American Bar Association
www.supremecourtpreview.org

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 RESPONDENTS

STEPHEN C. FITCH
*Counsel of Record*
GERHARDT A. GOSNELL II
CHESTER, WILLCOX & SAXBE, LLP
65 EAST STATE STREET, SUITE 1000
COLUMBUS, OH 43215
TELEPHONE: (614) 221-4000
FACSIMILE: (614) 221-4012
E-MAIL: sfitch@cwslaw.com
ggosnell@cwslaw.com

*Counsel for Respondents*

January 29, 2010

## QUESTIONS PRESENTED

1. The Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, generally bars federal district courts from exercising jurisdiction over lawsuits seeking to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." In *Hibbs v. Winn*, 542 U.S. 88 (2004), this Court held that a federal district court may exercise jurisdiction over a constitutional challenge seeking to enjoin a tax credit granted to others, because the TIA prohibits only lawsuits seeking to impede the collection of taxes. In this case, Plaintiffs challenge tax exemptions granted to other taxpayers and do not seek to enjoin the collection of any tax. Was the court of appeals correct in concluding that the TIA does not bar this suit?

2. There are times when this Court has applied principles of comity to prohibit a federal district court from exercising jurisdiction over state tax cases, without reliance upon the TIA. In *Hibbs*, however, this Court held that comity principles did not block a lawsuit seeking to enjoin a tax credit on constitutional grounds, noting that the Court has relied upon comity principles "only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." 542 U.S. at 107 n.9. Was the court of appeals correct in holding that comity does not bar this lawsuit, which does not seek to arrest or countermand state tax collection?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state as follows:

Respondent Commerce Energy, Inc. is a California corporation and is a wholly-owned indirect subsidiary of Just Energy Income Fund. Just Energy Income Fund is an open-ended, limited-purpose trust established under the laws of Ontario, Canada. Trust units of Just Energy Income Fund are traded on the Toronto Stock Exchange. As of December 31, 2009, Acuity Investment Management Inc. ("Acuity") holds approximately 11.81% of the units of the Fund. Acuity publicly reports that the units were acquired in the ordinary course of business for investment purposes and not for the purpose of exercising control or direction over the Fund. Other than Acuity, to the knowledge of the Just Energy Income Fund, no publicly held company owns 10% or more of the trust units in Just Energy Income Fund.

Respondent Interstate Gas Supply, Inc. is not a publicly traded company, has no parent company, and no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED .................................... i

CORPORATE DISCLOSURE STATEMENT ......... ii

TABLE OF AUTHORITIES .................................. vi

STATUTORY PROVISIONS INVOLVED ............. 1

STATEMENT OF THE CASE ................................ 1

Ohio's Competitive Natural Gas Market. .......... 1

Plaintiffs' Complaint Seeks to Invalidate Certain Discriminatory Tax Exemptions That LDCs Enjoy. .............................................. 4

The Decisions of the Courts Below. .................. 6

SUMMARY OF ARGUMENT ................................ 9

ARGUMENT ......................................................... 11

I. THE TAX INJUNCTION ACT DOES NOT BAR PLAINTIFFS' SUIT BECAUSE, AS THIS COURT HELD IN *HIBBS*, THE TIA DOES NOT PROHIBIT A SUIT THAT SEEKS TO ENJOIN STATE TAX EXEMPTIONS. ...................... 11

A. This Case Falls Squarely Within the Holding of *Hibbs* Because It Seeks to

**TABLE OF CONTENTS**
(continued)

Page

Enjoin State Tax Exemptions and Thus Does Not Seek to Impede the Collection of State Tax Revenue........... 12

B. The Commissioner's Effort to Limit *Hibbs* to Its Facts Is Unpersuasive....... 14

C. Plaintiffs' Lawsuit Is Not Barred by the TIA Based Upon the Commissioner's Unsupportable Fear That the District Court Will Grant Relief Not Requested by the Plaintiffs and Prohibited by the TIA or Based Upon the Commissioner's Hypothetical Speculation as to the Lawsuit's Eventual Economic Consequences. ....................................... 19

II. PRINCIPLES OF COMITY DO NOT BAR PLAINTIFFS' ACTION BECAUSE IT DOES NOT SEEK TO ARREST OR COUNTER-MAND STATE TAX COLLECTION............................................ 22

A. As the Commissioner Agrees, This Court Held That the Suit Before It in *Hibbs* Was Not Barred by Principles of Comity. .................................................. 24

B. The Holding in *Hibbs*, That Comity Does Not Bar a Suit Unless the Suit Is

**TABLE OF CONTENTS**
(continued)

Page

Directed at Arresting or Countermanding a State Tax, Was Not Limited to the Particular Circumstances in *Hibbs*. ........................ 27

C. Comity Should Not Preclude Jurisdiction Where the Suit Does Not Seek to Arrest State Tax Collection. ..... 30

1. There is no precedent for applying comity to block a lawsuit directed at enjoining a tax credit or exemption, and such a suit does not implicate the comity concerns expressed in the precedents. ........... 30

2. A categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits is far more certain and amenable to judicial administration than the Commissioner's multi-factor test. .... 36

D. This Case Satisfies Even the Commissioner's Multi-factor "Undue Intrusion" Test. ..................................... 39

CONCLUSION ..................................................... 42

## TABLE OF AUTHORITIES

Page

### Cases

*Arkansas v. Farm Credit Servs.,*
520 U.S. 821 (1997).........................................35

*BellSouth Telecomm., Inc. v. Farris*,
542 F.3d 499 (6th Cir. 2008) ...........................19

*Boise Artesian Hot & Cold Water Co. v. Boise City*,
213 U.S. 276 (1909)...................................34, 35

*Califano v. Westcott*,
443 U.S. 76 (1979)...........................................20

*Cherry Hill Vineyards, LLC. v. Lilly*,
553 F.3d 423 (6th Cir. 2008) ...........................20

*Columbia Gas Transm. Corp. v. Levin*,
882 N.E.2d 400 (Ohio 2008) ..............................3

*Coors Brewing Co. v. Mendez-Torres*,
562 F.3d 3 (1st Cir. 2009).............23, 32, 37, 41

*DaimlerChrysler Corp. v. Cuno*,
547 U.S. 332 (2006).........................................17

*Davis v. Michigan Dept. of Treasury*,
489 U.S. 803 (1989).........................................41

*DIRECTV, Inc. v. Tolson*,
513 F.3d 119 (4th Cir. 2008) ...........................26

## TABLE OF AUTHORITIES

Page

*Dows v. City of Chicago*,
78 U.S. (11 Wall.) 108 (1871) ....................31, 34

*Fair Assessment in Real Estate Ass'n v. McNary*,
454 U.S. 100 (1981).................................*passim*

*Flast v. Cohen*,
392 U.S. 83 (1968)...........................................17

*General Motors Corp. v. Tracy*,
519 U.S. 278 (1997)...........................................6

*Great Lakes Dredge & Dock Co. v. Huffman*,
319 U.S. 293 (1943)...........23, 25, 27, 32, 33, 35

*Hibbs v. Winn*,
542 U.S. 88 (2004)...................................*passim*

*Hill v. Kemp*,
478 F.3d 1236 (10th Cir. 2007).......................21

*Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,
513 U.S. 527 (1995)...................................37, 38

*Johnson v. Orr*,
551 F.3d 564 (7th Cir. 2008) ..........................18

*Lapides v. Board of Regents of University System of Georgia*,
535 U.S. 613 (2002)...................................37, 38

## TABLE OF AUTHORITIES

Page

*Levy v. Pappas*,
510 F.3d 755 (7th Cir. 2007) ..........................37

*Luessenhop v. Clinton County*,
466 F.3d 259 (2d Cir. 2006) ............................18

*Matthews v. Rodgers*,
284 U.S. 521 (1932).........................................35

*McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*,
496 U.S. 18 (1990)....................................20, 41

