IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, on behalf of itself and all similarly situated organizations; and MARY DIXON, on behalf of herself and all similarly situated persons,	)	Case No. 09 C 7706
Plaintiffs,	)	The Hon. Joan B. Gottschall
v.	)	
JESSE WHITE, Illinois Secretary of State, in his official capacity,	)	
Defendant.	)	

PLAINTIFFS REPLY BRIEF
IN SUPPORT OF THEIR TRO MOTION

Defendant's principal response to plaintiffs' TRO motion is the assertion that the federal Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, deprives this Court of subject matter jurisdiction. *See* R. 22-1 (defendants' response to plaintiffs' motion for a TRO) ("Def. Resp.") at 5-8. This assertion lacks merit, for the simple reason that the challenged fee mandated by the amended Illinois Lobbyist Registration Act ("LRA"), 25 ILCS 170, is not a "tax," as that term is used in the TIA and the judicial decisions interpreting it. Rather, it is a "fee," and the TIA therefore is no jurisdictional bar.

I. THE TIA APPLIES TO TAXES, NOT FEES

The TIA provides, in relevant part: "[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. "The TIA divests the district courts of subject matter jurisdiction in 'cases in which state

taxpayers seek federal-court orders enabling them to avoid paying state taxes.'" *Scott Air Force Base Properties LLC v. County of St. Clair*, 548 F.3d 516, 520 (7th Cir. 2008), quoting *Hibbs v. Winn*, 542 U.S. 88, 107 (2004). If a sum charged by government is a "tax," then the TIA strips the federal courts of subject matter jurisdiction; but if the charge is a "fee," then the TIA does not apply, and the federal courts retain subject matter jurisdiction. *Hager v. City of West Peoria*, 84 F.3d 865, 870 (7th Cir. 1996) (holding that the disputed charge was a "fee" under the TIA, and reversing the district court's erroneous holding that it was a "tax"). Indeed, federal courts have routinely held that disputed charges are fees, and thus, the TIA did not bar jurisdiction. *See, e.g., Hager*, 84 F.3d at 870-72 (holding that a charge for driving heavy trucks on a particular road was a fee, given its regulatory purpose, even though the fee was paid to the city's general revenue coffers); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 932 (9th Cir. 1996) (holding that a charge to apple growers to pay for apple promotion was a fee); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1271 n.2 (7th Cir. 1992) (holding that a charge to register a garbage truck was a fee, given its regulatory purpose and use); *San Juan Cellular Telephone Co. v. Public Service Comm'n*, 967 F.2d 683, 685-6 (1st Cir. 1992) (Breyer, J.) (holding that a charge of 3% of a phone company's revenue was a fee, because it was paid to a special fund, and used to regulate the paying party); *Marigold Foods, Inc. v. Redalen*, 834 F. Supp. 1163, 1166 (D. Minn. 1993) (holding that a charge on milk processors was a fee, given its regulatory purpose, even though it generated revenue paid to milk producers).

In determining whether moneys collected are a fee or a tax,

> [courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes . . . indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

San Juan Cellular Telephone Co., 967 F.2d at 685 (internal citations omitted).[1] Here, the LRA clearly falls at the fee end of the spectrum. It is not a general tax imposed upon all, or even many, citizens and it is not spent for the benefit of the entire community. Rather, it is a fee imposed only upon about 3500 individuals and organizations engaged in lobbying, ostensibly to defray the costs of regulating such lobbyists.

Courts interpreting the TIA do not defer to the way the government or private parties choose to label the disputed charge. *Kathrein v. City of Evanston*, No. 08 C 83, 2009 WL 3055364, *3 (N.D. Ill. Sept. 18, 2009) (Guzman, J.) (holding that that the TIA status of a charge is determined "without regard to the label affixed to it" by the government); *Lavis v. Bayless*, 233 F. Supp. 2d 1217, 1220 (D. Ariz. 2001) ("The characterization of a particular assessment as either a 'fee' or a 'tax' by the imposing body has no dispositive effect or talismanic significance."); *National Right to Life PAC State Fund v. Devine*, No. 96-359-P-H, 1997 WL 525139, *1 n.1 (D. Me. Aug. 8, 1997) ("Because federal law governs the characterization of the payment as a tax or a fee, it is

