

No. 09-223

In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

*ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF OF PETITIONER

RICHARD CORDRAY
Attorney General of Ohio
BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
ALEXANDRA T. SCHIMMER
Chief Deputy Solicitor General
STEPHEN P. CARNEY
ELISABETH A. LONG
Deputy Solicitors
BARTON A. HUBBARD
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.mizer@
ohioattorneygeneral.gov
Counsel for Petitioner
Richard A. Levin, Tax
Commissioner of Ohio

QUESTIONS PRESENTED

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity, which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?
2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

LIST OF PARTIES

The Petitioner is Richard Levin, the Tax Commissioner of the State of Ohio.

Respondents are Commerce Energy, Inc. (d.b.a. Commerce Energy of Ohio), Interstate Gas Supply, Inc., and Gregory Slone.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT.....	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION.....	2
STATEMENT OF THE CASE	3
A. Respondents sued the State in federal court for allegedly discriminatory tax treatment.....	3
B. The district court dismissed on comity grounds, but the appeals court reversed and allowed the case to proceed.....	8
SUMMARY OF ARGUMENT.....	10
ARGUMENT	12
A. Principles of comity preclude federal district courts from hearing suits that	

challenge the operation of a state system of taxation.....	12
1. The broader comity doctrine both preceded and subsists after Congress’s enactment of the Tax Injunction Act.....	12
2. <i>Hibbs v. Winn</i> only confirms the vitality of the comity doctrine.....	19
a. <i>Hibbs</i> left comity principles intact.....	20
b. The Sixth Circuit offered no sound reasons for limiting comity in light of <i>Hibbs</i>	23
3. Comity principles apply to this case.....	27
B. The Tax Injunction Act divests the federal court of jurisdiction over this case.....	33
CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997).....	23
<i>Aluminum Co. of Am. v. Utils. Comm'n of N.C.</i> , 713 F.2d 1024 (4th Cir. 1983).....	26
<i>Arkansas v. Farm Credit Servs.</i> , 520 U.S. 821 (1997).....	17, 19
<i>Boise Artesian Hot & Cold Water Co. v. Boise City</i> , 213 U.S. 276 (1909).....	13
<i>Brown v. Board of Educ.</i> , 347 U.S. 483 (1954).....	22
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943).....	18
<i>Califano v. Westcott</i> , 443 U.S. 76 (1979).....	37
<i>California v. Grace Brethren Church</i> , 457 U.S. 393 (1982).....	25, 33
<i>Cherry Hill Vineyards, LLC v. Schneider</i> , 553 F.3d 423 (6th Cir. 2008)	37
<i>Chick Kam Choo v. Exxon Corp.</i> , 486 U.S. 140 (1988).....	25
<i>City Bank Co. v. Schnader</i> , 291 U.S. 24 (1934).....	14

<i>City of Fort Worth v. Southwestern Bell Tel. Co.</i> , 80 F.2d 972 (5th Cir. 1936)	14
<i>Colorado River Water Conservation Dist. v.</i> <i>United States</i> , 424 U.S. 800 (1976)	18
<i>Columbia Gas Transmission Corp. v. Levin</i> , 882 N.E.2d 400 (Ohio 2008)	32
<i>Coors Brewing Co. v. Mendez-Torres</i> , 562 F.3d 3 (1st Cir. 2009)	9
<i>Davis v. Michigan Dep't of Treasury</i> , 489 U.S. 803 (1989)	29, 30
<i>Dennis v. Higgins</i> , 498 U.S. 439 (1991)	36
<i>DirecTV, Inc. v. Tolson</i> , 513 F.3d 119 (4th Cir. 2008)	9, 23, 30, 31
<i>Dows v. City of Chicago</i> , 78 U.S. (11 Wall.) 108 (1871)	10, 12, 13, 20
<i>Fair Assessment in Real Estate Ass'n v. McNary</i> , 454 U.S. 100 (1981)	<i>passim</i>
<i>Franchise Tax Bd. v. Hyatt</i> , 538 U.S. 488 (2003)	17
<i>Franchise Tax Bd. v. United States Postal Serv.</i> , 467 U.S. 512 (1984)	17
<i>Fulton Corp. v. Faulkner</i> , 516 U.S. 325 (1996)	28

<i>General Motors Corp. v. Tracy</i> , 519 U.S. 278 (1997).....	<i>passim</i>
<i>Great Lakes Dredge & Dock Co. v. Huffman</i> , 319 U.S. 293 (1943).....	<i>passim</i>
<i>Gully v. Interstate Natural Gas Co.</i> , 82 F.2d 145 (5th Cir. 1936)	14
<i>Henderson v. Stalder</i> , 407 F.3d 351 (5th Cir. 2005)	35
<i>Hibbs v. Winn</i> , 542 U.S. 88 (2004).....	<i>passim</i>
<i>Hill v. Kemp</i> , 478 F.3d 1236 (10th Cir. 2007).....	23, 35, 37
<i>In re Gillis</i> , 836 F.2d 1001 (6th Cir. 1988).....	22, 25, 38
<i>Lac D'Amiante Du Quebec, LTEE v. Am. Home Assurance Co.</i> , 864 F.2d 1033 (3d Cir. 1988).....	18
<i>Levy v. Pappas</i> , 510 F.3d 755 (7th Cir. 2007)	9
<i>Madden v. Kentucky</i> , 309 U.S. 83 (1940).....	18
<i>Marvin F. Poer & Co. v. County of Alameda</i> , 725 F.2d 1234 (9th Cir. 1984).....	25
<i>Matthews v. Rodgers</i> , 284 U.S. 521 (1932).....	13

<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	39
<i>McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco</i> , 496 U.S. 18 (1990)	37
<i>Middlesex County Ethics Comm. v. Garden State Bar Ass'n</i> , 457 U.S. 423 (1982).....	19
<i>Miller v. French</i> , 530 U.S. 327 (2000).....	24
<i>Missouri v. Jenkins</i> , 495 U.S. 33 (1990).....	17
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972).....	25
<i>Moore v. Sims</i> , 442 U.S. 415 (1979).....	19
<i>National Private Truck Council v. Oklahoma Tax Commission</i> , 515 U.S. 582 (1995)	16, 25
<i>Nordlinger v. Hahn</i> , 505 U.S. 1 (1992).....	17
<i>Ohio Grocers Ass'n v. Levin</i> , 123 Ohio St. 3d 303 (2009)	28
<i>Perez v. Ledesma</i> , 401 U.S. 82 (1971).....	17, 18
<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 505 U.S. 833 (1992).....	22

<i>Rees v. City of Watertown</i> , 86 U.S. (19 Wall.) 107 (1874)	17
<i>Rosewell v. LaSalle National Bank</i> , 450 U.S. 503 (1981).....	16, 17, 33, 34
<i>Samuels v. Mackell</i> , 401 U.S. 66 (1971).....	16, 18
<i>Singer Sewing Mach. Co. v. Benedict</i> , 229 U.S. 481 (1913).....	13
<i>Township of Hillsborough v. Cromwell</i> , 326 U.S. 620 (1946).....	36
<i>Tully v. Griffin</i> , 429 U.S. 68 (1976).....	33
<i>United States Brewers Ass'n v. Perez</i> , 592 F.2d 1212 (1st Cir. 1979)	22
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986).....	22
<i>Vectren Energy Delivery of Ohio, Inc. v. PUCO</i> , 863 N.E.2d 599 (Ohio 2007)	5
<i>Wilbur v. Locke</i> , 423 F.3d 1101 (9th Cir. 2005).....	9
<i>Winn v. Arizona Christian Sch. Tuition Org.</i> , 562 F.3d 1002 (9th Cir. 2009).....	38
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	12, 25

