No. 09-____

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

PETITION FOR WRIT OF CERTIORARI

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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 (1981)—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?

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LIST OF PARTIES

The Petitioner is Richard Levin, the Tax Commissioner of the State of Ohio.

Respondents are Commerce Energy, Inc. (dba Commerce Energy of Ohio), Interstate Gas Supply, Inc., and Gregory Slone.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Richard Levin, Tax Commissioner of Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir. 2009), and orders are reproduced at App. 1a-2a, 3a-18a. The United States District Court for the Southern District of Ohio's opinion and order is reproduced at App. 19a-33a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its original judgment and opinion on February 4, 2009. The Sixth Circuit denied rehearing en banc on May 22, 2009. The State of Ohio now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, Section 1341 of Title 28 of the United States Code, provides:

> The district courts shall not 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.

INTRODUCTION

Five years ago, this Court held in *Hibbs v. Winn*, 542 U.S. 88 (2004), that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, did not bar federal jurisdiction over an Establishment Clause challenge to an Arizona tax credit. Along the way, the *Hibbs* Court acknowledged a separate line of cases—exemplified by *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100 (1981)—that invoked principles of comity to deny federal jurisdiction over suits intruding on the administration of state tax systems. But *Hibbs* did not say whether its TIA holding had any effect on the comity doctrine.

The circuit courts are now sharply divided over the meaning of *Hibbs*. Specifically, the courts are split—four circuits to one—on the question whether *Hibbs* narrowed or altogether eliminated the comity doctrine, which *Fair Assessment* had expressly recognized extends beyond the TIA's scope. Under the reading of *Hibbs* adopted by the majority of those circuits, including the Sixth Circuit below, comity principles extend no further than the text of the TIA. The statute, in other words, has swallowed the preexisting comity doctrine whole, and *Hibbs* overruled *Fair Assessment sub silentio.* On that view, federal courts have jurisdiction to consider any challenge to a state taxation regime so long as the relief available to the plaintiff would not reduce the State's tax revenues.

This case illustrates why that approach is inconsistent with the comity doctrine, and even with *Hibbs*'s own reading of the TIA. Respondents challenge Ohio's system of taxing natural gas suppliers as unconstitutional under both equal protection and dormant Commerce Clause principles. To resolve this suit and afford Respondents' requested relief, the federal court will have to engage in a detailed analysis of the manner in which Ohio administers its taxation and regulatory systems, which coexist in delicate balance. Neither longstanding comity rules nor *Hibbs*'s narrow exception to the TIA would permit such close federal court scrutiny of the State's tax scheme.

This Court's review is needed to resolve the confusion that *Hibbs* sowed among the lower courts as to both the scope of the TIA and the persistence of preexisting comity rules, and to restore the proper federalism balance in judicial scrutiny of state tax systems.

STATEMENT OF THE CASE

A. Respondents sued the State in federal court for allegedly discriminatory tax treatment.

Respondents are Commerce Energy, Inc. (dba Commerce Energy of Ohio), Interstate Gas Supply, Inc. ("IGS"), and Gregory Slone. Commerce Energy is a "retail natural gas supplier" or "independent marketer," as those terms are explained below, that sells natural gas in Ohio. App. 5a, citing Compl. ¶ 1. IGS is also such a seller, *id.* at ¶ 2, and Slone is a residential customer of IGS, *id.* at ¶ 3.

The natural gas market in Ohio has been partly deregulated, so that most residential and business consumers may purchase natural gas in one of two ways. First, the consumer may buy gas from the state-regulated public utility serving the customer's area. These companies, which once were monopoly sellers in their respective areas, are called "natural gas companies" in Ohio law, Ohio Rev. Code § 4905.03(A)(6), and are also called "local distribution companies," or LDCs. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997). LDCs sell customers a "bundled product," supplying both the gas itself, as a commodity, and the service of delivering the gas by pipeline into the customer's home or business.