*Milliken v. Bradley*,
433 U.S. 267 (1977).........................................41

*Nat'l Private Truck Council v. Oklahoma Tax Commission*,
515 U.S. 582 (1995).........................................35

*Owen v. City of Independence*,
445 U.S. 622 (1980).........................................31

*Pierson v. Ray*,
386 U.S. 547 (1967).........................................31

*Rosewell v. LaSalle Nat'l Bank*,
450 U.S. 503 (1981).........................................35

*Singer Sewing Machine Co. v. Benedict*,
229 U.S. 481 (1913).........................................35

## TABLE OF AUTHORITIES

Page

*Wilbur v. Locke*,
423 F.3d 1101 (9th Cir. 2005) .................... 37, 40

*Winn v. Killian*,
307 F.3d 1011 (9th Cir. 2002) .................... 12, 25

**Statutes**

28 U.S.C. § 1331 ................................................ 1, 30

28 U.S.C. § 1341 ................................................ 7, 21

28 U.S.C. § 1983 .................................................... 33

42 U.S.C. § 1983 .................................................... 31

Ohio Rev. Code § 4929.01 ....................................... 2

Ohio Rev. Code § 4929.01(N) .................................. 2

**Other**

Brief for Multistate Tax Commission as Amicus Curiae Supporting Petitioner, *Levin v. Commerce Energy* (No. 09-223) ....................... 14

*In re Application of Dominion East Ohio,* Case No. 07-1224-GA-EXM, (Opinion and Order, June 18, 2008), *available at* http://dis.puc.state.oh.us/TiffToPDF/A1001001A08F18B41305E23144.pdf, last visited Jan. 26, 2010 .............. 3

**TABLE OF AUTHORITIES**

Page

*In re Application of Vectren Energy Delivery of Ohio*, Case No. 07-1285-GA-EXM, (Entry, Aug. 20, 2008), *available at* http://dis.puc.state.oh.us/TiffToPDf/A1001001A08H20B40954D08592.pdf, last visited Jan. 26, 2010 .......... 3

*In re Application of Columbia Gas of Ohio*, Case No. 08-1344-GA-EXM (Opinion and Order, Dec. 2, 2009), *available at* http://dis.puc.state.oh.us/TiffToPDf/A1001001A09L02B05955A92538.pdf, last visited Jan. 26, 2010 .......... 3

Petition for Writ of Certiorari, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 22428272 .......... 25

Petitioner's Brief on the Merits, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 22766739 .......... 25

Respondents' Brief on the Merits, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 23052002 .......... 26

Transcript of Oral Argument, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2004 WL 193039 .......... 26

## STATUTORY PROVISIONS INVOLVED

In addition to the Tax Injunction Act (quoted at Pet'r Br. at 1), this case involves 28 U.S.C. § 1331, which reads as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

## STATEMENT OF THE CASE

***Ohio's Competitive Natural Gas Market.***

Natural gas is the energy source most Ohioans use to heat their homes and a major source of energy and power used by industrial and commercial businesses in Ohio. J.A. 3. Ohio's current competitive market for the sale of natural gas to residential and industrial users is relatively new. Traditionally, both industrial and residential consumers could purchase natural gas from only one source: the local utility, also known as the local distribution company ("LDC"). J.A. 4. Under the historical approach, the LDCs charged a "bundled" price for both (1) the natural gas commodity itself and (2) the service of delivering the commodity through its network of natural gas pipelines and distribution facilities. *Id.*

Beginning in the 1970s, Ohio granted certain large and mid-sized industrial consumers the authority to purchase their natural gas from independent natural gas marketers rather than from the LDC. J.A. 4-5. These independent marketers did not hold themselves out to the public at large, and the LDCs continued to service all

residential and the vast majority of business consumers in the state. J.A. 5.

After authorizing pilot programs in the late 1990s, Ohio revolutionized the residential market in 2001 by creating Ohio's Consumer Choice program. J.A. 6. Through this program, Ohio sharply curtailed the LDCs' monopoly and extended a competitive market-based system to most residential natural gas consumers in Ohio. J.A. 6-7; Ohio Rev. Code § 4929.01 et seq. The centerpiece of the program is the "unbundling" of the sale of the natural gas commodity from the service of delivering that gas to the consumer. J.A. 6-7. Residential and business consumers alike now have a choice to purchase their gas from either the LDC that serves their area or from a non-utility gas supplier. The Ohio Revised Code labels the latter group "retail natural gas suppliers" (hereinafter "retail suppliers"). J.A. 7-8; Ohio Rev. Code § 4929.01(N). Retail suppliers must be certified biennially by the Public Utilities Commission of Ohio ("PUCO") and, like LDCs, are now subject to significant PUCO oversight with respect to commodity services provided. J.A. 9. LDCs continue to own and operate the local network of distribution pipelines that run to homes. J.A. 8. Thus, LDCs continue to deliver natural gas to consumers, whether the consumer purchases the gas from the LDC or from a retail supplier. J.A. 8.

Residential consumers continue to receive a single monthly gas bill from their LDC separately reflecting the price of the commodity itself and the price the LDC charges for delivery. J.A. 8-9. If a consumer purchases natural gas from a retail

supplier, the bill separately identifies the amount the consumer owes to the retail supplier for the gas commodity itself, and the amount of the applicable sales taxes. *Id*. The LDC remits the full amount to the retail supplier. The monthly bill also reflects the LDC charges for the delivery service including fees and taxes. *Id*.

Accordingly, under Ohio's Consumer Choice program, LDCs and retail gas suppliers now compete directly in all material respects for natural gas commodity sales in Ohio. *See Columbia Gas Transm. Corp. v. Levin*, 882 N.E.2d 400, 415 (Ohio 2008) ("[T]he main competitors of LDCs in the residential and small-business markets are not interstate pipelines. Rather, independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market.").

At the time of the filing of the Complaint, Ohio's Consumer Choice program applied in the areas of the state served by four larger LDCs. J.A. 7. Since then, the PUCO has approved the applications of two LDCs to exit the retail natural gas commodity sales market, and a third LDC has taken steps to follow suit.[1]

---

[1] *See In re Application of Dominion East Ohio*, Case No. 07-1224-GA-EXM (Opinion and Order, June 18, 2008), *available at* http://dis.puc.state.oh.us/TiffToPDF/A1001001A08F18B41 305E23144.pdf; *In re Application of Vectren Energy Delivery of Ohio*, Case No. 07-1285-GA-EXM (Entry, Aug. 20, 2008), *available at* http://dis.puc.state.oh.us/TiffToPDf/A1001001A08 H20B40954D08592.pdf; *In re Application of Columbia Gas of Ohio*, Case No. 08-1344-GA-EXM (Opinion and Order, Dec. 2, 2009), *available at* http://dis.puc.state.oh.us/TiffToPDf/A100

***Plaintiffs' Complaint Seeks to Invalidate Certain Discriminatory Tax Exemptions That LDCs Enjoy.***

Even though LDCs sell the same exact commodity (natural gas) and deliver it in the same exact manner (through LDC-owned pipelines), Ohio maintains a tax system that treats sales of natural gas from LDCs more favorably than sales by retail suppliers. As described in the allegations of the Complaint (which on a motion to dismiss must be taken as true), this discrimination is effectuated by three types of tax exemptions granted to the LDCs related to their sales of natural gas but not to retail suppliers.

