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

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1991)—which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?

2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

THE SIXTH CIRCUIT'S RULE CONFLICTS WITH HISTORIC PRACTICES AND THREATENS THE INDEPENDENCE OF STATE TAX ADMINISTRATION 7

A. Comity Is A "Vital Consideration" And Has Special Force In Matters Of State Tax Administration 7

B. The Sixth Circuit's Approach Channels To Federal Court Myriad Issues Of State Law And Deprives State Courts Of The Opportunity To Resolve Federal Constitutional Issues 9

C. The Sixth Circuit's Approach Promotes "Artful Pleading" To Obtain Federal Court Jurisdiction 14

D. The Sixth Circuit's Approach Is Not Required By Either The TIA Or *Hibbs* 18

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ark. v. Farm Credit Servs. of Central Ark.,
520 U.S. 821 (1997) 8

Assoc. Grocers, Inc. v. Washington,
787 P.2d 22 (Wash. 1990) 16

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 22

Brown v. Gen. Servs. Admin.,
425 U.S. 820 (1976) 14

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 11

Chang v. Michiana Telecasting Corp.,
900 F.2d 1085 (7th Cir. 1990) 12

Combs v. Int'l Ins. Co.,
354 F.3d 568 (6th Cir. 2004) 12-13

Coors Brewing Co. v. Mendez-Torres,
562 F.3d 3 (1st Cir. 2009) 18

Dane v. Jackson, 256 U.S. 589 (1921) 12

Dep't of Revenue v. Davis,
128 S. Ct. 1801 (2008) 16, 22

Dows v. Chicago, 78 U.S. 108 (1870) 8

TABLE OF AUTHORITIES—Continued

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1991) ..... *passim*

Franchise Tax Bd. v. Constr'n Laborers Vacation Trust, 463 U.S. 1 (1983) 14, 15

Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997) .. 22

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 8, 19

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

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 13

In re Gillis, 836 F.2d 1001 (6th Cir. 1988) 10

Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) 11

Levy v. Pappas, 510 F.3d 755 (7th Cir. 2007) 5

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 13

Nat'l Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 582 (1995) 1, 13, 18, 19

Nordlinger v. Hahn, 505 U.S. 1 (1992) 11

Palmore v. United States, 411 U.S. 389 (1973) 13

TABLE OF AUTHORITIES—Continued

Panhandle Producers & Royalty Owners Ass'n v. Okla. Tax Comm'n, 162 P.3d 960 (Okla. Civ. App. 2007) 17

Perez v. Ledesma, 401 U.S. 82 (1971) 8, 9

Preiser v. Rodriguez, 411 U.S. 475 (1973) 14

Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237 (1952) 10

R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) 15

Rivet v. Regions Bank of La., 522 U.S. 470 (1998) 15

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1980) 8, 18, 19, 20

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 14, 15

Solomon v. Walgreen Co., 975 F.2d 1086 (5th Cir. 1992) 12

Steffel v. Thompson, 415 U.S. 452 (1974) 13

Trainor v. Hernandez, 431 U.S. 434 (1977) 13

Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987) 22

TABLE OF AUTHORITIES—Continued

United Air Lines, Inc. v. Mahin,
410 U.S. 623 (1973) 12

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 11

U.S. Brewers Ass'n v. Cesar Perez,
592 F.2d 1212 (1st Cir. 1979) 18

Winn v. Killian, 307 F.3d 1011 (9th Cir. 2002) ... 21

Younger v. Harris, 401 U.S. 37 (1971) 7

Statute and Rule:

28 U.S.C. § 1341 ..... 1, 3

Sup. Ct. R. 37.2(a) 1

Miscellaneous:

19 Wright, Miller & Cooper, Federal Practice &
Procedure: Jurisdiction 2d § 4507 (1996) 12

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INTEREST OF THE *AMICI CURIAE*[1]

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

The Sixth Circuit's approach both misunderstands this Court's holding in *Hibbs v. Winn*, 542 U.S. 88 (2004), regarding the scope of federal jurisdiction under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and, worse, misconstrues a footnote in *Hibbs* to undermine the historically grounded, federalism-based concern for comity in state tax matters. This holding, which is the subject of a circuit split but has become the majority

