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 COUNCIL ON STATE TAXATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional businesses. COST represents nearly 600 of the largest multistate businesses in the United States. Its members include businesses from every state and every industry. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009), *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), and *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007).

COST's membership has a vital interest in ensuring that states do not impede, through discriminatory taxes, the rights of all businesses to engage in commerce in the national market. COST's membership has an equally vital interest in ensuring that federal courts remain available to resolve constitutional challenges to state taxing schemes where the flow of tax revenue to the state will not be impeded. That is the historical role of the doctrine of comity, one that is respectful of state authority while

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[1] In accordance with Supreme Court Rule 37, counsel of record for both parties have received timely notice of *amicus curiae*'s intention to file a brief in support of Respondents, and letters of consent to the filing of this brief are being submitted to the Court with this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities (other than the *amicus* itself or its counsel) made a monetary contribution to the preparation or submission of this brief.

at the same time protecting out-of-state corporations from parochial favoritism.

SUMMARY OF THE ARGUMENT

Ohio grants certain tax credits to in-state natural gas companies. Respondents (two out-of-state natural gas suppliers and a customer of one of these suppliers) sought to enjoin these tax credits as violative of the Equal Protection and Commerce Clauses of the United States Constitution. Respondents brought their suit in federal—as opposed to state—court. In response, the State of Ohio claimed that both the doctrine of comity and the Tax Injunction Act, 28 U.S.C. § 1341, have precluded certain state tax disputes from proceeding in federal court. At issue in this case is whether either bars Respondents' suit.

The first question presented—whether *Hibbs v. Winn*, 542 U.S. 88 (2004), narrowed or eliminated the doctrine of comity—assumes that comity at one time reached farther than described in *Hibbs*. Not so. In an unbroken line of state tax cases stretching back to 1870, this Court has invoked comity only when a federal suit threatens the state revenue stream. Thus, although sometimes spoken of in broad terms, comity always has played a limited, albeit important, role in state tax disputes: precluding federal courts from adjudicating suits that would disrupt the inflow of state tax revenue.

This historical scope is the proper one, as it respects the operations of state government while permitting access to a federal forum for cases that do not threaten the state fisc. Adhering to this understanding provides a clear definition of comity, grounded in precedent and easy to apply. It also

leaves federal courts open to state tax cases that turn on the interpretation of federal law, are based on claims of in-state bias, or both, when these cases would not disrupt the inflow of state tax revenue. In such cases, a federal forum often is appropriate or even essential. And for these cases, other traditional abstention doctrines remain available to address any federalism issues that are beyond comity's historical application to state tax disputes.

ARGUMENT

Comity embodies federal courts' "proper respect for state functions," instructing them to refrain from "unduly interfer[ing] with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In *Hibbs v. Winn*, 542 U.S. 88 (2004), this Court recognized that where state tax is concerned, it "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." *Id.* at 107 n.9 (internal quotation omitted). Far from signaling a departure from a long-standing practice, the Court in *Hibbs* simply echoed the historical operation of the doctrine of comity in the state tax context. In such cases, comity always has required that federal courts avoid disrupting the inflow of state tax revenue.

Nonetheless, Petitioner claims that the doctrine of comity "applies regardless of whether the requested relief is declaratory, injunctive, or compensatory in nature." Pet'r Br. at 19. But effects, not labels, are comity's affair. If the relief sought will disrupt the stream of state tax dollars, then—and only then—does comity direct a federal court to refrain from exercising its congressionally mandated authority.

There is no reason for expanding the principle beyond this traditional scope, nor basis for eliminating comity's historical limitations.