First, retail suppliers must charge and collect the statewide and relevant county "piggyback" sales and use tax on all sales of natural gas to consumers. J.A. 13. Ohio law, however, exempts all sales of natural gas by LDCs from all of these sales and use taxes, and instead, imposes a lower gross receipts tax. J.A. 14. Second, Ohio imposes a commercial activities tax ("CAT") on the gross sales of most Ohio businesses, including retail suppliers. J.A. 15-16. Ohio law, however, exempts LDCs from the CAT. J.A. 16. Third, Ohio law imposes the applicable gross receipts tax on sales of natural gas from an LDC to a retail supplier. J.A. 17. Ohio law, however, exempts sales of natural gas between LDCs from that tax. J.A. 17. The net result is that a consumer can buy the same amount of natural gas, delivered by the same LDC through the same

---

1001A09L02B05955A92538.pdf. All links last visited Jan. 26, 2010.

pipelines, but if the consumer chooses to purchase the gas from a retail supplier rather than from an LDC, the consumer will pay a higher tax.[2]

Respondents (who will be referred to collectively as "Plaintiffs") brought this lawsuit in the U.S. District Court for the Southern District of Ohio to challenge this discriminatory treatment. Respondents Commerce Energy, Inc. ("Commerce Energy") and Interstate Gas Supply, Inc. ("IGS") are retail suppliers. J.A. 2. Respondent Gregory Slone is a residential purchaser of natural gas from the latter, under Ohio's Consumer Choice program. J.A. 2-3. Since 2001, Commerce Energy, IGS, and other retail suppliers have moved to compete in the restructured free market for sales of natural gas, and a significant percentage of Ohio residential consumers now purchase their natural gas commodity from retail suppliers. J.A. 11.

Plaintiffs challenge the exemptions on two federal constitutional grounds. First, Plaintiffs allege that the exemptions violate the Dormant Commerce Clause because they provide a discriminatory advantage to in-state LDCs at the expense of retail suppliers who are both in and out-of state entities. J.A. 18-19. Second, Plaintiffs allege that the exemptions violate the Equal Protection Clause by discriminating against

[2] The Commissioner points out that LDCs are subject to two taxes that are not paid by retail suppliers. Pet'r Br. at 6. These taxes, which are unrelated to commodity sales, have no relevance to the jurisdictional issue presented here.

similarly situated businesses without a rational basis. J.A. 19-20.[3]

The relief sought in Plaintiffs' Complaint is limited. Plaintiffs seek a declaration that the exemptions at issue violate the U.S. Constitution and an injunction against enforcement of the exemptions. J.A. 20-21. The Complaint does not seek to enjoin the collection of any tax paid by Plaintiffs or any other taxpayer. Nor do Plaintiffs seek a refund of any taxes they previously paid.

Because Plaintiffs do not challenge their own tax liability, there is no administrative procedure under Ohio law that could grant the relief requested in Plaintiffs' Complaint. Rather, the only alternative state forum to assert the relief requested in Plaintiffs' Complaint is to refile it in state court.

***The Decisions of the Courts Below.***

The Commissioner never answered the Complaint but instead moved to dismiss the complaint for a lack of jurisdiction on two bases.

[3] This Court once before addressed a similar argument, but in the context of the old regime, where the LDCs did not compete directly with independent gas marketers for residential sales because residential and small commercial customers did not have the option to purchase the gas commodity from other than an LDC. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997). Because of that, this Court concluded that the gas marketers were not "similarly situated" for dormant commerce clause purposes, and thus the constitutional claims of discriminatory treatment could not be sustained. *Id.* Plaintiffs contend that the drastically different competitive environment today warrants a different result.

First, the Commissioner argued that the Complaint was barred by the Tax Injunction Act ("TIA" or "the Act"), 28 U.S.C. § 1341, which generally prohibits a court from "enjoin[ing] . . . the assessment, levy or collection of any tax under State law." Second, he asserted that general principles of comity and federalism bar the lawsuit even if the TIA does not. The district court rejected the first ground, but accepted the second. Pet. App. 22a-33a. It held that the TIA did not bar this lawsuit, because the TIA is limited to lawsuits seeking to enjoin the collection of a tax. *Id.* at 22a-26a. Nevertheless, the district court dismissed the lawsuit on the ground that principles of federalism and comity compelled it to refrain from adjudicating this case. *Id.* at 19a-33a. No discovery was had and no factual record was developed prior to or in connection with the Commissioner's motion to dismiss.

The U.S. Court of Appeals for the Sixth Circuit reversed. The court of appeals agreed that the TIA was inapplicable, but reversed the district court's holding that comity nevertheless blocks the suit. Pet. App. 3a-18a. This Court's opinion in *Hibbs v. Winn* played a prominent role in both holdings. The court of appeals based its TIA conclusion on this Court's holding that the jurisdictional bar "applies only 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 (quoting *Hibbs*, 542 U.S. at 106-07). Since Plaintiffs did not contest their own tax liability, and success on their claims would not

reduce state tax revenue, the court held the Act did not apply. *Id.* at 7a-9a.

As to comity, the court of appeals rejected the Commissioner's argument that comity principles "broadly bar from federal court nearly every state-tax challenge." Pet. App. 13a. The court explained that such a reading ignores this Court's teaching in *Hibbs* that comity, too, "strips jurisdiction 'only where plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.'" *Id.* at 17a-18a (quoting *Hibbs*, 542 U.S. at 107 n.9). The court of appeals also observed that the Commissioner's reading would *sub silentio* overrule a series of important cases from the Supreme Court including "possibly *Hibbs* itself," and that it would make the TIA entirely superfluous. *Id.* at 17a-18a.

In so ruling, the court of appeals emphasized that it was not holding that principles of comity are co-extensive with the parameters of the TIA. To the contrary, "principles of comity and federalism sweep somewhat more broadly than the Act." Pet. App. 18a. The court opined that "[t]o determine whether comity and federalism preclude jurisdiction over state taxation claims, courts must determine whether the relief requested in the pleadings would significantly intrude upon traditional matters of state taxation such that dismissal is necessary." *Id.* at 13a-14a. The court concluded that comity did not bar this action, because Plaintiffs' claims were directed to a few limited exemptions that, at the time of the Complaint, affected only four specific LDCs and because the relief sought "would not significantly

intrude upon traditional matters of state taxation." *Id*. at 18a.

The Commissioner unsuccessfully sought rehearing en banc, Pet. App. 1a, and this Court granted review, 130 S.Ct. 496 (2009).

## SUMMARY OF ARGUMENT

This Court held in *Hibbs v. Winn*, 542 U.S. 88 (2004), that neither the TIA nor principles of comity barred a federal district court from hearing a lawsuit challenging state tax credits granted to other taxpayers because such suits would not impede the state's collection of tax revenue. This Court reasoned that such a result was mandated by the language and purposes of the TIA and because "this Court has relied upon 'principles of comity' … to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." 542 U.S. at 107 n.9.

*Hibbs* requires the same result here. As in *Hibbs*, Plaintiffs challenge the validity of certain tax exemptions benefiting other taxpayers. Plaintiffs' Complaint does not seek to impede the collection of any tax, and on its face, would result in increased revenue to the state.

Nonetheless, the Commissioner contends that both the TIA and principles of comity bar Plaintiffs' suit. In so doing, the Commissioner invites this Court to: (1) limit *Hibbs* to its unique facts, in particular the type of constitutional claims being asserted therein, i.e., Establishment Clause claims; (2) adopt a "robust," yet undefined view of comity

contrary to this Court's historical precedents and divorced from their underlying state revenue-protection rationale; and (3) ignore the relief requested in Plaintiffs' Complaint and speculate that Plaintiffs' suit may ultimately diminish rather than enhance Ohio's coffers. This Court must reject the Commissioner's invitation.

First, the result in *Hibbs* cannot be explained away by limiting its holding to the constitutional claims raised therein. Nothing in *Hibbs* indicates that this Court's TIA and comity analysis was dependent upon the precise nature of the constitutional challenge at stake. Neither the language of the TIA nor its revenue-protective purposes are dependent upon such distinctions. Fundamentally, there is no plausible constitutional theory explaining why the TIA and comity should give favorable treatment to some constitutional claims over others.

