No. 21-1258

In the
Supreme Court of the United States

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,
Petitioner,
v.
TEXAS ENTERTAINMENT ASSOCIATION, INC.,
Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE MULTISTATE TAX COMMISSION AND FEDERATION OF TAX ADMINISTRATORS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE MULTISTATE TAX COMMISSION AND FEDERATION OF TAX ADMINISTRATORS IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Multistate Tax Commission (MTC) and Federation of Tax Administrators (FTA) respectfully request this Court's permission to file an amicus curiae brief in support of Texas's petition for certiorari.

Counsel for both sides received timely notice, and counsel for the respondent has withheld consent.

The MTC is an intergovernmental agency founded to promote tax uniformity, assist taxpayers with compliance, and champion state sovereignty. The FTA is the membership organization for state revenue agencies and promotes best practices in state tax administration and tax enforcement.

Both organizations routinely file *amicus* briefs calling attention to multistate tax interests in state and federal appellate courts. Our recent filings in this Court include *amicus* briefs in *Idaho State Tax Commission v. Noell Industries, Inc.* (on petition), Dkt. No. 20-947; *Alabama Department of Revenue v. CSX Transportation, Inc.* (on petition), Dkt. No. 18-447; *Franchise Tax Board of the State of California v. Gilbert P. Hyatt* (on petition and on the merits), Dkt. No. 17-1299; and *South Dakota v. Wayfair, Inc.* (on petition and on the merits), Dkt. No. 17-494.

The case currently on petition, which involves the Tax Injunction Act (TIA), 28 U.S.C. § 1341, has a significant effect on state tax agencies and has attracted the notice and concern of the MTC and the FTA. Some federal circuits, including the Fifth Circuit in this case, have made recent rulings on the Tax Injunction Act that provide an overbroad definition of a "fee" and take jurisdiction out of state courts in violation of the principles of federalism and state sovereignty.

We write to bring to this Court's attention the effect of the current circuit split on state tax administration. We emphasize the general need to protect the states' long-established systems of adjudication, including administrative processes, for resolving state tax issues. And we encourage this Court to grant Texas's petition and interpret the TIA in a way that will provide certainty to litigants and safeguard state tax sovereignty.

Respectfully submitted,

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Counsel of Record

April 15, 2022

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INTEREST OF THE AMICI CURIAE

The Multistate Tax Commission (MTC) [1] and Federation of Tax Administrators (FTA) file this brief jointly to ask this Court to grant Texas's petition for certiorari. Our interest in this case arises from our mutual goal of preserving a critical component of state sovereignty—the ability to have important matters affecting state tax systems and the enforcement and collection of state taxes adjudicated in the courts of those states.

The MTC [2] is an intergovernmental agency founded to promote uniformity, assist taxpayers with compliance, and champion state sovereignty. It administers the Multistate Tax Compact,[3] which was formed in 1967 in response to the need for state tax reform in the face of threatened federal preemption. Forty-nine states and the District of Columbia participate in our committees and programs.

The FTA [4] is the membership organization for state revenue agencies. Previously known as the

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[1] No counsel for any party authored this brief in whole or in part. Only amici curiae MTC and FTA and their member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file the brief under Supreme Court Rule 37(2)(a). The respondent withheld consent.

[2] Information on the MTC and its activities is available on its website, www.mtc.gov.

[3] See *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978) (upholding the validity of the Compact).

[4] Information on the FTA and its activities is available on its website, www.taxadmin.org.

National Association of Tax Administrators, the FTA has been operating since 1937. The members of the FTA are all 50 states, the District of Columbia, and the cities of New York and Philadelphia. The primary purpose of the FTA is to promote best practices in state tax administration and tax enforcement.

The case currently on petition, which involves the Tax Injunction Act (TIA), 28 U.S.C. § 1341, has a significant effect on state tax agencies and has attracted the notice and concern of the MTC and the FTA.

SUMMARY OF THE ARGUMENT

We write to bring to this Court's attention the importance to every state of establishing an easily-administrable test to distinguish "taxes" from "fees" under the TIA. Currently, the circuit courts apply a variety of inconsistent and subjective tests. The Fifth Circuit's overbroad definition of a "fee" has exacerbated the confusion created by the various tests.

We emphasize the importance of protecting the states' abilities to resolve state tax disputes through well-established systems of adjudication, including administrative processes, without federal court interference. We encourage this Court to grant Texas's petition and interpret the TIA in a way that will provide certainty to litigants and safeguard state tax sovereignty.

ARGUMENT

I. The states need this Court to provide certainty for state taxing jurisdictions and taxpayers as to when the Tax Injunction Act (TIA) applies; the clear split in the federal circuits is a basis for granting the Texas petition and providing that certainty.