[1] *San Juan Cellular Telephone Co.* addressed the tax/fee dichotomy under the Butler Act, which is the TIA for Puerto Rico. 967 F.2d at 684. It is one of the most frequently cited TIA decisions. *See, e.g., Hager*, 84 F.3d at 870 (citing it).

immaterial that the plaintiffs' Amended Complaint calls the registration an 'unlawful tax.'"). *Cf. Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992) (in the parallel context of whether a city has the power to impose a charge, holding that the government "may not circumvent this limitation by calling a tax something else," that "[t]he test is functional," and that a court will not defer to a "nominal designation").[2]

II. THE PRIMARY INTENDED PURPOSE OF THE LRA IS REGULATION, NOT REVENUE GENERATION

Although plaintiffs have argued and will ultimately show that the money collected under the LRA is unconstitutionally excessive, it is the primary intended purpose of the challenged payment, rather than where the money actually ends up, that is the dominant consideration in determining whether the act is a tax or a fee for purposes of the TIA. *See Hager*, 84 F.3d at 870-71 ("Rather than a question solely of *where* the money goes, the issue is *why* the money is taken.) (emphasis in original).[3] *See also Government Suppliers Consolidating Servs., Inc.*, 975 F.2d at 1271 n.2 (holding that the disputed charge was a TIA fee, because its "*purpose* is regulatory rather than revenue-raising") (emphasis added); *Kathrein*, 2009 WL 3055364 at *3 (emphasizing the disputed charge's "primary purpose" and what it was "meant" to do); *Independent Coin Payphone Ass'n*,

[2] Thus, it is not relevant to the TIA analysis that plaintiffs have sometimes referred to the disputed lobby fee as a "tax." *Cf.* Def. Resp. at 5, citing plaintiffs' complaint. Plaintiffs previously used that term only as a rhetorical shorthand. Rather, as explained herein, what matters are the objective facts relied upon by courts in making the TIA-specific determination of whether a government charge is a "fee" or a "tax."

[3] The government cites *Hager* for the proposition that courts look to the "ultimate use" of funds in determining whether moneys collected constitute a fee or a tax for TIA purposes. Def. Resp. at 6. What the government fails to mention, however, is that the Seventh Circuit in *Hager* rejected the district court's application of the "ultimate use" test, instead holding, as noted above, that the issue is *why* money is taken, not where it ends up. 84 F.3d at 870-71.

Inc. v. City of Chicago, 863 F. Supp. 744, 755 (N.D. Ill. 1994) (Aspen, J.) (emphasizing what the government "seeks" to do with the disputed charge); *Empress Casino Joliet Corp. v. Blagojevich*, 2009 WL 4679333, *9 (N.D. Ill. 2009) (quoting *Hager*).[4]

Here, it is clear that the primary intended purpose of the LRA is to defray the costs of regulating those subject to the fee. In determining government purpose, courts will examine the text and history of the law creating the disputed charge. *Hager*, 84 F.3d at 871 (looking to an ordinance's "whereas" clauses); *Kathrein*, 2009 WL 3055364, *3 ("The purpose analysis considers the language and legislative purpose of the ordinance and the facts underlying its passage."). These factors show that the primary intended purpose of the LRA is regulation, not general revenue generation.

First, on the face of the LRA, fully 80% of the new $1,000 lobby fee is paid directly to the Lobbyist Registration Administration Fund. 25 ILCS 170/5.

Second, the LRA provides that $800 of each lobby fee is to be used to regulate lobbying. Specifically, $50 is "for administration and enforcement of this Act and is intended to be used to implement and maintain electronic filing of reports under this Act"; $100 is "for administration and enforcement of this Act"; and $650 is "to be used for the costs of reviewing and investigating violations of this Act." 25 ILCS 170/5.