Second, as recognized in *Hibbs*, this Court has never applied comity to bar suits seeking to enjoin tax exemptions. Such suits do not offend the principles of comity expressed in this Court's precedent. To be sure, this Court has recognized that there are instances where principles of comity sweep more broadly than the TIA. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). However, this Court has applied comity to bar such suits only where the relief requested sought federal-court aid to arrest or countermand state tax collection. Nothing in this Court's precedent warrants the adoption of the Commissioner's broad view that comity bars any suit that would involve "an unwarranted intrusion

into state tax policy," Pet'r Br. at 27, a standard lacking clarity and impossible to apply, particularly when judged, as here, solely from the face of the Complaint.

Finally, the most rational touchstone for determining whether a court has jurisdiction under the TIA and principles of comity is by reference to the relief requested in the Complaint. A categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits is far more certain and amenable to judicial administration than the Commissioner's "unwarranted intrusion" test.

Because the relief sought by the Plaintiffs here would not arrest or countermand state tax collection, this case is barred neither by the TIA nor principles of comity. As a result, this Court should affirm the decision of the court of appeals.

## ARGUMENT

### I. THE TAX INJUNCTION ACT DOES NOT BAR PLAINTIFFS' SUIT BECAUSE, AS THIS COURT HELD IN *HIBBS*, THE TIA DOES NOT PROHIBIT A SUIT THAT SEEKS TO ENJOIN STATE TAX EXEMPTIONS.

This Court held in *Hibbs* that the TIA bars lawsuits seeking to impede the collection of a tax, but does not bar lawsuits, like this one, seeking to invalidate tax credits granted to other taxpayers. *See infra* Point I.A. The Commissioner urges this Court to read into *Hibbs* two limitations that bear no relation to the text of the TIA or the rationale of

the opinion. *See infra* Point I.B. The Commissioner also urges this Court to reach a different result than in *Hibbs* based on speculation that the district court will actually enjoin the collection of a tax, even though Plaintiffs did not request such relief and the district court would be prohibited from granting it. *See infra* Point I.C. Both arguments fail.

### A. This Case Falls Squarely Within the Holding of *Hibbs* Because It Seeks to Enjoin State Tax Exemptions and Thus Does Not Seek to Impede the Collection of State Tax Revenue.

In *Hibbs*, this Court held as a matter of statutory interpretation that the TIA does not prohibit suits that challenge state tax credits. The plaintiffs in *Hibbs*, like Plaintiffs here, were not trying to avoid paying any tax themselves. Rather, the *Hibbs*' plaintiffs were citizens challenging a credit enjoyed by other taxpayers who made donations to school tuition organizations ("STOs"). 542 U.S. at 93-94. The court of appeals held that neither the TIA nor comity precluded federal court jurisdiction over the lawsuit because the plaintiffs were not challenging their own tax liability and thus did not seek to impede the state's receipt of tax revenues. *Winn v. Killian*, 307 F.3d 1011, 1020 (9th Cir. 2002). This Court affirmed. 542 U.S. at 112.

With respect to the TIA, this Court's opinion focused on whether the relief requested fell within the Act's prohibition against actions seeking to "enjoin, suspend or restrain the assessment, levy or

collection of any tax under State law." 542 U.S. at 100. Specifically, the analysis turned on whether the plaintiffs were seeking to enjoin an "assessment," within the meaning of the Act. *Id.* This Court held that they were not, basing its decision on the plain meaning of the word "assessment," the legislative history of the Act, and the Court's precedent in applying the Act. As this Court explained, "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Id.* at 104-05 (quoting Brief of Petitioner 20).

This Court rejected any notion that its previous cases applying the TIA could be "fairly portrayed cut loose from their secure, state-revenue-protective moorings." 542 U.S. at 106. Rather, all of the Court's prior TIA cases "involved plaintiffs who mounted federal litigation to avoid paying state taxes or to gain a refund of such taxes." *Id.* at 106. "In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107. Under *Hibbs*, the TIA did not bar the plaintiffs' lawsuit because it did not seek a federal court order impeding the state's collection of tax revenue.

*Hibbs* dictates the same conclusion here. Like in *Hibbs*, Plaintiffs' Complaint seeks to invalidate

certain tax exemptions applied to others and disclaims any relief that would reduce Plaintiffs' own tax liability. Plaintiffs' lawsuit is no more a challenge to an "assessment" than the lawsuit in *Hibbs*, and this case is no more an appropriate vehicle to cut the TIA loose from its "state-revenue-protective moorings" than was *Hibbs*.[4]

### B. The Commissioner's Effort to Limit *Hibbs* to Its Facts Is Unpersuasive.

The Commissioner seeks to limit the holding of *Hibbs* to its facts in two ways. First, he suggests that *Hibbs* applies only to certain constitutional challenges and not others. He reads *Hibbs* as holding that the TIA permits Establishment Clause claims and some claims brought under the Equal Protection Clause—those that are based in racial discrimination—but not others. Pet'r Br. at 38. Second, he asserts that *Hibbs* does not apply equally to all plaintiffs who challenge credits or exemptions, but only to those who have the right motive for filing the lawsuit. Specifically, the Commissioner asserts that those who file suits to

---

[4] Amicus Curiae Multistate Tax Commission ("MTC") argues that the TIA should be interpreted to bar any lawsuit "[w]here a statute's unconstitutional effects can be completely cured by the full range of available state tax remedies." Brief for Multistate Tax Commission as Amicus Curiae Supporting Petitioner 7, *Levin v. Commerce Energy* (No. 09-223). According to the MTC, if there is an alternative and fully-compensatory remedy available in state court, the TIA should not be "short-circuited" through a taxpayer's "narrow pleading of the relief sought in federal court." *Id.* at 7-8. MTC's interpretation must be summarily rejected because such an interpretation would rewrite the TIA and would effectively overrule *Hibbs*.

advance a business interest must be treated differently from those who lack such a motive. Pet'r Br. at 35. The Commissioner's effort to limit the holding of *Hibbs* cannot be squared with the language of the Act, this Court's analysis in *Hibbs*, general constitutional principles, or common sense.

The Commissioner's contention finds no support in the statutory language of the Act. The TIA is triggered based upon the relief sought – i.e., whether the challenge seeks to "enjoin . . . the assessment, levy or collection of any [state] tax." The TIA is not triggered by the constitutional provision upon which the relief is sought or by the motive of the plaintiff bringing the suit. The TIA does not prohibit suits aimed at "enjoining the assessment of any state tax *under the Establishment Clause and certain equal protection theories*." Nor does it prohibit suits aimed at "enjoining the assessment of any state tax *where the plaintiff has a business interest in securing such injunction*." It is simply impossible to read the text of the TIA to support the Commissioner's assertion that some lawsuits that challenge state tax exemptions are barred by the TIA while some lawsuits are not.

Nothing in this Court's analysis in *Hibbs* suggests that this Court's decision was dependent upon either the precise nature of the constitutional challenge at stake or a plaintiff's interests in seeking to invalidate the credit. At no point did this Court suggest that Establishment Clause cases have some special status. To be sure, the Court cited numerous Establishment Clause cases, but only to demonstrate that "numerous federal-court

decisions – including decisions of this Court reviewing lower federal-court judgments – have reached the merits of *third-party constitutional challenges to tax benefits* without mentioning the TIA." 542 U.S. at 110 (emphasis added). Likewise, the Court did not mention anything about the plaintiffs' motives in *Hibbs*. The only attribute about the plaintiffs that the Court emphasized was that they were not seeking to block a tax that they were obliged to pay. That was what the Court meant when it identified the plaintiffs as "third parties." *See*, *e.g.*, *id*. at 108 (explaining that lower courts have also read the TIA to "restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum") (emphasis added).

Likewise, the Commissioner's effort to limit the holding of *Hibbs* to a subclass of favored constitutional claims and favored motives is completely divorced from the revenue-protective purposes of the Act relied upon in *Hibbs*. Plaintiffs' Commerce Clause claim does not offend the TIA's revenue-protection purposes any more than the *Hibbs* plaintiffs' Establishment Clause claim. Plaintiffs' motive in seeking to prevent Ohio from granting favored tax treatment to in-state LDCs does not offend the TIA's revenue-protection purposes any more than the *Hibbs* plaintiffs' motive to prevent Arizona from subsidizing religious-based education.