Statutes and Rules

15 U.S.C. 717(b)..... 27

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1341 1, 2, 30

28 U.S.C. § 1342 25, 28

28 U.S.C. § 2201-02 7

28 U.S.C. § 2283 25

42 U.S.C. § 1983 15, 16, 26

Ohio Admin. Code Ch. 4901:1-14..... 5, 6, 27, 28

Ohio Rev. Code § 4905..... 4, 5, 27

Ohio Rev. Code § 4929..... 4

Ohio Rev. Code § 5727..... 6, 28

Ohio Rev. Code § 5739..... 5, 6, 32

Ohio Rev. Code § 5741..... 5, 6

Ohio Rev. Code § 5751..... 5, 6, 31

Other Authorities

17A James Wm. Moore et al., *Moore’s Federal Practice* § 121.46 (3d ed. 2009)..... 18

Note, <i>Federal Court Interference with the Assessment and Collection of State Taxes</i> , 59 Harv. L. Rev. 780 (1946).....	14
S. Rep. No. 1035 (1937)	34

OPINIONS BELOW

The Sixth Circuit's opinion, *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir. 2009), and orders are reproduced at Pet. App. 1a-2a, 3a-18a. The United States District Court for the Southern District of Ohio's opinion and order is reproduced at Pet. App. 19a-33a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its original judgment and opinion on February 4, 2009. The Sixth Circuit denied rehearing en banc on May 22, 2009. The State of Ohio timely filed a petition for a writ of certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the petition on November 2, 2009. 130 S. Ct. 496 (2009).

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, Section 1341 of Title 28 of the United States Code, 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.

INTRODUCTION

When a plaintiff challenges a state tax law in federal court, the suit may be barred in one of two ways: by principles of comity or by the Tax Injunction Act (“TIA”), 28 U.S.C. § 1341. Comity principles preceded the TIA and, as the Court has repeatedly explained, retain a broader scope even after the statute’s enactment. See, e.g., *Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100, 110-11 (1981). The comity doctrine affords due respect for the States’ sovereign authority over their own tax policies and preserves fiscal stability by preventing unwarranted federal court intrusion in questions of state tax law.

The central question in this case is whether comity principles remain independently vital after the Court’s decision interpreting the TIA in *Hibbs v. Winn*, 542 U.S. 88 (2004). Since *Hibbs* did not purport to overrule *Fair Assessment*, the answer should be easy. Yet the Sixth Circuit held here that *Hibbs* effectively rendered the comity doctrine a dead letter in tax cases.

This case perfectly illustrates why that view is wrong. If the comity doctrine is to have any force independent of the TIA (as this Court has said again and again it must), it surely precludes Respondents’ claim that Ohio law taxes them unevenly vis-à-vis their competitors. Resolving that claim would require the federal court to undertake a detailed analysis of state tax and regulatory policy, and any relief to which Respondents might be entitled would substantially alter Ohio’s tax regime.

Even if the comity doctrine does not survive *Hibbs*, however, this case bears all the hallmarks of cases to which the TIA applies. *Hibbs* allowed a challenge to a state tax to proceed in federal court under the TIA only in the narrow circumstances where it was (1) brought by a third party, (2) would not reduce state revenues, and (3) rested on the Establishment Clause. *Hibbs* in no way countenanced intrusive federal suits—like this one—brought by business plaintiffs claiming that their own taxes are unfair relative to their competitors’. Whether by dint of comity principles or the TIA, this case belongs in state court.

STATEMENT OF THE CASE

A. Respondents sued the State in federal court for allegedly discriminatory tax treatment.

Respondents are Commerce Energy, Inc. (d.b.a. Commerce Energy of Ohio), Interstate Gas Supply, Inc. (“IGS”), and Gregory Slone. Commerce Energy is a “retail natural gas supplier” or “independent marketer,” as those terms are explained below, that sells natural gas in Ohio. J.A. 2 (Compl. ¶ 1). IGS is also such a seller, J.A. 2 (Compl. ¶ 2), and Slone is a residential customer of IGS, J.A. 2-3 (Compl. ¶ 3).

The natural gas market in Ohio has been partly deregulated, such that most residential and business consumers may now purchase natural gas in one of two ways. First, the consumer may buy gas from the state-regulated public utility serving the customer’s area. These companies, which once were

monopoly sellers in their respective areas, are called “natural gas companies” in Ohio law. Ohio Rev. Code § 4905.03(A)(6). They are also called “local distribution companies,” or LDCs. *General Motors Corp. v. Tracy*, 519 U.S. 278, 282 (1997). LDCs sell customers a bundled product consisting of both (1) the gas itself, as a commodity, and (2) delivery of the gas by pipeline into the customer’s home or business. J.A. 4 (Compl. ¶ 9).

Second, a consumer may, under Ohio’s “Consumer Choice” program, Ohio Rev. Code § 4929.02, purchase natural gas from any of the newer companies, such as Respondents, that now compete with the LDCs for retail sales of the unbundled “gas as a commodity” product. These companies are called “independent marketers” (“IMs”), or, as Respondents call themselves, “Retail Suppliers.” J.A. 2 (Compl. ¶ 1). When a consumer selects an IM, he actually buys two unbundled products: delivery (from the LDC, which carries the product through its exclusive pipeline into the home) and the gas itself (from the IM). J.A. 7 (Compl. ¶ 20). A residential consumer receives a single bill from the LDC, but the bill separately enumerates the delivery and gas charges. J.A. 8-9 (Compl. ¶ 24). The LDC collects the full amount and remits the IM’s share to the IM. *Id.*

The IMs and LDCs are subject to different regulatory and taxation regimes. The LDCs, for example, are obliged to serve everyone in their respective territories, see Ohio Rev. Code §§ 4905.03(A)(6), 4905.06, 4905.35; *Tracy*, 519 U.S. at 297—a duty that the IMs do not bear. Also, the Public Utilities Commission of Ohio (“PUCO”)

regulates the LDCs' rates and sets tariffs on a "cost-plus" basis, which allows the LDCs the opportunity to recover their costs under a set formula and earn a PUCO-approved rate of return. Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Admin. Code Ch. 4901:1-14; e.g., *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 863 N.E.2d 599 (Ohio 2007) (applying the "gas cost recovery process" established under Ohio Admin. Code Ch. 4901:1-14); see also *Tracy*, 519 U.S. at 297. The IMs are not subject to a similar rate-setting regime.

Along with divergent regulatory duties, the two types of gas sellers also face differing state tax structures, and Respondents object to these tax differences. First, customers, such as Respondent Slone, pay an ordinary sales tax on their purchases of gas from IMs. J.A. 13 (Compl. ¶¶ 40-42). (Respondents also object to Ohio's use tax; they define "sales tax" to include both. *Id.*) Ohio's statewide sales tax is 5.5%. Ohio Rev. Code §§ 5739.02-.025 (sales), 5741.02 (use). Ohio's counties may add a "piggyback" sales tax of up to 3%. Ohio Rev. Code §§ 5739.021 et seq., 5741.021 et seq. Currently, the combined sales tax rate in Ohio's counties ranges from 6.0% to 7.5%. J.A. 13, 22-23 (Compl. ¶¶ 41, 45 & Ex. A).

