 9–12.)

The Court agrees with Plaintiff and rejects Defendant's arguments to the contrary.[8] First, although nude dancing as expressive conduct "falls only within the outer ambit of the First Amendment's protection[,]" City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000), "[c]ourts have long recognized nude or partially nude dancing as a form of communicative conduct under the First Amendment." Edge v. City of Everett, 291 F. Supp. 3d 1201, 1205–06 (W.D. Wash. 2017) (citing cases).

Next, the Court finds that MD II Entertainment v. City of Dallas persuasive and controlling. 935 F. Supp. 1395 (N.D. Tex 1995), aff'd, 85 F.3d 624 (5th Cir. 1996). "For a regulation to be content neutral, the enacting authority must be predominantly motivated by a substantial governmental interest, such as the control or reduction of deleterious secondary effects of the establishment to be regulated." Id. at 1397.

The Comptroller argues the government interest motivating the amended rule was combating "the

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[8] Defendant's res judicata and Rooker-Feldman arguments based on the Texas Supreme Court's decision in Combs are inapposite. Combs dealt with the First Amendment constitutionality of the $5 fee statute itself. The instant case, however, presents a different issue, namely whether the administrative amendment defining clothing violates the First Amendment. The challenged administrative rule did not even exist at the time Combs was decided, so Combs cannot be held to have settled the issue of its First Amendment constitutionality. See Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2305 (2016) ("[D]evelopment of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.").

secondary effects of the expression of nude dancing in the presence of alcohol," the same interest approved by the Texas Supreme Court in Combs. (Dkt. # 37 at 5.) But Plaintiff has presented evidence— that has not been directly disputed by Defendant—that "[t]he Comptroller did not adopt the rules based on whether the statute would or would not mitigate and discourage the secondary effects of erotic dancing in the presence of alcohol." (Dkt. # 31-3, Ex. C at 32; see also id. at 38 ("The Comptroller did not rely upon any adverse effects.").) The Comptroller also did not conduct or review any studies or make any factual findings about the deleterious secondary effects of entertainment from latex-clad dancers in the presence of alcohol. (Id. at 14–15.)

Defendant argues he "was not required to conduct a new study or rely on any new evidence to justify its adoption of a rule because the agency was adopting an interpretive rule that simply defined an undefined statutory term[,]" and therefore he can rely on the deleterious effects recognized in connection with the $5 fee statute itself. (Dkt. # 37 at 5.) But Defendant is wrong on two fronts. First, the amended rule was not a mere interpretive rule. Interpretive rules, unlike legislative rules, are those that "do not have the force and effect of law." Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995). For an administrative regulation to have the force and effect of law it must meet two requirements. First, it must be substantive, meaning it "affects individual rights and obligations." Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)). Second, it must be rooted in a grant of power from the body in whom legislative power is vested, in this case the Texas

legislature, meaning the regulations are "issued…pursuant to statutory authority and…implement [a] statute." Id. at 302–03.

By defining the word "clothing" to not cover the latex worn in latex clubs, the Comptroller expanded the application of the fee to businesses not previously taxed, and then tried to recover fees based on that expanded coverage. Further, failure to comply with such a rule made by the Comptroller incurs a per-day fine of $25 to $500. Tex. Tax Code § 111.002(b). The amended rule is thus substantive because it "affects individual rights and obligations." See Chrysler Corp., 441 U.S. at 302. Further, in adopting the amended rule, the Comptroller expressly stated the rule was: (1) adopted under its authority under Texas Tax Code § 111.002[9] and Texas Business and Commerce Code § 102.056[10]; and (2) designed to implements the $5 fee statute. 42 Tex. Reg. 223. For these reasons, the Court concludes the amended rule is a legislative rule, not an interpretive one. See Chrysler Corp., 441 U.S. at 302.

But more importantly, such a scenario was exactly faced by the court in MD II Entertainment, and the court rejected an identical argument. MD II Entertainment also dealt with an amendment to regulation of sexually oriented businesses that expanded the meaning of nudity, and thus the application and

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[9] This provision of the tax code grants the Comptroller authority to "adopt rules . . . for the enforcement of the provisions of this title and the collection of taxes and other revenues."

[10] This provision of the business and commerce code extends the authority vested in the Comptroller under Texas Tax Code § 111.002 to the "administration, payment, collection, and enforcement" of the $5 fee statute.

enforcement of the regulation. 935 F. Supp. at 1396. And in MD II Entertainment, the expanded definition was also enacted "without further study to link the regulated activity to the production of deleterious, substantial secondary effects." Id. Like Defendant in this case, the City of Dallas had also argued that "the amendments are nothing more than the fine tuning of ordinances which have previously passed constitutional scrutiny." Id. at 1397. Thereby, the city sought "to relate the amendment at issue to the constitutionally sound ordinances existing before the amendments." Id.

But the court in MD II Entertainment determined that "[w]hile a city's interest in curbing demonstrated secondary effects produced by certain kinds of sexually oriented businesses has been held sufficient to support certain . . . restrictions," no evidence had been presented "indicat[ing] that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." Id. at 1398. Further, no evidence indicates the drafters of the amendment relied upon any studies indicating the amendment's necessity or effectiveness or any studies or information linking semi-nude dancing to the production of secondary effects linked to fully nude dancing. Id. at 1397–98. The absence of evidence that the city relied on or considered such justifications proved "fatal" to the amendment. Id. Such is also the case here. Because the Comptroller enacted the amended regulation at issue without reference to or concern for mitigating any identified secondary deleterious effects, the Court is forced to conclude the amendment is directed at the essential expressive nature of latex clubs' business, and thus is a content-based restriction. See id. at 1399.

As a content-based restriction, the amended rule is presumptively unconstitutional. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015). Such content-based laws are constitutional only if they are narrowly tailored to serve compelling state interests. Id. Defendant does not present any argument that the amendment satisfies this standard. (See Dkt. # 37.)

Additionally, even assuming for the sake of argument that the amended rule is content-neutral, the rule does not satisfy intermediate scrutiny under O'Brien. Under the intermediate standard of scrutiny applied to content-neutral laws regulating expressive conduct, for a regulation to be constitutional under the First Amendment it must satisfy four requirements: (1) the regulation must be within the constitutional power of the state; (2) it must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction of alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest. O'Brien, 391 U.S. at 377.

Plaintiff argues that the administrative rule fails the O'Brien test because it does not further a substantial government interest. This prong of the O'Brien analysis encompasses two distinct questions: (1) "whether there is a substantial government interest . . . i.e. whether the threatened harm is real"; and (2) "whether the regulation furthers that interest." Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 558–59 (5th Cir. 2006) (quoting Pap's A.M., 529 U.S. at 300). The Comptroller asserts two government interests in support of the amended rule: (1) reducing the secondary effects of adult businesses; and (2) managing fiscal operations through

assessing, administering, and collecting taxes. (Dkt. # 37 at 6.) But as previously discussed, the Comptroller presented no evidence the amended rule actually addresses any secondary deleterious effects, nor did the Comptroller rely on the mitigation of any such deleterious effects in enacting the amendment.

The amended rule also does not serve the second asserted interest. The amended rule expands—or clarifies—the application of the $5 fee statute. It speaks to the imposition of the fee itself; it is not a rule that merely assists in the administration or collecting of an otherwise valid fee or tax. If this asserted interest is sufficiently substantial to justify the amended rule, then any fee or tax furthers a substantial government interest merely by existing, no matter what it seeks to regulate or why. Such expansive and tautological reasoning must be rejected, particularly so where the issues are of a constitutional dimension. See, e.g., Okpalobi v. Foster, 244 F.3d 405, 421 (5th Cir. 2001) (rejecting "tautological reasoning" that "can easily be applied to every statute" as not "serving any real use" is determining the constitutionality of a state statute); see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (concluding that "[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected" because "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute").