Third, the legislative history confirms this purpose. Specifically, on May 29, 2009, the Illinois House of Representatives held floor debate regarding Senate Bill 54, which raised the disputed lobby fees. Defendant has submitted into the TRO record an

[4] While the court in *Empress Casino* ultimately held that a statute requiring casinos to pay a percentage of their revenue into a fund for the benefit of horse racing tracks was a tax not a fee for purposes of the TIA, that case is distinguishable. Unlike here, the primary intended purpose of the charge at issue in *Empress Casino* was to generate revenue for a separate industry and create jobs; it was not, as here, the primary intended purpose to defray costs of regulating those subject to the charge. 2009 WL 467333 at *9.

informal transcript of that floor debate. *See* R. 22-5 (exhibit B-1). It indicates that the bill's House sponsor – Speaker Madigan – explained that the bill "increase[s] the registration fee [for lobbyists] to pay for the additional inspections." *Id.* at p. 2.

Fourth, defendant's TRO brief repeatedly and explicitly states that the government purpose of the new $650 portion of the disputed lobby fee is to raise funds to regulate lobbying. *See* Def. Br. at 2-3 ("all of the increased fees collected are intended to fund the costs of the new review and investigation powers"); *id.* at 11 ("the entire increase . . . is specifically earmarked for reviewing and investigating violations"); *id.* at 11-12 ("the use of the additional fees by [defendant's] Inspector General to fund the investigations was discussed on the House floor").

A small part of each $1,000 lobby registration fee – 20%, or $200 – is directed by the amended Act to the General Revenue Fund. 25 ILCS 170/5. This does not diminish the overwhelming weight of the foregoing evidence, which shows that the dominant government purpose of the entire lobby registration fee is to raise funds to regulate lobbying. The fact that some of the moneys collected under the LRA may not actually be used to defray regulation costs does not turn this fee into a tax. *See San Juan Cellular Telephone Co.*, 967 F.2d at 687 (holding that the disputed telephone charge was a fee, because its purpose was regulatory, even though the statute provided that "fees collected, but not used . . . will be deposited in the General Fund") (internal quotations omitted); *Marigold Foods, Inc.*, 834 F. Supp. at 1166 (holding that a charge imposed on milk processors was a TIA fee, because it was part of a scheme dedicated "primarily" to regulating milk prices, even though the charge "also raises revenue" that is paid to milk producers); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 219 (E.D.N.Y. 1998)

("[W]here the predominant purposes of a legislative scheme are regulatory, the mere fact that the scheme also raises revenue does not transform the scheme into a tax.")[5]. *Cf. Kathrein*, 2009 WL 3055364 at *4 ("If the primary purpose of an assessment is to generate revenue, it is a tax, even if it has 'incidental' regulatory effects."). The $200 deposit to general revenue contemplated by the LRA is merely incidental to the $1,000 lobby fee's core regulatory purpose. Accordingly, the entire $1,000 is a TIA fee.[6]

The two lobbying cases cited by the government to support their TIA argument are distinguishable on this ground. Unlike the LRA, where 80% of the fee collected ostensibly goes to the Lobbying Registration Administration Fund for administrative and enforcement purposes, only half of the lobbying fees collected in *National Right to Life PAC State Fund* expressly went to the body charged with regulating lobbyists, 1997 WL 525139 at *1, and less than 10% of the moneys collected in *Lavis* were to be spent on "administration and enforcement," with the rest to be used for general purposes, 233 F. Supp. 2d at 1221. Each of these cases is further distinguishable because the charges in those cases were unlike the LRA in important respects. Unlike the LRA, even the half of

[5] In *Gasparo*, the court held that a disputed newsstand charge was a tax for purposes of the TIA because the charge "was intended in significant part to raise revenues." 16 F. Supp. 2d at 219. The court based this holding upon an ample factual record, including legislative findings ("the City should receive revenues for the use of its sidewalks"), testimony of a city official ("it will bring the City some additional revenues"), floor debate ("the City should make money"), and subsequent city financial plans (describing it as a "revenue program"). *Id.* at 219-20. Here, in contrast, as discussed above, the language of the LRA, the available legislative history, and the government's position before this Court all show that the primary intended purpose of the LRA is regulation, not revenue generation.