Second, a consumer may, under Ohio's "Consumer Choice" program, Ohio Rev. Code § 4929.02, purchase natural gas from any of the newer companies, such as Respondents, that now compete with the LDCs for retail sales of the unbundled "gas as a commodity" product. These companies are called "independent marketers," or IMs, see *Tracy,* 519 U.S. at 306, and Respondents call themselves "retail natural gas suppliers" or "Retail Suppliers." Compl. ¶ 1. When a consumer selects an IM, he actually buys two "unbundled products": delivery (from the LDC, which carries the product through its exclusive pipeline into the home) and the gas itself (from the IM). *Id.* at ¶ 20. A residential consumer receives a single bill from the IM, but the bill separately enumerates the charge due the LDC for delivery. *Id.* at ¶ 24. The IM then collects the full amount and remits the LDC's share to the LDC. *Id.*

The IMs and LDCs are subject to different regulatory and taxation regimes. Both IMs and LDCs share certain regulatory obligations, such as procedures for terminating residential service. See Ohio Rev. Code § 4929.22(D). But they face divergent regulations. The LDCs, for example, are obliged to serve everyone in their respective territories—a duty that the IMs do not bear. Ohio Rev. Code §§ 4905.03, 4905.06, 4905.35; *Tracy,* 519 U.S. at 296-97. Also, the Public Utilities Commission of Ohio ("PUCO") regulates the LDCs' rates and sets tariffs on a "cost-plus" basis, which allows the LDCs to recover their costs under a set regulatory formula and earn a PUCO-approved fixed rate of profit. Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Admin. Code Chapter 4901:1-14; e.g., *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 863 N.E. 2d 599 (2007) (applying the "gas cost recovery process" established under Ohio Admin. Code Chapter 4901:1-14); see also *Tracy*, 519 U.S. at 297.

Ohio's tax system also treats the two types of gas sellers differently, and Respondents object to the differences. First, customers, such as Respondent Slone, pay sales tax on their purchases of gas from IMs. Compl. ¶¶ 41-42. Ohio's statewide sales tax is 5.5%. Ohio Rev. Code §§ 5739.02-.025, 5741.02. Ohio's counties may add a "piggyback" sales tax of up to 3%. Ohio Rev. Code §§ 5739.021 et seq., 5749.021 et seq. Currently, the combined sales tax rate in Ohio's counties ranges from 6.0% to 7.5%. Compl. ¶ 41 & Ex. A.

Second, the IMs pay a business tax called the "commercial activities tax," or CAT, which applies to almost all Ohio businesses and taxes a company's gross receipts generated in Ohio. Compl. ¶ 49; Ohio Rev. Code § 5751.02. A company pays no tax on its first $150,000 in such gross receipts; it then pays a flat tax of $150 for receipts between $150,000 and $1 million. Ohio Rev. Code § 5751.03. Gross receipts over $1 million are taxed at 0.26%. *Id.*

LDCs, by contrast, do not pay the CAT, and their customers are exempt from paying the sales tax. Ohio Rev. Code §§ 5751.01(E)(2); 5739.02(B)(7), .021(E), .023(G), & .026(F); 5741.02(C); .021(A); .022(A); & .023(A). Instead, the LDCs pay a separate "gross receipts excise tax," or GRT, aimed solely at them. The GRT is charged at a rate of 4.75% of the sale price of the gas. Ohio Rev. Code § 5727.24. The GRT is also charged against a broad array of an LDCs' receipts beyond consumer sales of gas. Ohio Rev. Code § 5727.33. Ohio's public utilities regulations allow each LDC to include its GRT payments in its costs in calculating its allowed cost-plus rate that the LDC may charge consumers. See Ohio Admin. Code § 4901:1-14-05 (specifying formula for "gas cost recovery rate" and authorizing "other factors" to be specified in appendix to cited rule); see Appendix at http://www.registerofohio.state.oh.us/pdfs/4901/1/14/4901$1-14-5_FF_A_APP1_20040805_1202.pdf (last visited August 19, 2009).

LDCs also pay two other taxes that the IMs do not pay. The first, called the "MCF tax," is charged to LDCs based on the volume of gas that the LDCs sell and deliver. ("MCF" stands for "thousands of cubic feet," the basis for measuring such volume). Ohio Rev. Code § 5727.811. The second is a personal property tax that once was charged to almost all Ohio companies. That tax has now been phased out for most companies but retained for public utilities such as LDCs. Ohio Rev. Code § 5727.06.

According to Respondents' complaint, this different tax treatment violates equal protection and dormant Commerce Clause principles. Respondents allege that the GRT is like the sales tax, in that the cost-plus regulations allow the LDCs to pass the cost on to customers.[1] Because the GRT rate is 4.75%, and the sales tax rates vary from 6% to 7.5%, Respondents allege that the "exemption from the sales tax for sales made by a Choice LDC (at least an exemption over and above what is paid pursuant to the gross receipts tax) discriminates against interstate commerce by providing an exemption that benefits" only LDCs. Compl. ¶ 48. They also allege that the "exclusion of LDCs from the CAT imposes an additional tax on the sales of natural gas by [IMs] that is not imposed on the sales of natural gas by LDCs."