A. IN STATE TAX DISPUTES, COMITY REQUIRES THAT FEDERAL COURTS AVOID DISRUPTING THE INFLOW OF STATE TAX REVENUE

1. This Court initially invoked comity to explain and reinforce its exercise of equitable restraint

Long before Congress passed the Tax Injunction Act (the "Act") in 1937, this Court acknowledged that a steady stream of tax revenue is essential to the operations of both state and federal governments. "No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs." *Tennessee v. Sneed*, 96 U.S. 69, 75 (1877). Any interruption could disrupt the provision of government services and, ultimately, harm the public. The ability of courts to enjoin tax collection was a primary threat to this revenue stream; an injunction against the collection of taxes could "seriously embarrass all the operations of the government depending on the source of revenue which by means of [an injunction] would be stopped." Thomas M. Cooley, *A Treatise on the Law of Taxation* 536–37 (1876).

As a result, both state and federal governments took steps to prevent courts from disrupting their revenue streams. With respect to federal tax dollars, for example, the federal government enacted legislation prohibiting any court from restraining the

assessment or collection of federal taxes. *See* Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475. As the Court recognized, this Act "shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *The State R.R. Tax Cases*, 92 U.S. 575, 613 (1875). With respect to state tax dollars, many States imposed identical restraints on their own courts. *See* S. Rep. No. 1035, at 1 (1937); Maurice S. Culp, *The Powers of a Court of Equity in State Tax Litigation*, 38 Mich. L. Rev. 610, 618–24 (1940) (reviewing state statutes).

But these statutes left one area unaddressed—suits in federal court to restrain the collection of state taxes. Not only did such suits threaten the state fisc but they also created the potential for federal-state tension. The doctrine of comity, well-established outside the state tax context, filled the statutory gap. It demanded that, in all but exceptional circumstances, federal courts refrain from disrupting the inflow of state tax revenue.

Thus, as early as 1870, the Court expressed its aversion to hearing suits that would disrupt the inflow of state tax revenue. In *Dows v. City of Chicago*, 78 U.S. 108 (1870), for example, the Court upheld the lower court's refusal to enjoin the collection of a municipal tax. In so doing, the Court emphasized that it was "upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Id.* at 110. Consequently, "[a]ny 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." *Id.* For this reason, the Court stated, federal courts should interfere "as little as possible" with "the modes adopted to enforce the taxes levied." *Id.*

Although the Court in *Dows* looked to the plaintiff's adequate remedy at law, *id.* at 112, the language of the decision was—as this Court subsequently acknowledged, *see, e.g.*, *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586, 590 (1995)—fully grounded in the principle of comity. Comity both explained and reinforced the Court's refusal to grant equitable relief. *Dows* formed the basis for a long line of cases refusing to enjoin the collection of state taxes.[2] In each of these cases, comity extended only to suits that would disrupt the inflow of state tax revenue. *See, e.g.*, *Matthews*, 284 U.S. at 522–23 (suit to enjoin the collection of state taxes); *Henrietta Mills*, 281 U.S. at 122 (same); *Singer Sewing Mach. Co.*, 229 U.S. at 483 (same). From the earliest days, then, this Court has

[2] *See, e.g.*, *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (noting that the rules of equity practice apply with "peculiar force" to suits "brought to enjoin the collection of a state tax in courts of a different, though paramount, sovereignty"); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 281 (1909) ("A notable application of the rule [of equitable restraint] in the courts of the United States has been to cases where a demand has been made to enjoin the collection of [state] taxes . . . ."); *Ark. Bldg. & Loan Ass'n v. Madden*, 175 U.S. 269, 273 (1899) ("[O]n principle, the interference of the courts of the United States by injunction with the collection of state taxes . . . can only be justified in a plain case not otherwise remediable."); *see also Henrietta Mills v. Rutherford County*, 281 U.S. 121, 128 (1930); *Singer Sewing Mach. Co. of N.J. v. Benedict*, 229 U.S. 481, 486–88 (1913); *Ind. Mfg. Co. v. Koehne*, 188 U.S. 681, 684 (1903); *Allen v. Pullman's Palace Car Co.*, 139 U.S. 658, 661 (1891); *Shelton v. Platt*, 139 U.S. 591, 600 (1891).

applied comity only to a limited category of state tax cases, those where federal court action would interrupt the flow of state tax revenue.

