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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 FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## 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—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1991)—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?

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## INTEREST OF THE *AMICI CURIAE*

Acknowledging "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems," *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981), this Court "has long recognized that principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration" and, as a result, that challenges to state taxation must be brought in state court if there is an adequate remedy under state law, *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586-587 (1995). In its decision below, the Sixth Circuit upset this historic federal-state balance in matters of state taxation by making available a federal forum for state tax challenges so long as the challengers frame their complaint as contesting a third party's tax liability rather than their own.

The Sixth Circuit's approach both misunderstands this Court's holding in *Hibbs v. Winn*, 542 U.S. 88 (2004), on the scope of federal jurisdiction under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and, worse, misconstrues a footnote in *Hibbs* to undercut the historically grounded, federalism-based concern for comity in state tax matters. If affirmed by this Court, States and their subdivisions will be forced to spend substantial time and money on state tax litigation in the federal courts, even though they offer adequate remedies under their own laws. Because the Sixth Circuit's view subjects state tax administration to unprecedented federal interference, the *amici* States

urge the Court reverse the decision below and confirm the longstanding place of state courts as the principal forum for adjudicating challenges to state taxation.

## STATEMENT

1. Respondents, in-state and out-of-state retail natural gas suppliers ("independent marketers" or "IMs") and one of their customers, filed suit alleging that Ohio's laws for taxing natural gas discriminate against interstate commerce and violate equal protection by favoring the IMs' competitors, local natural gas distribution companies ("LDCs"). Pet. App. 4a, 20a. Respondents challenged three exemptions and exclusions Ohio law affords LDCs but not IMs. *Id.* at 4a-5a, 21a. Rather than claim that they, too, were entitled to these exemptions—relief that would have reduced their own state tax burden—respondents sought to eliminate the exemption for their competitors. *Id.* at 7a, 24a.

2. Petitioner moved to dismiss, arguing that the TIA barred respondents' suit in federal court or, in the alternative, that comity required dismissal of respondents' claims. Pet. App. 19a-20a. The district court granted petitioner's motion on comity grounds. *Id.* at 26a-32a.

Before doing so, however, the court rejected petitioner's argument that the TIA barred respondents' federal lawsuit. The TIA directs federal courts not to "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, and although the parties agree that Ohio makes available an adequate state court

remedy, Pet. App. 6a n.2, the district court read *Hibbs* to say that the TIA precludes federal jurisdiction only where "state taxpayers seek federal-court orders enabling them to avoid paying taxes," *id.* at 23a (internal quotations omitted). Because respondents framed their complaint so as "not [to] contest[] their own tax liability," and granting their requested relief—enjoining enforcement of the exemptions and exclusions that allegedly favor the LDCs—"would increase state tax revenue," the TIA was inapplicable. *Id.* at 24a. On the latter point, the court dismissed as "speculat[ive]" petitioner's suggestion that, if respondents were to obtain their desired injunction, the LDCs might respond by suing to enjoin the imposition of certain taxes as to themselves, thereby raising the specter of a decrease rather than an increase in state tax revenue. *Id.* at 24a-25a n.1.

Regarding comity, however, the court rejected respondents' argument that *Hibbs* similarly restricted comity's reach "to those cases seeking to stop or countermand state tax collection." Pet. App. 27a. To the contrary, "[t]he scope of federal court deference based on principles of comity is substantially broader than that required under the TIA," extending to suits "seeking to force the collection of additional taxes," which represent "as much of an interference with state tax administration as a suit seeking to enjoin collection of a state tax." *Id.* at 26a, 29a (internal quotations omitted). The court acknowledged that while respondents had not sought to extend the challenged exemptions and exclusions to IMs—"presumably because [respondents] correctly understood that the TIA expressly bars federal court jurisdiction over such claims"—Ohio could remedy any constitutional

violation either by ending the challenged exemptions and exclusions, as respondents requested, or by extending the exemptions to the IMs. *Id.* at 32a. The court "decline[d] to impose its own judgment on the state legislature" by itself determining which of the "two possible remedies" is "appropriate." *Ibid.*

3. The Sixth Circuit reversed. Pet. App. 4a. The court first affirmed the district court's conclusion that the TIA did not foreclose federal jurisdiction. *Id.* at 7a. The court acknowledged that success on respondents' claims "might * * * have *some* negative impact on local revenues" but deemed this insufficient to overcome the rule, purportedly set forth in *Hibbs*, limiting the TIA "to cases in which state taxpayers seek to avoid paying state taxes where success would operate to reduce the flow of state tax revenue." *Id.* at 8a (internal quotations and brackets omitted; emphasis in original).