Your amici agree with Judge Posner that "a jurisdictional rule should be simple and clear, where possible—and this is possible in regard to the Tax Injunction Act." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 727 (7th Cir. 2011) (en banc). But the current landscape is anything but simple and clear—and this is partly due to the nature of state governmental charges.

As the First Circuit Court of Appeals in *San Juan Cellular* pointed out, government charges are a spectrum, "with a paradigmatic tax at one end and a paradigmatic fee at the other." *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992). But in reality, any difference between taxes and fees is irrelevant to the day-to-day activities of state and local government. In fact, any distinction is generally lost in the sheer number of state and local charges and the pressing nature of state legislative sessions.

MTC and FTA member states impose a variety of governmental charges, ranging from broadly imposed income, excise, and property taxes to charges on loan administration and oyster sales. Many states administer the entire range of financial charges

through a central agency. That single agency may be tasked with interpreting and applying these charges according to procedures established by the state legislature and executive branches, and it often represents the state in adjudication or resolution of tax disputes, as well. The California Department of Tax and Fee Administration (CDTFA), for instance, handles the administration of some 37 taxes and fees. Its website identifies the charges, but does not emphasize any difference among taxes, fees, or exactions. *See* "Tax and Fee Rates," https://bit.ly/3NZDdkY (last visited Apr. 8, 2022). The petitioner in this case is responsible for administering more than 60 taxes, fees, and assessments. *See* "Texas Taxes and Fees," https://bit.ly/3JnHZ8q (last visited Apr. 7, 2022). Other agencies and many local jurisdictions in Texas impose dozens of additional charges. There are currently more than 12,000 state and local jurisdictions collecting sales tax across the 50 states, and as of 2019 there were nearly 5,000 jurisdictions collecting income tax. *See* Sovos State-by-State Guide to Sales Tax Nexus Laws, https://bit.ly/3v0YmCRc (last visited Apr. 11, 2022) and Jared Walczak, *Local Income Taxes in 2019* (July 30, 2019), Tax Foundation, https://bit.ly/3jeT7tT (last visited Apr. 11, 2022).

State legislators are unlikely to consider whether the nature of or the name given any particular charge could one day impact whether disputes are heard in state or federal courts. The National Conference of State Legislatures stated as of 2017 that more than 109,000 bills were introduced in state legislatures each year. Brenda Erickson, *Limiting Bill*

Introductions, LegisBrief Vol. 25, No. 23, June 2017, https://bit.ly/3uWwRtY (last visited Apr. 7, 2022). A single state legislative session involves consideration of a range of bills, from those implementing major tax changes to those permitting the consumption of roadkill. [5] With an average session length of approximately 120 calendar days, a state legislature is unlikely to have the luxury of pondering the ramifications of whether a charge would be considered a "tax" under the TIA.

A. The Fifth Circuit's decision adds to the confusion in the circuits as to how the term "tax" should be interpreted.

The Texas petition thoroughly explains the current split in the federal circuits and the assortment of tests applied across the country when the application of the TIA is in question. Not only are the circuit courts' tests inconsistent, they are so subjective as to remove all ability to confidently identify a charge as either a tax or a fee. Only this Court can resolve this conflict and the resulting confusion.

The Fifth Circuit's decision below highlights the subjectivity of these tests: Similar facts and circumstances can too often produce divergent results depending on which facts the court prioritizes.

The Fifth Circuit held that a "fee" is imposed: (1) by an agency, not the legislature; (2) upon those it

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[5] California SB 395, signed by the governor 10/13/19 and currently undergoing implementation.

regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes. *Tex. Entm't Ass'n v. Hegar*, 10 F.4th 495, 505 (5th Cir. 2021) (citing *Home Builders Association of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1011 (5th Cir. 1998), and *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000), which in turn took the test from the First Circuit's analysis in *San Juan Cellular*, 967 F.2d at 685).

The Fifth Circuit, in keeping with other circuits' analysis, found that because the Texas legislature imposed the sexually oriented business fee (SOBF), this factor moved the assessment "on the spectrum closer to a classic tax." *Tex. Entm't Ass'n* at 506 (cleaned up). But in other respects, the Fifth Circuit reached a different conclusion than other circuits applying the same test may have reached.