The distinctions relied upon by the Commissioner are fundamentally flawed as a

matter of constitutional law and unworkable. The Commissioner fails to provide an explanation, let alone a plausible constitutional theory, as to why a challenge to state tax credits based upon the Establishment Clause should be treated more favorably under the TIA than a challenge to state tax exemptions based on the Commerce Clause. Likewise, the Commissioner fails to explain why the Act would treat some equal protection claims one way and treat others another way. One cannot help but wonder what exactly the hierarchy of constitutional rights proposed by the Commissioner would be and on what this hierarchy would be based. Does the TIA apply to free speech claims? Equal protection claims based upon gender? Due process claims? And what should a federal district court do when a lawsuit alleges both "favored" and "unfavored" claims? In short, the Commissioner's interpretation of *Hibbs* would lead to an unprincipled morass where no litigant and no court would know which claims deserve to be in federal court.

Moreover, the Commissioner's hierarchy of claims and motives creates an odd incongruity with this Court's standing jurisprudence. Typically, the only entity that could challenge a tax is an entity with a concrete financial stake in the outcome. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). Establishment Clause cases are the exception to the rule, in that a citizen can challenge a tax provision on constitutional grounds without having to show any economic stake in the outcome of the dispute. *See Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). The Commissioner is arguing,

however, that the very business interests that give Plaintiffs standing to bring their claims somehow bar them from federal court under the TIA, and that the only reason the plaintiffs in *Hibbs* could sue was that they were granted an exceptional form of "taxpayer standing." *See* Pet'r Br. at 35-36. The Commissioner does not offer any reason why Congress would want to (or why this Court should) grant preferential access to the federal forum to the parties that have the most tenuous standing to sue in federal court.

Not surprising, therefore, the Commissioner cannot cite to a single case where a court has barred a lawsuit that seeks to enjoin state tax exemptions based upon any of the distinctions espoused by the Commissioner here. In fact, lower federal courts interpreting *Hibbs* have held across the board that the test for survival under the TIA is whether the suit seeks to impede the collection of taxes, not whether the plaintiff is a financially disinterested third-party bringing an Establishment Clause or race-based equal protection claim. *See*, *e.g.*, *Johnson v. Orr*, 551 F.3d 564, 571 (7th Cir. 2008) (TIA did not bar suit by individual taxpayer to challenge a tax law to which he himself was subject, so long as the relief requested did not "impede the collection of taxes or reduce the flow of tax revenue to Illinois"); *Luessenhop v. Clinton County*, 466 F.3d 259, 267-68 (2d Cir. 2006) (rejecting assertion that *Hibbs* was limited in scope to the type of substantive claims presented in that case, and allowing individual taxpayers' due process challenge of state tax notification procedure to proceed as not barred by

the TIA); *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 501-504 (6th Cir. 2008) (TIA did not bar free speech and Commerce Clause claims challenging state tax statute prohibiting telecommunications providers from identifying state tax on consumers' bills or from collecting tax directly from consumers even though plaintiffs had a financial interest in the litigation).

### C. Plaintiffs' Lawsuit Is Not Barred by the TIA Based Upon the Commissioner's Unsupportable Fear That the District Court Will Grant Relief Not Requested by the Plaintiffs and Prohibited by the TIA or Based Upon the Commissioner's Hypothetical Speculation as to the Lawsuit's Eventual Economic Consequences.

In a final effort to fit this case within the parameters of the TIA, the Commissioner contends that the *Hibbs* rule does not apply here because this "challenge would likely diminish, not enhance, Ohio's coffers." Pet'r Br. at 37. In support, the Commissioner makes two remarkable assertions. First, the Commissioner contends that "regardless of [Plaintiffs'] artful pleading," if Plaintiffs are successful on the merits, the district court "would likely exempt [Plaintiffs] from the challenged taxes, not terminate the LDCs' exemptions." *Id*. at 37-38. Second, the Commissioner contends that even if the district court left Plaintiffs' tax liabilities untouched, "it is not at all clear" that in tailoring a nullification remedy the Court would augment Ohio's revenues "in the end." *Id*. at 38. Again, the Commissioner's arguments are not convincing.

First, we know that the district court will not extend the exemptions to Plaintiffs—and enjoin collection of some portion of their tax liability that is prescribed by statute—because it would violate the TIA for the court to do so. The TIA is unequivocal. It does not just bar a court from exercising jurisdiction over a complaint that seeks to enjoin the collection of a tax, but it also expressly bars a court from issuing such an injunction once a case is properly before it. There is no basis to believe that the district court would attempt to fashion a remedy that is both unsought and illegal. And it makes no sense to engraft a non-textual limitation on the TIA's language that is premised on the possibility that a court will violate the TIA's plain command.

Nothing in the cases cited by the Commissioner is to the contrary, as none of the plaintiffs in any of those cases limited their requested relief to a "nullification" remedy and none of those cases were otherwise limited by the TIA. *See*, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, (1979) (all of the parties agreed that extension was an appropriate remedy in federal lawsuit challenging constitutionality of federal welfare statute); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (lawsuit brought in state court seeking refund of taxes previously paid); *Cherry Hill Vineyards, LLC. v. Lilly*, 553 F.3d 423 (6th Cir. 2008) (federal lawsuit not challenging any state tax statute where plaintiffs, out-of-state wineries, sought to have the same right of direct shipping to consumers extended to them as allowed by in-state wineries). In fact, the cases cited by the Commissioner

actually support, rather than undermine, the authority of the district court to grant the nullification remedy sought by the Plaintiffs in this case.

Second, neither the text of the TIA nor the rationale of *Hibbs* suggests that the outcome of the jurisdictional inquiry depends upon the analysis of hypothetical consequences of the lawsuit beyond looking at the *relief requested* in the Complaint. *Hibbs* did not do that. Rather, in framing the question, *Hibbs* recounted the allegations of the complaint and then asked whether "[t]aking account of the prospective nature of the relief requested, does respondents' suit, in 28 U.S.C. § 1341's words, seek to 'enjoin, suspend or restrain the assessment, levy or collection of any tax under State law?'" 542 U.S. at 99-100 (emphasis added). The Commissioner's speculation as to the ultimate effect Plaintiffs' lawsuit might have on the state's coffers invites this Court to engage in the very exercise that the Commissioner insists courts should be careful not to undertake: becoming "'second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collection.'" Pet'r Br. at 37 (quoting *Hill v. Kemp*, 478 F.3d 1236, 1250 (10th Cir. 2007)).[5] In fact, the

---

[5] The speculative nature of the Commissioner's hypotheticals about the possible result of the litigation if Plaintiffs are successful is underscored by the market change referenced above in Statement of the Case. Many factors may influence the ultimate result. Nonetheless, the immutable fact is that Plaintiffs do not seek relief which would "arrest or

dangers are more pronounced here, because the Commissioner is asking this Court to second guess the financial impact of a lawsuit that on its face would result in an increase in tax revenue. In short, the only rational touchstone for determining whether a court has jurisdiction under the TIA is the relief being requested. This Court should reject the Commissioner's suggestion that the TIA's jurisdictional lines depend upon some prediction of what economic consequences might develop "in the end." Pet'r Br. at 38.

Plaintiffs' lawsuit falls outside the type of cases barred by the TIA because the suit seeks to enjoin tax exemptions granted to others and seeks no relief that would impede the collection of state tax revenue. Accordingly, the decision of the court of appeals holding that the TIA does not bar this suit should be affirmed.

## II. PRINCIPLES OF COMITY DO NOT BAR PLAINTIFFS' ACTION BECAUSE IT DOES NOT SEEK TO ARREST OR COUNTER-MAND STATE TAX COLLECTION.