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[1] Pursuant to Rule 37.2(a), the *amici* States provided notice of their intention to file this brief to counsel of record at least 10 days prior to filing.

view, is of substantial concern to the *amici* States. If it continues to take root, States and their subdivisions will be forced to spend substantial time and money on state tax litigation in the federal courts, even though they have made available adequate remedies under their own laws. Both because comity principles should be applied uniformly throughout the nation and because the prevalence of the Sixth Circuit's view subjects state tax administration to unprecedented federal interference, the *amici* States urge the Court to grant the petition, resolve the circuit split, and restore state courts to their proper role as the principal forum for adjudicating challenges to state taxation.

STATEMENT

1. Respondents, in-state and out-of-state retail natural gas suppliers ("independent marketers" or "IMs") and one of their customers, filed suit alleging that Ohio's laws for taxing natural gas discriminate against interstate commerce and violate equal protection by favoring the IMs' competitors, local natural gas distribution companies ("LDCs"). Pet. App. 4a, 20a. Respondents challenged three exemptions and exclusions Ohio law affords LDCs but not IMs. *Id.* at 4a-5a, 21a.

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

Before doing so, however, the court rejected petitioner's argument that the TIA barred respondents'

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

Regarding comity, the court rejected respondents' argument that *Hibbs* restricted comity's reach "to those cases seeking to stop or countermand state tax collection." Pet. App. 27a. To the contrary, "[t]he scope of federal court deference based on principles of comity is substantially broader than that required under the TIA," extending to suits "seeking to force the collection of additional taxes," which represent "as much of an interference with state tax administration as a suit seeking to enjoin collection of a state tax." *Id.* at 26a, 29a (internal quotations omitted). The court

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[2] The TIA directs federal courts not to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The parties agree that Ohio makes available an adequate state court remedy. Pet. App. 6a n.2.

acknowledged that while respondents had not sought to extend the challenged exemptions and exclusions to IMs—"presumably because [respondents] correctly understood that the TIA expressly bars federal court jurisdiction over such claims"—Ohio could remedy any constitutional violation either by ending the challenged exemptions and exclusions, as respondents requested, or by extending the exemptions to the IMs. *Id.* at 32a. The court "decline[d] to impose its own judgment on the state legislature" by itself determining which of the "two possible remedies" is "appropriate." *Ibid.*

3. The Sixth Circuit reversed. Pet. App. 4a. The court first affirmed the district court's conclusion that the TIA did not foreclose federal jurisdiction. *Id.* at 7a. The court acknowledged that success on respondents' claims "might * * * have *some* negative impact on local revenues" but deemed this insufficient to overcome the rule, purportedly set forth in *Hibbs*, that the TIA "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 (internal quotations and brackets omitted; emphasis in original).

The Sixth Circuit held that comity did not bar respondents' federal lawsuit, either. Pet. App. 9a-18a. The court acknowledged a "circuit split" over whether *Hibbs* "limit[ed] an expansive reading of * * * the comity principle's breadth," and embraced the Seventh and Ninth Circuit's view—expressly rejecting the Fourth's—that "comity guts federal jurisdiction only when plaintiffs try to thwart tax collection." *Id.* at 10a, 11a. According to the Sixth Circuit, a contrary conclusion would render the TIA "entirely superfluous," ignore this Court's supposed "directive" in *Hibbs* "that comity strips jurisdiction only when plaintiffs have

sought district-court aid in order to arrest or countermand state tax collection," and "*sub silentio* overrule * * * cases" such as *Hibbs*. *Id.* at 17a-18a.

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

REASONS FOR GRANTING THE PETITION

Applying federalism principles, this Court has held consistently that state tax administration should be protected against federal intrusion. Yet, as the petition explains, Pet. 10-21, and the court below acknowledged, Pet. App. 10-11a, a circuit split has arisen after *Hibbs* over whether a constitutional challenge to state taxation may go forward in federal court merely because the challengers have contested another's tax liability rather than their own—and thus are not expressly "try[ing] to thwart state tax collection," *id.* at 11a. As a result, the five States within the Fourth Circuit currently receive the full benefit of the proper balancing of federal-state

interests, while the twenty States within the First, Sixth, Seventh, and Ninth Circuits do not. This Court's intervention is necessary to ensure that rules of federal jurisdiction over state tax challenges are applied uniformly nationwide.