The Fifth Circuit reasoned that because the charge was imposed "solely on sexually[ ]oriented businesses that allow alcohol consumption, as opposed to the public at large," it was more like a fee. *Id*. But in *Bidart Brothers v. California Apple Comm'n*, 73 F.3d 925, 931-32 (9th Cir. 1996), the Ninth Circuit noted that an assessment upon a narrow class of parties can still be characterized as a tax under the TIA. The court based that conclusion on *Wright v. McClain*, 835 F.2d 143, 145 (6th Cir. 1987) (fees imposed upon parolees for supervision and victim compensation were "taxes" under the TIA); *Tramel v. Schrader*, 505 F.2d 1310, 1314-16 (5th Cir. 1975) (assessments upon street residents for street improvements were "taxes" under the TIA); *Indiana*

Waste Systems, Inc. v. County of Porter, 787 F. Supp. 859, 864-65 (N.D. Ind. 1992) (fee imposed on landfill owners was a "tax" under the TIA); and *Butler v. Maine Supreme Judicial Court,* 767 F. Supp. 17, 19 (D. Me.1991) (jury fee imposed on plaintiffs was a "tax" under TIA).

In *Bidart Bros.*, the revenue was segregated from the general fund and applied to a narrow purpose—to promote apple sales. 73 F.3d at 933. Under the Ninth Circuit's analysis, this put the charge firmly in the realm of a "fee." *Id.* Here, a portion of the funds raised by the SOBF are distributed to a sexual assault program fund, not general revenue. *Tex. Entm't Ass'n*, 10 F.4th at 507. But revenue that goes into the general fund has been ruled a "fee" if it serves only to regulate the party being charged. *Bidart Bros.,* 73 F.3d at 932-33 (citing *In re Head Money Cases*, 112 U.S. 580 (1884)). And assessments that are segregated from general revenues have been found to be "taxes" under the TIA if expended to provide "a general benefit to the public." *San Juan Cellular*, 967 F.2d at 685.

In the end, with such conflicting interpretations of the same test, the Fifth Circuit had no clear guidance. Its analysis serves to illustrate that the circuit courts have failed to settle on a principled and reliable standard for determining what constitutes a tax under the TIA—and even when applying the same tests, the factors are so subjective that courts reach different conclusions on similar facts.

B. The question presented here affects every state and will continue to cause confusion until it is resolved.

While this case concerns Texas and its particular charge, the interpretation of the TIA regularly affects all states since they assess a myriad of charges for various purposes. Because the circuit courts have reached inconsistent results using a myriad of tests, the states have no option but to seek a remedy in this Court.

The central question in this case—what factors distinguish a tax from a fee—has been at issue in two other cases from this term. *Healthcare Distribution Alliance v. James* concerned the nature of New York's monetary assessment on the sale of opioids in the State by licensed opioid manufacturers and distributors. *Ass'n for Accessible Medicines v. James*, 974 F.3d 216 (2d. Cir. 2020), *cert. denied sub nom. Healthcare Distribution All. v. James*, 142 S. Ct. 87 (2021). In *Healthcare*, the Second Circuit looked at the ultimate use of the funds and found that the primary purpose was to raise revenue for the purpose of managing New York's opioid crisis. *Id.*at 227. Based primarily on that factor, the Second Circuit concluded that the charge was a tax. *Id.*

Ferrellgas Partners, LP v. Director, Div. of Taxation did not involve the TIA directly. No. 007051-2014, 2018 BL 455568 (N.J. Tax Ct. Dec. 7, 2018), *cert. denied,* 2022 BL 117809 (Apr. 4, 2022). The petitioner asked this Court to determine whether a levy that raises revenue for a state's general fund must be internally consistent (a tax) or not (a fee). In

Ferrellgas, the New Jersey Tax Court rendered summary judgment in favor of the state without reaching the "tax or fee" issue, because the distinction has been "blurred" where the dormant commerce clause test is concerned. *Id.* at *10.

More TIA issues are bubbling through the lower courts. [6] Without the assistance of this Court in resolving the conflict and establishing clearly drawn lines for the exercise of federal court jurisdiction over state and local taxes, the validity of state impositions will be put into question as the federal courts consider their jurisdiction to hear such suits. This will inevitably impede state tax administration. As Texas demonstrated in its petition, this case presents the Court with a clear opportunity to provide taxpayers and tax administrators with the certainty they need and only this Court can provide. Pet. Brief at 23.

[6] *See*, e.g., *Chamber of Commerce of U.S. v. Franchot*, 21-cv-00410-LKG (D. Md. Mar. 30, 2022) (finding that Maryland's new digital advertising tax is a tax, rather than a penalty or fee, for TIA purposes).

II. Congress enacted the TIA to protect state sovereignty and advance principles of federalism in matters of state fiscal operations, and it should be interpreted in accordance with those purposes.

A. The TIA reflects Congress's understanding that state fiscal operations are an essential element of sovereignty.

As early as 1871, this Court expressed its reluctance to assume that Congress intended to interfere with state taxing authority, as it supports all other governmental powers: "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chi.*, 78 U.S. 108, 110 (1871).