[6] For purposes of the determination of this issue on the basis of the existing record, this Court should consider that the government at the December 18, 2009 hearing stated that some or all of the 20% deposited into the General Revenue Fund may actually be intended to help defray general costs of administration and enforcement of the LRA.

the fee going to the body regulating lobbyists in *National Right to Life PAC State Fund* was expressly to be "broadly used for more than regulation of lobbyists," including monitoring and enforcement of campaign and election practices. 1997 WL 525139 at *2. In *Lavis*, the fee at issue was not even, as here, ostensibly part of the state's lobbyist filing or registration fee, that being a $25 charge under a separate statute. 223 F. Supp. 2d at 1221 n.4.

Thus, the fact that some portion of a fee may not ultimately be used to defray regulatory costs as stated or intended does not turn the fee into a tax such that federal courts are without jurisdiction to review such fees. Indeed, federal courts – including the Seventh Circuit and the Northern District of Illinois – routinely entertain cases to determine whether a fee imposed by the state, whose primary intended purpose was to defray regulatory costs, accurately reflects the state's actual costs. *See Joelner v. Village of Washington Park*, 378 F.3d 613, 626 (7th Cir. 2004) (remanding for fact-finding in constitutional challenge to village's $10,000 licensing fee for adult book stores, and $30,000 licensing fee for adult cabarets); *South-Suburban Housing Center v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 897-98 (7th Cir. 1991) (invalidating city's $60 permit fee for all "for sale" signs); *Covenant Media of Illinois, LLC v. City of Des Plaines*, No. 04 C 8130, 2005 WL 2277313, *5 (N.D. Ill. Sept. 15, 2005) (Lefkow, J.) (enjoining city's $15,000/sign licensing fee for all commercial signs); *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1471-72 (N.D. Ill.

1988) (Hart, J.) (invalidating city's $25 initial/$15 annual renewal permit fee for all newsracks).[7]

Here, 80% of the lobbyist registration fee collected under LRA ostensibly goes to administration and enforcement of the act. The primary intended *purpose* of the act is to regulate lobbying, not generate revenue. Whether the fees collected are in fact properly related to the costs of such regulation (as constitutionally required), or whether the fees collected are in fact ultimately used in conformance with the intended purpose of the LRA is the subject of this litigation. But whatever the result of the merits determination, it is clear that the primary intended purpose of the LRA is to regulate lobbying. The LRA thus falls on the fee end of the fee/tax spectrum, and this court is not divested of jurisdiction under the TIA.

[7] *See also Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1205-06 (11th Cir. 1991) (remanding for fact-finding in constitutional challenge to state's five-cent administrative fee for each newspaper sold by newsrack at interstate rest areas); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (remanding for fact-finding in constitutional challenge to state's $200 permit fee for demonstrating on state-owned rail bed); *Fernandes v. Limmer*, 663 F.2d 619, 632-33 (5th Cir. 1981) (enjoining airport's $6/day permit fee for individuals wishing to distribute literature or solicit funds at airport); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981, 994-95 (S.D. Ind. 2008) (enjoining state's $250 registration fee imposed on persons intending to sell sexually explicit materials); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 703-06 (M.D. Fla. 1978) (enjoining city ordinance imposing varying licensing fees on adult entertainment establishments, including a $1200 annual licensing fee for adult bookstores and dancing establishments); *Moffett v. Killian*, 360 F. Supp. 228, 231-32 (D. Conn. 1973) (invalidating state statute imposing a $35 fee on certain lobbying activities and depositing revenue in state general fund); *NAACP v. City of Chester*, 253 F. Supp. 707, 712-13 (E.D. Pa. 1966) (enjoining city's $25 permit fee for use of sound trucks in demonstrations).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court hold that the disputed lobby fee is a TIA fee and not a TIA tax, and grant plaintiffs' TRO motion.

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Respectfully submitted:

/s/ Roger J. Perlstadt
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