Second, the IMs pay a business tax called the "commercial activities tax," or CAT, which applies to almost all Ohio businesses and taxes a company's gross receipts generated in Ohio. J.A. 15-16 (Compl. ¶ 49); Ohio Rev. Code § 5751.02. A company pays no tax on its first \$150,000 in such gross receipts, Ohio Rev. Code § 5751.01(E)(1); it then pays a flat tax of \$150 for receipts between \$150,000 and \$1 million.

Ohio Rev. Code § 5751.03. Gross receipts over \$1 million are taxed at 0.26%. *Id.*

LDCs pay taxes through a different mechanism. They do not pay the CAT, and their customers are exempt from paying the sales tax. Ohio Rev. Code §§ 5751.01(E)(2); 5739.02(B)(7), .021(E), .023(G), & .026(F); 5741.02(C); .021(A); .022(A); & .023(A). Instead, the LDCs pay a “gross receipts excise tax,” or GRT, aimed solely at them. The GRT taxes gross receipts at a statutory rate of 4.75%, Ohio Rev. Code § 5727.24, although the effective rate is closer to 5%, see J.A. 14 (Compl. ¶ 43). The GRT is also assessed against a broad array of an LDC’s receipts beyond consumer sales of gas. Ohio Rev. Code § 5727.33. Ohio’s public utilities regulations allow each LDC to include its GRT payments in its costs when calculating the cost-plus rate that the LDC may charge consumers. See Ohio Admin. Code § 4901:1-14-05 (specifying formula for “gas cost recovery rate” and authorizing “other factors” to be specified in appendix to cited rule); see Appendix at [http://www.registerofohio.state.oh.us/pdfs/4901/1/14/4901\\$1-14-05_FF_A_APP1_20040805_1202.pdf](http://www.registerofohio.state.oh.us/pdfs/4901/1/14/4901$1-14-05_FF_A_APP1_20040805_1202.pdf) (last visited Dec. 18, 2009).

LDCs also pay two other taxes that the IMs do not. The first, called the “MCF tax,” is based on the volume of gas that the LDCs sell and deliver. (“MCF” stands for “thousands of cubic feet,” the basis for measuring natural gas volume.) Ohio Rev. Code § 5727.811. The second is a personal property tax that once was charged to almost all Ohio companies. That tax has now been phased out for IMs and most other companies but retained for public utilities such as LDCs. Ohio Rev. Code § 5727.06.

Respondents argue that this different tax treatment violates equal protection and dormant Commerce Clause principles. They allege that the GRT is like the sales tax, in that the cost-plus regulations allow the LDCs to pass the cost on to customers. J.A. 14-15 (Compl. ¶¶ 45, 48). Because the GRT rate is 4.75%, and the sales tax rates vary from 6% to 7.5%, Respondents allege that “[t]he exemption from the sales tax for sales made by a Choice LDC (at least an exemption over and above what is paid pursuant to the gross receipts tax) discriminates against interstate commerce by providing an exemption that benefits” only LDCs. J.A. 15 (Compl. ¶ 48). They also allege that “[t]he exclusion of LDCs from the CAT imposes an additional tax on the sales of natural gas by [IMs] that is not imposed on the sales of natural gas by LDCs.” J.A. 16 (Compl. ¶ 53). Finally, Respondents complain that Ohio law, in calculating the GRT, excludes receipts generated by sales of natural gas between LDCs. J.A. 18 (Compl. ¶ 58).

Invoking the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, J.A. 3 (Compl. ¶ 6), Respondents requested the following relief:

1. “[a] declaration that the exemptions/exclusions identified above, either individually or together, violate the Commerce Clause . . . and/or violate the Equal Protection Clause”;
2. “[a]n order invalidating” the exemptions/exclusions;
3. “[a] permanent injunction enjoining” Petitioner Levin and his agents from

“recognizing and/or enforcing those exemptions/exclusions”; and

4. “[s]uch other relief to which Plaintiffs are entitled.”

J.A. 20-21 (Compl., prayer for relief).

B. The district court dismissed on comity grounds, but the appeals court reversed and allowed the case to proceed.

The State moved to dismiss, arguing that both the TIA and comity principles preclude federal jurisdiction. Pet. App. 21a-22a, 26a. The district court granted the motion to dismiss. With respect to the TIA, the district court held that Respondents fell under the *Hibbs* allowance for third-party challenges because they do not challenge their own tax liability. *Id.* at 24a. The court reasoned that invalidating the LDCs’ exemptions would increase, not decrease, the State’s revenue. *Id.* The court therefore concluded that the TIA did not bar the suit. *Id.* at 26a.

The district court then held, however, that comity principles did bar the suit. *Id.* at 29a, 31a. The court reasoned that *Hibbs* did not alter the scope of the comity bar, because “[n]owhere did the *Hibbs* Court address principles of comity beyond the scope of determining the TIA’s application to the case before it.” *Id.* at 28a. The court noted that “general principles of comity extend beyond the comity rationale underlying the TIA,” *id.* at 28a, and it concluded that such principles required dismissal, *id.* at 29a, 31a.

The Sixth Circuit reversed, holding that neither the TIA nor comity principles precluded

Respondents' federal action. The appeals court first adopted the district court's reasoning as to the TIA. *Id.* at 7a, 9a. The court then reversed the district court's comity holding, finding that *Hibbs* had narrowed *Fair Assessment's* broad description of comity, and that, following *Hibbs*, comity—like the TIA—can be invoked “only when plaintiffs try to thwart tax collection.” *Id.* at 11a. The court acknowledged that “there is a circuit split” on the issue, *id.* at 10a, but it adopted a restrictive reading of comity principles in *Hibbs's* wake.

After the Sixth Circuit denied the State's request for rehearing en banc, Pet. App. 1a, the Tax Commissioner sought this Court's review, highlighting the circuit split that the appeals court had identified. Compare *DirectTV, Inc. v. Tolson*, 513 F.3d 119, 127-28 (4th Cir. 2008) (holding that *Hibbs* had no effect on the comity principle), with *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 17-18 (1st Cir. 2009) (holding that *Hibbs* sharply limited the scope of the comity bar); *Levy v. Pappas*, 510 F.3d 755, 761-62 (7th Cir. 2007) (placing comity in lockstep with the TIA); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) (same). This Court granted review. 130 S. Ct. 496 (2009).

SUMMARY OF ARGUMENT

For well over a century, this Court has applied principles of comity to preclude federal courts from entertaining intrusive challenges to state tax laws. See *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871). The comity rule properly defers to the States' sovereign authority over their own tax policies, preserves fiscal stability by avoiding disruption of local revenue streams, and respects the States' courts and administrative processes.

The Tax Injunction Act buttresses, rather than supplants, these essential principles. Congress enacted the TIA to respond to a specific problem: Notwithstanding the comity doctrine, federal courts were too liberally entertaining challenges to state tax systems on the ground that the available state remedies were inadequate. Congress fixed that narrow problem by instructing district courts to evaluate the available state law remedy under a more deferential standard. This Court has made clear that two things remain true in the TIA's wake: The comity doctrine survived the TIA's enactment, and comity principles apply more broadly than the federal statute. See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110-11 (1981).