The Commissioner posits that "[t]he central question in this case is whether comity principles remain independently vital after the Court's decision interpreting the TIA in *Hibbs*." Pet'r Br. at 2. Thus, the central theme pervading his brief is that "the Sixth Circuit held here that *Hibbs* effectively rendered the comity doctrine a dead letter in tax cases," *id*., that "*Hibbs* . . . overruled, *sub silentio*, an unbroken line of comity cases

---

counter-mand" state tax collection and the district court could not, consistent with the TIA, order such relief.

extending back [to] 1871," Pet'r Br. at 20, and "restricted or eliminated the comity doctrine," Pet'r Br. at 23. The problem is that the Sixth Circuit held no such thing, and Plaintiffs do not embrace any such notion.

The court of appeals acknowledged that "principles of comity and federalism sweep somewhat more broadly than the Act," Pet. App. 18a, and "thus they sometimes bar federal challenges to state taxation where the Act would not," *Id.* at 9a. The court correctly observed that "the pertinent question is whether the claims and requested relief fall within that sweep." *Id.* at 18a. All this was in keeping with this Court's precedents holding that the comity doctrine can block a lawsuit even when the TIA does not. Thus, for example, all parties agree that this Court has held that comity bars a damages action seeking essentially to countermand a tax collection, whether or not the TIA bars such a suit, *Fair Assessment*, 454 U.S. 100 (1981), and the same goes for a suit seeking declaratory judgment that a tax collection is impermissible, even though the TIA says nothing about declaratory judgment actions, *see Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Neither the Sixth Circuit nor the other appellate circuits aligned with it on this issue dispute the continued vitality of these cases. *See, e.g.*, *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009) ("This is not to say that principles of comity are of no further effect. As recognized in *Hibbs*, *Fair Assessment* is still good law . . . .").

But the Commissioner cannot prevail here just by making the uncontroverted point that there are circumstances where comity can bar a lawsuit even though the TIA does not. The question presented in this case is whether comity bars this lawsuit even though the TIA does not. This Court in *Hibbs* held that the suit before it was not barred by principles of comity. *See infra* Point II.A. The holding in *Hibbs* was that comity principles do not bar a lawsuit, like this one, that does not seek to arrest or impede the collection of state taxes. *See infra* Point II.B. Even if *Hibbs* could be read more narrowly, however, this Court should now conclude that comity principles do not block any lawsuit meeting those same criteria, because that categorical rule is consistent with comity precedents and principles and has the virtue of clarity. *See infra* Point II.C. In any event, even under the Commissioner's multi-factor test for "undue interference" with state tax functions, federal jurisdiction would be proper, because entertaining this challenge does not unduly interfere with the state's tax operations. *See infra* Point II.D.

### A. As the Commissioner Agrees, This Court Held That the Suit Before It in *Hibbs* Was Not Barred by Principles of Comity.

The Commissioner and Plaintiffs agree that this Court's opinion in *Hibbs* was not just about the TIA, but also about comity. While the opinion devoted more attention to the TIA, the Commissioner concedes that this Court found that the claims in *Hibbs* "cleared *both* the TIA *and*

comity hurdles." Pet'r Br. at 23. That much is evident not just from the opinion's footnotes addressing comity, *see Hibbs*, 542 U.S. at 107 n.9, 109 n.11, but also from the course of the litigation.

*Hibbs* arrived before this Court as a challenge to jurisdiction rooted in both the TIA and comity. The Ninth Circuit addressed at length the district court's "alternative ground for its dismissal of this action, that principles of comity preclude lawsuits involving potential federal court interference in the administration of state tax systems." *Winn*, 307 F.3d at 1018. Presaging this Court's eventual opinion, the court of appeals held that this Court's opinions in *Fair Assessment* and *Great Lakes* were concerned with a federal court hindering "the state's ability to collect revenue" and that "comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue" in a case involving a tax credit. *Id.* at 1019-20.

The question presented in both the certiorari petition and the petitioner's merits brief was:

> Did the Ninth Circuit err in holding . . . that the Tax Injunction Act . . . *and principles of comity* that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

Petition for Writ of Certiorari at i, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 22428272; Petitioner's Brief on the Merits at i, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809)

2003 WL 22766739 (emphasis added). The petitioner's merits brief included a separate argument that "even if the Tax Injunction Act did not preclude Respondents' federal-court action, the principles of comity would." *Id.* at 26. The respondents joined the issue, arguing that "Principles of Federal-State Comity Do Not Deprive The District Court Of Subject Matter Jurisdiction." Respondents' Brief on the Merits at 39, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 23052002. Both parties also addressed comity at oral argument. Transcript of Oral Argument at 28-29, 45-46, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2004 WL 193039.

Consequently, as the Commissioner concedes, this Court's statements about comity in *Hibbs* were not passing dicta, as the district court and the Fourth Circuit have suggested. *See* Pet. App. 28a; *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 127-28 (4th Cir. 2008) (stating that comity "was simply not before the Supreme Court in *Hibbs*"). Rather, they represent a considered holding that addressed one of the two specific questions presented in that case. The question before the Court now is exactly how broad that holding was. Was it a narrow comity holding limited to the unique facts of *Hibbs* (as the Commissioner asserts) or was it a holding that applied to any lawsuit that is not directed at arresting or countermanding state tax collection (as Plaintiffs assert)?

### B. The Holding in *Hibbs*, That Comity Does Not Bar a Suit Unless the Suit Is Directed at Arresting or Countermanding a State Tax, Was Not Limited to the Particular Circumstances in *Hibbs*.

The parties' dispute about the scope of this Court's comity holding in *Hibbs* mirrors, in most respects, their dispute about the scope of this Court's TIA holding in *Hibbs*. The natural place to start is with what this Court *said* in rejecting the comity argument. It held: "[T]his Court has relied upon 'principles of comity' . . . to preclude original federal-court jurisdiction *only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection*." *Hibbs*, 542 U.S. at 107 n.9 (emphasis added). In support of this holding, this Court cited two cases. The first was *Fair Assessment*, which it characterized as a case where "taxpayers sought damages caused by alleged overassessments." *Id*. The other was *Great Lakes*, which it characterized as a "challenge[]" to a state "unemployment compensation tax." *Id*. If, as the parties agree, *Hibbs* included a holding rejecting a comity defense, then the most natural reading of this holding is that comity principles preclude jurisdiction only where, as in *Fair Assessment* and *Great Lakes*, the "plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Id*.

The Commissioner observes that "[t]he 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." Pet'r Br. at 23. But,

as is explained above, what made the case a poor fit under the TIA, too, was that the plaintiffs were not seeking "district court aid in order to arrest or countermand state tax collection," *Hibbs*, 542 U.S. at 107 n.9—that the TIA, too, covers only those situations where "taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority," where the lawsuit is directed at arresting "the collection of state taxes." *Id.* at 105 (citation and internal quotes and brackets omitted).

As he does in addressing the TIA, the Commissioner asserts that the *Hibbs* comity holding is to be found not in what the Court *said* about comity—nor, for that matter what it said about the TIA—but in some unspoken limitations to be extracted from the peculiar facts of the case. Specifically, the Commissioner asserts that "[t]hree factors were critical" to the Court's comity holding. Pet'r Br. at 20. The first is that "the measure at issue was a tax *credit*," and a "judgment invalidating a tax credit would increase, not decrease, the State's revenue." *Id.* The second is "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.* This second factor is nothing but a restatement of the first, and both are easily satisfied in this case. Where, as here and in *Hibbs*, a party challenges a tax benefit that has been granted "to other taxpayers," and does not object to its "own tax liability," the consequence is relief that will "increase, not decrease, the State's revenue." *Id.*

The clincher for the Commissioner, then, appears to be the third supposed factor: "[T]he challenge was based on the Establishment Clause, not state tax law." Pet'r Br. at 21. But as in the TIA context, the Commissioner fails to offer any evidence that this Court considered that factor important, nor does he explain why principles of comity would give favorable treatment to Establishment Clause claims over other constitutional claims. The alleged intrusion, if any, on state sovereignty is the same whether a federal court strikes a tax credit on the basis of the Establishment Clause or whether it strikes the same statute on the basis of its neighbor, the Free Speech Clause, or the Commerce Clause, or any number of other clauses of the U.S. Constitution. Surely, principles of comity do not give Establishment Clause challenges primacy just because there have been "a host of cases alleging that tax laws violated the Establishment Clause." *Id.* at 21.