Equally important, the Court should grant the petition to restore state courts to their proper role as the principal forum for adjudicating state tax matters. The majority view—exemplified by the decision below—limits the comity bar to direct challenges to the public fisc, and ignores federalism's broader concerns, which include preserving the presumption that state courts are well-equipped to resolve questions of federal constitutional law, protecting state officers from being hailed into federal court when relief is available under state law, and preventing plaintiffs from circumventing the States' established rules for adjudicating tax challenges. This approach also channels myriad questions of state law into federal courts, which have no authority to render controlling pronouncements on such issues, and deprives state courts of the opportunity to develop their own legal doctrine. Finally, the majority rule promotes efforts by plaintiffs to shop for their preferred forum through "artful" pleading. For all these reasons, the petition should be granted, and the judgment below should be reversed.

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

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

This Court has consistently identified the federalism-based interest in comity as a "vital consideration." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Comity embodies

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

Ibid. Thus, comity counsels federal courts, "anxious though [they] may be to vindicate and protect federal rights and federal interests," to "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.*

Proper recognition of comity principles is particularly essential in matters of state tax administration. More than a century ago, this Court recognized that federal interference with the state taxing power jeopardizes the delicate balance of federal-state relations: as the Court then explained, "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of

them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 78 U.S. 108, 110 (1870). More recently, the Court reaffirmed that "the reasons supporting federal non-interference" in state tax administration remain equally "compelling today," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527 (1980), reiterating that "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," *Ark. v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) ("*Farm Credit Servs.*"); see also *Fair Assessment*, 454 U.S. at 102-103 ("the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts"). In short, "the federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary." *Farm Credit Servs.*, 520 U.S. at 826.

Thus, comity bars federal courts from rendering declaratory judgments in lawsuits challenging the constitutionality of state tax laws, see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943), or granting damages relief in such cases, see *Fair Assessment*, 454 U.S. at 107. In declining to find federal jurisdiction over these claims, the Court identified broader concerns than merely protecting the public fisc. See *id.* at 108 n.6. First, challenges to state taxation, even if based on the Federal Constitution, "'are likely to turn on questions of state tax law, which * * * are more properly heard in state courts.'" *Ibid.* (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, *J.*, concurring in part and dissenting in

part)). Second, "'[i]f federal * * * relief were available to test state tax assessments, * * * taxpayers might escape the ordinary procedural requirements imposed by state law'" and thus avoid the States' "'established rules'" for the adjudication of tax disputes. *Ibid.* (quoting *Perez*, 401 U.S. at 128 n.17) (Brennan, *J.*, concurring in part and dissenting in part)). Third, successful challenges to state tax systems, even if for damages, require a federal court determination that state law is unconstitutional, thereby "halt[ing] its operation." *Id.* at 115. And fourth and finally, such challenges have the effect of "hal[ing] state officers into federal court." *Ibid.* The Court thus has articulated and enforced "a federal policy against federal adjudication of [this] class of litigation altogether." *Perez*, 401 U.S. at 115 (Brennan, *J.*, concurring in part and dissenting in part).

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

B. The Sixth Circuit's Approach Channels To Federal Court Myriad Issues Of State Law And Deprives State Courts Of The Opportunity To Resolve Federal Constitutional Issues.

The decision below permits challenges to state taxation to proceed in federal court so long as the challengers do not seek openly to "thwart tax collection," Pet. App. 11a, merely by framing their case as a complaint about another's tax liability rather than

their own.[3] This approach creates two unfortunate effects: it forces state authorities to litigate questions of state tax law in federal court, and it deprives state courts of the opportunity to resolve issues of federal constitutional law.