But the Sixth Circuit held that comity did not bar respondents' federal lawsuit, either. Pet. App. 9a-18a. The court acknowledged a "circuit split" over whether *Hibbs* "limit[ed] an expansive reading of * * * the comity principle's breadth," and embraced the view—expressly rejected by the Fourth Circuit—that "comity guts federal jurisdiction only when plaintiffs try to thwart tax collection." *Id.* at 10a, 11a. According to the Sixth Circuit, a contrary conclusion would render the TIA "entirely superfluous," ignore this Court's supposed "directive" in *Hibbs* "that comity strips jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection," and "*sub silentio* overrule * * * cases" such as *Hibbs*. *Id.* at 17a-18a.

The court of appeals did not go so far, however, as to adopt the view, endorsed by the Seventh Circuit, that the TIA and comity are fully coextensive and apply only "'[w]hen a plaintiff alleges that the state tax collection or refund process is singling her out for unjust treatment.'" Pet. App. 10a (quoting *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007)). Rather, the court created a novel, balancing test, whereby the comity bar turns on "the degree to which the claims and relief requested would intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. Because success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, "the suggested intrusion into traditional matters of state taxation here is not significant enough to trigger comity to bar jurisdiction." *Ibid.*

4. This Court granted certiorari on November 2, 2009.

## SUMMARY OF ARGUMENT

Honoring federalism principles, this Court has held consistently that state tax administration should be protected against federal intrusion. Yet, since *Hibbs*, several federal appellate courts, including the Sixth Circuit below, have permitted constitutional challenges to state taxation to proceed in federal court so long as the challengers have contested another's tax liability rather than their own—and thus have not "tr[ied] to thwart state tax collection" directly. Pet. App. 11a. By so limiting the comity bar to direct challenges to the public fisc, however, this approach ignores federalism's broader concerns, which include preserving the presumption that state courts are well-equipped to

resolve questions of federal constitutional law, protecting state officers from being haled into federal court when state law offers relief, and preventing plaintiffs from circumventing established state rules for adjudicating tax challenges.

The Sixth Circuit's approach also channels myriad questions of state law into federal courts, which lack authority to render controlling pronouncements on such issues. The adjudication of inevitably complex issues of state tax law by federal courts increases the likelihood that courts will treat similarly situated parties differently and deprives state courts of the opportunity to develop their own legal doctrine, including, where appropriate, to adopt saving constructions. In fact, this Court's practice, in cases where it has sustained a challenge to a state tax law adjudicated through the state courts, is to remand for state court resolution of any remaining state-law issues, including determining the appropriate relief (which may be more broadly available from state than federal courts). Such proper deference to the state systems is impossible under the decision below.

Nor is an expansive view of federal jurisdiction necessary to ensure that litigants receive the full protections of federal law. State courts are as capable as their federal counterparts of safeguarding constitutional rights. Yet, under the Sixth Circuit's rule, state courts are deprived of the opportunity to resolve issues of federal constitutional law, so long as plaintiffs use artful pleading to select a federal forum.

For all these reasons, the judgment below, which does not follow from either the TIA or *Hibbs*, should be

reversed and state courts restored to their proper role as the principal forum for adjudicating state tax matters.

## ARGUMENT

### THE SIXTH CIRCUIT'S RULE CONFLICTS WITH HISTORICAL PRACTICES AND THREATENS THE INDEPENDENCE OF STATE TAX ADMINISTRATION.