For these reasons, the Court concludes the amended rule is an unconstitutional restriction on expressive conduct under the First Amendment. Plaintiffs motion

for summary judgment on their First Amendment claim is therefore **GRANTED**. (Dkt. # 31.)

VI. Defendant's Motion for Summary Judgment

Defendant moves for summary judgment on all of Plaintiff's claims except for overbreadth. First, Defendant's motion is denied as to Plaintiff's First Amendment claim for the same reasons that Plaintiff's motion was granted on that claim. See Section V, supra. But two additional arguments Defendant raises as to the First Amendment claim require brief further discussion.

First, Defendant argues the amendment defining clothing is merely an interpretive agency rule that by itself taxes nothing. (Dkt. # 34 at 8.) This argument is wrong on two counts. First, the rule is not merely interpretive. The amended definition is meant to have the force of law, as the Comptroller has relied and will rely on it in assessing the $5 fee against businesses that fall within its scope. See Perez, 135 S. Ct. at 1204. Additionally, while the rule itself is just a definition, in connection with the $5 fee statute itself, the amended definition broadens the application of the fee statute to more businesses. By expanding who is subject to the fee, the amended definition imposes the fee on the businesses it now covers. The functional effect of the amendment therefore is to impose a fee on parties that were previously not subject to it. And the Comptroller has sought to enforce the amended rule as such. (See Dkt. # 39-4, Ex. D; Dkt. # 39-6, Ex. E.)[11]

[11] The Comptroller objects to this evidence as irrelevant and lacking foundation. (Dkt. # 44 at 4–6.) The Court overrules these objections. This evidence is relevant at least to the extent it indicates Defendant's attempts to enforce the amended definition of clothing as imposing the fee on an expanded group of businesses, and to do

Second, Defendant argues the amended rule does not restrict any rights to free speech or expression. But by functionally expanding the definition of nudity, the amended rule subjects additional modes of erotic dance to the $5 fee statute. While not per se expressive, when nudity or semi-nudity is "combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and the dancer's acts in going from clothed to nude, as in a strip tease, are integrated into the dance and its expressive function." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991). It follows therefore that what one wears while engaged in erotic performance is similarly communicative, just like all clothing is potentially communicative. See Edge, 291 F. Supp. 3d at 1205–06 (ruling in a case involving G-string and pasty-clad baristas that such attire is communicative because "it is not the Court's responsibility to comment on taste or decorum, but rather to determine whether Plaintiff's choice of clothing is communicative[,]" and "[c]ourts have long recognized nude or partially nude dancing as a form of communicative conduct under the First Amendment.") (citing cases); see also Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 (5th Cir. 2001) ("The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be understood by those intended

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so retroactively. Fed. R. Evid. 401. Defendant also did not produce any argument has to why this evidence cannot be authenticated at trial or the pertinent facts therein otherwise presented in an admissible form, for instance through witness testimony. See Fed. R. Evid. 901, Fed. R. Civ. P. 56(c)(2).

to view it."). The amended rule thus burdens expressive conduct.

The Court now turns to Defendant's remaining arguments, relating to Plaintiff's remaining claims.

A. Equal Protection

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against international and arbitrary discrimination, whether occasioned by express terms if a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Defendant argues he is entitled to summary judgment on Plaintiff's equal protection claim because the amended rule applies equally to all, and "there is no evidence that the definition of 'clothing' [contained in the amended rule] applies differently to those who appear to be similarly situated." (Dkt. # 34 at 12.)

Plaintiff has asserted, however, that the $5 fee statute, as amended or interpreted by the newly enacted definition of clothing, is being enforced in an arbitrary and discriminatory manner. (Dkt. # 39-2, Ex. B[12] at 1–2.)

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[12] Defendant objects to this declaration as lacking personal knowledge, irrelevant, hearsay, and improper opinion testimony. (Dkt. # 44 at 2–4.) These objections are overruled for the reasons stated in Plaintiff's response to Defendant's objections. (Dkt. # 46 at 3–4.) The statements in the declaration do not lack personal knowledge because the declarant is an officer of some of the clubs subject to the $5 fee statute and is Plaintiff's designated corporate representative. See Fed. R. Evid. 602. The statements are relevant because they concern the prior history of the Comptroller's enforcement of the $5 fee statute and the latex clubs' understanding of whether or not they were considered subject to the statute prior to 2015. See Fed. R. Evid. 401. Whether the statements as made by

Plaintiff provides witness testimony that the $5 fee statute is not enforced against businesses like music concerts, burlesque shows, and body building competitions, that all serve alcohol and that all would be classified as nude entertainment under the definitions contained in the statute. (Id.) Plaintiff also points out that Defendant refused to answer Plaintiff's requests for admission asking whether the Comptroller ever imposed the $5 fee on such businesses. (Dkt. # 39 at 18.) Whether the Comptroller, without any demonstrable justification, fails to enforce the $5 fee statute against businesses other than nude and latex clubs that similarly fall within the amended rule's definition of nudity is a genuine issue of material fact related to Plaintiff's equal protection claim. See Village of Willowbrook, 528 U.S. at 564 (recognizing a valid equal protection claim exists "where

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the declarant are hearsay is not relevant in the summary judgment context, because at this stage "materials cited to support or dispute a fact need only be capable of being 'presented in a form that would be admissible in evidence.'" LSR Consulting, LLC v. Wells Fargo Bank, N.A., 835 F.3d 530, 534 (5th Cir. 2016) (quoting Fed. R. Civ. P. 56(c)(2)). And Plaintiff asserts the substance of the relevant statements can be presented at trial in admissible form either through the declarant's testimony, the testimony of TEA members, or the testimony of Comptroller personnel. (Dkt. # 46 at 4.) The statements are also not improper opinion because they are rationally based on the declarant's perception, are helpful to determining a fact at issue, and are not based on specialized knowledge within the scope of Federal Rule of Evidence 702. Fed. R. Evid. 701. Moreover, Defendant's objections here are more properly suited to the trial context where the disputed evidence in the precise form sought to be admitted can by analyzed in its full context. For evidence to be proper at the summary judgment stage it does not need to be admissible in the exact form presented, but merely capable of being "presented in a form that would be admissible." Fed R. Civ. P. 56(c)(2).

the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"). Summary judgment in favor of Defendant is thus inappropriate on this claim.[13]

Defendant is therefore not entitled to summary judgment as to Plaintiff's Equal Protection claim.

B. Due Process

Plaintiff asserts the amended rule is unconstitutionally retroactive because the Comptroller's efforts to exact fees that allegedly accrued prior to the enactment of the amendment violate its right to due process. (Dkt. # 1 at 5.) Defendant argues that the law is not retroactive, or alternatively, even if retroactive, is not unconstitutional because it does not violate the right to due process.

However, Plaintiff has presented evidence that the Comptroller seeks and has sought to apply the amended definition retroactively. First, in propounding the amendment, the Comptroller stated that he intended to enforce the amended rule in all cases currently "pending." 42 Tex. Reg. 223. More importantly, Plaintiff has pointed to at least two enforcement actions undertaken by the Comptroller that sought to charge fees under the amended rule to conduct antedating the enactment of the amended rule. (See Dkt. # 39-4, Ex. D; Dkt. # 39-6, Ex. E.)

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[13] The Court does not reach Defendant's Tax Injunction Act related arguments, because, as discussed previously, it has already been determined in this action that the statute imposes a regulatory fee and not a tax. (Dkt. # 23 at 4–7; Dkt. # 26 at 2.)