As to the former effect, the Sixth Circuit's decision undermines the States' legitimate interest in interpreting their own law. "It is the state courts which have the first and last word as to the meaning of state statutes." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). Thus, "no matter how seasoned the judgment of [a federal] district court may be" on a question of state law, "it cannot escape being a forecast

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[3] In an effort to reconcile the decision below with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), the Sixth Circuit left open the possibility that comity would bar federal jurisdiction in cases where, although the plaintiffs did not challenge their own tax assessments, "the claims and relief requested" threatened to sufficiently "intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. The court admitted that it could not provide any guidance as to when this standard might be satisfied, however. See *id.* at 13a ("we cannot make all-encompassing decrees regarding how principles of comity and federalism will always apply; they are merely *principles*") (emphasis in original). And notwithstanding the court's insistence that success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, that the court allowed the case to proceed in federal court even though respondents are seeking to rewrite Ohio's tax laws for the State's entire market for selling natural gas to consumers demonstrates that only in few (if any) cases will "the suggested intrusion into traditional matters of state taxation" be "significant enough to trigger comity to bar jurisdiction." *Id.* at 14a; see also Pet. 21-24.

rather than a determination." *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941). The problems engendered by adjudicating state tax law issues in the federal courts, which lack the power to render controlling pronouncements of state law, are three-fold.

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

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

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

Third, the Sixth Circuit's rule interferes with the development of state law because federal courts are less likely to expand the contours of state law to the same extent as state courts. Federal judges view themselves as "*Erie*-bound to apply state law as it currently exists," not to "change that law or adopt innovative theories of recovery," *Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992) (per curiam), for it is not "the function of the federal court to expand the existing scope of state law," 19 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4507, at 207 (1996); accord *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990) ("Federal judges are disinclined to make bold departures in areas of the law that we have no responsibility for developing.") (internal quotations omitted). Federal courts thus approach "innovative theories" of state law "charily" and are "extremely cautious about adopting substantive innovation in state law." *Combs v. Int'l Ins. Co.*, 354

F.3d 568, 578 (6th Cir. 2004) (internal quotations omitted). By routing myriad issues of state tax law to federal court, the Sixth Circuit's approach slows the development of state law in an area at the core of state sovereignty.

Not only does the Sixth Circuit's expansive approach to federal jurisdiction channel questions of state tax law to federal court, but it also deprives state courts of the opportunity to resolve issues of federal constitutional law. State courts "'have the solemn responsibility equally with the federal courts' to safeguard constitutional rights." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974)). Indeed, historically, "'state courts provided the only forum for vindicating many important federal claims.'" *Nat'l Private Truck*, 515 U.S. at 588 (quoting *Palmore v. United States*, 411 U.S. 389, 401 (1973)). Consistent with comity, this Court accordingly has "refuse[d]" to "assume[e] that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975); accord *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.") (emphasis in original). By preventing States from "not only 'effectuating [their] substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies,'" *Trainor*, 431 U.S. at 443 (quoting *Huffman*, 420 U.S. at 604), the decision below undermines the

state courts' role as capable adjudicators of federal constitutional rights.

C. The Sixth Circuit's Approach Promotes "Artful Pleading" To Obtain Federal Court Jurisdiction.

The rule adopted below not only conflicts with comity's respect for state courts as principle arbitrators of issues of state law and competent adjudicators of federal constitutional claims, but it also runs afoul of the prohibition on obtaining federal jurisdiction through "artful pleading." The Sixth Circuit's holding that state tax challengers are entitled to federal jurisdiction so long as they do not expressly request "district court aid in order to arrest or countermand state tax collection," Pet. App. 9a (internal quotations omitted), encourages plaintiffs seeking what they perceive as a more favorable federal forum to characterize their complaint as a demand for an increase in another's tax liability rather than a decrease in their own.

This Court has long refused to sustain efforts to manipulate federal jurisdiction "'by the simple expedient of putting a different label on [the] pleadings.'" *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973)) (brackets in original). For example, the Court, applying the "well-pleaded complaint rule," has rejected attempts to bring a state law suit within federal jurisdiction by anticipating a defense based on federal law. See, *e.g.*, *Franchise Tax Bd. v. Constr'n Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950). Instead, "[s]uch a defense is properly made in the state proceedings, and the state court's disposition of it is

subject to this Court's ultimate review." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 (1998). To proceed otherwise would "[n]ot only * * * unduly swell the volume of litigation in the District Courts," but "also embarrass those courts—and this Court on potential review—in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts." *Skelly Oil*, 339 U.S. 667 at 673-674. In short, the well-pleaded complaint rule "avoid[s] automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10.