This Court's recent decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), changed neither of those precepts. *Hibbs* held simply that the suit before it could proceed in federal court—under both the TIA and comity principles—because three characteristics distinguished it from cases that came before: (1) the plaintiffs were third parties to the challenged tax credit who did not object to their own liability; (2) the suit, if successful, would increase, rather than

decrease, state revenue; and (3) the substantive basis of the challenge—the Establishment Clause—did not require a searching review of the state tax law’s operation, which was not even in dispute. *Hibbs* did not purport to overrule earlier decisions holding that the freestanding comity doctrine is broader than the TIA. Nor did it need to. It was enough for the Court to hold that, however broadly comity principles reach, they did not apply to the narrow case before it.

If the comity doctrine has any vitality after *Hibbs*, it bars this case. To resolve Respondents’ dormant Commerce Clause and equal protection claims, the federal court would have to undertake a granular analysis of Ohio’s tax and public-utilities laws. And if Respondents prevail on the merits, any possible relief would intrusively alter Ohio’s tax system. Principles of comity and federalism do not permit such disruptive federal court intervention in state tax regimes.

Even if comity principles do not apply, the TIA itself strips the federal courts of jurisdiction over Respondents’ suit. This case satisfies none of the exceptions to the TIA articulated in *Hibbs*: (1) Respondents are not third parties, because they object to their own tax liability relative to their competitors’; (2) their challenge jeopardizes state revenue; and (3) their suit is not of the subject matter type that this Court has explained falls outside of the TIA’s reach.

The Sixth Circuit was therefore doubly wrong to remand this case to the district court. The Court should reverse that judgment and allow the Ohio courts the opportunity to review their own State’s tax system.

ARGUMENT**A. Principles of comity preclude federal district courts from hearing suits that challenge the operation of a state system of taxation.**

Comity concerns are not unique to the tax context. In all cases implicating the relationship between the state and federal governments, fundamental principles of federalism and comity require that federal courts afford “a proper respect for state functions” and avoid “undu[e] interfere[nce] with the legitimate activities of the States.” *Younger v. Harris*, 401 U.S. 37, 44 (1971). These precepts carry all the more weight “in suits challenging the constitutionality of state tax laws . . . because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court.” *Fair Assessment*, 454 U.S. at 108. These concerns apply with full force to this case.

1. The broader comity doctrine both preceded and subsists after Congress’s enactment of the Tax Injunction Act.

The comity doctrine in tax cases was engendered in part by the inherent limits on equity. The Court long ago recognized that “[i]t 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 Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). The

Dows Court accordingly instructed that “[n]o court of equity will . . . allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law.” *Id.*

Later cases explained that “this guiding principle” of equitable restraint carries “peculiar force in cases where the suit . . . is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty.” *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). In *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909), for instance, the Court surveyed its decisions and found that “a proper reluctance to interfere by prevention with the fiscal operations of the state governments ha[d] caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.” The Court’s repeated instructions were clear: So long as the state remedy was “plain, adequate, and complete,” the “scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.” *Matthews*, 284 U.S. at 525-26; accord *Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481, 484-85 (1913).

Congress enacted the Tax Injunction Act in 1937 to reinforce these background equitable principles. Despite the well-settled comity rule, “the federal courts had become ‘free and easy with

injunctions” in state tax cases by opening two specific loopholes in the doctrine. *Fair Assessment*, 454 U.S. at 129 (Brennan, J., concurring in the judgment) (citation omitted). First, federal courts held that, although “equity jurisdiction does not lie where there exists an adequate legal remedy,” that phrase meant an “‘adequate legal remedy’ cognizable in federal court.” *Id.* at 129 n.15 (citing *City Bank Co. v. Schnader*, 291 U.S. 24, 29 (1934)). And sovereign immunity, among other jurisdictional limitations, meant that a remedy cognizable in federal court often did not exist in tax cases. *Id.* Second—and more often—“the federal courts, in construing strictly the requirement that the remedy available at law be ‘plain, adequate and complete,’ had frequently concluded that the procedures provided by the State were not adequate.” *Id.*; see, e.g., *Gully v. Interstate Natural Gas Co.*, 82 F.2d 145 (5th Cir. 1936); *City of Fort Worth v. Southwestern Bell Tel. Co.*, 80 F.2d 972 (5th Cir. 1936); see also Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 Harv. L. Rev. 780, 782-83 & nn.13-14 (1946) (citing cases). Congress closed both loopholes by barring district courts from enjoining state tax laws when *state* law (not federal law) provided a remedy, and by setting forth a more deferential standard by which to evaluate the adequacy of that remedy. See *Fair Assessment*, 454 U.S. at 109-110; *id.* at 129 n.15 (Brennan, J., concurring in the judgment).

This Court quickly explained that the TIA bolstered but did not displace the comity doctrine, and that the comity rule’s scope was broader than the TIA’s. First, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court

considered a federal action for declaratory relief against a state tax law. The Court looked to the recently enacted TIA and found it unclear whether the statute's terms covered actions for declaratory relief. *Id.* at 299. But the Court saw no need to resolve the question under the new statute, because the preexisting comity doctrine resolved the matter. *Id.* The TIA's enactment, the Court observed, "is hardly an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion." *Id.* at 301. The Court accordingly held that the comity principles "which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* at 299.

The Court has repeatedly confirmed *Great Lakes*' holding that the comity doctrine extends beyond the bounds of the TIA. Most prominently, in *Fair Assessment*, the plaintiffs sought damages under 42 U.S.C. § 1983 (rather than injunctive or declaratory relief) "to redress the allegedly unconstitutional administration of a state tax system." 454 U.S. at 101. The Court reviewed both pre-TIA law and the TIA's legislative history to conclude that comity has a broader scope than the TIA alone, and that "the principle of comity which predated the Act was not restricted by its passage." *Id.* at 110. The Court further explained that *Great Lakes* "demonstrates not only the post-Act vitality of the comity principle, but also its applicability to actions seeking a remedy other than injunctive relief." *Id.* at 111. In *Great Lakes*, "[t]he focus was not on the specific form of relief requested," but on

the “practical effects” engendered by even a declaration. *Id.* The damages relief sought in *Fair Assessment*, said the Court, “would have a similarly disruptive effect.” *Id.*; see also *Samuels v. Mackell*, 401 U.S. 66, 71-72 (1971).

Case after case has reiterated this rule. In *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 525 n.33 (1981), for instance, the Court explained that “even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief.” And in *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 584-85 (1995) (“*NPTC*”), the plaintiffs brought a § 1983 action in state court, but the Oklahoma Supreme Court declined to afford relief because adequate remedies existed under state law. In affirming the state court’s judgment, this Court explained that, “[g]iven the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation.” *Id.* at 590 (citing *Fair Assessment*, 454 U.S. at 110). The Court therefore held that “state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy.” *Id.* at 592. This principle applied, the Court explained, regardless of whether the requested relief was injunctive or declaratory in nature. *Id.* at 591.

Beyond core federalism safeguards for state sovereignty, three specific rationales animate this “hands-off approach” to state tax challenges. *NPTC*,

515 U.S. at 586. First and foremost, it preserves the States' fiscal stability. "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions . . . restraining collection of state taxes." *Great Lakes*, 319 U.S. at 298. If federal court-ordered "relief were available to test state tax assessments, state tax administration might be thrown into disarray." *Fair Assessment*, 454 U.S. at 108 n.6 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). That threat is especially acute given "the dependency of state budgets on the receipt of local tax revenues," *Rosewell*, 450 U.S. at 527, and the reality that "[t]he power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997).