Defendant argues that even if retroactive, the amended rule does not violate due process, because it is merely an administrative definition, not a tax itself. But the amended rule expands the application of the $5 fee to conduct that was previously not subject to the fee. Though in a vacuum the amended rule is merely a defintion, in this way the amended rule functionally imposes the fee on all business subject to the new definition.

For retroactive application of such an exaction to be unconstitutional its "retroactive application" must be "so harsh and oppressive as to transgress . . . constitutional limitation[s]." United States v. Hemme, 476 U.S. 558, 568 (1986). One of the relevant circumstances for courts to consider is "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." Id. at 569. To the extent the Comptroller intends to or does enforce the amended rule to business conduct that occurred before he noticed his intention to modify the definition of nudity under the $5 fee statute, the Court concludes, for the following reasons, that such enforcement gave, without notice, a different and more oppressive legal effect to conduct previously undertaken and is thus harsh and oppressive.

The record indicates that prior to Defendant's tenure as Comptroller, the comptroller's office and related regulatory agencies disavowed that latex clubs fell within the ambit of the $5 fee statute, represented as such to the clubs themselves, and affirmatively avoided imposing the fee on such clubs. (Dkt. # 39-5, Ex. D-1 at

8[14]; Dkt. # 31-5, Ex. E at 18[15]; Dkt. # 31-8, Ex. G[16].) Now, the Comptroller seeks to retroactively assess fees in the hundreds of thousands of dollars against businesses that were previously told that the $5 fee statute did not apply to their conduct under the prevailing definition and understanding of the term nudity, for the time period before the amended rule was even propounded for public notice and comment, let alone enacted. (See Dkt. # 39-4, Ex. D; Dkt. # 39-6, Ex. E.) Such retroactive assessment gives a more oppressive legal effect—assessment of the $5 fee—to conduct undertaken prior to the enactment of the amended rule. And it does so, not just without notice,

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[14] Defendant's evidentiary objection to this deposition is overruled. The witness's testimony is relevant to the Comptroller's practices and procedures prior to the adoption of the amended rule, informing Plaintiff's retroactivity and equal protection claims. The substance of the evidence also would be admissible at least through live testimony, if not also through introduction of the transcript of the witness's deposition.

[15] Defendant's evidentiary objection to this deposition is also overruled. The substance of the evidence would be admissible, at the very least, through live witness testimony.

[16] Defendant's evidentiary objection to this letter is also overruled. This exhibit is relevant to whether the comptroller considered latex clubs subject to the $5 fee and assessed the fee against them prior to adoption of the amended rule. Moreover, this exhibit bears sufficient marks of genuineness, including email addresses, signature blocks and letterhead. Fed. R. Evid. 901(4); see also Marentes v. State Farm Mut. Auto. Ins. Co., 224 F. Supp. 3d 891, 927 (N.D. Cal. 2016). "[T]he objected-to emails and records [could] be presented in a form that is admissible at trial because they will fall either into the business records hearsay exception or will be considered admissions of a party opponent and thus not hearsay." Musket Corp. v. Suncor Energy (U.S.A.) Mktg., Inc., CV H-15-100, 20-16 WL 6704163, at *4 (S.D. Tex. Nov. 15, 2016).

but in contravention of notice previously given that the latex clubs were not subject to the fee.

There is undisputed evidence in the record that the latex clubs presented dancers wearing latex specifically to avoid enforcement of the $5 fee against them and were reassured the use of latex coverings allowed them to comply with the statute and avoid the fee. (Dkt. # 39-2, Ex. B at 1; Dkt. # 31-8, Ex. G.) The Comptroller's attempt to enforce the fee against these business for conduct undertaken before they were put on notice that the definition of nudity would be changed or clarified to cover their conduct is harsh and oppressive, and thus violates due process. See Hemme, 476 U.S. at 569. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). Defendant is therefore not entitled to summary judgment on to Plaintiff's Due Process claim.

C. Vagueness

"A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." Women's Med. Ctr. of Nw. Hous. v. Bell, 248 F.3d 411, 421 (5th Cir. 2001.) As discussed in relation to Plaintiff's equal protection claim, Plaintiff has raised a genuine issue of material fact as to the amended rule's propensity to allow arbitrary and discriminatory enforcement. However, "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974). The

amended rule plainly spells out that latex is not clothing, and that latex clubs therefore fall within the ambit of the fee statute as providing nude entertainment. Because the conduct TEA sues in connection with, latex covered dancers, is clearly covered by the amended rule, TEA cannot successfully challenge it as unconstitutionally vague. Defendant is therefore entitled to summary judgment on this claim.[17]

D. § 1983 Claims

To prevail under § 1983, Plaintiff must prove: (1) it has been deprived of a right secured by the Constitution or laws of the United States; and (2) the Comptroller acted under color of state law. Doe ex rel Magee v. Covington Cty. Sch. Dist., 675 F.3d 849, 854 (5th Cir. 2012). Defendant argues he is entitled to summary judgment on Plaintiff's § 1983 claim because there is no evidence TEA or its members have been deprived of any constitutional right simply because a state agency adopted an administrative rule. However, in connection with Plaintiff's motion for summary judgment, the Court has determined that the amended rule violates Plaintiff's First Amendment rights. Further, that violation occurred through the Comptroller acting under the color of state law. The Comptroller propounded the amended

[17] Because it does not appear Defendant moved for summary judgment on Plaintiff's overbreadth claim, the Court will not reach the arguments on that issue presented in Plaintiff's response and Defendant's reply. See D'Onofio v. Vacation Publ'ns, Inc., 888 F.3d 197, 210 (5th Cir. 2018) (holding that district courts may not grant summary judgment on issues not raised in a motion for summary judgment without giving the parties notice that it intends to consider summary judgment on that issue and gives them a reasonable time to respond) (citing Fed. R. Civ. P. 56(f)).

administrative rule relating to the definition of clothing pursuant to its statutory authority to "adopt rules … for the enforcement of the provisions of this title and the collection of taxes and other revenue." 42 Tex. Reg. 423; Tex. Tax Code § 111.002(a); see also Tex. Bus. & Com. Code § 102.056 (extending the Comptroller's power under the tax code to "the administration, payment, collection, and enforcement" of the $5 fee). Because the two requirements of § 1983 are met in this case, Defendant is not entitled to summary judgment on Plaintiff's § 1983 claim.

Defendant's motion for summary judgment is thus **GRANTED IN PART AND DENIED IN PART**. (Dkt. # 34.)

VII. Sua Sponte Grant of Summary Judgment to Plaintiff on its Due Process and § 1983 Claims

Although Plaintiff did not itself move for summary judgment on these claims, "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); see also Fed. R. Civ. P. 56(f). Sua sponte summary judgment is proper if there is good reason for the [non-moving party] to suspect that the Court is about to rule on the issue. Kibort v. Hampton, 538 F.2d 90, 91 (5th Cir. 1976). The Fifth Circuit has further noted that when "one party moves for summary judgment the district court, in an appropriate case, may grant summary judgment against the movant, even though the opposite party has not actually filed a motion for summary judgment." Landry v. G.B.A., 762 F.2d 462, 464 (5th Cir. 1985). This result is so because when a party

moves for summary judgment on an issue, it is thus on notice that the Court will be considering summary judgment on that issue and had the opportunity to present its best evidence and arguments in its favor at that time. See Barkley, Inc. v. Gabriel Brothers, Inc., 829 F.3d 1030, 1041 (8th Cir. 2016).