Respondents requested the following relief:

1. a "declaration that the exemptions/ exclusions identified above, either individually or together, violate the Commerce Clause . . . and/or violate the Equal Protection Clause";

2. "an order invalidating" the exemptions;

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[1] Respondents' comparison between the sales tax and the GRT is questionable, although the question need not be resolved for purposes of the threshold jurisdictional issue presented in this Petition. The sales tax is paid by retail customers such as Plaintiff Slone, while the GRT is paid by LDCs (although current utility-rate regulations allow the cost to be included in an LDC's cost calculations in setting rates). In addition, the GRT is analogous, under Ohio law, to the CAT, which Respondents also attack. While the issue of the proper comparison need not be resolved at this jurisdictional stage, the issue's existence is notable for the reasons explained below at 22-23.

3. a "permanent injunction enjoining" Petitioner Levin and his agents from "recognizing and/or enforcing these exemptions/exclusions"; and

4. "[s]uch other relief to which Plaintiffs are entitled."

Compl., Prayer for Relief.

B. The federal district court dismissed on comity grounds, but the appeals court reversed and allowed the case to proceed.

The State moved to dismiss, arguing that both the TIA and comity principles preclude federal jurisdiction. App. 21a-22a, 26a. With respect to the TIA, the district court first held that Respondents fell under the *Hibbs* allowance for third-party challenges because they are not challenging their own tax liability. *Id.* at 24a. The court added that invalidating the LDCs' exemptions would increase, not decrease, the State's revenue. *Id.* The court therefore concluded that the TIA did not bar the suit. *Id.* at 26a.

The district court then held, however, that comity principles did bar the suit. *Id.* at 29a, 31a. The court reasoned that *Hibbs* did not alter the scope of the comity bar, because "[n]owhere did the *Hibbs* Court address principles of comity beyond the scope of determining the TIA's application to the case before it." *Id.* at 27a. The court noted that "general principles of comity extend beyond the rationale underlying the TIA," *id.* at 28a, and it concluded that such principles required dismissal, *id.* at 29a, 31a.

The Sixth Circuit reversed, holding that neither the TIA nor comity is a bar to suit. The appeals court first adopted the district court's reasoning as to the TIA. *Id.* at 6a, 9a. The court then reversed the district court's comity holding, finding that *Hibbs* had narrowed *Fair Assessment*'s broad description of comity, and that, following *Hibbs*, comity—like the TIA—can be invoked "only when plaintiffs try to thwart tax collection." *Id.* at 11a. The court acknowledged that "there is a circuit split" on the issue, *id.* at 10a, but it concluded that the "Seventh and Ninth Circuits have the more persuasive view," *id.* at 11a, and that "*Hibbs*'s logic. . . compels us to reject the approach endorsed by the district court and the Fourth Circuit," *id.*

REASONS FOR GRANTING THE WRIT

The Court should grant the State of Ohio's petition and reverse the Sixth Circuit's judgment. As the Sixth Circuit itself noted, the circuits are divided on the first question presented. The opinion below also conflicts with this Court's decisions in *Fair Assessment* and *Hibbs*. Consequently, the Court should grant the Petition to resolve these conflicts and clarify the scope of federal jurisdiction over challenges to state tax laws.

A. The circuit courts are divided on the question of the comity rule's vitality following *Hibbs*.

The State agrees with the Sixth Circuit's reasoning in one significant respect: "[T]here is a circuit split" on the scope of the comity doctrine vis-à-vis the TIA. That division of authority derives from the circuits' different readings of this Court's TIA-based decision in *Hibbs*, and of the effect, if any, that *Hibbs* had on the Court's earlier comity-based decision in *Fair Assessment*.

1. This Court has explained that the comity doctrine extends beyond the TIA, and the Fourth Circuit has followed that understanding.