Nor does some critical distinction lie in the fact that "the plaintiffs [in *Hibbs*] had 'not asked the District Court to interpret any state law.'" *Id.* at 21 (quoting *Hibbs*, 542 U.S. at 106 n.8). The Court's response was that the plaintiffs in that case "have not asked the District Court to interpret any state law-there is no disagreement as to the meaning of [the Arizona statute], only about whether, as applied, the State's law violates the Federal Constitution." *Id.* Similarly, as discussed *infra* Part II.D., prosecution of the instant case will not require the district court to interpret any state law as suggested by the Commissioner. Pet'r Br. at 31.

Any constitutional challenge, whether based upon the Establishment Clause or any other constitutional provision, requires the reviewing court to *read* the state statute and understand what it means.

### C. Comity Should Not Preclude Jurisdiction Where the Suit Does Not Seek to Arrest State Tax Collection.

Even if there were a way to read the comity ruling in *Hibbs* as a narrow holding that was only on the facts of the particular case then before the Court, all that would mean is that this Court now confronts afresh the broader question whether, consistent with principles of comity, federal courts may exercise jurisdiction over lawsuits seeking to enjoin a tax exemption without seeking to arrest or countermand tax collections. The answer is yes, because (1) this Court has never applied comity to bar such a suit, and such suits do not offend principles of comity expressed in this Court's precedents; and (2) the alternative is an unpredictable multi-factor test that is unsuitable for jurisdictional determinations at the outset of a case.

#### 1. There is no precedent for applying comity to block a lawsuit directed at enjoining a tax credit or exemption, and such a suit does not implicate the comity concerns expressed in the precedents.

Since 1875, Congress has provided general federal question jurisdiction for the district courts. 28 U.S.C. § 1331 ("The district courts shall have

original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The statute admits of no exceptions and, as in *Hibbs*, the claims of the Plaintiffs here indisputably arise under the Constitution of the United States. This Court has historically resisted contracting the jurisdiction otherwise explicitly granted by Congress except on the basis of compelling interests—and, even then, typically only on the basis of principles that are so longstanding that one would expect that Congress was aware of them and intended to embrace them. *See Owen v. City of Independence*, 445 U.S. 622, 637 (1980) (finding that "a tradition of [common-law] immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine'" when Congress enacted 42 U.S.C. § 1983) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). That is why this Court, in discerning the extent to which comity contracts federal jurisdiction, has historically invoked cases, such as *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871), that predate § 1331, and cases that predate the TIA. *See*, *e.g.*, *Fair Assessment*, 454 U.S. at 102 (citing and examining *Dows*); *Id.* at 103 (analyzing cases that preceded the enactment of the TIA).

The Commissioner repeatedly makes a similar point when he insists that "the Court [in *Hibbs*] left the comity doctrine exactly where it found it," and that this Court's point in *Hibbs* was that it is inappropriate to apply principles of comity where "[n]ever before had the Court invoked either the

TIA or comity to preclude a federal challenge" of the sort it confronted there. Pet'r Br. at 23. These useful guideposts are dispositive, for the same is true here: this Court has "never before . . . invoked the TIA or comity to preclude a federal challenge" to a credit or exemption, nor to any case where the plaintiff was not trying to arrest or countermand its own tax liability. The proof lies, again, in this Court's observation that "this Court has relied upon 'principles of comity' . . . to preclude original federal-court jurisdiction only when *plaintiffs have sought district-court aid in order to arrest or countermand state tax collection*." *Hibbs*, 542 U.S. at 107 n.9 (emphasis added). Even if, as the Commissioner posits, this was not a definitive holding, it was an authoritative statement of historical fact. *Coors*, 562 F.3d at 17 ("The Court's statements [regarding comity] were not made in connection with narrowly construing the facts of the case, but rather were made as part of a survey of the state of the law.").

This Court's statement of historical fact is, of course, correct—and it applies to every case the Commissioner invokes in support of his position. In *Great Lakes*, for example, a taxpayer brought a declaratory judgment action to challenge his obligations under a state unemployment tax. *Great Lakes*, 319 U.S. at 294-95. This Court expressed the view that by enacting the TIA, Congress "recognized and gave sanction to" the practice of federal equity courts to deny injunctive relief to a state taxpayer where the state had set up an adequate remedy at law. *Id.* at 298-99. Recognizing that the text of the TIA spoke in terms

of injunctive relief, this Court concluded that it was unnecessary to construe the language of the TIA to apply to declaratory judgments because "those considerations 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.

*Fair Assessment*, too, fits this mold. Taxpayers there sought damages under 28 U.S.C. § 1983 for alleged overassessments of their property resulting in higher taxes. The Court concluded that, as in *Great Lakes*, it was unnecessary to decide whether the TIA, standing alone, would preclude such cases because "the principle of comity bars federal courts from granting relief in such cases." *Fair Assessment*, 454 U.S. at 107. In a passage the Commissioner repeatedly invokes, this Court "recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Id.* at 102. But this Court then explained that federal interference with state tax *collection* was its primary concern:

> It 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*. Any delay in the proceedings of the officers, upon whom the duty is devolved of *collecting the taxes*, may derange the operations of government, and

> thereby cause serious detriment to the public.

*Fair Assessment*, 454 U.S. at 102, (quoting *Dows*, 78 U.S. (11 Wall.) at 110) (emphasis added). Paradoxically, the Commissioner invokes *Dows* in support of his position. Pet'r Br. at 10. He cites it for the proposition that "this Court has applied principles of comity to preclude federal courts from entertaining intrusive challenges to state tax laws" for well over a century. Pet'r Br. at 10. But he neglects to note that *Dows* involved a complaint to enjoin collection of a tax levied on the plaintiff, and that it refers emphatically to the dangers of a court interfering with "the modes adopted to enforce the taxes levied" and "collecting the taxes." *Dows*, 78 U.S. (11 Wall.) at 110.

The same is true of each of the other cases the Commissioner cites for the broad proposition that comity is not just directed at protecting state tax *collections*, but is a "robust . . . doctrine" that "bar[s] intrusive review of state tax law," generally, Pet'r Br. at 19, insulating all "state tax *policy*" from federal review, without regard to its impact on collections. Pet'r Br. at 17 (emphasis added). While the precedents occasionally use broad language about "a proper reluctance to interfere by prevention with the fiscal operations of the state governments," *e.g.*, *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909), the simple fact remains that every single case the Commissioner cites involved an effort by a taxpayer to impede the collection of taxes. *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 108 (1871) (bank

owner sought to restrain collection of tax levied on his bank by the City of Chicago); *Boise Artesian*, 213 U.S. at 280 (water supply company sought to enjoin collection of tax that Boise City levied on its operations); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481, 483 (1913) (sewing machine company sought to enjoin collection of taxes that Denver, Colorado levied on its operations); *Matthews v. Rodgers*, 284 U.S. 521, 523 (1932) (cotton sellers sought to enjoin Mississippi's collection of tax on buying and selling cotton); *Great Lakes*, 319 U.S. at 294-95 (dredging company sought declaratory judgment to prevent enforcement of state unemployment insurance fund tax on its operations); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 510 (1981) (individual homeowner sought to enjoin collection of property tax assessed on her home); *Nat'l Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 584 (1995) (non-resident motor carriers sought to enjoin collection of various taxes levied against motor carriers); *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 824 (1997) (corporate financial institutions organized by farmers sought to enjoin collection of Arkansas sales and income taxes on their business). And case after case makes clear that the Court's central concern was interference with collections. *See*, *e.g.*, *Matthews*, 284 U.S. at 525 (referring to "cases where the suit . . . is brought to enjoin the collection of state tax"); *Rosewell*, 450 U.S. at 527 ("The compelling nature of these considerations is underscored by the dependency of state budgets on the receipt of local tax revenues.").