For the reasons discussed in denying Defendant's motion on Plaintiff's Due Process claim, see Section VI.B, supra, Plaintiff is entitled to partial summary judgment on that claim. To the extent Defendant sought or seeks to enforce the $5 fee statute against latex clubs for conduct undertaken prior to Defendant providing notice to such businesses, such an exaction is harsh and oppressive because it "gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute" and thus is unconstitutionally retroactive under the Due Process Clause. See Hemme, 476 U.S. at 568; see also Landgraf, 511 U.S. at 265. However, when exactly the latex clubs were put on notice that the $5 fee statute would be interpreted by the Comptroller to cover their conduct—and thus from what point Due Process would permit the Comptroller to enforce the fee against the latex clubs—is a genuine issue of material fact. This issue is thus inappropriate for disposition at summary judgment and must be determined by the factfinder at trial.

Additionally, for the reasons discussed in denying Defendant's motion on Plaintiff's § 1983 claim, see Section VI.D, supra, Plaintiff is entitled to summary judgment on that claim as well. As previously discussed in this order, the amended rule violates Plaintiff's Free Speech and Due Process rights. See Sections V & VI.B, supra. The amended rule was also propounded under the color of state law. See 42 Tex. Reg. 223. The two

requirements of a claim under § 1983 are thus satisfied. See 42 U.S.C. § 1983.

Summary judgment is therefore **GRANTED** as to Plaintiff's Due Process claim to the extent that assessing the fee on the latex clubs for conduct undertaken prior to them receiving notice is unconstitutionally retroactive and **GRANTED** as to Plaintiff's § 1983 claim.

## CONCLUSION

For the reasons stated, the Court **DENIES** Plaintiff's motion to Amend. (Dkt. # 31.) The Court **GRANTS** Plaintiff's Motion for Summary Judgment. (Dkt. # 31.) The amended Rule 3.722 as it relates to defining clothing, § 3.722(a)(1), is therefore **DECLARED UNCONSTITUTIONAL** under the First Amendment. Defendant's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. (Dkt. # 34.) Summary judgment is **GRANTED** as to Plaintiff's vagueness claim. In all other respects, Defendant's motion is **DENIED**. Additionally, Plaintiff is **GRANTED** summary judgment as to its § 1983 claim and its Due Process claim on the partial issue that retroactive application of the $5 fee statute to conduct undertaken by the latex clubs prior to them receiving notice that it would be imposed on them in unconstitutional. Plaintiff's Equal Protection and Overbreadth claims, and the issue of when the latex clubs received notice that the $5 fee statute was being interpreted to apply to them survive summary judgment and can proceed to trial.

**IT IS SO ORDERED**.

**DATED**: San Antonio, Texas, February 27, 2019.

/s/ *David Alan Ezra*
David Alan Ezra
Senior United States District Judge

## APPENDIX E

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

**FILED**
18 MAR 14 AM 8:25
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY /s/ *Deputy Clerk*
DEPUTY CLERK

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| TEXAS ENTERTAINMENT ASSOCIATION, INC., PLAINTIFF, | § | |
| V. | § | CAUSE NO. 1:17-CV-594-LY |
| GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, DEFENDANT. | § | |

**ORDER ON REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Before the court in the above styled and numbered cause are Hegar's Motion to Dismiss, filed July 14, 2017 (Dkt. No. 5), Texas Entertaimnent Association, Inc.'s Response, filed August 4, 2017 (Dkt. No. 10), Hegar's Reply, filed August 18, 2017 (Dkt. No. 14), Hegar's Supplemental Brief, filed October 23, 2017 (Dkt. No. 18),

and Texas Entertainment Association, Inc.'s Supplemental Brief, filed October 30, 2017 (Dkt. No. 19). The motion, response, reply, and briefs were referred to the United States magistrate judge for findings and recommendations. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72; Loc. R. W.D. Tex. Appx. C, R. 1(c). The magistrate judge rendered a Report and Recommendation on February 5, 2018 (Dkt. No. 23), recommending that the court dismiss without prejudice Texas Entertainment Association, Inc.'s claims for damages, and deny the remaining requests for relief in Hegar' s motion to dismiss.

Under Title 28 of the United States Code, Section 636(b) and Rule 72(b) of the Federal Rules of Civil Procedure, a party may serve and file specific, written objections to the proposed findings and recommendations of the magistrate judge within 14 days after being served with a copy of the report and recommendation, and thereby secure a *de novo* review by the district court. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). The record reflects that the parties received the report and recommendation by February 5, 2018. Hegar timely filed objections on February 20, 2018 (Dkt. No. 24), and Texas Entertainment Association, Inc. timely filed a response on March 6, 2018 (Dkt. No. 25).

In light of Hegar's objections, the court has undertaken a *de novo* review of the motion, briefs,

applicable law, and entire record in the cause. The court is of the opinion that the objections do not raise any issues that were not adequately addressed in the report and recommendation. Therefore, finding no error, the court will accept and adopt the report and recommendation as filed for substantially the reasons stated therein.

**IT IS THEREFORE ORDERED** that the objections contained in Hegar's Objections to the Magistrate Judge's Report and Recommendation filed February 20, 2018 (Dkt. No. 24) are **OVERRULED.**

**IT IS FURTHER ORDERED** that the Report and Recommendation of the United States Magistrate Judge filed February 5, 2018 (Dkt. No. 23) is **ACCEPTED AND ADOPTED** by the court.

**IT IS FURTHER ORDERED** that Hegar's Motion to Dismiss is **DENIED** except to the extent that Texas Entertainment Association, Inc.'s claims for damages are dismissed.

**IT IS FURTHER ORDERED** that Texas Entertainment Association, Inc.'s claims for damages are **DISMISSED** without prejudice.

SIGNED this /s/ 14th day of March, 2018.

/s/ *Lee Yeakel*
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

## APPENDIX F

**IN THE UNITED STATE DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| **TEXAS ENTERTAINMENT ASSOCIATION, INC** | § | |
| **V.** | § | **NO. 1:17-CV-594-LY** |
| **GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS** | § | |

**REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

TO: THE HONARABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before this Court are Defendant's Motion to Dismiss (Dkt. No. 5), Plaintiff's Response (Dkt. No. 10), Defendant's Reply (Dkt. No. 14); Defendant's Supplemental Brief (Dkt. No. 18) and Plaintiff's Response (Dkt. No. 19). The District Court referred the above motion to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. §636(b)(1)(A), FED. R. CIV. P. 72, and Rule 1(c) of Appendix C of the Local Rules.

## I. GENERAL BACKGROUND

Plaintiff Texas Entertainment Association, Inc. (TEA) brings this suit against Glenn Hegar, in his official capacity as Comptroller of Public Accounts of the State of Texas (Comptroller), asserting that a "fee" assessed on sexually oriented businesses violates the First Amendment. The statute at issue, TEX. BUS. & COM. CODE § 102.052, levies a $5 "fee"[1] for each customer admitted into a sexually-oriented business. This is not the first case challenging the fee. In fact, TEA and a number of sexually-oriented businesses brought suit shortly after the law went into effect challenging the statute on First Amendment grounds, among others. In that case, the Texas Supreme Court found that the fee did not violate the Constitution. *See Combs v. Tex. Entmt. Ass'n*, 347 S.W.3d 277, 288 (Tex. 2011). This case, however, does not challenge the statute itself, but rather the Comptroller's limited interpretation of the word "clothing." This is because whether a business is a sexually-oriented business depends on the definition of "nude" as defined in § 102.051. This section defines nude as "entirely unclothed" or "clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks." The Texas Regulatory Code provides additional guidance on what materials constitute "clothing" for the purposes of the statute. In January 2017, the definition of clothing was

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[1] As the statute refers to this as a "fee," in this Report and Recommendation the Court will use that term to refer to the assessment.

limited to exclude "[p]aint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state." 42 TEX. REG. 219. The Comptroller determined that this subjected more businesses to the fee and instituted proceedings to collect the fees both moving forward and reaching back to 2008 when the statute was first enacted.