The decision below contravenes this federalism-based prohibition against artful pleading. Although respondents framed their claim to seek the elimination of LDC tax exemptions and exclusions, they just as easily could have sought to extend the credits to the IMs, and the complaint does not preclude such relief. See Pet. 8 (requesting "[s]uch other relief to which plaintiffs are entitled"). Respondents declined to characterize their complaint in this way "presumably because they correctly understood that the TIA expressly bars federal court jurisdiction over such claims." Pet. App. 32a. But if respondents were to succeed on the merits, the most likely outcome would be the exemption of IMs from the complained-of taxes, not a termination of the exemptions and exclusions to the LDCs. See Pet. 26. Thus, by allowing respondents' suit to proceed in federal court, the Sixth Circuit endorsed their use of drafting sleight-of-hand to obtain federal court review of a state tax challenge that properly belongs in state court.

The ease with which respondents were able artfully to plead themselves into federal court under the Sixth Circuit's rule is ripe for replication, should that approach continue to take root. For example, in *Department of Revenue v. Davis*, 128 S. Ct. 1801 (2008) ("*Davis*"), this Court rejected a dormant Commerce Clause challenge to a Kentucky law exempting from state income taxes any interest earned on bonds issued by the State or its political subdivisions, while taxing bond interest from other States. See *id.* at 1804. The plaintiffs, who pursued their claim through the Kentucky courts, sought to extend the exemption and requested a refund of taxes they had paid on income earned from out-of-state bonds. See *id.* at 1807. Had the plaintiffs instead sought to enjoin the exemption, however, they could have obtained federal jurisdiction under the Sixth Circuit's approach. And although there is no persuasive reason why the latter complaint should go forward in federal court when the former cannot, that is the result of the majority rule that the decision below adopts.

Similarly, in *Associated Grocers, Inc. v. Washington*, 787 P.2d 22 (Wash. 1990), the Washington Supreme Court, after undertaking a careful analysis of state law, held that a Washington law affording an exemption from that State's business and occupation tax to grocery distributors but not wholesalers violated the Equal Protection Clause of the Federal Constitution. See *id.* at 23-26. Although the plaintiff wholesalers had sought an extension of the exemption and a refund of taxes paid, the court held that under Washington law "the proper remedy consists solely of striking the offending tax exemption." *Id.* at 23. The court's award, which would have the effect of increasing Washington's tax

revenues, obviates any doubt that, had the plaintiffs cast their complaint differently, they could have (in the Sixth Circuit's view) obtained federal jurisdiction over substantial questions of state tax law.

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

The same is true of any state court case in which the plaintiffs argued that their tax bill violated federal law because it was excessive when compared to a third party's. Were these plaintiffs merely to recharacterize their complaint to focus on others' tax assessments rather than their own, their case could have gone forward in federal district court under the Sixth Circuit's approach. And a federal court would have had to undertake an invasive (but ultimately nonbinding) analysis of a State's taxing scheme that is properly reserved to state courts in the first instance. The

prohibition against artful pleading thus provides an additional reason to reject the Sixth Circuit's rule.

D. The Sixth Circuit's Approach Is Not Required By Either The TIA Or *Hibbs*.

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

First, before *Hibbs*, this Court made clear that the interests protected by comity are not coextensive with those safeguarded by the TIA. *Hibbs*, which addressed comity in a footnote and did not purport to overrule decades of jurisprudence protecting "the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court," *Fair Assessment*, 454 U.S. at 108, does not hold otherwise.

