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 Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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

September 22, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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QUESTION PRESENTED

Under this Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), does either the Tax Injunction Act, 28 U.S.C. § 1341, or comity principles bar federal court jurisdiction over a case alleging federal equal protection and dormant commerce clause claims where the plaintiffs do not challenge their own tax assessment and the relief sought is directed to specific tax exemptions or exclusions applicable to only four other taxpayers.

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 August 31, 2009, Acuity Investment Management Inc. ("Acuity") holds approximately 14.82% 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.

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28 U.S.C. § 1331 provides:

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

In *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), a buyer of natural gas sought to challenge, on dormant commerce clause and equal protection grounds, Ohio's exemption of local distribution companies ("LDCs") from sales and use taxes on sales of natural gas. This Court declined to reach the substance of the dormant commerce clause claim based upon the Court's determination that LDCs and retail gas suppliers were not "similarly situated" for purposes of a commerce clause claim.

Since *General Motors* was decided, regulation of natural gas sales in Ohio has dramatically changed. LDCs and retail gas suppliers now compete directly in virtually all markets. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 136 (2008) (". . . the main competitors of LDCs in the residential and small-business markets are not interstate pipeline companies. Rather, independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market.") Nonetheless, Ohio has maintained its exemption from sales and use taxes for natural gas purchases from LDCs while imposing the same taxes on purchases from retail gas suppliers. In addition, in 2005, Ohio adopted a new commercial activities tax

("CAT"), which is imposed upon retail gas suppliers, among others, but from which LDCs are specifically excluded.

Given these changes, and the competitive nature of the natural gas commodity market, Respondents sought to have the substance of the dormant commerce clause claims advanced in *General Motors*, as well as federal equal protection claims, heard in the U.S. District Court for the Southern District of Ohio. The relief sought in Respondents' complaint was limited to a declaration that the exemptions/exclusions enjoyed by four LDCs under Ohio law violate the Commerce Clause and/or the Equal Protection Clause of the United States Constitution, and a permanent injunction enjoining recognition or enforcement of those exemptions/exclusions.

The District Court, on a motion to dismiss, held that its jurisdiction to hear Respondents' claims was not barred by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, but was barred by general principles of federalism and comity. No discovery was had nor was any factual record developed prior to or in connection with the motion to dismiss. Because the district court found dismissal appropriate on comity grounds, it declined to rule on Petitioner's alternative argument that Respondents had failed to join indispensable parties. The Sixth Circuit affirmed with respect to the TIA but reversed the District Court's federalism and comity holding and remanded the case for further proceedings.

Petitioner filed a petition for rehearing en banc. After circulation to all active members of the Court, no judge of the Sixth Circuit requested a vote on the en

banc petition. The petition was subsequently denied by the original panel.

SUMMARY OF ARGUMENT

No circuit has adopted the Petitioner's position with respect to the TIA. With respect to federalism and comity, the Sixth Circuit's opinion below is in accord with three other circuits while the lone circuit supporting Petitioner's position, the Fourth Circuit, demonstrably erred in its analysis of this Court's holding in *Hibbs v. Winn*, 542 U.S. 88 (2004). In addition, the Fourth Circuit's judgment may be reconciled with the Sixth Circuit's opinion below. Accordingly, Petitioner's request for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

A. The District Court's and Sixth Circuit's Denial of Petitioner's TIA Argument Requires No Review.

Petitioner seeks review of the Sixth Circuit's affirmation of the District Court's decision that Respondents' claims are not barred by the TIA. Petitioner cites to no circuit court opinion in conflict with the Sixth Circuit's opinion on this issue. Nor does Petitioner assert that the question of law at issue has not been settled by this Court. Rather, Petitioner contends that the District Court and the Sixth Circuit erroneously applied the rule of law set forth in *Hibbs* to the facts in this case. Even if true, the misapplication of a settled question of law does not present grounds for review by this Court.

With respect to Petitioner's claim that the decisions below conflict with *Hibbs*, the District Court and the Sixth Circuit correctly found that there is no meaningful distinction between Respondents' action here and the action in *Hibbs*. Respondents are not contesting their own tax liability, are not trying to avoid paying their own taxes, and the relief requested would not disrupt the flow of tax revenue. In addition, *Hibbs* is not, by its terms or as applied, limited to Establishment Clause cases as Petitioner suggests. Finally, Petitioner's argument that the District Court would likely extend to Respondents the tax exemptions at issue even though Respondents have not sought an extension is, as noted by the Sixth Circuit, "strained, to say the least." *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094, 1097 (6th Cir. 2009).

