

# Vinson & Elkins

Thomas S. Leatherbury tleatherbury@velaw.com  
Tel +1.214.220.7792 Fax +1.214.999.7792

August 13, 2020

## VIA CM/ECF

Lyle W. Cayce  
Clerk of the Court  
United States Court of Appeals for the  
Fifth Circuit  
600 S. Maestri Place  
Suite 115  
New Orleans, LA 70130-3408

**Re: *Tony McDonald, et al. v. Randall Sorrels, et al.*, No. 20-50448**

Dear Mr. Cayce:

The Court has requested that the parties submit supplemental letter briefs “addressing the applicability, if any, of the Tax Injunction Act to, respectively, the mandatory bar fee and the legal services fee.” Order (Aug. 5, 2020). The Tax Injunction Act does not preclude the exercise of federal court jurisdiction over Plaintiffs’ challenges to the Texas State Bar’s mandatory membership fees and the legal services fee. Neither fee constitutes a “tax” subject to the Tax Injunction Act because each is imposed only on Texas lawyers in connection with the State Bar’s objectives of regulating the legal profession and improving the quality of legal services in the state. *See* ROA.3446-3450.

The Tax Injunction Act provides: “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.” 28 U.S.C. § 1341. The Act reflects “the fundamental principle of comity between federal courts and state governments that is essential to ‘Our Federalism,’ particularly in the area of state taxation.” *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 103 (1981). It limits “federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.” *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 522 (1981). The Act reflects the recognition that such interference may “derange the operations of [state] government, and thereby cause serious detriment to the public.” *California v. Grace*



*Brethren Church*, 457 U.S. 393, 410 n.23 (1982) (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870)).

The Tax Injunction Act applies only to “taxes”; it does not apply to regulatory “fees.”<sup>1</sup> See *Henderson v. Stalder*, 407 F.3d 351, 354 (5th Cir. 2005). This Court has set forth guidelines for “[d]istinguishing a tax from a fee”:

[T]he 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.

*Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1011 (5th Cir. 1998) (footnotes omitted); 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.”).

Under that standard, the Bar’s mandatory membership fees are “classic fee[s],” not subject to the Tax Injunction Act. *Home Builders*, 143 F.3d at 1011. First, the Bar’s membership fees are undoubtedly “linked” to a “regulatory scheme,” *id.*, because they fund Bar expenditures incurred “for the purpose of regulating the legal profession” or “improving the quality of . . . legal service[s]” in the state, *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality op.)).

---

<sup>1</sup> If the law at issue imposes a “tax,” such that the Tax Injunction Act applies, the court must then determine whether state courts are capable of providing a “plain, speedy and efficient remedy.” 28 U.S.C. § 1341. Because Texas state courts are likely capable of providing Plaintiffs with a plain, speedy, and efficient remedy for their alleged claims, this brief focuses on whether the fees at issue are “taxes” under the Tax Injunction Act. See *Smith v. Travis Cty. Educ. Dist.*, 968 F.2d 453, 456 (5th Cir. 1992) (“plain, speedy and efficient remedy exists” if “state provides a procedural vehicle” affording “full hearing and judicial determination,” with possibility of U.S. Supreme Court review (citation omitted)); see also, e.g., Tex. Civ. Prac. & Rem. Code Ann. §§ 37.003-.004 (authorizing declaratory judgments); *id.* § 65.011 (injunctions).



*See* ROA.3447 (holding that State Bar’s activities “further Texas’s interest in professional regulation or legal-service quality improvement”). Unlike a classic tax, the membership fees are *not* assessed to “sustain[] the essential flow of revenue to the government.” *Home Builders*, 143 F.3d at 1011. Rather, they fund Bar expenditures that help the Bar achieve its specific objectives, including “advanc[ing] the quality of legal services,” “aid[ing] the courts in carrying on and improving the administration of justice,” and “foster[ing] and maintain[ing]” among lawyers “high ideals and integrity, learning, competence in public service, and high standards of conduct.” Tex. Gov’t Code Ann. § 81.012; *see also* ROA.4050 (Bar Board Policy Manual’s preamble notes Bar was not created “to participate in the general government of the State”); *cf. Home Builders*, 143 F.3d at 1012 (charge used to fund essential municipal services like streets, fire and police departments, and park improvements was “tax”).