The TIA embodies but "one manifestation" of the traditional "aversion" to federal-court interference in state tax administration. *Nat'l Private Truck Council*, 515 U.S. at 586. While the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," only the "last consideration" "was the principle motivating force behind the Act." *Rosewell*, 450 U.S. at 522 (internal quotations omitted). The TIA "was first and foremost a vehicle to limit

drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Ibid.*; accord *Fair Assessment*, 454 U.S. at 183

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

These decisions dispel the Sixth Circuit's concern that a "broad view of comity would render * * * [the TIA] effectively superfluous." Pet. App. 11a. There is no reason why Congress would not have sought to codify certain aspects of existing federal court practice to respond to the problems that legislators deemed most

urgent.[4] And even if the TIA cannot be understood as but a partial codification of comity principles, it still would not be "superfluous." The TIA "limit[s] drastically federal district court *jurisdiction* to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522 (emphasis added). The TIA does not alter the federal courts' historic ability to refrain from hearing challenges to state taxation that stand to increase tax revenues but nevertheless implicate federalism concerns.

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

Central to comity is federalism's respect for the role of state courts as principal arbiters of state law. See *supra* pp. 8, 10-13. This Court in *Hibbs* acknowledged this interest, see 542 U.S. at 106 n.8 (describing States' "vital" interest in their courts' "authority * * * to determine what state law means"), but noted that it was not implicated because there was "no disagreement as to the meaning of" state law and thus no call for the federal district court "to interpret any state law," *ibid.*;

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

see also *Fair Assessment*, 454 U.S. at 107 n.4. (declining to decide whether comity would bar claim for damages that "requires no scrutiny whatever of state tax assessment practices"). The Court did not suggest that the comity bar would not apply where, as here, see Pet. 7 & n.1, 22-23, the plaintiffs' constitutional claims are intertwined with disputed issues of state law.

Hibbs does not compel a departure from the federalism-based prohibition against artful pleading, either, because the plaintiffs there could not have recast their complaint as a suit to contest their own tax liability. Success on the Establishment Clause claims could not be remedied other than through the relief the plaintiffs requested—an injunction against the Arizona law authorizing tax credits for charitable contributions made by Arizona taxpayers to "school tuition organizations," as well as the return to the State's general fund of monies already distributed to (but not yet spent by) the STOs. See *Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002). Under no imaginable circumstance could the suit have a "negative impact on tax collection," *Hibbs*, 542 U.S. at 94, and therefore this Court did not decide whether federal jurisdiction exists where the plaintiffs could have but did not directly challenge their own tax liability.

Finally, crucial to *Hibbs*' conclusion that the TIA did not bar federal jurisdiction was the fact that "in decisions spanning a near half century" federal courts had adjudicated challenges to state tax credits as racially discriminatory. 542 U.S. at 93. By contrast, claims like respondents'—dormant Commerce Clause and Equal Protection challenges to a State's allegedly favorable tax treatment of business competitors—have almost invariably been adjudicated in state courts, with

ultimate review by this Court where appropriate. See, *e.g.*, *Davis*, *supra* p. 16; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 285-286 (1997) (on certiorari review from state court adjudication of dormant Commerce Clause and equal protection challenges to Ohio's sales and use tax exemption for LDCs); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 239-240 (1987) (same for dormant Commerce Clause challenge to Washington's multiple activities tax exemption for local manufacturers); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265-267 (1984) (same for dormant Commerce Clause and equal protection challenges to Hawaii's excise tax exemption for locally produced liquors).

Moreover, this Court has taken pains to ensure that state courts have an opportunity to address in the first instance all issues raised by such challenges. For example, in *Tyler Pipe*, the Court held invalid the Washington tax exemption but declined to "take it upon itself in this complex area of state tax structures to determine how to apply its holding." 483 U.S. at 252. The Court accordingly remanded the case to the Washington Supreme Court for a determination "in the first instance" whether the adverse decision should be applied retroactively. *Id.* at 253; see also *Bacchus*, 468 U.S. at 277 (after finding state tax exemption invalid, remanding to state supreme court to address "refund issues" "in the first instance" because, *inter alia*, "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law").

* * *

This Court should grant certiorari to resolve a well-defined split in authority, address the scope of

federal jurisdiction over challenges to state tax administration, and make clear that *Hibbs* did not jettison the Court's long-settled deference to state courts as the principle forum for adjudicating state tax challenges, respect for the state courts' ability to resolve federal constitutional claims, and resistence to efforts at manipulating federal jurisdiction through "artful pleading."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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