#### A. Comity Is A "Vital Consideration" And Has Special Force In Matters Of State Tax Administration.

This Court long ago recognized that "[t]he existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference." *Burgess v. Seligman*, 107 U.S. 20, 33 (1883). And because "[t]he people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws," *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922), the Court deemed it its "duty * * * to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States," *Taylor v. Carryl*, 61 U.S. 583, 595 (1857).

Since these early cases, this Court has identified the "preference" for federal-state harmony—or "comity"—"as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). It is a "vital consideration," *Younger v. Harris*, 401 U.S. 37, 44 (1971), and "'essential to the federal design,'" *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004) (quoting *Ruhrgas*

*AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)). Comity embodies

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

*Younger*, 401 U.S. at 44. Thus, comity counsels federal courts, "anxious though [they] may be to vindicate and protect federal rights and federal interests," to "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.* Then as now, this Court has made clear that federal courts must engage in "forbearance"—"by avoiding interference" with their state counterparts—and thereby limit conflict with state systems. *Covell v. Heyman*, 111 U.S. 176, 182 (1884). This "is a principle of right and of law, and therefore of necessity." *Ibid.*

Matters of state tax administration demand an especially rigorous adherence to comity. Since the founding, it has been recognized that "the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants," and, moreover, that any "attempt on the part of the national government to abridge them in the exercise of [this authority] would be a violent assumption of power." Federalist No. 32 (Alexander Hamilton), reprinted in The Federalist Papers 193-194 (Clinton Rossiter ed., Signet 2003).

This Court accordingly acknowledged more than a century ago that federal interference with the state taxing power uniquely jeopardizes the delicate balance of federal-state relations, for "[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. Chicago*, 78 U.S. 108, 110 (1870). More recently, the Court reaffirmed that "the reasons supporting federal non-interference" in state tax administration remain equally "compelling today," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527 (1981), reiterating that "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," *Ark. v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) ("*Farm Credit Servs.*"); see also *Fair Assessment*, 454 U.S. at 102-103 ("the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts"). In short, "the federal balance is well served when the several States define and elaborate their own [tax] laws through their own courts and administrative processes and without undue interference from the Federal Judiciary." *Farm Credit Servs.*, 520 U.S. at 826.

Thus, comity bars federal courts from rendering declaratory judgments in lawsuits challenging the constitutionality of state tax laws, see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943), or awarding damages in such cases, see *Fair Assessment*, 454 U.S. at 107. In declining to find federal jurisdiction over these claims, the Court identified broader concerns than merely protecting the public fisc.

See *id.* at 108 n.6. First, challenges to state taxation, even if based on the Federal Constitution, "'are likely to turn on questions of state tax law, which * * * are more properly heard in state courts.'" *Ibid.* (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, *J.*, concurring in part and dissenting in part)). Second, "'[i]f federal * * * relief were available to test state tax assessments, * * * taxpayers might escape the ordinary procedural requirements imposed by state law'" and thus avoid the States' "'established rules'" for adjudicating tax disputes. *Ibid.* (quoting *Perez*, 401 U.S. at 128 n.17) (Brennan, *J.*, concurring in part and dissenting in part)). Third, successful challenges to state tax systems, even if for damages, require a federal court to hold state law unconstitutional, thereby "halt[ing] its operation." *Id.* at 115. And fourth and finally, such challenges have the effect of "hal[ing] state officers into federal court." *Ibid.* The Court thus has articulated and enforced "a federal policy against federal adjudication of [this] class of litigation altogether." *Perez*, 401 U.S. at 115 (Brennan, *J.*, concurring in part and dissenting in part).

By allowing respondents' challenge to Ohio's tax laws to proceed in federal court, the Sixth Circuit violated this entrenched policy and upset the established balance between States and the federal government on questions of state taxation.