Second, state tax policy warrants particular deference as a matter of sovereign authority. See *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1874); *Missouri v. Jenkins*, 495 U.S. 33, 69 (1990) (Kennedy, J., concurring in part and concurring in the judgment). The power to tax is "an essential attribute of sovereignty," *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 498 (2003)—"the life-blood of government," *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 523 (1984) (citation omitted). "In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (internal quotations and citations omitted). "Indeed, 'in taxation, even more than in other fields, legislatures

possess the greatest freedom in classification.” *Tracy*, 519 U.S. at 311 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). This approach recognizes not only state sovereignty, but also the judiciary’s practical limitations. In *Tracy*, for instance, the Court acknowledged that it “lack[ed] the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio’s tax scheme on the utilities’ capacity to serve [a] captive market.” *Id.* at 304.

In this regard, the comity rule resembles abstention doctrines that respect “the rightful independence of state governments in carrying out their domestic policy.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (internal quotations and citation omitted); see, e.g., *Lac D’Amiante Du Quebec, LTEE v. Am. Home Assurance Co.*, 864 F.2d 1033, 1046 (3d Cir. 1988) (applying *Burford* abstention because federal intervention would have been “highly disruptive to the state’s regulatory scheme” for the liquidation of insolvent insurers). In fact, this Court has cited *Great Lakes*—which was decided the same day as *Burford*—as a case in which abstention was appropriate because of due “regard for federal-state relations.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 816-17 (1976); see also *Samuels*, 401 U.S. at 71; 17A James Wm. Moore et al., *Moore’s Federal Practice* § 121.46 (3d ed. 2009) (citing *Fair Assessment* and *Great Lakes* as cases barred by abstention rather than the TIA).

Third, the comity doctrine respects the vital role played by the States’ own courts and administrative processes. See *Fair Assessment*, 454 U.S. at 108 n.6 (citing *Perez*, 401 U.S. at 128 n.17

(Brennan, J., concurring in part and dissenting in part)). “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,” particularly “respecting questions of state taxation.” *Farm Credit Servs.*, 520 U.S. at 826. “State courts are the principal expositors of state law,” and they have the opportunity in “[a]lmost every constitutional challenge” to impart a “narrowing construction[] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.” *Moore v. Sims*, 442 U.S. 415, 429-30 (1979). “When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals.” *Id.* at 430. These comity interests apply equally to administrative processes. See *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982).

The case law therefore settles three propositions: (1) Even after the TIA’s enactment, the robust comity doctrine continues to bar intrusive review of state tax law; (2) the comity doctrine reaches more broadly than the TIA; and (3) the doctrine applies regardless of whether the requested relief is declaratory, injunctive, or compensatory in nature. Nothing in *Hibbs* affected those three propositions.

2. *Hibbs v. Winn* only confirms the vitality of the comity doctrine.

This Court’s repeated observation that “[t]he principle of comity which predated the [TIA] was not

restricted by its passage,” *Fair Assessment*, 454 U.S. at 110, should suffice to resolve this case. If it does not, it is because *Hibbs v. Winn* overruled, *sub silentio*, an unbroken line of comity cases extending back at least as far as *Dows* in 1871. But this reading of *Hibbs* is not a plausible understanding either of the Court’s opinion or of the TIA itself.

a. *Hibbs* left comity principles intact.

Hibbs involved an Establishment Clause challenge to an Arizona tax credit for payments to organizations that award scholarships to children attending private schools. 542 U.S. at 92-93. The tax credit at issue was not so much a revenue-raising device as it was a subsidy to advance a particular educational policy. See *id.* at 92-93. The plaintiffs sought injunctive and declaratory relief, and the central question was whether their challenge sought to enjoin the “assessment” of a state tax within the meaning of the TIA. See *id.* at 99-100. The Court looked to the statute’s history, purpose, and case law and determined that Congress’s word choice reflected its primary concern—revenue collection. *Id.* at 100-107.

Three factors were critical to the Court’s holding that the suit could proceed in federal court because it did not threaten state revenue. First, the measure at issue was a tax *credit*, and the Court noted that a judgment invalidating a tax credit would increase, not decrease, the State’s revenue. *Id.* at 93. Second, the Court stressed that the plaintiffs were “third parties” who objected to the provision of credits to *other* taxpayers—not taxpayers objecting to their own tax liability. *Id.* at

93, 108. And third, because the challenge was based on the Establishment Clause, not state tax law, the plaintiffs had “not asked the District Court to interpret any state law.” *Id.* at 106 n.8. The Court explained that the TIA had never been raised, and federal jurisdiction never questioned, in a host of cases alleging that tax laws violated the Establishment Clause or improperly used race-based classifications—disputes in which the analysis did not turn on tax doctrine. *Id.* at 93-94, 110-12.

What little *Hibbs* had to say about comity is contained in two footnotes. In footnote 9, the Court observed:

[T]his Court has relied upon “principles of comity,” Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. See *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107-108 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-299 (1943) (plaintiffs challenged Louisiana’s unemployment compensation tax).

Id. at 107 n.9. Then, in footnote 11, the Court discussed several lower court cases that Arizona invoked to support the view that, for TIA purposes, “no line should be drawn between challenges that would reduce revenues and attacks that might

augment collections.” *Id.* at 109 n.11. The Court explained that two of those cases—*In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and *United States Brewers Ass’n v. Perez*, 592 F.2d 1212 (1st Cir. 1979)—did not rely on the TIA (and that *U.S. Brewers* expressly rested on comity grounds), but the Court offered no further explanation. Finally, the Court elsewhere cited *Fair Assessment* as a case in which “[f]ederal-court relief . . . would have operated to reduce the flow of state tax revenue. *Id.* at 106.

The *Hibbs* Court did not directly address the relationship between comity and the TIA, nor did it suggest, in citing *Fair Assessment* and *Great Lakes*, that its decision affected those earlier holdings. It certainly did not purport to overrule any prior decisions. On the contrary, the decision vehemently denied that it was effecting a sea change, explaining that the *opposite* approach would have called a line of precedent into doubt. *Id.* at 93 (citing, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954)); see also *Hibbs*, 542 U.S. at 112-13 (Stevens, J., concurring). It is doubtful that the Court would have expressed *stare decisis* concerns for one “decades-long understanding,” *id.* at 112, while tacitly overruling another.

Had the *Hibbs* Court intended to eliminate or narrow the comity doctrine in tax cases, it would have said so explicitly. “[W]hen this Court reexamines a prior holding,” it does not do so furtively. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992). Rather, it “detours from the straight path of *stare decisis*” only for reasons that are clearly articulated. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). Nor does the Court

leave it to the lower courts to conclude that “more recent cases have, by implication, overruled an earlier precedent,” for it is alone this Court’s “prerogative [to] overrul[e] its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). In light of those principles, it is evident why the *Hibbs* Court did not carefully justify its elimination of the comity doctrine: because it did not eliminate the comity doctrine.

Instead, the natural reading of *Hibbs*’s cursory reference to comity is that the Court left the comity doctrine exactly where it found it. The Court in footnote 9 simply explained that the same factors that made the case a poor fit under the TIA also made it a poor fit for comity. Never before had the Court invoked either the TIA *or* comity principles to preclude a federal challenge by a third party who objected to a tax credit received by others rather than to her own liability under a revenue-raising tax provision, with no dispute as to the operation of tax doctrine. See *DirectTV*, 513 F.3d at 127; *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007). The *Hibbs* Court therefore said that the unusual case before it cleared *both* the TIA *and* comity hurdles—not that the second hurdle no longer exists.

b. The Sixth Circuit offered no sound reasons for limiting comity in light of *Hibbs*.