Second, the membership fees are imposed only on licensed attorneys by the State Bar, which is an “administrative agency of the judicial department” of the Texas government. Tex. Gov’t Code Ann. § 81.011(a). Although the Texas Legislature has *authorized* the collection of Bar membership fees in the State Bar Act, that statute does not specify an exact fee amount. *See id.* § 81.054(a). Instead, the Texas Supreme Court and the Bar’s Board of Directors share responsibility for setting the membership fee amount. *See id.* §§ 81.022, 81.054(a); ROA.3689. The Texas Supreme Court and the Bar Board are also responsible for setting the deadline for Bar members to pay their membership fees. *See* Tex. Gov’t Code Ann. § 81.054(e); ROA.3613 (State Bar R. art. III, § 4); *see also* Twenty-Third Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9096 (Tex. Aug. 7, 2020), <https://www.txcourts.gov/media/1449573/209096.pdf> (Texas Supreme Court order extending fee-payment deadline because of COVID-19 pandemic).

Finally, like a “classic fee,” the Bar’s membership fees are “designed to raise money to help defray” its regulatory and administrative expenses. *Home Builders*, 143 F.3d at 1011. The membership fees are not used “for general revenue-raising purposes.” *Neinast*, 217 F.3d at 278. The Texas State Bar is entirely self-funded; it does not receive funds through the legislative appropriations process. ROA.3691. The Bar’s membership fees are paid to the clerk of the Texas Supreme Court and are then disbursed by the clerk for State Bar expenditures. *See* Tex. Gov’t Code Ann. § 81.054(c). The membership fees



constitute nearly half of the Bar's annual revenue. ROA.3581, 3691. They ensure that Texas lawyers bear “a fair share of the cost” of collective professional efforts to regulate attorneys and improve legal-service quality. *Keller*, 496 U.S. at 12, 14; *see also* Leo Brewster, *The State Bar*, 22 Tex. B.J. 113, 114 (1959) (noting “a bar is state-organized to *enable the profession* to discharge its duty to the public to maintain the high standards of practice and conduct” (emphasis added)). Accordingly, the Bar's mandatory membership fees are not “taxes” subject to the Tax Injunction Act.

The same is true of the \$65 legal services fee, which is distributed to the Supreme Court Judicial Fund and the state's Fair Defense Account. *See* Tex. Gov't Code Ann. § 81.054(c). Although the fee amount is set by statute, *id.* § 81.054(j), the legal services fee, like the Bar's membership fees, is directly related to the state's professional regulatory scheme. As the fee's supporters explained when it was enacted, although the Texas State Bar does not receive or control the legal services fee, the fee nonetheless complements “the State Bar's mission to provide equal access to justice.” Tex. H. Research Org., Bill Analysis, H.B. 599, 78th Leg., Reg. Sess., at 4 (2003), <https://bit.ly/30EwQx3> (“Bill Analysis”). The fee is “a nominal payment by each active bar member in return for the privilege of practicing law in Texas.” *Id.* at 5. That privilege carries with it “a special responsibility to serve the public,” including “poor clients” who cannot pay the fees that lawyers' state-issued licenses enable them to charge. *Id.*

Accordingly, as the district court correctly concluded, promoting legal services for the indigent furthers the state's interests in regulating the legal profession and improving legal-service quality. ROA.3450 (citing *Keller*, 496 U.S. at 13-14). For example, the Texas Disciplinary Rules of Professional Conduct provide that Texas lawyers have an “ethical responsibility to provide public interest legal service.” ROA.3448 (quoting Tex. Disciplinary R. Prof'l Conduct 6.01 cmt. 5); *accord* Tex. Disciplinary R. Prof'l Conduct, preamble ¶ 6. Ensuring that indigent litigants are represented by legal counsel also benefits attorneys and the judicial system, given the serious burdens that *pro se* litigants frequently impose on both opposing counsel and court resources. *See* Appellees' Br. 56. Therefore, the legal services fee is not a “tax” subject to the Tax Injunction Act because its “underlying” purpose, *Home Builders*, 143 F.3d at 1011—i.e., to complement “*the State Bar's mission* to provide equal access to justice,” Bill Analysis 4 (emphasis added)—is directly connected to the state's regulatory scheme.