### B. The Sixth Circuit's Approach Channels Myriad Issues Of State Law To Federal Courts Less Suited To Resolve Them.

The decision below permits challenges to state taxation to proceed in federal court so long as the challengers do not seek openly to "thwart tax

collection," Pet. App. 11a, merely by framing their case as a complaint about another's tax liability rather than their own.[1] This approach forces state authorities to litigate questions of state tax law in federal court. But "[s]tate courts are the principal expositors of state law," *Moore v. Sims*, 442 U.S. 415, 429 (1979), and "have the first and last word as to the meaning of state statutes," *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). Thus, "no matter how seasoned the judgment of [a federal] district court may be" on a question of state law, "it cannot escape being a forecast rather than a determination." *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941); accord *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984) ("when a federal decision on state law is

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[1] In an effort to reconcile the decision below with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), the Sixth Circuit allowed that comity would bar federal jurisdiction in cases where, although plaintiffs did not challenge their own tax assessments, "the claims and relief requested" threatened sufficiently to "intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. But the court could not provide any guidance on when this standard might be satisfied. See *id.* at 13a ("we cannot make all-encompassing decrees regarding how principles of comity and federalism will always apply; they are merely *principles*") (emphasis in original). And although the court insisted that success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, Pet. App. 14a, respondents are seeking to rewrite Ohio's tax laws for the State's entire market for selling natural gas to consumers, see Pet. Br. 31-32. Under the Sixth Circuit's approach, therefore, in few (if any) cases will "the suggested intrusion into traditional matters of state taxation" be "significant enough to trigger comity to bar jurisdiction." Pet. App. 14a.

obtained, the federal court's construction is often uncertain and ephemeral"). The problems engendered by adjudicating state tax law issues in the federal courts, which lack the power to render controlling pronouncements of state law, are myriad.

First, routing issues of state law to federal court increases the likelihood that courts will treat similarly situated parties differently. Cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (per curiam) (holding that federal court should abstain in favor of state court resolution of issue of state law because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other" parties); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) (recognizing that allowing federal courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy," and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). Because a federal court's construction of state law does not bind state courts, "[n]eedless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted).

Second, federal courts face unique obstacles when addressing state tax matters, which are notoriously intricate, involving fine distinctions and competing state policies. See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (on equal protection challenge to state tax law, applying "especially deferential" standard of review to state

classifications in recognition of complexity of state taxation schemes); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973) (describing difficulties of assessing Commerce Clause challenge to state tax law, because "for a long time this area of state tax law has been cloudy and complicated"); *Dane v. Jackson*, 256 U.S. 589, 598-599 (1921) ("it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state Legislatures"). Thus, federal court determinations on issues of state tax law not only are necessarily non-binding predictions, but for institutional reasons they also run a heightened risk of being wrong.

Third, federal courts see themselves as "*Erie*-bound to apply state law as it currently exists," *Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992) (per curiam), and therefore approach "innovative theories" of state law "charily" and are "extremely cautious about adopting substantive innovation in state law," *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004) (internal quotations omitted). Accordingly, routing myriad state tax issues to federal court will not only stunt the development of this critical area of state law—which lies at the core of state sovereignty—but it will likely result in the unnecessary resolution of constitutional questions and, worse, in decisions striking down laws that state courts would have preserved with a saving construction. "Almost every constitutional challenge" to a state law "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional

concerns and state interests." *Moore*, 442 U.S. at 429; accord *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987). But state courts, as the primary expositors of state law, are uniquely positioned to adopt such constructions. See, *e.g.*, *Pennzoil*, 481 U.S. at 12 (had plaintiff asserted its claims in state rather than federal court, "it was entirely possible that the [state] courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions"). Federal courts, by contrast, are limited by *Erie* in their interpretation of state law and thus poorly placed to interpret state statutes to avoid constitutional problems.