The Sixth Circuit offered three principal reasons for disregarding *Fair Assessment*’s clear rule and concluding that *Hibbs* restricted or eliminated the comity doctrine. None of those rationales withstands scrutiny.

First, the Sixth Circuit found it hard to reconcile “a sweeping reading of *Fair Assessment*” with “*Hibbs*’s instruction that comity guts federal jurisdiction only when plaintiffs try to thwart tax collection.” Pet. App. 11a. As explained above, however, no tension exists between *Hibbs* and *Fair Assessment*. The *Hibbs* Court merely observed that the case before it was unlike any it had seen before, including in the comity context. 542 U.S. at 107 n.9. Thus, even under the robust comity rule described in *Fair Assessment*, the third-party complaint at issue in *Hibbs* could proceed in federal court. Put another way, the *Hibbs* Court simply held that Arizona’s arguments fared no better under the comity rule than under the TIA. See *id.*

Second, the Sixth Circuit worried that “an unduly broad view of comity would render an Act of Congress—the Tax Injunction Act—effectively superfluous, as its contours would never be dispositive so long as extant ‘comity principles’ uniformly barred challenges to state taxation.” Pet. App. 11a. But this concern disregards Congress’s point in enacting the TIA. As explained in Part A.1 above, Congress was moved to close two specific loopholes that allowed too many state tax challenges to enter the federal courts—(1) the requirement that an “adequate legal remedy” be cognizable in federal court, and (2) the view that available state remedies were inadequate. See *Fair Assessment*, 454 U.S. at 109; *id.* at 129 n.15 (Brennan, J., concurring in the judgment). Congress therefore adopted the TIA to shore up the comity doctrine in a set of cases where it had eroded, but it left in place the federal courts’ broader equitable authority to stay their hand in state tax cases. See *Miller v. French*, 530 U.S. 327,

340 (2000) (requiring a clear statement for a statute to displace federal courts' equitable powers).

The result is a statute that works in tandem with background equitable principles. When federal courts confront a state tax challenge, they ordinarily ask first whether the TIA divests them of jurisdiction. See, e.g., *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Marvin F. Poer & Co. v. County of Alameda*, 725 F.2d 1234, 1235-36 (9th Cir. 1984). If the challenge falls within the core set of cases that drove Congress to enact the statute—“i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes,” *Hibbs*, 542 U.S. at 107—the TIA has fulfilled its role as “a partial codification of the federal reluctance to interfere with state taxation.” *NPTC*, 515 U.S. at 590. If not, then the courts turn to the broader comity doctrine. See, e.g., *Gillis*, 836 F.2d at 1005.

This customary order of operations—statute first, then background principles—is common. For instance, even if the terms of the Anti-Injunction Act, 28 U.S.C. § 2283, permit a federal court to enjoin parallel state proceedings, *Younger* abstention and background comity principles nonetheless may require the federal court to stay its hand. See *Mitchum v. Foster*, 407 U.S. 225, 229-30, 243 (1972); see also *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151 (1988) (“[T]he fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue.”). Similarly, even when the Johnson Act, 28 U.S.C. § 1342—which divests federal courts of jurisdiction to enjoin public utility commission orders—does not bar federal jurisdiction

over an action, “[t]he usual rule of comity must govern.” *Aluminum Co. of Am. v. Utils. Comm’n of N.C.*, 713 F.2d 1024, 1028-29 (4th Cir. 1983). Just as there is no suggestion that this approach guts either the Anti-Injunction Act or the Johnson Act, neither does it leave the TIA feckless. Instead, it appropriately gives effect to both the TIA *and* principles of comity.

The Sixth Circuit had a final reason for its parsimonious view of comity following *Hibbs*. The Sixth Circuit noted this Court’s concern in *Hibbs* that, under an expansive reading of the TIA, a series of earlier Establishment Clause and race-discrimination precedents would have been jurisdictionally barred. Pet. App. 12a. “This same logic applies to comity,” the appeals court said, for a broad comity bar likewise would have barred the earlier precedents cited by *Hibbs*. *Id.* On this point, however, *Hibbs* is entirely consistent with *Fair Assessment*, which reserved the question “whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race.” 454 U.S. at 107 n.4. *Hibbs* simply illustrates the rare case contemplated by *Fair Assessment*.

Nothing about *Hibbs*, in short, calls *Fair Assessment* or the independent comity doctrine into question. And everything about this case shows that it belongs in state court.

3. Comity principles apply to this case.

The overriding purpose of the comity doctrine, as explained in Part A.1 above, is to avoid unwarranted intrusion into state tax policy. Several different aspects of this case demonstrate that, if Respondents' suit were allowed to proceed in federal court, it would entail precisely the kind of disruption that the comity rule exists to prevent. See *Fair Assessment*, 454 U.S. at 108, 113. At every step of the way—in both the merits analysis and in crafting a remedy—the district court would need to undertake a fine-grained analysis of Ohio tax and regulatory law.

First, the district court would have to scrutinize Ohio's regulatory regime to address the “threshold question whether the companies are indeed similarly situated for constitutional purposes.” *Tracy*, 519 U.S. at 299. As *Tracy* shows, that analysis requires a careful examination of the different businesses' operations and the divergent state regulatory structures that govern LDCs and IMs. *Id.*; see, e.g., Ohio Rev. Code §§ 4905.35 (requiring LDCs to serve all in their territories); Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Admin. Code Ch. 4901:1-14 (regulating LDCs' rates and setting tariffs on a “cost-plus” basis). Those regulatory differences are rooted in state *utility* law, not just state tax law, and, by virtue of other jurisdictional provisions, federal district courts have little experience with such law. See Natural Gas Act of 1938 § 1(b), 15 U.S.C. 717(b) (exempting local distribution of natural gas from federal regulation and providing express Commerce Clause exemption

for state regulation of retail natural gas sales); *Tracy*, 519 U.S. at 291, 305 (noting NGA exemptions); see also Johnson Act of 1934, 28 U.S.C. § 1342 (barring federal court jurisdiction to enjoin public utility commission orders).

Second, the district court would need to understand how different state taxes operate in order to conduct its discrimination analysis. Respondent Commerce Energy argues, for example, that the gross receipts tax, or GRT (which applies to LDCs), should be compared to the sales tax (which applies to IMs). J.A. 13-15 (Compl. ¶¶ 40-48). But under Ohio law, the GRT is analogous to the State's commercial activity tax, or CAT, because both the GRT and the CAT are franchise taxes imposed on the privilege of doing business; neither is a tax on sales, see *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 303 (2009). Moreover, because the GRT is not the only tax that the LDCs pay, the district court would need to review two other taxes imposed on LDCs—the “MCF tax,” charged on the volume of gas sold, and a personal property tax, Ohio Rev. Code § 5727.811, § 5727.06—to determine the evenness of Ohio's tax system. And to the extent Respondents complain that IM customers must pay sales tax of up to 7.5%, while customers of the LDCs allegedly pay only the passed-along GRT of 4.75%, JA 14 (Compl. ¶ 45), that claim hinges on the rate formula that Ohio's public-utilities law sets for LDCs. See Ohio Admin. Code § 4901:1-14-05. Finally, the district court would need to determine whether any discrimination that might seem to exist is overcome because the LDC-specific taxes implicate the compensatory tax doctrine. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996).