Both the TIA and the analogous federal act barring initial challenges to federal tax assessments in federal courts, the Tax Anti-Injunction Act, 28 U.S.C. § 7421(a), reflect Congress's view that tax collection is an essential part of state governmental sovereignty. The TIA was intended to protect state administrative processes for tax adjudication from outside federal court interference (unless there is a lack of a plain, speedy and efficient remedy). 81 Cong. Rec. 1416 (1937). This even includes claims of unconstitutionality under the federal constitution. *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 103 (1981) (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943)). The TIA

"serves to minimize the frictions inherent in a federal system of government." *Empress Casino,* 651 F.3d at 725. This is because the TIA codifies a long-accepted doctrine of judicial comity which counseled federal courts to refrain from interfering with the fiscal operations of state governments where the federal rights at issue could otherwise be preserved unimpaired. *Boise Artesian & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). It has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal operations. *Franchise Tax Bd. v. Alcan Aluminium Ltd*., 493 U.S. 331, 338, (1990) (quoting *Tully v. Griffin, Inc.,* 429 U.S. 68, 72 (1976)) (cleaned up).

This Court has 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." *California v. Grace Brethren Church*, 457 U.S. 393, 409 (1982) (quoting *Rosewell v. LaSalle Nat'l. Bank*, 450 U.S. 503, 522 (1981)). As Justice Brennan cautioned in his opinion concurring in part and dissenting in part in *Perez v. Ledesma*, 401 U.S. 82, 127, n. 7 (1971):

> During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

> Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

Justice Kennedy, writing for the majority in a subsequent TIA case, agreed:

> The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation.

Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 826 (1997).

As state tax experts Charles E. McLure, Jr. and Walter Hellerstein point out, "[t]he understanding that states' tax sovereignty is essential to their independent political status in the federal system has never been regarded as inconsistent with the view that the federal government likewise possesses sovereign tax powers." *Congressional Intervention in State Taxation: A Normative Analysis of Three Proposals*, 102 TAX NOTES 1375, 1377 (Mar. 15, 2004). Recognizing this importance of state tax sovereignty in our federalist system, Congress has chosen to proceed cautiously where state sources of revenue are concerned.

B. The TIA embodies this Court's recognition that principles of federalism prevent states from being subject to the processes and choice-of-law decisions of other courts.

This Court's jurisprudence reveals the delicate balance our system of federalism requires when deciding jurisdictional questions. Congress enacted the TIA in recognition of the need for stability in matters of state fiscal operations. In doing so, it made clear that, while there is a role for federal courts in ensuring that state laws do not contravene essential constitutional rights, *Ex parte Young*, 209 U.S. 123 (1908), questions regarding state revenue measures should properly be heard in state courts.

In 1996, this Court considered whether Congress had the power under Article I to abrogate the States' immunity from federal court jurisdiction conferred by the Eleventh Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In *Seminole*, the tribe filed suit against the State of Florida for violating the good faith negotiations requirement of the Indian Gaming Regulatory Act. *Id.* This Court found that the case had to be dismissed for lack of jurisdiction, holding that the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. *Id.* at 73. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, this Court wrote, the Eleventh Amendment prevents congressional authorization of suits by private parties against nonconsenting states. *Id.*

Alden v. Maine, 527 U.S. 706 (1999) followed *Seminole* in presenting the question of whether Congress has the authority under Article I to abrogate a state's immunity in its *own* courts. Concluding that this authority was also restricted, the Court noted that the states have "a residuary and inviolable sovereignty," where they are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty. *Id.* at 715 (quoting THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961) (J. Madison)).

Almost two decades later, this Court found that state sovereignty prevented a citizen of another state from suing California's taxing authorities in Nevada state court. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019). Justice Thomas, writing for the Court, stated that the Constitution fundamentally adjusts the states' relationship with each other and requires them to recognize each other's sovereign immunity. *Id.* at 1493. He wrote, "According to the founding era's foremost expert on the law of nations, '[i]t does not. . . belong to any foreign power to take cognisance [sic] of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.'" *Id.* at 1494 (citing 2 E. de Vattel, The Law of Nations §55, p. 155 (J. Chitty ed. 1883)).

Hyatt adhered to this Court's longstanding jurisprudence establishing that the Constitution bars suits against nonconsenting states. *Hyatt,* 139 S. Ct. at 1496 (citing *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (actions by private parties before federal

administrative agencies); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (suits by Indian tribes in federal court); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (suits by foreign states in federal court); *Ex parte New York*, 256 U.S. 490 (1921) (admiralty suits by private parties in federal court); *Smith v. Reeves*, 178 U.S. 436 (1900) (suits by federal corporations in federal court)).

CONCLUSION

We ask this Court to grant Texas's petition for certiorari and interpret the TIA to limit federal court interference with the states' procedures for administering their revenue programs, in accordance with the statute's intent.

Respectfully submitted,

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Counsel of Record

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