TEA challenges this interpretation, arguing that it violates the businesses' right to freedom of expression, due process, and equal protection, and that the interpretation is unconstitutionally vague. TEA also argues that the Comptroller's retroactive application of the interpretation violates due process. The Comptroller filed the instant motion to dismiss arguing: (1) TEA's claims are barred by the Tax Injunction Act; (2) this Court should dismiss on comity grounds; (3) Hegar is immune from suit under the 11th Amendment; and (4) TEA lacks standing to sue.

## II. LEGAL STANDARD

### A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Federal district courts are courts of limited jurisdiction, and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Assn. of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to

dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

**B. Rule 12(b)(6)**

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also, Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). A plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court recently expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating a motion to dismiss, the Court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the

complaint as true. *See In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2009).

## III. ANALYSIS

### A. Tax Injunction Act

The Tax Injunction Act (TIA) precludes a federal district court from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The TIA is a "broad jurisdictional impediment to federal court interference with the administration of state tax systems." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (1998) (quoting *United Gas Pipe Line Co. v. Whitman*, 595 F.3d 323, 326 (5th Cir. 1979)). For the statute to apply, two conditions must be met: (1) the law at issue must be a tax, as opposed to a regulatory fee, and (2) the state court must be "equipped to furnish the plaintiffs with a plain, speedy, and efficient remedy." *Id.*

The threshold question requires this Court to determine whether TEX. BUS. & COM. CODE § 102.052 levies a "tax" or a "fee." Three main distinctions assist courts in determining whether the statute imposes a tax or fee. A fee "is imposed (1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes." *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000).[2] This question is determined

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[2] *See also Home Builders Ass'n*, 143 F.3d at 1011 ("Workable distinctions emerge from the relevant case law, however: the classic tax sustains the essential flow of revenue to the government, while

under federal, not state law, and "[t]he label affixed to [a statute] by its drafters has no bearing on the resolution of the question." *Home Builders Ass'n*, 143 F.3d at 1010 n.10.

As noted in *Home Builders*, "[d]istinguishing a tax from a fee often is a difficult task" as "the line between a 'tax' and a 'fee' can be a blurry one." *Id.* at 1011 (internal quotations omitted). Rather than being mutually exclusive, taxes and fees exist on "a spectrum with the paradigmatic fee at one end and the paradigmatic tax at the other;" weighing the three factors determines where on the spectrum the challenged statute lies. *Neinast*, 217 F.3d at 278 (quoting *San Juan Cellular Telephone Co. v. Pub. Serv. Com'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992)). Here, the analysis for the first two factors is fairly simple. The statute was imposed by the legislature, moving the assessment on the spectrum closer to a classic tax. On the other hand, the assessment is imposed solely on sexually-oriented businesses that allow alcohol consumption, as opposed to the public at large. Though this cost can be—and almost certainly is—passed on to the customers, the imposition of the statute directly on only a subset of the population pushes the assessment toward the other end of the spectrum, that of a regulatory fee. The first two factors therefore balance out, leaving the third to tip the scales in either direction.

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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.") (footnotes omitted).

For this question, it "is not where the money is deposited, but the purpose of the assessment" that matters. *Id.* A fee can "serve regulatory purposes directly by . . . deliberately discouraging particular conduct by making it more expensive" or indirectly by "raising money placed in a special fund to help defray the agency's regulation-related expenses." *San Juan Cellular*, 967 F.2d at 985. A tax, on the other hand, "raises money, contributed to a general fund, and spent for the benefit of the entire community." *Id.* Courts are "far more concerned with the purposes underlying the [statute] than with the actual expenditure of the funds collected under it," and to determine this "look principally to the language of the [statute] and the circumstances surrounding its passage." *Home Builders Ass'n*, 143 F.3d at 1011–12.

The purpose for which this statute was enacted is clearly regulatory in nature. When the bill was proposed, the heading noted that it was an act "relating to the imposition and use of a fee on certain sexually oriented businesses and certain programs for the prevention of sexual assault." H.B. 1751, 80th Leg., 2007 Reg. Sess. (Tex. 2007). The Texas Supreme Court noted—when addressing whether the statute violated the First Amendment—that the statute was drafted to limit "the secondary effects of nude dancing when alcohol is being consumed." *Combs v. Tex. Entmt. Ass'n*, *Inc.*, 347 S.W.3d277, 287–88 (Tex. 2011). It further pointed out that a "business can avoid the fee altogether simply by not allowing alcohol to be consumed." *Id.* at 288. Thus, the statute evidences an intent to regulate behavior, with the revenues raised as a mere side effect. *See Gen-On Mid- Atlantic, LLC v. Montgomery Cty, Md.*, 650 F.3d 1021, 1026 (4th Cir. 2011) (finding that a carbon charge

was a regulatory fee when it also sought to raise revenue for greenhouse gas reduction programs).

On the other hand, the funds raised are to be distributed to a sexual assault fund, rather than directly to the regulatory body. *See* TEX. BUS. & COM. CODE § 102.054. Thus, the revenue raised does not go to defray the costs of regulation. TEA argues that because the revenues go to a single fund, as opposed to the general revenue fund, this indicates that the statute imposes a fee. The location of the funds is relevant to this inquiry, but the fact that the funds are not deposited into the state's general revenue fund, but instead are used for a more specific purpose, is not dispositive. *See Tramel v. Schrader*, 505 F.2d 1310, 1315–16 (5th Cir. 1975) (finding that the revenues generated were not required to be distributed for "general governmental purposes," but could rather be distributed for specific purposes); *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 731 (7th Cir. 2011) ("That the revenue is earmarked for a particular purpose is hardly unusual . . . ."). However, the fact that the revenues are limited to one fund that is related to the very behavior that the statute seeks to inhibit tips the scales in favor of finding the statute imposes a fee. Thus, the legislature's stated purpose in enacting the statute, taken together with the limited—and related—use of the funds, points to the statute imposing a regulatory fee.

Thus, considering the three factors relevant to this analysis, the fee at issue here, while certainly not all the way at the paradigmatic fee end of the spectrum, is closer to that end of the spectrum than the paradigmatic tax side of the spectrum. Accordingly, the Tax Injunction

Act does not divest the Court from jurisdiction to address TEA's claims.[3]

**B. Comity**

The Comptroller alternatively argues that, even if the TIA does not preclude jurisdiction over TEA's claims, the comity doctrine requires dismissal. That doctrine "restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010) (citing *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100 (1981)). In *Levin* the plaintiff was objecting to the existence of tax benefits that its competitor received under Ohio law as discriminatory. The district court had concluded that the TIA did not bar the suit, because the suit did not seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax," but instead challenged the *failure* to tax. It nevertheless concluded that it should refrain from deciding the case under the comity doctrine

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[3] In the Comptroller's Motion to Dismiss, it also argues that the Texas court of appeals had previously decided that the statute imposed a tax. As discussed in this Court's Order on October 11, 2017, this argument has no merit. First, this issue is decided under federal, not state law. *Home Builders Ass'n*, 143 F.3d at 1010 n.10. Moreover, the Texas courts noted that they were in fact expressly not deciding the issue. *Tex. Entmt. Ass'n v. Combs*, 431 S.W.3d 790, 794 n.1 (Tex. App.—Austin 2014, pet. denied) ("Given that the primary dispute in this case concerns whether the relevant statute is an occupation tax, we refer to the statute as a tax for the sake of convenience."); *see also Combs v. Tex. Entmt. Ass'n, Inc.*, 347 S.W.3d 277, 281 (Tex. 2011) (assuming without deciding that the statute imposed a tax rather than a fee because the legal challenge did not depend on that question in that case). Thus, this argument fails.