Third, even if the district court were to find an equal protection or dormant Commerce Clause violation (and the State disputes that either exists), any remedy it might craft would necessarily offend comity principles. The most obvious remedy would be to reduce Respondents' tax liability, but Respondents disclaim any desire for that remedy in order to call themselves "third parties." Instead, Respondents ask for "[a]n order invalidating as a matter of law the [allegedly unconstitutional] exemptions/exclusions." J.A. 20 (Compl., prayer for relief). But that "approach . . . could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 818 (1989); accord *U.S. Brewers*, 592 F.2d at 1215. If the Ohio tax law is unconstitutional, the Ohio "courts are in the best position to determine how to comply with the mandate of equal treatment." *Davis*, 489 U.S. at 818.

What is more, the solution could not be as simple as Respondents suggest. Respondents ignore the divergent regulatory regime for LDCs and complain simply that the IMs' customers pay a higher tax rate of up to 7.5% (differing by county), while the LDCs' customers pay a different, substitute tax—the GRT—at a rate of only 4.75%. The complaint says not that the LDCs' sales-tax exemption alone is discriminatory, but that the exemption, "at least an exemption over and above what is paid pursuant to the gross receipts tax," discriminates. J.A. 15 (Compl. ¶ 48). A district court could not achieve parity on that claim by just invalidating the LDCs' sales-tax exemption, because

such invalidation, standing alone, would leave the LDCs with much higher taxes.

Instead, the federal court would need to do one of two things. The court could couple the invalidation of the LDCs' sales-tax exemption with an injunction against levying the GRT against the LDCs, requiring both LDCs and IMs to pay the sales tax equally. But the TIA would bar such an injunction, because the order would "enjoin . . . collection of [a] tax under State law." 28 U.S.C. § 1341. Alternatively, the court could take a scalpel to the LDCs' sales-tax exemption and reduce it by however many percentage points are needed, on a county-by-county basis, to eliminate the gap. But such careful tailoring of a state tax code is "just th[e] sort of heavy-handed federal court interference in state taxation that the principle of comity is intended to avoid." *DirectTV*, 513 F.3d at 125.

The Sixth Circuit dismissed concerns about enjoining the LDCs' payment of the GRT by saying that it need not concern itself with what might happen in "a hypothetical future lawsuit" in which the LDCs might "seek[] to enjoin the imposition of other taxes," leading to lost revenue. Pet. App. 7a-8a. But the Sixth Circuit was mistaken in attributing that injunction to a "hypothetical" second lawsuit. It would make little sense for the court in this case to invalidate only one tax exemption and tilt the field the other way, leaving it to the LDCs to start a new case to even things up. Any injunction enforcing "equality," as Respondents posit it, would have to take account of the GRT in its disposition of *this case*. See *Davis*, 489 U.S. at 818 (remanding for

the Michigan courts to determine how to remedy an invalid tax that affected nonparties).

Likewise, Respondents' claim regarding the CAT cannot be resolved by simply invalidating the LDCs' exemption. Ohio law ensures that no company pays two gross receipts taxes on the privilege of doing business. The CAT, which covers most businesses, does not single out LDCs for an exemption; rather, it exempts all businesses that already pay an industry-specific gross receipts tax (such as specific taxes on insurance companies and financial institutions, as well as LDCs and other public utilities). See Ohio Rev. Code § 5751.01(E). Thus, any attempt to level the playing field as to the CAT exemption would require the federal court to consider state laws against duplicate taxation of gross receipts. In other words, forcing LDCs to pay the CAT would trigger a need either to enjoin a different state tax (in violation of the TIA) or to craft a new tax that fills the gap. "This relief would be heavy-handed indeed, and would be a particularly inappropriate intrusion by the federal courts into [Ohio's] tax laws." *DirecTV*, 513 F.3d at 127.

The Sixth Circuit believed that the requested relief here is narrow because "the only entities affected would be four natural gas distributors and the only taxes affected would be a limited class of exemptions that apply to only these four entities." Pet. App. 14a. But that reasoning is wrong on multiple levels. It is premised on the fact that Respondents object to the tax treatment of the natural gas producers, or LDCs, which, by virtue of their natural monopoly and public utility status, are Ohio's sole means of delivering natural gas to Ohio

homes. See *Tracy*, 519 U.S. at 284-85. A challenge to “only” four LDCs’ tax treatment, then, is a challenge to *all* LDCs’ tax treatment, because those four entities are the only game in town. The State’s tax scheme for these entities is therefore a significant policy choice and a major revenue source.

The Sixth Circuit’s “only four” reasoning also disregards the fact that Respondents independently challenge the sales tax. See J.A. 14 (Compl. ¶ 45). And the sales tax is levied on the LDCs’ customers—the end consumer—not on the LDCs themselves. *Id.*; Ohio Rev. Code § 5739.03(A) (requiring sales tax to be collected by the natural gas vendors from consumers). Thus, Respondents are asking a federal court to invalidate a sales-tax exemption for, and thereby raise taxes on, *millions* of Ohio taxpayers, not just four.

A similar case from Ohio demonstrates that, when properly handled, tax challenges such as Respondents’ require a close inspection of state tax law. The Ohio Supreme Court recently rejected a suit resembling this one but brought by another type of company in the natural gas market, an “interstate-pipeline company.” *Columbia Gas Transmission Corp. v. Levin*, 882 N.E.2d 400, 412 (Ohio 2008), cert. denied, 129 S. Ct. 896 (2009). In rejecting the dormant Commerce Clause and equal protection claims, the state court carefully analyzed the divergent regulatory and administrative regimes to which Ohio law subjects LDCs and interstate pipeline companies. E.g., *id.* at 415.

If Respondents’ challenge goes forward in federal court, the discovery and decision would be much like that in *Columbia Gas*. The suit would

require the federal court to delve into the intricacies of both Ohio's tax law and Ohio's public utility regulatory scheme. This case therefore presents a textbook example of the comity concerns that have long precluded federal review of state tax laws.

B. The Tax Injunction Act divests the federal court of jurisdiction over this case.

Even if comity principles do not preclude the federal courts from entertaining this suit, the Tax Injunction Act does. That is to say, even if the Sixth Circuit was correct that *Hibbs* sets identical standards for both the TIA and comity, the decision below nonetheless conflicts with *Hibbs* itself. Under a proper reading of *Hibbs*, the TIA bars federal jurisdiction over Respondents' complaint.

The chief purposes of the TIA and the comity doctrine are the same. "[T]he statute 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." *Tully v. Griffin*, 429 U.S. 68, 73 (1976). "The principal motivating force behind the Act" was Congress's desire "first and foremost . . . to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522. "[T]he legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethren*, 457 U.S. at 409 n.22.

As discussed in Part A above, Congress enacted the TIA to close two loopholes that allowed federal courts to entertain an increasing number of state tax challenges. These federal cases created significant financial distress for the States. When the TIA was enacted, most States required plaintiffs challenging a tax in state court to pay the contested tax under protest and then to seek a refund if they prevailed in litigation. S. Rep. No. 1035, at 1 (1937); see also *Rosewell*, 450 U.S. at 522-23 & n.29. These rules “ma[de] it possible for the States and their various agencies to survive while long-drawn-out tax litigation [was] in progress.” S. Rep. at 1. Federal court plaintiffs, by contrast, could avoid paying a challenged tax for the duration of the litigation. Because most of these plaintiffs were foreign corporations (relying on diversity jurisdiction) that generated significant tax dollars for the States, federal court jurisdiction over state tax challenges had the potential to “seriously disrupt State and county finances.” *Id.* at 2. States often settled the challenges raised in federal court, rather than waiting for a resolution on the merits, because they had a pressing need for the contested tax revenue. *Id.* Among other things, then, the TIA was intended to enable States both to protect the public fisc and to have a fair opportunity to litigate fully any taxpayer’s challenge to a state or local tax. See *Hibbs*, 542 U.S. at 104-05.