The jurisdiction of a federal court over a challenge to a state tax law can be barred in one of two ways: by the TIA or by principles of comity. The TIA provides that a federal court may not "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 comity doctrine, meanwhile, cuts a broader swath, prohibiting cases that intrude upon several interests related to state sovereignty, even if the relief sought does not formally seek to enjoin tax collection. *Fair Assessment*, 454 U.S. at 111. As the Court explained, "federal courts, in exercising the discretion that attends requests for equitable relief, may not even render declaratory judgments as to the constitutionality of state tax laws." *Fair Assessment*, 454 U.S. at 103 (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943)).

The Court has long made clear that the comity bar is not coterminous with the TIA. The doctrine took root in cases that preceded the TIA's enactment in 1937, see *Matthews v. Rodgers*, 284 U.S. 521 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276 (1909), and has continued to have independent life since.

In *Great Lakes*, for instance, the Court barred federal jurisdiction over a suit for declaratory relief against a state tax law. The Court looked to the then-recently enacted TIA and found that the statute's terms do not encompass actions for declaratory relief. 319 U.S. at 299. Instead, the Court held that "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* By "those considerations," the Court meant principles of federalism—"'[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations." *Id.* at 298.

The Court confirmed in *Fair Assessment* that the comity doctrine extends beyond the bounds of the TIA. The plaintiffs in that case sought damages under 42 U.S.C. § 1983, not injunctive or declaratory relief, to redress an allegedly unconstitutional administration of a state tax system. 454 U.S. at 101. Citing *Great Lakes*, the Court explained that comity has a broader scope than the TIA alone, and that "the principle of comity which predated the Act was not restricted by its passage." *Id.* at 110. Thus, the *Fair Assessment* Court declined to decide whether the TIA also would have barred the challenge at issue, because the comity principle bars taxpayers "from asserting § 1983 actions against the validity of state tax systems." *Id.* at 116; see also *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 525-26 n.33 (1981) ("[E]ven where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief.").

The comity bar reaches beyond suits that would directly impede state revenue with good reason: because the federalism concerns that underlie the comity rule themselves extend more broadly than simply protecting the state fisc. *Fair Assessment*, 454 U.S. at 109 n.6, 114-15. For example, cases challenging state tax administration, even if based on federal constitutional law, "'are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'" *Id.* (quoting *Perez v. Ledesma,* 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). Also, any judgment against the State, regardless of the relief sought, would involve a predicate determination that the state tax system was unconstitutional—the equivalent of the declaratory judgment barred in *Great Lakes*. And allowing such cases in federal court would allow taxpayers to bypass available state procedures. *Fair Assessment*, 454 U.S. at 109 n.6. Finally, "[i]n addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme," because "State tax collection officials could be summoned into federal court to defend their assessments," impeding their enforcement of State law. *Id.* at 114.

The TIA, by contrast, has a more limited compass. The Court in *Hibbs* held that the TIA did not bar a suit seeking to invalidate, on Establishment Clause grounds, state "income-tax credits for payments to organizations that award educational scholarships and tuition grants to children attending private schools." *Hibbs,* 542 U.S. at 92.

Three factors were critical to the Court's decision allowing the federal suit in *Hibbs* to proceed. First, the Court explained that the TIA, by its text, "proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—*i.e.*, assessment, levy, and collection." 542 U.S. at 105 n.7. Because a judgment invalidating a tax credit would increase, not decrease, the State's revenue, the Court held that the TIA does not bar attacks on tax credits. *Id.* at 93. Second, the *Hibbs* Court stressed that the plaintiffs before it were "third parties" who objected to the provision of credits to *other* taxpayers—not taxpayers objecting to their *own* tax liability. *Id.* at 93, 108. And third, because the challenge in *Hibbs* was based on the Establishment Clause, not state tax law, the plaintiffs had "not asked the District Court to interpret any state law." *Id.* at 106 n.8. The Court explained that the TIA had never been raised, and federal jurisdiction never questioned, in a litany of cases alleging that tax laws violated the Establishment Clause or amounted to racial discrimination—disputes, in other words, in which the analysis did not turn on tax doctrine. *Id.* at 93, 110-12.

The *Hibbs* Court had little to say on the independent doctrine of comity. In a footnote, the Court observed:

> [T]his Court has relied upon "principles of comity," Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. See *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107-108, 70 L Ed 2d 271, 102 S. Ct. 177 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-299, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943) (plaintiffs challenged Louisiana's unemployment compensation tax).