2. In enacting the Tax Injunction Act, Congress also understood comity to require that federal courts avoid disrupting the inflow of state tax revenue

Despite this Court's decision in *Dows*, some lower federal courts continued to enjoin the collection of state taxes too often. *See England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 431 (1964) (Douglas, J., concurring) (noting that prior to enactment of the Tax Injunction Act, "federal courts, free and easy with injunctions, interfered wholesale . . . with efforts of the States to collect their revenue"). This situation stemmed primarily from the particularities of federal equity practice. For example, federal equity practice required that an adequate legal remedy be available in federal, rather than state, court. *See, e.g.*, *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 29 (1934) (allowing a state-tax-injunction suit to proceed in federal court because the state law claim to recover wrongfully assessed taxes could not be brought in federal court). Even when a taxpayer might have had an adequate legal remedy, federal courts still enjoined state tax collection to avoid a multiplicity of suits. *See, e.g.*, *Gramling v. Maxwell*, 52 F.2d 256, 260–01 (W.D.N.C. 1931) (enjoining the collection of a state tax—despite the availability of an adequate legal remedy—to avoid a hundred or more individual suits). And federal courts sometimes enjoined the collection of state taxes after strictly construing equity's requirement that a legal remedy be plain, adequate, and complete, frequently concluding that

state remedies did not suffice under that standard. *See, e.g.*, *Hopkins v. S. Cal. Tel. Co.*, 275 U.S. 393, 399–400 (1928).

Regardless of the cause, federal courts' penchant for enjoining the collection of state tax revenue was too often disrupting the inflow of state tax revenue. *See* S. Rep. No. 1035, at 1–2 (1937). In response, Congress passed the Act of August 21, 1937, Pub. L. No. 75-332, 50 Stat. 738, more commonly known as the Tax Injunction Act. With the Act, Congress created a statutory bar on the ability of federal courts to decide certain state tax disputes. Designed to produce precisely the same result as the doctrine of comity, had it been properly applied, the Act embodied Congress's views on what comity required in the state tax context. Like this Court, Congress understood comity to demand only the minimization of federal interference with the inflow of state tax revenue.

The Act's plain text reveals Congress's concerns. It declares that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State." *Id.* (codified as amended at 28 U.S.C. § 1341). "By its terms, the Act bars *anticipatory relief*, suits to stop ('enjoin, suspend or restrain') the collection of taxes." *Jefferson County v. Acker*, 527 U.S. 423, 433 (1999) (emphasis added). By prohibiting anticipatory relief, Congress directly addressed the form of relief that would directly disrupt the inflow of state tax revenue.

The Act's legislative history tells the same story. The Act's sponsor, Senator Bone, emphasized the threat to state tax revenue in urging passage of the

Act, as did the Senate Judiciary Committee Report. As the Report noted, States regularly forbade the issuance of injunctions against the collection of taxes, which made "it possible for the States and their various agencies to survive while long-drawn-out tax litigation [was] in progress." S. Rep. No. 1035, at 1. But those parties who could invoke federal jurisdiction—often out-of-state corporations—were able to use federal courts to enjoin the collection of state taxes. *Id.* at 1–2; *see also* 81 Cong. Rec. 1416–17 (1937) (statement of Senator Bone). This disparity in the available forum and relief meant that out-of-state taxpayers could "withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances." 81 Cong. Rec. 1416; *see also* S. Rep. No. 1035, at 1–2. Indeed, as the States grew desperate for much-needed tax funds, these parties were often able to settle their tax bills for a fraction of what they owed. 81 Cong. Rec. 1416; *see also id.* (citing statistics on the millions of dollars in lost tax revenue from only a few suits).

