

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*

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS**INTRODUCTION**

Pursuant to Supreme Court Rule 25.5, Respondents submit this supplemental brief to highlight the intervening opinion in *Hertz Corp. v. Friend et al.*, Case No. 08-1107, 559 U.S. ____ (2010), Slip Opinion issued on February 23, 2010.¹ In *Hertz*, this Court unanimously held that a clear jurisdictional test should be adopted for purposes of the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1). Slip Op. at 14. One of the key rationales underlying *Hertz* is that jurisdictional rules should be clear because they foster administrative simplicity and predictability. *Id.* at 15-16. For the same reasons, this Court should likewise reject the Petitioner’s multi-factored and vague “unwarranted intrusion” test to determine when comity bars a constitutional challenge in federal district court to state tax exemptions. See Brief of Respondents at Argument § II.C.2. Rather, this Court should continue to recognize the clear jurisdictional test set forth in *Hibbs v. Winn*, 542 U.S. 88, 107 n.9 (2004), that comity precludes federal-court jurisdiction only when plaintiffs seek an order “to arrest or countermand state tax collection.”

¹ The Brief of Respondents was filed on January 29, 2010.

ARGUMENT

Like in *Hertz*, the twin virtues of administrative simplicity and predictability warrant rejection of the multi-factored comity test espoused by the Commissioner.

In *Hertz*, this Court unanimously held that the phrase “principal place of business” in the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1), “is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” Slip Op. at 14. This test is typically referred to as the “nerve center” test, and in practice should normally be the place where the corporation maintains its headquarters. *Id.* This Court reasoned that the “never center” test was not only consistent with the language and legislative history of the statute, but also fostered the twin “virtues” of administrative simplicity and predictability preferred in jurisdictional rules. *Id.* at 15 (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)).

“Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.” *Id.* at 15 (citing *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 464, n. 13 (1980)). Complex tests add expense to the litigation, encourage gamesmanship, and reduce the chance that the results of litigation accurately reflect the legal and factual merits of the claims. *Id.* Complex tests also waste judicial resources. Accordingly, “courts benefit from straightforward rules under which they can readily

assure themselves of their power to hear a case.” *Id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

“Simple jurisdictional rules also promote greater predictability.” Slip Op. at 16. Corporations making business and investment decisions value predictability. *Id.* Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court. *Id.*

The twin virtues of administrative simplicity and predictability are just as important when a district court is asked to determine at the pleading stage whether comity bars a case from proceeding in federal district court. As already explained in the Brief of Respondents, Argument § II.C.2, a categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions is far more predictable and amendable to judicial administration than the Commissioner’s multi-factored “intrusion” analysis. Thus, like in *Hertz*, this Court should reaffirm the holding in *Hibbs*, 542 U.S. at 107 n.9, that comity bars federal district court jurisdiction only when the plaintiffs seek to impede state tax collection.

Respectfully submitted,

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