because the relief requested "would require Ohio to collect taxes which its legislature has not seen fit to impose." *Id.* at 420. In affirming that decision, *Levin* held that "[c]omity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Id.* at 421. Because there was "an adequate state-court forum . . . available to hear and decide [the plaintiff's] constitutional claims," comity dictated that the be dismissed. *Id.*

Relying on *Levin*, the Comptroller contends that TEA has an adequate state forum to pursue its claims, and therefore the comity doctrine should apply. In particular, he points to the number of cases currently in state court challenging this regulation—eight at last count (Dkt. No. 18 at 9 n.2)—as evidence that this case should proceed in state court. This argument misunderstands the application of the comity doctrine. As with the TIA itself, the comity doctrine has no application where the charge at issue is a fee, not a tax. Like the TIA, the purpose of the comity doctrine is to avoid "disrupting state *tax* administration." *Id.* at 417. If the litigation concerns not a tax, but instead a fee, then the suit by definition cannot disrupt a state's administration of its tax system. *Wenz v. Rossford Ohio Transp. Improvement Dist.*, 392 F. Supp. 2d 93, 935 (N.D. Ohio 2005) ("The TIA and the principle of comity apply only if the challenged assessment is a 'tax,' as opposed to a 'regulatory fee' . . . .").[4] Moreover, reading

[4] *See also Z & R Cab, LLC v. Philadelphia Parking Authority*, 616 F. App'x 527, 537–38 (3d Cir. 2015) (Ambro, J., concurring) ("Every court of appeals to address the question has applied comity only in state *tax* cases where an adequate state remedy exists. Taxes aside,

the comity doctrine to encompass regulatory fees would essentially negate the regulatory fee versus tax distinction at the heart of TIA jurisprudence. *See Z & R Cab*, 616 F. App'x at 538 ("[E]xpanding comity to our case would, it seems to me, mean that the doctrine would bar any suit against a state practice that is subject to rational basis review, a radical curtailment of the scope of § 1983 unsupported by cases from any level of the federal judiciary.").

### C. Eleventh Amendment Immunity

Next, the Comptroller contends that he should be immune from suit under the Eleventh Amendment. TEA brought suit against the Comptroller in his official capacity, arguing that his interpretation of "clothing" and retrospective application of the interpretation violate the Constitution. The Eleventh Amendment precludes suits in which a state agency is named as a defendant. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). This includes suits against state officials when "the state is a real, substantial party in interest." *Id.* at 101–02. There is a narrow exception to Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123 (1908), allowing a plaintiff to bring a suit for

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federal courts must exercise their virtually unflagging obligation . . . to exercise the jurisdiction given them . . . when presented with constitutional challenges to regulatory fees.") (internal quotations omitted); *Attorneys' Liability Assurance Society, Inc. v. Fitzgerald*, 174 F. Supp. 2d 619, 627–29 (W.D. Mich. 2001) (finding that "federalism and comity principles are only implicated when a 'tax' is at issue, an dare not present with a 'fee'"); *Etzler v. City of Cincinnati, Ohio*, 2008 WL 11352572, at *2 (S.D. Ohio Dec. 17, 2008) ("Accordingly the VBML fee is not a tax and the Tax Injunction Act and the principles of comity are not applicable.").

a violation of the Constitution or federal law when it is "brought against individual persons in their official capacities as agents of the state, and the relief sought [is] declaratory or injunctive in nature and prospective in effect." *Aguilar v. Tex. Dep't of Crim. Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998). To decide if the *Ex Parte Young* exception applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

Here, TEA sues the Comptroller solely in his official capacity, and seeks both damages and equitable relief under § 1983. Dkt. No. 1 at 1. In each of the claims, TEA makes clear that it is challenging the so-called "Amended Rule" and refers throughout the Complaint to the Comptroller by his title. A suit against an officer in his official capacity "is, in all respects other than name, to be treated as a suit against the entity," and the real party in interest is the state. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Claims for damages against a state officer in their official capacity are barred under the Eleventh Amendment. *Id.* at 169. Because TEA has only sued the Comptroller in his official capacity, its claim for damages is barred by the Eleventh Amendment.[5]

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[5] The Comptroller also moved to dismiss TEA's claims on the basis of qualified immunity, despite the fact that the doctrine only applies to suits against officers in their *individual* capacity. Dkt. No. 5 at 11. The TEA compounds the confusion by responding to the arguments without addressing the fact that it has not sued Hegar (or any other state officer) individually. Dkt. No. 10 at 14-19. Because there are no individual capacity claims brought here, the qualified immunity doctrine is inapplicable.

The claim for declaratory and injunctive relief, however, is viable under *Ex Parte Young*. *Ex Parte Young* identifies an exception to the general immunity for suits brought for prospective, as opposed to retroactive, relief. TEA requests declaratory and injunctive relief in the form of declarations that the Comptroller's interpretation of clothing violates the First Amendment, Due Process, and Equal Protection clauses, that it is unconstitutionally vague, and that the Comptroller's retroactive application of the interpretation violates the Due Process clause. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) ("The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry.'"). These claims clearly request relief that is prospective in nature, and therefore fit squarely into the *Ex Parte Young* exception.

The Comptroller also argues that the reasoning in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) applies to this case to preclude application of *Ex Parte Young*. Dkt. No. 14 at 4–5. However, *Coeur d'Alene* is inapplicable to the circumstances in this case. In *Couer d'Alene*, the Supreme Court found that, based on the facts presented by that case, *Ex Parte Young* did not apply because the suit "implicate[d] special sovereignty interests." 521 U.S. at 281. There, the Couer d'Alene Tribe sought an injunction for an allegedly "ongoing violation of its property rights in contravention of federal law." *Id*. The court viewed the "the Tribe's suit [as] the functional equivalent of a quiet title action." *Id*. The state's interest in its sovereign land, the court found, precluded application of *Ex Parte Young* and required resolution in state court. *Id*. Simply because a party is

challenging an action taken under a state's police powers does not mean *Couer d'Alene* applies; rather, the suit must be "the functional equivalent of a quiet title action" against the state. *Id.* at 495. Here, claims that a state tax statute violates the Constitution are clearly not the equivalent of a quiet title action. Thus, the Comptroller is not immune from TEA's claims for declaratory and injunctive relief.

**D. Standing**

Finally, the Comptroller argues that TEA lacks standing to bring suit on behalf of its business members. To establish standing, a plaintiff must show (1) that it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent;" (2) a causal connection between the injury and the complained-of conduct; and (3) that it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations omitted). The Comptroller contends that TEA cannot show that it is subject to the fee that is being challenged in the lawsuit, and therefore cannot show an injury in fact.

TEA argues that it has associational standing, as an organization representing the interests of its members. An association has standing to sue to redress its member's injuries when:

> it can show that (1) one or more of the organization's members would have standing in his or her own right; (2) the interests which the organization seeks to protect in the lawsuit are germane to the purposes of the organization; and (3) the nature of the case does not require the participation of the individual affected

> members as plaintiffs to resolve the claims or prayers for relief at issue.

