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August 13, 2020

Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130

**Re: *McDonald v. Sorrels*, No. 20-50448
Appellants' Supplemental Brief regarding the Tax Injunction Act**

Dear Mr. Cayce:

The Court asked whether the Tax Injunction Act (TIA) applies to Texas's mandatory bar fee or legal services fee. It does not. Under the relevant precedents, the bar fees are fees, not taxes. That's why the Bar has not raised the TIA throughout this litigation, and why no one raised the TIA in the comparable litigation over mandatory dues to public-sector unions. *See generally Friedrichs v. Calif. Teachers Ass'n*, 136 S. Ct. 1083 (2016); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

* * *

The TIA prohibits certain suits involving “any *tax* under State law.” 28 U.S.C. §1341 (emphasis added). It does not apply to suits involving mere “fees.” *Home Builders Ass'n of Miss. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

This Court's precedents have listed several relevant factors to help “[d]istinguish[]” taxes from fees. *Id.* at 1011. Taxes “sustain[] the essential flow of revenue to the government,” are “imposed by a state or municipal legislature,” and are “designed to provide a benefit for the entire community.” *Id.* Fees, by contrast, are “linked to some regulatory scheme,” are “imposed by an agency upon those it regulates,” and are designed “to help defray an agency's regulatory expenses.” *Id.*; *see also Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (“The classic 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”).

The bar fees at issue here are classic fees, for at least three reasons:

First, the fees are not “imposed by” the legislature. *Neinast*, 217 F.3d at 278. The Bar is a state agency beholden to the Texas Supreme Court. *See* Tex. Code Ann. §81.011 (noting the bar is “an administrative agency of the judicial department of government”). “The Supreme Court of Texas ... exercise[s] administrative control over the state bar” to ensure the bar “regulate[s] the practice of law” effectively. *Id.* Under Texas law, “[t]he supreme court shall set membership fees and other fees for members of the state bar during the court’s annual budget process.” §81.054. Similarly, although the State Bar Act specifically references a \$65 legal services fee, the Act is equally clear that the fee is set by “[t]he supreme court.” §81.054(j).

Under Texas’s constitution, taxes are “imposed by the legislative power,” *City of Austin v. Nalle*, 120 S.W. 996, 996 (Tex. 1909), while regulating the state bar is a judicial power. “In Texas, the power to regulate the practice of law resides in the Supreme Court of Texas,” which derives in part from “the Supreme Court of Texas’ inherent judicial power.” *Texans Against Censorship v. State Bar of Tex.*, 888 F. Supp. 1328, 1334 (E.D. Tex. 1995), *aff’d*, 100 F.3d 953 (5th Cir. 1996); *see also State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (noting that this inherent, administrative power “is not secured by any legislative grant or specific constitutional provision,” rather “th[e] ... power is derived ... from ... the Texas Constitution”). Texas’s constitution demands that “the Supreme Court of Texas” “regulat[e] the legal profession ... [to] ensur[e] that Texas lawyers maintain appropriate standards of professionalism and responsibility.” *Texans Against Censorship*, 888 F. Supp. at 1334. “[I]n order to fulfill its constitutional role,” the Texas Supreme Court has the inherent “obligation ... to regulate judicial affairs.” *Gomez*, 891 S.W.2d at 245. This power does not include the power to impose taxes.

Second, the bar fees are imposed only on members of the bar—the “narrow class” that the Bar regulates, “not the public at large.” *Neinast*, 217 F.3d at 278. Only one-third of one percent of Texas residents are lawyers. *Compare State Bar of Texas Membership: Attorney Statistical Profile (2019-20)* 1 (105,125 lawyers), *with U.S. Census of Population and Housing, 2019: Summary Population and Housing Characteristics Texas* (2019) (29 million Texans). That number is thirty times smaller than the 11.4% of Texans who could have been affected by the fee for handicapped parking placards in *Neinast*, which this Court said was too narrow a class to constitute a tax. 217 F.3d at 278; *see Texas Workforce Investment Counsel, People with Disabilities: A Texas Profile* 6, 18 (2019).

Third, the bar fees are imposed to defray regulatory costs, not to raise general revenue. Consider *Neinast* again. There, the Fifth Circuit examined “a \$5 fee ... for handicapped placards” that enabled disabled Texans “to park in specially designated parking spaces.” 217 F.3d at 277. During litigation, Texas claimed the funds “will more likely provide a benefit to the community in the highway fund than actually defray the cost of the program,” and that “the charge [wa]s a tax because it first goes to the tax

collector,” rather than directly to a segregated “highway fund.” *Id.* at 278. Yet *Neinast* held that the exaction was a fee because its “purpose” was “the benefit of the [highway fund] program itself.” *Id.* Even though Texas claimed the exaction helped millions of Texans, *Neinast* held that the exaction was a fee because “the funds were primarily regulatory” in nature. *Id.* at 279.

Texas’s bar fees work the same way. They “primarily regulat[e],” *id.*, lawyers and legal services. Texas law and Supreme Court precedent confirm this. The bar has twin aims: “aid ... the judicial department” in its power of “regulat[ing] the practice of law,” Tex. Code Ann. §81.011(b), and provide effective government-appointed attorneys to indigent defendants. The bar fees go to these services. Under Texas law, ordinary bar dues must be used “only for administering the public purposes provided by” the State Bar Act. §81.054(d). As for the \$65 legal services fee, “50 percent of the ... fees” go to the “judicial fund for programs ... that provide basic civil legal services to the indigent”; the “remaining 50 percent” of fees are used to “promote best practices for the efficient delivery of quality representation to indigent defendants in criminal cases at trial, on appeal, and in postconviction proceedings.” §81.054(c). Indeed, the First Amendment *requires* Texas to use mandatory bar fees only to “fund activities germane to th[e] goals” of “regulating the legal profession and improving the quality of legal services.” *Keller v. State Bar of Calif.*, 496 U.S. 1, 13-14 (1990). Although Appellants believe the Bar has exceeded the First Amendment limitations on the use of coerced dues, there is no question that the Bar purports to use all of the charged fees for the purposes enumerated in the State Bar Act rather than for general revenue-raising purposes.

* * *

In short, Texas’s bar fees are just that—fees. Because the TIA applies only to “tax[es],” 28 USC §1341, it has no bearing on this case.

Sincerely,

/s/ Jeffrey M. Harris
Counsel for Appellants

August 13, 2020

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CERTIFICATE OF COMPLIANCE

This letter brief complies with the Court's order for supplemental briefs of not more than 2,000 words because its body contains 1,124 words.

Dated: August 13, 2020

/s/ Jeffrey M. Harris

CERTIFICATE OF SERVICE

I filed this letter brief with the Clerk via ECF, which will electronically notify all counsel of record.

Dated: August 13, 2020

/s/ Jeffrey M. Harris