Id. at 107 n.9. And in a separate footnote, the Court distinguished a First Circuit case that had rested on comity grounds rather than the TIA. *Id.* at 109 n.11 (citing *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979)). But the Court did not expressly address the relationship between comity and the TIA, nor did it suggest, in citing *Fair Assessment* and *Great Lakes*, that its decision affected those earlier holdings.

The Fourth Circuit accordingly held, in *DirecTV v. Tolson,* 513 F.3d 119, 127-28 (2008), that *Hibbs* had no effect on the Court's comity teachings. In that case, the plaintiffs brought a dormant Commerce Clause challenge to North Carolina's system of taxing multichannel television programming. *Id.* at 120. The court explained that the plaintiffs were asking the court to reinstate an earlier taxing regime that North Carolina had abandoned, and "[i]t is just this sort of heavy-handed federal court interference in state taxation that the principle of comity is intended to avoid." *Id.* at 125.

The Fourth Circuit gave three reasons for rejecting the plaintiffs' argument that, in the wake of *Hibbs*, comity principles no longer reached any further than the TIA. *Id.* at 127. First, "*Hibbs*' characterization of prior tax cases was intended to underscore the unusual claim before the Court in *Hibbs*, not to disavow [this Court's] earlier holdings" in *Fair Assessment* and *Great Lakes*. *Id.* at 127 (citing *Hill v. Kemp*, 478 F.3d 1236, 1249 & n.11 (10th Cir. 2007)). Second, *Hibbs* focused on the TIA's revenue-protecting purpose, whereas the purpose of the comity doctrine—to obviate federal court interference in state taxing and regulatory authority—is broader. And third, *Hibbs* footnote 11 had distinguished the First Circuit's decision in *U.S. Brewers v. Perez*, 592 F.2d 1212, as a case based on "comity concerns," not on the Butler Act (the TIA-analogue that applies to Puerto Rico). *DirecTV*, 513 F.3d at 128 n.5 (citing *Hibbs*, 542 U.S. at 109 n.11). The Fourth Circuit in *DirecTV* took that distinction to mean that the *Hibbs* Court saw no tension between its TIA holding and *U.S. Brewers*' comity reasoning, because *Hibbs* did not touch the comity bar. *Id.*

The Fourth Circuit therefore held that, after *Hibbs*, the comity doctrine may still bar federal jurisdiction over cases to which the TIA does not apply. And those cases include disputes in which the plaintiffs, as in *DirecTV*, seek to use the dormant Commerce Clause to force the State to enhance its coffers by imposing a tax.

2. The First, Seventh, and Ninth Circuits have held that *Hibbs* narrowed the comity doctrine to extend no further than the TIA.

In stark contrast with the Fourth Circuit, the First, Seventh, and Ninth Circuits all have held that *Hibbs* sharply limited—if not eliminated—the scope of the comity bar. Indeed, these courts have said not only that comity is now narrower than it was in *Fair Assessment,* but also that comity in fact reaches no further than the TIA itself.

The degree to which these courts read *Hibbs* as having affected the comity doctrine is most clearly illustrated by the First Circuit's recent reversal of course. In its earlier decision in *U.S. Brewers*, the

First Circuit had held that "[s]ound equity practice and a concern for interests of federalism" barred a federal challenge to Puerto Rico's tax on large beer producers. *U.S. Brewers*, 592 F.2d at 1215. In *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 5 (1st Cir. 2009), the First Circuit confronted a similar challenge to Puerto Rico's taxation scheme for beer producers. The *Coors* court acknowledged that, "[i]f not for *Hibbs*, *U.S. Brewers* would control the resolution of this action." *Id.* at 16.

But then the court noted the growing "circuit split" on the question "[w]hether the principles of comity described in *U.S. Brewers* are intact after *Hibbs*." *Id.* It explained that "[t]he Sixth and Seventh Circuits have adopted a narrowed view of comity principles in light of *Hibbs*," and that "[t]he Ninth Circuit has also suggested that *Hibbs* limited the reach of comity in this context." *Id.* (citing *Commerce Energy*, 554 F.3d at 1098-99; *Levy v. Pappas*, 510 F.3d 755, 761-62 (7th Cir. 2007); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005)). By contrast, the First Circuit noted, the Fourth Circuit "has relied on *U.S. Brewers*, even after *Hibbs*, to refuse jurisdiction over a challenge to a state tax regime's allegedly preferential treatment of cable companies over satellite TV companies." *Id.* (citing *DirecTV*, 513 F.3d at 126-28).