In short, Petitioner has set forth no persuasive reasons why this Court should review the lower courts' interpretation and application of *Hibbs* to the facts in this case regarding the TIA.

B. The Circuit Split Relied upon by Petitioner is One-sided, Becoming Increasingly So, and is Likely to Remedy Itself.

The circuit split relied upon by Petitioner is due to a single circuit court decision, the Fourth Circuit's opinion in *DIRECTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008), which, when decided, contradicted two prior circuit court decisions and which has since been rejected by two other circuit courts, including the Sixth Circuit below. Thus the split is the result of a single circuit decision that was an anomaly when decided and has been rejected twice since being issued.

Prior to the Sixth Circuit's decision below, the circuit courts were evenly split on how expansively federal courts should apply this Court's opinion in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), regarding the applicability of general comity principles to constitutional challenges to state tax laws. As the Sixth Circuit's opinion below recognized, the First Circuit (in a pre-*Hibbs* decision) and the Fourth Circuit (in a post-*Hibbs* decision) had issued opinions broadly interpreting *Fair Assessment*. *See U.S. Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *DIRECTV, Inc.*, 513 F.3d 119. The Seventh and Ninth Circuits, however, had recently held that under this Court's opinion in *Hibbs*, comity principles preclude jurisdiction only where the plaintiff sought to countermand state tax collection. *See Levy v. Pappas*, 510 F.3d 755 (7th Cir. 2007); *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005). In its decision below, the Sixth Circuit held that the Seventh and Ninth Circuits had the more persuasive view, thus creating a three to two circuit split.

Subsequent to release of the Sixth Circuit's opinion below, the circuit split has grown more one-sided. Seven weeks later, in March, 2009, the First Circuit filed its opinion in *Coors Brewing Company v. Mendez-Torres*, 562 F.3d 3 (2009), in which it abrogated its 1979 pre-*Hibbs* opinion in *U.S. Brewers Ass'n*. In so doing, the First Circuit's *Coors* decision relied heavily on the Sixth Circuit's opinion below as to the effect of *Hibbs* on the broad language in *Fair Assessment* and concluded that comity was not a bar to a federal court action that did not seek to arrest state tax collection. *Coors*, 562 F.3d at 18.

Since this Court's decision in *Hibbs*, four circuits have now applied *Hibbs* in a consistent manner regarding comity principles while only one circuit, the Fourth, has held to the contrary. The Fourth Circuit's opinion in *DIRECTV, Inc.* stands as an anomaly among otherwise uniform circuit court opinions. Contrary to Petitioner's contention, *Hibbs* has not sown confusion among the lower courts that requires resolution by this Court.

C. The Sixth Circuit Correctly Interpreted *Hibbs*.

Petitioner argues that the federal courts should ignore the specific language in this Court's opinion in *Hibbs* that 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." *Hibbs* at 107, n.9. Rather, Petitioner seeks the adoption of a broad reading of *Fair Assessment* that would effectively bar any federal court jurisdiction involving a state tax-related matter.

The Sixth Circuit correctly determined that adoption of Petitioner's argument would not only be contrary to the express language in *Hibbs* but would also render the TIA superfluous since, under Petitioner's argument, principles of comity would already bar any challenge in federal court to a state tax-related matter. The Sixth Circuit also correctly noted that adoption of Petitioner's argument would call into question a series of important decisions where the federal courts had exercised jurisdiction in cases involving state taxation.

D. The Sixth Circuit's Opinion Does Not Limit Comity to the Parameters of the TIA.

In its opinion below, the Sixth Circuit stressed that "our holding is narrow." *Commerce Energy, Inc.*, 554 F.3d at 1102. The opinion rejects the Petitioner's argument that comity principles "broadly bar from federal court nearly every state-tax challenge," but also rejects the notion that principles of comity are co-extensive with the parameters of the TIA. Rather, the Sixth Circuit held that because Respondents' claims were directed to a few limited exemptions that affect only four specific entities, the relief sought would not significantly intrude upon traditional matters of state taxation.

The Sixth Circuit distinguished this case from its previous holding in *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), by noting that the plaintiff class in *Gillis* included every Kentucky citizen who owned taxable property assessed by the challenged method and the defendant class included most Kentucky county property tax administrators. As stated by the Sixth Circuit, "In *Gillis*, the plaintiffs went too far; here, they have not." *Commerce Energy, Inc.*, 554 F.3d at 1100.