*Friends of the Earth, Inc. v. Chevron Chemical Co.*, 129 F.3d 826, 827–28 (5th Cir. 1997) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342–43 (1977)). Here, TEA has sufficiently pled associational standing. First, it has pled that several of its members are subject to the fee, which would evidence the member's injury in fact. Dkt. No. 1 at 3 (pleading that TEA "is an association of businesses, including those featuring nude or topless entertainment . . . and businesses featuring only entertainers who are fully covered"). It has also pled that the TEA's goal is to protect the financial interests of its members, which is germane to the purposes of the organization. *Id.* at 11. Finally, the nature of the case does not require the affected members to participate as plaintiffs. As noted above, TEA's claims for damages should be dismissed pursuant to the Eleventh Amendment; the remaining claims for declaratory and injunctive relief do not require the individual members to sue in their own rights, but rather they can be represented as a whole. *Cf. Hunt*, 432 U.S. 343 ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.") (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). Thus, TEA has sufficiently pled Article III standing.

## IV. RECOMMENDATIONS

In accordance with the foregoing discussion, the Court **RECOMMENDS** that the District Court **GRANT IN PART and DENY IN PART** Defendant's Motion to

Dismiss (Dkt. No. 5). In particular, the Court recommends that the District Court dismiss TEA's claims for damages, and deny all further relief requested.

## VII. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-153 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-1429 (5th Cir. 1996) (en banc).

To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 5th day of February, 2018.

/s/ *Andrew W. Austin*
ANDREW W. AUSTIN
UNITED STATES
MAGISTRATE JUDGE

## APPENDIX G

**Relevant Constitutional Provisions:**

**U.S. Const. amend I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. amend XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement:**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial

officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## APPENDIX H

**Relevant Statutory Provisions**

**Anti-Injunction Act, 26 U.S.C. § 7421. Prohibition of suits to restrain assessment or collection:**

(a) Tax.--Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.--No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code, in respect of any such tax.

**Tax Injunction Act, 28 U.S.C. § 1341. Taxes by States:**

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

**Tex. Bus. & Com. Code § 102.051. Definitions:**

In this subchapter:

(1) "Nude" means:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or

visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(2) "Sexually oriented business" means a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

**Tex. Bus. & Com. Code § 102.052. Fee Based on Admissions; Records:**

(a) A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business.

(b) A sexually oriented business shall record daily in the manner required by the comptroller the number of customers admitted to the business. The business shall maintain the records for the period required by the comptroller and make the records available for inspection and audit on request by the comptroller.

(c) This section does not require a sexually oriented business to impose a fee on a customer of the business. A business has discretion to determine the manner in which the business derives the money required to pay the fee imposed under this section.

**Tex. Bus. & Com. Code § 102.053. Remission of Fee; Submission of Reports:**

Each quarter, a sexually oriented business shall:

(1) remit the fee imposed by Section 47.052 to the comptroller in the manner prescribed by the comptroller; and

(2) file a report with the comptroller in the manner and containing the information required by the comptroller.

**Tex. Bus. & Com. Code § 102.054. Allocation of Certain Revenue for Sexual Assault Programs:**

The comptroller shall deposit the amounts received from the fee imposed under this subchapter to the credit of the sexual assault program fund.

**Tex. Bus. & Com. Code § 102.055. Repealed by Act of May 29, 2015, 84th Leg., R.S., ch. 448, § 46(1), 2015 Tex. Gen. Laws 1740, 1757, eff. Sept. 1, 2015.**

**Tex. Bus. & Com. Code § 102.056. Administration, Collection, and Enforcement:**

The provisions of Subtitle B, Title 2, Tax Code[ section 111.001 et seq.] , apply to the administration, payment, collection, and enforcement of the fee imposed by this chapter.

**Tex. Tax Code § 111.002. Comptroller's Rules; Compliance; Forfeiture:**

(a) The comptroller may adopt rules that do not conflict with the laws of this state or the constitution of this state or the United States for the enforcement of the provisions of this title and the collection of taxes and other revenues under this title. In addition to the

discretion to adopt, repeal, or amend such rules permitted under the constitution and laws of this state and under the common law, the comptroller may adopt, repeal, or amend such rules to reflect changes in the power of this state to collect taxes and enforce the provisions of this title due to changes in the constitution or laws of the United States and judicial interpretations thereof.

(b) A person who does not comply with a rule made under this section forfeits to the state an amount of not less than $25 nor more than $500. Each day on which a failure to comply occurs or continues is a separate violation.

(c) If a forfeiture is not paid, the attorney general shall file suit to recover the forfeiture in a court of competent jurisdiction in Travis County or in any other county where venue lies.

(d) Any other provision of this code that imposes a different penalty for the violation of a comptroller's rule made for the enforcement or collection of a specific tax imposed by this title prevails over the penalty provided by this section.

**Tex. Tax Code § 111.0041(a). Records; Burden to Produce and Substantiate Claims:**

(a) Except as provided by Subsection (b), a taxpayer who is required by this title to keep records shall keep those records open to inspection by the comptroller, the attorney general, or the authorized representatives of either of them for at least four years.

**Tex. Tax Code § 151.801. Disposition of Proceeds:**

(a) Except for the amounts allocated under Subsections (b), (c), (c-2), (c-3), and (f), all proceeds from the

collection of the taxes imposed by this chapter shall be deposited to the credit of the general revenue fund.

(b) The amount of the proceeds from the collection of the taxes imposed by this chapter on the sale, storage, or use of lubricating and motor oils used to propel motor vehicles over the public roadways shall be deposited to the credit of the state highway fund.

(c) The proceeds from the collection of the taxes imposed by this chapter on the sale, storage, or use of sporting goods shall be deposited as follows:

(1) an amount equal to 93 percent of the proceeds shall be credited to the Parks and Wildlife Department for the purposes described by Subsection (c-1) and deposited to department accounts as provided by that subsection; and

(2) an amount equal to seven percent of the proceeds shall be credited to the Texas Historical Commission and deposited to the credit of the historic site account under Section 442.073, Government Code.

(c-1) The legislature shall allocate the money credited to the Parks and Wildlife Department under Subsection (c) to department accounts specified in the Parks and Wildlife Code in specific amounts provided in the General Appropriations Act, and those amounts may be used only for the following purposes :

(1) to acquire, operate, maintain, and make capital improvements to parks;

(2) for a purpose authorized under Chapter 24, Parks and Wildlife Code;

(3) to pay debt service on park-related bonds;

(4) to fund the state contributions for benefits and benefit-related costs attributable to the salaries and wages of department employees paid from sporting goods sales tax receipts; and

(5) to fund the portion of the state contributions for annuitant group coverages under the group benefits program operated by the Employees Retirement System of Texas under Chapter 1551, Insurance Code, attributable to sporting goods sales tax receipts.

(c-2) An amount equal to the revenue derived from the collection of taxes at the rate of two percent on each sale at retail of fireworks shall be deposited to the credit of the rural volunteer fire department insurance fund established under Section 614.075, Government Code.

(c-3) Subject to the limitation imposed under Section 2028.2041, Occupations Code, an amount equal to the proceeds from the collection of the taxes imposed by this chapter on the sale, storage, or use of horse feed, horse supplements, horse tack, horse bedding and grooming supplies, and other taxable expenditures directly related to horse ownership, riding, or boarding shall be deposited to the credit of the escrow account administered by the Texas Racing Commission and established under Section 2028.204, Occupations Code.