Thus, as this Court has recognized, the Act's history demonstrates that Congress designed it to limit "the jurisdiction of the district courts of the United States *over suits relating to the collection of State taxes*," statutorily imposing precisely what the doctrine of comity—properly invoked—historically had accomplished. S. Rep. No. 1035, at 1 (emphasis added); *see also Hibbs*, 542 U.S. at 104. Nowhere in the legislative history of the Act—much less the Act itself—is there any evidence that comity in the state tax context functioned to do anything more than protect the inflow of state tax revenue. Instead, "[a]s understood and applied by this Court prior to the

passage of the Tax Injunction Act, and by Congress in enacting the Tax Injunction Act, the 'principle of comity' which demanded respect for state tax administration, extended precisely as far as was necessary to ensure that the federal courts not become party to the abuse of their equity power." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 132 (1981) (Brennan, J., concurring in the judgment). Thus, Congress understood comity, as well as the Tax Injunction Act, as protecting States from federal suits that would disrupt their inflow of tax revenue.

3. This Court's post-Tax Injunction Act cases have continued to treat comity as demanding only the avoidance of suits that would disrupt the inflow of state tax revenue

In post-Act cases, whether concerning the exercise of equitable power, the interpretation of the Act itself, or the interpretation of some other statute, this Court has invoked comity only as a proper reluctance to hear suits that would disrupt the inflow of state tax revenue.

For example, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court invoked comity just as it had in pre-Act cases. Faced with a request for a declaratory judgment that would have, in practical effect, halted the state's collection of the taxes at issue, the Court declined to decide whether the Tax Injunction Act would "prohibit a declaration by federal courts concerning the invalidity of a state tax." *Id.* at 299. The Court instead based its decision on the same "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes." *Id.* That is, the Court relied on comity

to explain and reinforce its exercise of equitable restraint. Thus, *Great Lakes* reflected the same conception of comity as the Court's pre-Act cases. Nearly forty years later, this Court answered the question left open in *Great Lakes*, reading the Act to "prohibit[] a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

Notwithstanding the co-extensive reach of the Tax Injunction Act and the doctrine of comity in the declaratory judgment setting, comity has an independent role in state tax disputes whenever there is a threat to a state revenue stream. As this Court has acknowledged, comity can reach some cases that the Act might not. *See, e.g.*, *Fair Assessment*, 454 U.S. at 110. Comity provides a guidepost to federal courts, directing them to avoid granting equitable or otherwise discretionary relief if it would disrupt the inflow of state tax revenue, even if the Act would not preclude the relief sought.

Thus, in *Fair Assessment*, this Court examined whether 42 U.S.C. § 1983 authorizes damages for unconstitutional state taxes when state law furnishes an adequate legal remedy. *See* 454 U.S. at 116; *accord Nat'l Private Truck Council*, 515 U.S. at 587. Although the Act does not reach such claims for damages, the Court recognized that these damages suits could "'in every practical sense operate to suspend collection of the state taxes,' a form of federal-court interference previously rejected by this Court on principles of federalism." *Fair Assessment*, 454 U.S. at 115 (quoting *Great Lakes*, 319 U.S. at 299) (ellipsis and citation omitted). As the Court

subsequently underscored, in *Fair Assessment* it had "found no evidence that Congress intended § 1983 to overturn" these principles. *Nat'l Private Truck Council*, 515 U.S. at 590. For that reason, a remedy not precluded by the Tax Injunction Act was guided by a presumption rooted in comity—absent clear evidence to the contrary, Congress would not be presumed to have authorized a suit that would disrupt the inflow of state tax revenue. And this background presumption arose from the same "principles of comity and federalism" that were "invoked in *Dows* and subsequently followed by the courts." *Id.* at 587, 590.

As *Great Lakes*, *Grace Brethren*, and *Fair Assessment* demonstrate, the 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 (citation omitted, emphasis added). To be sure, this Court has sometimes spoken of comity in broad terms. But these statements "are not fairly portrayed cut loose from their secure, state-revenue-protective moorings." *Id.* at 106. Indeed, every case in which the Court spoke of comity in broad terms was also a suit involving plaintiffs seeking to reduce the inflow of state tax revenue. *See id.*; *see also id.* at 105–08.