The narrow decision in *Hibbs* is consistent with the TIA’s history and purpose. The tax credit at issue in *Hibbs* was an educational measure aimed at private schools and was not critical to Arizona’s revenue-raising scheme. *Id.* at 92. Given the nature of the challenge before it, “*Hibbs* opened the federal

courthouse doors slightly notwithstanding the limits of the TIA, but it did so only where (1) a third party (not the taxpayer) files suit, and (2) the suit's success will enrich, not deplete, the government entity's coffers." *Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005); see also *Hill*, 478 F.3d at 1249 ("Simply put, the Court held that giving away a tax credit is a very different thing than assessing, levying or collecting a tax."). The *Hibbs* Court also repeatedly underscored a third limitation: The subject-matter of the dispute related to the Establishment Clause rather than tax doctrine or the meaning of the challenged statute. E.g., 542 U.S. at 93, 106 n.8, 110-12.

Ohio's tax on natural gas suppliers, by contrast, is a major revenue-raising device, and Respondents' challenge to the tax bears none of the limitations that were dispositive in *Hibbs*. First, Respondents are not third-party challengers to Ohio's tax scheme. The taxpayer-plaintiffs in *Hibbs* were outsiders to the tax credit at issue who did not object to their own tax treatment; instead, they stated a generalized objection to having their tax money "spent" (in the form of credits or forgone revenue) on a program that they believed advanced religion. *Id.* at 93. The Court accordingly termed the *Hibbs* plaintiffs "third parties." *Id.* at 108.

Respondents here, by contrast, are not outsiders to the tax they challenge. They claim that Ohio "maintain[s] its exemption from sales and use taxes for natural gas purchases from LDCs while imposing the same taxes on purchases from retail gas suppliers." Opp. to Cert. at 1. Respondents invoke two different theories to support their

allegation—equal protection and the dormant Commerce Clause. J.A. 18-20 (Compl. ¶¶ 60-67). Under either theory, the root objection is the same: that “state action . . . selects [them] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class.” *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) (equal protection); see also *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (dormant Commerce Clause). The “right” Respondents evoke “is the right to equal treatment.” *Cromwell*, 326 U.S. at 623. And that right presupposes that *they are being treated unevenly vis-à-vis someone else*. See *Tracy*, 519 U.S. at 298. Respondents therefore *do* contest their own tax treatment. That is their whole reason for suing.

The Sixth Circuit appears to have assumed that the “third party” label fit Respondents because they purport not to object to the amount of taxes they owe; they just want the federal court to make the LDCs pay at the same rate. Pet. App. 7a. Even accepting at face value that Respondents are seeking cancellation of the LDCs’ benefits rather than tax exemptions of their own—a dubious assumption, for the reasons explained below—the nature of the remedy requested does not change the source of the *right* to that remedy. See *Cromwell*, 326 U.S. at 623. Respondents are only entitled to relief (if at all) because of the way Ohio taxes *them*. If it were otherwise, Respondents would lack standing. See *Tracy*, 519 U.S. at 286-87.

The second critical limitation in *Hibbs* is also lacking here, because Respondents’ requested relief implicates the “state-revenue-protective” purposes of

the TIA. 542 U.S. at 106. To begin with, the exercise of “forecasting the likely fiscal effects of variations on state tax policy” is a precarious one. *Hill*, 478 U.S. at 1250. It happened to be unusually straightforward in *Hibbs*, because there the Constitution dictated a one-way ratchet. The *Hibbs* plaintiffs challenged a tax credit on Establishment Clause grounds, and the only possible remedy if plaintiffs succeeded was invalidation of the credit (thereby increasing state revenue), because no court could *expand* an unconstitutional tax credit. But most cases will not be so easy—particularly not at the threshold, when jurisdiction ought to be decided. “[T]here is simply nothing in the TIA or *Hibbs* suggesting that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers.” *Hill*, 478 U.S. at 1250. “Were the case otherwise, judges might be free to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections.” *Id.*

In any event, Respondents’ challenge would likely diminish, not enhance, Ohio’s coffers. “[A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination,” *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40 (1990), and the frequent practice in such cases is “extension, rather than nullification,” of the disputed benefit. *Califano v. Westcott*, 443 U.S. 76, 89 (1979); see also *Cherry Hill Vineyards, LLC v. Schneider*, 553 F.3d 423, 435 (6th Cir. 2008). Thus, if Respondents were to succeed on the merits, the district court in this case—regardless of

Respondents' artful pleading—would likely exempt them from the challenged taxes, not terminate the LDCs' exemptions. That relief is particularly likely given that the LDCs are not parties to the federal suit. (The State's motion to join the LDCs as indispensable parties remained pending when the district court dismissed the action on comity grounds.) But even if the district court found for Respondents on the merits and left their tax liabilities untouched, it could achieve equality only by intrusive tailoring of Ohio's tax system. See Part A.3 above. It is not at all clear that such a disruptive remedy would augment Ohio's revenue in the end. See *Gillis*, 836 F.2d at 1008 n.4.

Finally, Respondents' suit is not of the subject-matter type that *Hibbs* allowed to proceed under the TIA. The *Hibbs* Court stressed that the third-party plaintiffs' claims arose under the Establishment Clause, and that federal courts historically had adjudicated such challenges, like racial discrimination claims, without trenching on federalism concerns. 542 U.S. at 93-94, 110-12; see also *Winn v. Arizona Christian Sch. Tuition Org.*, 562 F.3d 1002, 1005 (9th Cir. 2009) (holding, on this Court's remand of *Hibbs*, that "plaintiffs' allegations, if accepted as true, are sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause"). As noted above, this Court in *Fair Assessment* left the same space open under the comity doctrine. 454 U.S. at 107 n.4. Respondents' argument, by contrast, is that the State's tax law treats them differently from other natural gas suppliers. By its nature, that claim requires detailed scrutiny of Ohio's tax and utility-regulation systems.

Moreover, the parties here dispute the operation of Ohio's tax law—a factor that similarly distinguishes this case from *Hibbs*. 542 U.S. at 106 n.8.

All of this shows that the Sixth Circuit was mistaken when it shoehorned this case into its reading of *Hibbs*. This Court has never doubted that “the power of taxation is one of vital importance; that it is retained by the States; [and] that it is not abridged by the grant of a similar power to the government of the Union.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819). Whether by virtue of the comity doctrine or Congress's directive in the TIA, the upshot is the same: Federalism principles require that Respondents bring their challenge to Ohio's tax system in Ohio's courts.

CONCLUSION

For the above reasons, the Court should reverse the Sixth Circuit's decision.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General

**Counsel of Record*

ALEXANDRA T. SCHIMMER
Chief Deputy Solicitor General

STEPHEN P. CARNEY

ELISABETH A. LONG
Deputy Solicitors

BARTON A. HUBBARD
Assistant Attorney General

30 East Broad St., 17th Floor
Columbus, Ohio 43215

614-466-8980

benjamin.mizer@

ohioattorneygeneral.gov

Counsel for Petitioner
Richard Levin, Tax
Commissioner of Ohio

December 23, 2009