Even if the Court were to conclude that it is a close question whether the Bar's membership fees or the legal services fee is a "tax" under the Tax Injunction Act, the federalism concerns underlying that Act, *see supra* p. 1, support resolving any doubts in favor of the Texas State Bar Board's position that the Act does not deprive this Court of jurisdiction.<sup>2</sup> That is especially the case considering that a federal court's determinations under the Tax Injunction Act may have ramifications in any future state-court litigation. *Cf. Reagan Nat'l Advertising of Austin, Inc. v. City of Austin*, 498 S.W.3d 236, 243-46 (Tex. App.—Austin 2016, pet. denied) (giving issue-preclusive effect to federal district court's conclusion that city's billboard registration fee was a "tax" for purposes of the Tax Injunction Act).<sup>3</sup>

In sum, because the State Bar's mandatory membership fees and the legal services fee are not "taxes," the Tax Injunction Act does not apply in this case.

---

<sup>2</sup> In contrast to the Texas State Bar, the Louisiana State Bar Association argues in *Boudreaux v. Louisiana State Bar Association*, No. 20-30086 (5th Cir.), that its dues are "taxes." *See Boudreaux Appellees' Br.* 26-35. *Boudreaux* is distinguishable from this case in ways relevant to the Tax Injunction Act analysis. For example, the Louisiana Supreme Court, as well as this Court, has expressly described the Louisiana State Bar's dues as "tax[es]." *In re Mundy*, 11 So. 2d 398, 400 (La. 1942) (per curiam); *accord Lewis v. La. State Bar Ass'n*, 792 F.2d 493, 498 (5th Cir. 1986); *see also Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500 n.13 (5th Cir. 2001) (noting, in rejecting argument that Tax Injunction Act applied, that Mississippi Supreme Court characterized legal obligations as "leases," not "taxes"). No similar precedent exists in Texas. Furthermore, according to the Louisiana State Bar, "the regulatory scheme governing attorneys in Louisiana is funded by a *separate assessment* paid to the Louisiana Attorney Disciplinary Board," "not by [Louisiana State Bar] dues." *Boudreaux Appellees' Br.* 27 (emphasis added). By contrast, Texas imposes no such separate fee. Rather, the Texas State Bar's membership fees help fund attorney disciplinary expenditures, including for the Commission for Lawyer Discipline, Chief Disciplinary Counsel, and Board of Disciplinary Appeals. *See* Tex. Gov't Code Ann. § 81.076(f); ROA.3867. Finally, the Texas Legislature previously imposed a separate "attorney occupation tax," further indicating that the Texas State Bar membership fees are not "taxes." *See* Bill Analysis, H.B. 7, 84th Leg., Reg. Sess., at 3 (2015), <https://bit.ly/2DE9SgC> (explaining that bill "repeal[ed] Tax Code provisions relating to the attorney occupation tax").

<sup>3</sup> Were the Court to conclude that the Bar's membership fees and the legal services fee are "taxes" subject to the Tax Injunction Act, it should make clear that it is not intending to resolve any issues that might arise under state law. *See Henderson*, 407 F.3d at 356 ("[W]hat is a 'tax' for purposes of the [Tax Injunction Act] is a question of federal law . . .").



Sincerely,

/s/ Thomas S. Leatherbury

Thomas S. Leatherbury

*Counsel for Defendants-Appellees*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 13, 2020, I electronically filed the foregoing Supplemental Letter Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

All counsel of record in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: August 13, 2020

Respectfully submitted,

/s/ Thomas S. Leatherbury

Thomas S. Leatherbury  
VINSON & ELKINS LLP  
2001 Ross Avenue  
Suite 3900  
Dallas, TX 75201  
Tel: (214) 220-7792  
Fax: (214) 999-7792  
tleatherbury@velaw.com

*Counsel for Defendants-Appellees*

**CERTIFICATE OF COMPLIANCE**

This letter brief complies with the type-volume limitation set forth in this Court's August 5, 2020 order because the body of this brief contains 1993 words.

Dated: August 13, 2020

Respectfully submitted,

/s/ Thomas S. Leatherbury

Thomas S. Leatherbury

VINSON & ELKINS LLP

2001 Ross Avenue

Suite 3900

Dallas, TX 75201

Tel: (214) 220-7792

Fax: (214) 999-7792

tleatherbury@velaw.com

*Counsel for Defendants-Appellees*