As the history of state tax disputes in federal court demonstrates, both Congress and this Court have always understood that declining to hear a case on comity grounds is proper only when the case stands to threaten the inflow of state tax revenue. In the state tax context this accords states the appropriate

federal deference and respect. Whatever its impact on particular remedies sought, comity is, and always has been, as *Hibbs* described: a concern over suits that would disrupt the inflow of state tax revenue.

B. COMITY'S TRADITIONAL SCOPE IS STRAIGHTFORWARD IN APPLICATION AND LEAVES FEDERAL COURTS OPEN TO STATE TAX DISPUTES THAT WOULD NOT DISRUPT THE INFLOW OF STATE TAX REVENUE

In the state tax context, comity's traditional scope is firmly grounded in history and precedent, reflecting long-held views on proper federal-state relations. Its traditional reach provides clear and unambiguous guidance for federal courts. In deciding whether a case can proceed, federal courts need only ask a simple question: would this suit disrupt the inflow of state tax revenue? If it would, then comity guides the court's decision. If the plaintiff requests equitable relief, for example, and an adequate legal remedy is available, the court would refrain from granting such relief. Or if a particular damages suit would disrupt state tax collection to the point of imperiling the state's revenue stream, comity would instruct that, absent express congressional authorization, such suits may not proceed in federal court. In every case, then, comity's traditional scope provides a clear, predictable path for courts and litigants.

Deviating from comity's historical reach would sacrifice these virtues. Were comity to be defined by reference to general and broad notions of federalism as Petitioner and his *amici* urge, *see, e.g.*, Pet'r Br. at 12–13, 15–16; States' Br. at 7–9, courts and litigants would be left with little or no guidance as to when a

state tax dispute should proceed in federal court and when it should not. This absence of clarity leaves open the very real and undesirable possibility of inconsistent results as to the availability of federal-court relief in state tax disputes.

Moreover, although federal courts should be reluctant to hear suits that would disrupt the inflow of state tax revenue, there is a "strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Certain disputes over state taxation may fall within this scope. For example, many state tax disputes turn on the interpretation of federal law. Federal-court adjudication of these cases leads to greater uniformity in interpretation and application.

Access to federal courts also is important for federal constitutional challenges to a state tax, for example, claims that a state tax discriminates against out-of-state businesses. As Justice Story explained in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816), "[t]he constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." This proposition holds even when we "admit[] that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States." *Id.* at 346.

In Commerce Clause challenges to state taxes, apprehension over in-state bias is understandable. States often intend for these provisions to encourage

the growth of, or provide relief to, in-state businesses. And while not necessarily their purpose, these laws can have the unfortunate effect of discriminating against out-of-state business. It is plausible that a state court might be hesitant to find these taxes unconstitutional. Indeed, several decisions from this Court demonstrate that this is sometimes the case. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (reversing, on Commerce Clause grounds, state court decision upholding state statute that reduced taxes on stock transfers involving an in-state sale); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (reversing, on Commerce Clause grounds, state court decision upholding state statute that exempted certain locally produced liquor from state taxes); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (reversing, on Commerce Clause grounds, state court decision upholding Ohio statute according a tax credit for sales of ethanol produced in a state that provided a similar benefit for ethanol produced in Ohio). Since this Court cannot possibly review every challenge to an allegedly discriminatory tax, the lower federal courts must remain open to these suits if we are to ensure that federal rights are vindicated.

And to the extent a state tax case in federal court implicates other federalism concerns, other comity-based abstention doctrines remain available. *See, e.g.*, *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (court may defer deciding a constitutional challenge to a state law when the state courts might interpret the law in a way that would render the constitutional decision unnecessary); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (federal court can decline to decide a case when the state has special

procedures or forums for addressing that issue). There is thus no basis for extending comity's reach beyond its traditional basis.

CONCLUSION

For over a century, this Court and Congress have understood comity as requiring that federal courts avoid disrupting the inflow of state tax revenue. This is as far as comity has reached. The Court should therefore affirm the judgment.

Respectfully submitted,

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February 5, 2010