Fourth and finally, in the event that no narrowing construction is reasonably available, a broader range of remedies is available from state than federal courts. Federal courts "may not assess or levy [state] taxes"; accordingly, while they may declare a tax invalid, their authority to provide a remedy is limited. *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Thus, in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court, having sustained a challenge to a tax exemption available under Michigan law, remanded the case to state court to determine whether the violation should be remedied by extending or eliminating the exemption. See *id.* at 818. Because "[t]he latter approach * * * could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court," *ibid.*; see also *Moses*, 365 U.S. at 751-752 (court of appeals erred in remanding for district court "to decree a valid tax for the invalid one which the State had attempted to exact," because "[t]he District Court has no power so to decree"), the Court concluded that the Michigan courts, both because of

their less cabined remedial authority and their "special expertise" in matters of state law, "are in the best position to determine how to comply with the mandate of equal treatment," 489 U.S. at 818.[2]

Indeed, in cases where this Court has sustained a challenge to a state tax law adjudicated through the state courts—as most such challenges are—it has invariably remanded to the state court to determine the remedy. See *Davis*, 489 U.S. at 818; *Amer. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 297-298 (1987); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 252-253 (1987); *Williams v. Vermont*, 472 U.S. 14, 28 (1985); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197 (1983); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933). Comity demands no less. For even where the Court has "jurisdiction of the issue," *Liggett*, 288 U.S. at 541, a proper respect for state functions demands that it decline to "take it upon itself in th[e] complex area of state tax structures to determine how to apply its holding," *Tyler Pipe*, 483

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[2] *Missouri v. Jenkins*, 495 U.S. 33 (1990), held that although a federal court order imposing an increase in property taxes (in excess of limits set by state law) to ensure funding for school desegregation violated federal-state comity, the court could nevertheless require the school district itself to impose such a tax increase. See *id.* at 50-58. The Court emphasized, however, that this "extraordinary" relief, *id.* at 51, was available only because state law was "preventing a local government" from "fulfill[ing] the requirements that the Constitution impose[d] upon" it to remedy segregation, *id.* at 57-58. Both *Jenkins* and *Davis* thus make clear that successful state tax challenges should be remedied whenever possible by state courts in the first instance.

U.S. at 252; see also *Amer. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 176-177 (1990) (plurality op.) ("When we have held state taxes unconstitutional," "considerations of federal-state comity" "require[] that we carefully disentangle issues of federal law from those of state law and refrain from deciding anything apart from questions of federal law directly presented to us."). But if a challenge to a state tax law is allowed to go forward in a lower federal court, recourse to state court for determination of the remedy, or any other question involving state law, is not reasonably available.

For multiple reasons, therefore, the adjudication of issues of state tax law by federal courts—the inevitable result of the Sixth Circuit's approach—poorly serves the courts, the parties, and the development of the law.

### C. The Sixth Circuit's Approach Deprives State Courts Of The Opportunity To Resolve Federal Constitutional Issues.

Although federal courts are ill-suited to resolve state law issues arising in challenges to state taxation, the same is not true of state courts faced with issues of federal law. State courts "'have the solemn responsibility equally with the federal courts' to safeguard constitutional rights." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974)). Indeed, historically, "'state courts provided the only forum for vindicating many important federal claims.'" *Nat'l Private Truck*, 515 U.S. at 588 (quoting *Palmore v. United States*, 411 U.S. 389, 401 (1973)). Consistent with comity, this Court accordingly has "refuse[d]" to "assume[e] that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S.

592, 611 (1975); accord *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.") (emphasis in original). The Court has not wavered in its "emphatic reaffirmation . . . of the constitutional obligation of state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen*, 449 U.S. at 105.

The Sixth Circuit's expansive view of federal jurisdiction therefore is not necessary to ensure that litigants receive the full protections of federal law. And it has the unfortunate effect of preventing States from "'continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against th[eir] policies.'" *Trainor*, 431 U.S. at 443 (quoting *Huffman*, 420 U.S. at 604). The effect is even more damaging in cases where a challenge to state taxation is sustained, because "interests of comity are advanced, and friction reduced, if the courts of a state, rather than the federal courts, determine that the United States Constitution requires the state to alter its practices" in this sphere. *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1318 (8th Cir. 1990).

### D. The Sixth Circuit's Approach Promotes "Artful Pleading" To Obtain Federal Jurisdiction.

The rule adopted below not only conflicts with comity's respect for state courts as principal arbitrators of issues of state law and competent adjudicators of federal constitutional claims, but it also runs afoul of

the longstanding prohibition on using "artful pleading" to manufacture federal jurisdiction. The Sixth Circuit's holding that state tax challengers are welcome in federal court so long as they do not openly request "district court aid in order to arrest or countermand state tax collection," Pet. App. 9a (internal quotations omitted), encourages plaintiffs seeking what they perceive as a more favorable federal forum to characterize their complaint as a demand for an increase in another's tax liability rather than a decrease in their own.