In sum, what this Court said of the TIA precedents in *Hibbs* applies with even greater force to comity precedents: "[O]ur prior decisions are not fairly portrayed cut loose from their secure, state-revenue-protective moorings." 542 U.S. at 106. If, as the parties agree, the operative principle is that this Court should leave "the comity doctrine exactly where it [finds] it," Pet'r Br. at 23, then jurisdiction should lie here.

**2. A categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits is far more certain and amenable to judicial administration than the Commissioner's multi-factor test.**

Apart from being more consistent with the comity precedents, the categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits has other virtues. Most notable among them is the virtue of certainty. Simply by reading the complaint—which on a motion to dismiss is all a court has to go on—the court can immediately discern whether the plaintiff seeks to enjoin or otherwise impede tax collection, or merely to challenge a credit or exemption. This is an important virtue because "[t]he faults of balancing tests are clearest, and perhaps most destructive, in the area of jurisdiction. Vague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits, or they may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better

spent on the merits, as this action itself demonstrates." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring); *see also Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 621 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear.").

A categorical rule is the approach that the majority of the circuits that have addressed the issue apply. *See Coors*, 562 F.3d at 18 ("But, since Coors seeks an injunction eliminating an exemption and therefore does not seek to arrest state tax collection, comity is no bar to such a result."); *Levy v. Pappas*, 510 F.3d 755, 762 (7th Cir. 2007) ("In the end, it is not how Levy has described his complaint, but what relief he ultimately seeks, that matters."); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) ("Nor do principles of comity bar this lawsuit. The Supreme Court has relied on such principles 'to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.' *Hibbs*, 542 U.S. at 107 n.9. The Wilburs seek no such relief.").

In contrast, the Commissioner invites the Court to enmesh lower courts and litigants in a veritable jurisdictional morass. The touchstone of the Commissioner's approach is an inquiry into whether a particular case will involve an "unwarranted intrusion into state tax policy." Pet'r Br. at 27. How exactly does a court discern whether the intrusion is unwarranted? The Commissioner does not answer with precision,

because the question is inherently incapable of being answered with precision. He suggests, for example, that the court would need to:

- Determine whether, in resolving the merits of the case, the court would be required to conduct a "granular analysis" of state tax and regulatory policy. Pet'r Br. at 11;
- Discern whether the credit/exemption at issue relates to a major source of state revenue. Pet'r Br. at 32;
- Question whether, at the remedy phase, the court might extend the exemption rather than invalidate it. Pet'r Br. at 29;
- Speculate whether, by assuming jurisdiction and invalidating the exemption at issue, the court might prompt the parties losing the exemption to initiate further litigation in the federal courts that might impact the public fisc. Pet'r Br. at 30.

Many of the factors the Commissioner mentions simply cannot be discerned from the face of a complaint. That is reason alone to reject the Commissioner's approach. *See Grubart*, 513 U.S. at 549; *Lapides*, 535 U.S. at 621 (explaining the need for clear jurisdictional rules). But this nebulous test should be rejected also because it bears no resemblance to the manner in which this Court has routinely addressed jurisdictional issues under the rubric of comity.

### D. This Case Satisfies Even the Commissioner's Multi-factor "Undue Intrusion" Test.

Even if comity principles demanded a case-by-case prediction of whether a particular challenge will entail "undue intrusion" into state fiscal operations, this case would still warrant federal jurisdiction.[6]

First, obviously "the district court would need to understand how different state taxes operate in order to conduct its discrimination analysis," Pet'r Br. at 28, just as a court must understand any statutory scheme in order to apply any constitutional analysis to it. But that inquiry does not interfere in any way with state sovereignty. This case does not present any dispute (and certainly the Commissioner points to none) as to what *state law is*, so it will not involve a federal court trying to discern the meaning of ambiguous provisions of state tax law on which the state courts had not yet opined. Everything this Court said, in *Hibbs*, in response to that same argument, applies with equal force here: "[Plaintiffs] have not asked the District Court to interpret any state law-there is no disagreement as to the meaning of [the state statute], only about whether, as applied, the State's law violates the Federal Constitution . . .

[6] As a practical matter, the Commissioner's approach appears similar to that used by the Sixth Circuit, which analyzed the amount of intrusion that would result if the federal court exercised jurisdiction. Under that analysis, the Sixth Circuit found the Commissioner's objections to jurisdiction here unpersuasive.

That is a question federal courts are no doubt equipped to adjudicate." 542 U.S. at 106 n.8.

Second, for the reasons described above, the Commissioner is wrong in speculating that the district court will grant a remedy that is both different from what the complaint requests and illegal. *See supra* at I.C. And, as the court of appeals held, the prediction that this case might prompt further litigation by other parties that might impact state revenue "is strained, to say the least." Pet. App. 8a; *see also Wilbur*, 423 F.3d at 1110 ("Further, the State prediction about how this action might affect the State's financial bottom line in the future is too speculative to circumvent the holding of *Hibbs*.").

Similarly, the Commissioner is incorrect in arguing that Plaintiffs are asking the federal court to "take a scalpel" to Ohio's tax laws and fashion a remedy to "achieve parity" between the LDCs and the retail supplier. Pet'r Br. at 30, 29. The only way the Commissioner can argue that "any remedy [the district court] might craft would necessarily offend comity principles," Pet'r Br. at 29, is by misstating both the relief requested and the extent of comity limitations on that relief.

The relief that Plaintiffs request is simple and easy to implement: It is a declaration that the exemptions at issue violate the U.S. Constitution and an injunction against enforcement of the exemptions. J.A. 20-21. Plaintiffs do not ask the district court to rewrite Ohio's tax code. Rather, in keeping with this Court's longstanding practices, once that relief is granted, "[t]he State [will be] free

to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." *McKesson*, 496 U.S. at 51-52; *see also Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977) ("the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."). Once the district court grants the minimal relief requested—to disallow the exemptions—it will be up to the Ohio General Assembly to balance its own interests and determine how best to recast the tax laws, within constitutional constraints.

The Commissioner's bottom line, then, is that even the minimal relief requested—enjoining the exemptions at issue—"'could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court.'" Pet'r Br. at 29 (citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989)). If anything is clear from *Hibbs*, it is that merely enjoining an exemption is *not* "beyond the power of a federal court." The holding in *Hibbs* simply cannot be squared with the broad reading of *Davis* contended for by the Commissioner. *See also Coors*, 562 F.3d at 18 ("[S]ince Coors seeks an injunction eliminating an exemption and therefore does not seek to arrest state tax collection, comity is no bar to such a result.").

With respect to the Commissioner's argument that any remedy the district court would order "would necessarily offend comity principles," the Commissioner fails to reconcile that argument with his acknowledgement that *Hibbs* included a holding based on comity. In fact, the relief sought in *Hibbs*

was broader than that sought in this case. *Hibbs*, 542 U.S. at 96. ("Respondents sought injunctive and declaratory relief, and an order requiring the STOs to pay funds still in their possession 'into the state general fund.'"). Nonetheless, the Court affirmed the court of appeals holding that comity did not preclude federal court jurisdiction over the action. *Hibbs*, 542 U.S. at 107 n.9, 112. This case involves tax benefits indistinguishable from those in *Hibbs* and, accordingly, comity should no more bar this action than it did the action in *Hibbs*.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

Stephen C. Fitch
*Counsel of Record*
Gerhardt A. Gosnell II
Chester, Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
Telephone: (614) 221-4000
Facsimile: (614) 221-4012
E-Mail: sfitch@cwslaw.com
ggosnell@cwslaw.com

*Counsel for Respondents*