(d) The comptroller shall determine the amount to be deposited to the highway fund under Subsection (b) according to available statistical data indicating the estimated average or actual consumption or sales of lubricants used to propel motor vehicles over the public roadways. The comptroller shall determine the amounts to be deposited to the accounts under Subsection (c) according to available statistical data indicating the estimated or actual total receipts in this state from taxable sales of sporting goods, and according to the specific amounts provided in the General Appropriations Act in accordance with Subsection (c-1). The comptroller shall determine the amount to be deposited to the fund

under Subsection (c-2) according to available statistical data indicating the estimated or actual total receipts in this state from taxes imposed on sales at retail of fireworks. The comptroller shall determine the amount to be deposited to the account under Subsection (c-3) according to available statistical data indicating the estimated or actual total receipts in this state from taxable sales of horse feed, horse supplements, horse tack, horse bedding and grooming supplies, and other taxable expenditures directly related to horse ownership, riding, or boarding. If satisfactory data are not available, the comptroller may require taxpayers who make taxable sales or uses of those lubricants, of sporting goods, of fireworks, or of horse feed, horse supplements, horse tack, horse bedding and grooming supplies, or other taxable expenditures directly related to horse ownership, riding, or boarding to report to the comptroller as necessary to make the allocation required by Subsection (b), (c), (c-2), or (c-3).

(e) In this section:

(1) "Motor vehicle" means a trailer, a semitrailer, or a self-propelled vehicle in or by which a person or property can be transported upon a public highway. "Motor vehicle" does not include a device moved only by human power or used exclusively on stationary rails or tracks, a farm machine, a farm trailer, a road-building machine, or a self-propelled vehicle used exclusively to move farm machinery, farm trailers, or road-building machinery.

(2) "Sporting goods" means an item of tangible personal property designed and sold for use in a sport or sporting activity, excluding apparel and footwear except that which is suitable only for use in a sport or sporting activity, and excluding board games,

electronic games and similar devices, aircraft and powered vehicles, and replacement parts and accessories for any excluded item.

(3) "Fireworks" means any composition or device that is designed to produce a visible or audible effect by combustion, explosion, deflagration, or detonation that is classified as Division 1.4G explosives by the United States Department of Transportation in 49 C.F.R. Part 173 as of September 1, 1999. The term does not include:

(A) a toy pistol, toy cane, toy gun, or other device that uses a paper or plastic cap;

(B) a model rocket or model rocket motor designed, sold, and used for the purpose of propelling a recoverable aero model;

(C) a propelling or expelling charge consisting of a mixture of sulfur, charcoal, and potassium nitrate;

(D) a novelty or trick noisemaker;

(E) a pyrotechnic signaling device or distress signal for marine, aviation, or highway use in an emergency situation;

(F) a fusee or railway torpedo for use by a railroad;

(G) a blank cartridge for use in a radio, television, film, or theater production, for signal or ceremonial purposes in athletic events, or for industrial purposes; or

(H) a pyrotechnic device for use by a military organization.

(4) "Horse feed" means a product clearly packaged and labeled as feed for a horse.

(5) "Horse supplement" means a product clearly packaged and labeled as a supplement for a horse,

including a vitamin, mineral, or other nutrient intended to supplement horse feed.

(f) The comptroller shall deposit each fiscal year $100,000 of the revenue received under this chapter to the credit of the Texas music incubator account under Section 485.046, Government Code.

# APPENDIX I

## Relevant Regulatory Provisions

### 34 Tex. Admin. Code § 3.722. Sexually Oriented Business Fee:

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Clothing--A garment used to cover the body, or a part of the body, typically consisting of cloth or a cloth-like material. Paint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing.

(2) Customer--Any person on the premises of a sexually oriented business except:

(A) an owner, operator, independent contractor of the business or an employee of that sexually oriented business; or

(B) a person who is on the premises exclusively for repair or maintenance of the premises or for the delivery of goods to the premises.

(3) Nude--To be entirely unclothed, or clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(4) Sexually oriented business--A nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

(b) Clothing requirements. An entertainer or performer will be considered "nude" for purposes of this section unless the entertainer or performer wears fully opaque clothing that covers all portions of the genitals and buttocks, and if the entertainer or performer is a female, the entertainer or performer must also wear fully opaque clothing that covers the portions of the breasts below the top of the areola of the breasts.

(c) Questionnaire. A sexually oriented business, as defined in this section, is required to complete and submit a Texas Sexually Oriented Business Fee Questionnaire, Form AP-225 or a subsequent form prescribed by the comptroller to file the report and remit the fee imposed under Business and Commerce Code, Chapter 102 (Sexually Oriented Businesses).

(d) Imposition and Calculation of Fee.

(1) A $5.00 fee is imposed on a sexually oriented business for each entry by each customer admitted to the business. In determining the amount of fee due by a sexually oriented business for more than one entry by the same customer on the same business day at the same location, it shall be presumed to have been one entry by the customer and the fee amount due from the business for the entry is $5.00. A business day begins when the business opens and continues until the close of business.

(2) A sexually oriented business has the discretion to determine how it will derive the money to pay the fee. All door and cover charges, including reimbursement

of the sexually oriented business fee from its customers, are subject to sales tax as provided by Tax Code, Chapter 151 (Limited Sales, Excise and Use Tax). A sexually oriented business that chooses to recover the fee from its customer by including a separately stated charge for the fee on the customer check or invoice must clearly identify the charge as a reimbursement. A charge not clearly identified as reimbursement of the fee is considered a tax collected from the customer and these amounts must be remitted to the comptroller in addition to the $5.00 entry fee.

(3) The comptroller will presume that a business is a sexually oriented business if the business holds itself out as a sexually oriented business. Evidence that the comptroller may consider includes signage, advertising, social media, publication of images, inspections, investigations, and the reputation of the business. To rebut the presumption, a business may prove by a preponderance of the evidence the instances in which the business did not operate as a sexually oriented business.

(e) Report forms. The sexually oriented business fee must be reported on a form as prescribed by the comptroller. The fact that the sexually oriented business does not receive the form or does not receive the correct form from the comptroller for the filing of the return does not relieve the business of the responsibility of filing a return and remitting the fee.

(f) Due date of report and payment.

(1) The sexually oriented business fee report and payment are due no later than the 20th day of the month following the calendar quarter month in which the liability for the fee is incurred.

(2) A sexually oriented business must file a quarterly report even if there is no fee to report.

(g) Penalty. Penalties due on delinquent fees and reports shall be imposed as provided by Tax Code, §111.061 (Penalty on Delinquent Tax or Tax Reports).

(h) Interest. Interest due on delinquent fees shall be imposed as provided by Tax Code, §111.060 (Interest on Delinquent Tax).

(i) Records required.

(1) A sexually oriented business is required to maintain records, statements, books, or accounts necessary to determine the amount of fee for which the business is liable to pay.

(2) A sexually oriented business shall record daily the number of customers admitted to the business. The manner in which a sexually oriented business maintains records of the number of customers admitted to the business may be written, stored on data processing equipment, or may be in any form that the comptroller may readily examine.

(3) The comptroller or an authorized representative has the right to examine any records or equipment of any person liable for the fee in order to verify the accuracy of any report made or to determine the fee liability in the event no return is filed.

(4) Records required by the comptroller must be kept for at least four years after the date on which the records are prepared, and throughout any period in which any tax, fee, penalty, or interest may be assessed, collected, or refunded by the comptroller or in which an administrative hearing or judicial proceedings is pending, unless the comptroller authorizes in writing a shorter retention period. A

business must make records available for inspection and audit on request by the comptroller.

(j) Failure to keep accurate records. If a sexually oriented business fails to keep accurate records of the number of customers admitted to the business, the comptroller may estimate the amount of fee liability based on any available information that includes, but is not limited to, any reports required to be filed per Tax Code, Chapter 151, Chapter 171 (Franchise Tax), or Chapter 183 (Mixed Beverage Taxes).