But these two ways of framing tax challenges are often interchangeable, and this Court has long refused to sustain efforts to manipulate federal jurisdiction "'by the simple expedient of putting a different label on [the] pleadings.'" *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973)) (brackets in original). For example, the Court, applying the "well-pleaded complaint rule," has rejected attempts to bring a state law suit within federal jurisdiction by anticipating a defense based on federal law. See, *e.g.*, *Franchise Tax Bd. v. Constr'n Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950). Instead, "[s]uch a defense is properly made in the state proceedings, and the state court's disposition of it is subject to this Court's ultimate review." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 (1998). To proceed otherwise would "[n]ot only * * * unduly swell the volume of litigation in the District Courts," but "also embarrass those courts—and this Court on potential review—in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State

courts." *Skelly Oil*, 339 U.S. 667 at 673-674. In short, the well-pleaded complaint rule "avoid[s] automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10.

The decision below contravenes this federalism-based prohibition against artful pleading. Although respondents framed their claim to seek the elimination of LDC tax exemptions and exclusions, they just as easily could have sought to extend the credits to the IMs, and the complaint does not preclude such relief. See Pet. Br. 8 (requesting "[s]uch other relief to which Plaintiffs are entitled"). Respondents declined to characterize their complaint in this way "presumably because they correctly understood that the TIA expressly bars federal court jurisdiction over such claims." Pet. App. 32a. But if respondents were to succeed on the merits, the most likely outcome would be the exemption of IMs from the complained-of taxes, not a termination of the exemptions and exclusions to the LDCs. See Pet. Br. 37-38. Thus, by allowing respondents' suit to proceed in federal court, the Sixth Circuit endorsed their use of drafting sleight-of-hand to manufacture federal jurisdiction over a state tax challenge that properly belongs in state court.

The ease with which respondents were able artfully to plead themselves into federal court under the Sixth Circuit's rule is ripe for replication, should that approach be affirmed. For example, in *Department of Revenue v. Davis*, 128 S. Ct. 1801 (2008), this Court rejected a dormant Commerce Clause challenge to a Kentucky law exempting from state income taxes any interest earned on bonds issued by the State or its political subdivisions, while taxing bond interest from other States. See *id.* at 1804. The plaintiffs, who

pursued their claim through the Kentucky courts, sought to extend the exemption and requested a refund of taxes they had paid on income earned from out-of-state bonds. See *id.* at 1807. Had the plaintiffs instead sought to enjoin the exemption, however, their functionally identical constitutional challenge would have triggered federal jurisdiction under the Sixth Circuit's approach. And although there is no persuasive reason why the latter complaint should go forward in federal court when the former cannot, that is the result of the majority rule that the decision below adopts.

Similarly, the plaintiffs in *Associated Industries v. Lohman*, 511 U.S. 641 (1994), adjudicated in state court—and ultimately this Court—their claim that Missouri's use tax on goods purchased out of state (but stored, used, or consumed in Missouri) impermissibly discriminated against interstate commerce because the use tax exceeded the local sales tax payable on goods purchased in state. See *id.* at 643. The Court agreed that the use tax violated the dormant Commerce Clause, but, rejecting the plaintiffs' requested refund of all monies paid under the use tax, remanded to the state court to determine "[t]he methods best adopted to achieving equal treatment . . . , whether partial or complete refunds *or other measures*." *Id.* at 654, 656 (emphasis added). The Court's recognition that a refund was not the only appropriate remedy obviates any doubt that, had the plaintiffs cast the same challenge differently, they could have (in the Sixth Circuit's view) obtained federal jurisdiction over substantial questions of state tax law.