E. The Sixth Circuit Opinion Below may be Reconciled with *DIRECTV*.

Contrary to the relief requested by Respondents below, the relief in *DIRECTV* did not simply involve the elimination of certain tax exemptions to third-parties. Rather, the plaintiffs sought relief that "would have the effect of restoring the system of local franchise taxation coupled with state-level tax credits

to cable providers" that existed prior to legislative amendments. *DIRECTV*, 513 F.3d at 124. The Fourth Circuit described the requested relief as "a federal court-ordered redistribution of intra-state taxation authority." *Id.* at 127. Thus, while the opinion in *DIRECTV* stands alone as to the effect of *Hibbs* on comity analysis, the relief requested in that case makes it akin to the Sixth Circuit's decision in *In re Gillis*. Thus the judgment in *DIRECTV* may be reconciled with the Sixth Circuit's decision below.

F. The Fourth Circuit's Opinion in *DIRECTV* is Based upon an Erroneous Analysis of this Court's Decision in *Hibbs*.

In *DIRECTV*, the Fourth Circuit based its decision regarding comity on the proposition that the question of comity "was simply not before the Supreme Court in *Hibbs*." *Id.* at 127-128. That proposition was in error. As the Sixth Circuit noted in its opinion below:

> In *Hibbs*, the Supreme Court affirmed *in toto* a Ninth Circuit decision that-along with holding that the Act did not bar plaintiffs' claims-had specifically addressed and rejected comity as grounds for dismissal . . . Yet, though the Supreme Court did not extensively analyze comity, it both affirmed the Ninth Circuit in full and stated that its opinion doing so was not inconsistent with comity principles.

Commerce Energy, Inc., 554 F.3d at 1099 (citations omitted).

The reference in *Hibbs'* footnote 9 to "Brief for Petitioner 26" refers directly to the alternative

argument advanced by Arizona's Director of Revenue that "even if the Tax Injunction Act did not preclude Respondents' federal court action, the principles of comity would." *Hibbs v. Winn*, Petr.'s Br., 2003 WL 22766739, *26. Further, the underlying opinion of the Ninth Circuit in *Hibbs* affirmed by this Court dealt extensively with the Director's alternative comity argument. *Winn v. Killian*, 307 F.3d 1011, 1018 (9th Cir. 2002).

Thus, the Fourth Circuit's opinion in *DIRECTV*, which Petitioner relies upon so heavily as a reason for granting a writ as well as the merits of his argument, was based upon a clearly erroneous reading of this Court's opinion in *Hibbs* as well as a First Circuit opinion (*U.S. Brewers Ass'n*) that has now been abrogated. The other circuits have recognized the infirmities in the Fourth Circuit's opinion in *DIRECTV* and do not need further guidance from this Court. In fact, the Fourth Circuit's comity analysis contained in *DIRECTV* has yet to be followed by any other court.

G. Petitioner's Consent to Federal Court Jurisdiction in *Cuno* Militates Against Granting a Writ.

Petitioner's assertion that review by this Court is necessary in this case in order to "restore the proper federalism balance in judicial scrutiny of state tax systems" (Pet. at 3) is undermined by Petitioner's previous consent to federal court jurisdiction to resolve similar state tax-related claims in *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006).

In *Cuno*, plaintiff taxpayers filed an action in state court challenging certain state tax credits and local

property tax abatements as being, *inter alia*, in violation of the federal dormant commerce clause. *Cuno v. DaimlerChrysler, Inc.*, 154 F.Supp.2d 1196 (N.D. Ohio 2001). The defendants, including the Ohio Tax Commissioner, removed the action to the U.S. District Court for the Northern District of Ohio. *Id.* The Commissioner subsequently opposed remand to the state courts (2000 WL 34611832), the District Court denied remand, and the action proceeded through the Sixth Circuit and to this Court.

The significance of *Cuno* here is that it demonstrates the situational nature of Petitioner's federalism and comity concerns. Where Petitioner believes a federal forum may be better suited for its position regarding state tax issues, he consents to removal and opposes remand as in *Cuno*. Where Petitioner believes the converse is true, he urges this Court to impose a sweeping bar to federal court jurisdiction. As the Sixth Circuit noted below in a different context, "the Commissioner's argument is 'heads I win, tails you lose.'" *Commerce Energy, Inc.*, 554 F.3d at 1101. Thus, based upon Petitioner's prior conduct regarding federal court jurisdiction over analogous state-tax related claims, this Court should reject Petitioner's professed federalism concerns and deny the writ.

CONCLUSION

For the reasons set forth above, Respondents ask that the petition for a writ of certiorari be denied.

Respectfully submitted,

Stephen C. Fitch
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

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