The same is true of any state court case in which the plaintiffs argued that their tax bill violated federal law because it was excessive when compared to a third

party's. In *Panhandle Producers & Royalty Owners Association v. Oklahoma Tax Commission*, 162 P.3d 960 (Okla. Civ. App. 2007), for example, the plaintiffs sought to enjoin as violating, *inter alia*, the Equal Protection and dormant Commerce Clauses, an Oklahoma statute requiring withholding of income taxes due on certain royalty payments to non-residents, while exempting Oklahoma residents from the withholding requirement. See *id.* at 962-963. The suit was originally filed in federal district court but was dismissed under the TIA. After refiling in state court, the plaintiffs argued for the first time that the alleged violation could be remedied by amending the statute "to require taxes on royalties to be withheld from payments to all interest owners, regardless of residence." *Id.* at 966. Had the plaintiffs sought this relief earlier, the federal district court would have been required to hear their claims under the Sixth Circuit's rule.

Myriad cases are to the same effect. See, *e.g.*, *Ex Parte Hoover, Inc.*, 956 So.2d 1149, 115–1151 (Ala. 2006) (in dormant Commerce Clause challenge to state tax exemption afforded third parties, plaintiffs sought refund of taxes paid); *Smith v. N.H. Dep't of Revenue Admin.*, 813 A.2d 372, 374 (N.H. 2002) (same with regard to dormant Commerce Clause and equal protection challenges); *Northwest Airlines, Inc. v. Dep't of Revenue*, 943 P.2d 175, 177-178, 187-191 (Or. 1997) (plaintiffs sought to have their property tax assessments set aside as excessive when compared with third parties' assessments and thus in violation of federal law); *Amer. Tel. & Tel. Co. v. N.Y. State Dep't of Taxation & Finance*, 599 N.Y.S.2d 238, 239-240 (1993) (in dormant Commerce Clause and equal protection challenges to state tax deduction afforded third parties, plaintiffs

sought refund of taxes paid). Were any of these plaintiffs merely to recharacterize the same constitutional challenge to focus on others' tax assessments rather than their own, the Sixth Circuit would allow their case to proceed in federal district court. And a federal court would have had to undertake an invasive (but ultimately nonbinding) analysis of a State's taxing scheme that is properly reserved to state courts in the first instance. The prohibition against such artful pleading thus provides an additional reason to reject the Sixth Circuit's rule.

### E. The Sixth Circuit's Approach Does Not Follow From Either The TIA Or *Hibbs*.

The Sixth Circuit relied on *Hibbs* to hold that comity's reach is essentially coextensive with that of the TIA and that the TIA precludes federal jurisdiction only where plaintiffs choose to cast their complaint as a challenge to their own tax bill. See Pet. App. 7a, 11a; see also *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009) (in light of *Hibbs*, abrogating more expansive view of comity in *U.S. Brewers Ass'n v. Cesar Perez*, 592 F.2d 1212 (1st Cir. 1979)). But *Hibbs* does not compel the result below.

First, before *Hibbs*, this Court made clear that the interests protected by comity are not coextensive with those safeguarded by the TIA. *Hibbs*, which addressed comity in a footnote and did not purport to overrule decades of jurisprudence protecting "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, does not hold otherwise.

The TIA embodies but "one manifestation" of the traditional "aversion" to federal-court interference in state tax administration. *Nat'l Private Truck Council*, 515 U.S. at 586. While the TIA "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," only the "last consideration" "was the principle motivating force behind the Act." *Rosewell*, 450 U.S. at 522 (internal quotations omitted). The TIA "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Ibid.*; accord *Fair Assessment*, 454 U.S. at 183.

Because Congress did not "intend[] that federal-court deference in state tax matters be limited to the actions enumerated in [the TIA]," *Fair Assessment*, 454 U.S. at 183, the TIA is "best understood as but a partial codification of the federal reluctance to interfere with state taxation," *Nat'l Private Truck Council*, 515 U.S. at 590; accord *Rosewell*, 450 U.S. at 525 (rejecting view that with the TIA "every wrinkle of federal equity practice was codified, intact, by Congress"). The TIA's enactment therefore was not "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." *Great Lakes*, 319 U.S. at 301; accord *Fair Assessment*, 454 U.S. at 183 ("the principle of comity which predated the Act was not restricted by its passage"). As a result, "even where the [TIA] would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell*, 450 U.S. at 525 n.33.

These decisions dispel the Sixth Circuit's concern that a "broad view of comity would render * * * [the TIA] effectively superfluous." Pet. App. 11a. There is no reason why Congress would not have sought to codify certain aspects of existing federal-court practice to respond to the problems that legislators deemed most urgent.[3] And even if the TIA were more than a mere partial codification of comity principles, it still would not be "superfluous." The TIA "limit[s] drastically federal district court *jurisdiction* to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522 (emphasis added). The TIA does not alter the federal courts' historic ability to refrain from hearing challenges to state taxation that stand to increase tax revenues but nevertheless implicate federalism concerns.

Second, even if, under the circumstances presented, *Hibbs* limited the reach of both the TIA and comity to cases in which plaintiffs frame their complaint as a challenge to their own tax liability, *Hibbs* is distinguishable from this case in several ways.

Central to comity is federalism's respect for the role of state courts as principal arbiters of state law. See *supra* pp. 10, 11-12. This Court in *Hibbs* acknowledged

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[3] Congress enacted the TIA to eliminate disparities between those taxpayers who could obtain injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and those required to proceed in state courts, which generally require taxpayers to pay first and litigate later. See *Rosewell*, 450 U.S. at 522 n.29. Congress was also concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting government finances. See *id.* at 526.

this interest, see 542 U.S. at 106 n.8 (describing States' "vital" interest in their courts' "authority * * * to determine what state law means"), but noted that it was not implicated because there was "no disagreement as to the meaning of" state law and thus no call for the federal district court "to interpret any state law," *ibid.*; see also *Fair Assessment*, 454 U.S. at 107 n.4. (declining to decide whether comity would bar claim for damages that "requires no scrutiny whatever of state tax assessment practices"). The Court did not suggest that the comity bar would not apply where, as here, see Pet. Br. 27-28, 32-33, the plaintiffs' constitutional claims are intertwined with disputed issues of state law.

*Hibbs* does not compel a departure from the federalism-based prohibition against artful pleading, either, because the plaintiffs there could not have recast their complaint as a suit to contest their own tax liability. Success on the Establishment Clause claims could not be remedied other than through the relief the plaintiffs requested—an injunction against the Arizona law authorizing tax credits for charitable contributions made by Arizona taxpayers to "school tuition organizations," as well as the return to the State's general fund of monies already distributed to (but not yet spent by) the STOs. See *Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002). Because the Court was not asked to decide whether federal jurisdiction exists where the plaintiffs could have but did not challenge their own tax liability directly, *Hibbs* does not control the outcome of the present case.

Finally, crucial to *Hibbs*' conclusion that the TIA did not bar federal jurisdiction was the fact that "in decisions spanning a near half century" federal courts had adjudicated challenges to state tax credits as

racially discriminatory. 542 U.S. at 93. By contrast, claims like respondents'—dormant Commerce Clause and Equal Protection challenges to a State's allegedly favorable tax treatment of business competitors—have invariably been adjudicated in state courts, with ultimate review available in this Court. See, *e.g.*, *Dep't of Revenue v. Davis*, *supra* pp. 19-20; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 285-286 (1997); *Dennis v. Higgins*, 498 U.S. , 441-42 (1991); *Scheiner*, 483 U.S. at 268-269; *Tyler Pipe*, 483 U.S. at 239-240; *Bacchus*, 468 U.S. at 265-267; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 396-397 (1984); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 65-68 (1963). *Hibbs* did not purport to overrule this long-settled practice of affording state courts the first opportunity to adjudicate claims that their State's tax law has violated the Constitution by providing a competitive advantage to certain businesses.

* * *

This Court should reverse the decision of the Sixth Circuit below and make clear that *Hibbs* did not jettison the Court's long-settled deference to state courts as the principal forum for adjudicating state tax challenges, respect for the state courts' ability to resolve federal constitutional claims, and resistence to efforts at manipulating federal jurisdiction through "artful pleading."

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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