The First Circuit then took its place alongside the Sixth, Seventh, and Ninth Circuits, rejecting the Fourth Circuit's reading of *Hibbs*. The court read footnote 9 of *Hibbs*—in which this Court stated 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*, 542 U.S. at 107 n.9 (citation omitted)—as limiting both the TIA and the comity doctrine to the same revenue-protective purpose. *Coors*, 562 F.3d at 17. The First Circuit then disagreed with the Fourth Circuit's reading of *Hibbs* footnote 11 as approving of *U.S. Brewers*' broader comity holding. Instead, the First Circuit said, the *Hibbs* Court merely cited *U.S. Brewers* as a "related" case "in obvious tension" with *Hibbs*'s holding, "not as an endorsement of [*U.S. Brewers*'] result." *Id.* at 17-18. The First Circuit also relied on the Sixth Circuit's decision below and concluded that "*Hibbs* confined principles of comity to cases seeking to arrest or countermand state tax collection." *Id.* at 18.

The Seventh Circuit similarly has read *Hibbs* as limiting the comity rule, so much so that one unitary standard applies for both the TIA and comity. *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007). *Levy* recited the standard as follows:

> When a plaintiff alleges that the state tax collection or refund process is singling her out for unjust treatment, then the Act and comity bar the federal action, as in *Fair Assessment*. When a plaintiff alleges that the state tax collection or refund process is giving unfair benefits to someone else, then according to *Hibbs* the Act and comity are not in play.

Id. (citations and quotations omitted). Under this unitary jurisdictional rule, comity applies if and only if the TIA also applies. In the Seventh Circuit's formulation, in other words, the TIA swallows the comity doctrine.

The Ninth Circuit, like the First and Seventh, also has concluded that *Hibbs* eliminated comity's once-independent scope. In *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005), the court rejected a TIA defense as well as an alternate comity bar. Citing *Hibbs*'s footnote 9, the court said that comity, like the TIA, applied only to cases in which plaintiffs sought "to arrest or countermand state tax collection," and the *Wilbur* plaintiffs did not do so. *Id.*

3. The Sixth Circuit has broadened the split.

In its decision below, the Sixth Circuit explained the division among the circuits, rejected the Fourth Circuit's view, and joined the circuit courts holding that *Hibbs* restricted not just the TIA but also the comity bar. App. 10a-12a.

The Sixth Circuit offered four principal reasons for concluding that *Hibbs* limited the comity doctrine. First, the Sixth Circuit, like the appeals courts with which it sided, explained that the *Hibbs* Court's language in footnote 9 "is hard to square . . . with . . . [an] expansive reading of *Fair Assessment*." App. 9a. Second, the Sixth Circuit observed that the Ninth Circuit in *Hibbs* had expressly addressed (and rejected) comity in the decision on review, and that this Court, though without "extensively analyz[ing] comity," affirmed the Ninth Circuit's decision in whole. *Id.* at 12a. Thus, the court reasoned, the *Hibbs* Court implicitly rejected a broader view of comity. Third, the Sixth Circuit noted this Court's concern in *Hibbs* that, under an expansive reading of the TIA, a series of earlier Establishment Clause and race-discrimination precedents would have been jurisdictionally barred. *Id.* "This same logic applies to comity," the Sixth Circuit said, for a broad comity bar likewise would have barred the earlier precedents cited by *Hibbs*. *Id.* Finally, the Sixth Circuit worried that a broad comity rule would "render an Act of Congress entirely superfluous," because the comity rule would subsume the TIA. *Id.* at 17a.

The Sixth Circuit sent mixed signals on whether its view would fully eliminate, or just sharply limit, comity's broader scope. On one hand, the court identified itself with the Seventh and Ninth Circuits and described a comity standard that was identical to the TIA standard outlined in *Hibbs*. *Id.* at 10a-11a. On the other hand, the court said that "principles of comity and federalism sweep somewhat more broadly than the" TIA alone, *id.* at 18a, even after being narrowed in *Hibbs*, and that the only question was whether Respondents' claims fell outside the scope barred by comity, *id.*

But any lip service that the Sixth Circuit gave to retaining comity's "somewhat . . . broad[er]" scope cannot be squared with its refusal to apply comity to bar *this* case, as even a diminished comity rule should preclude Respondents' suit. Only by placing comity in lockstep with the TIA—that is, by eliminating it as an independent jurisdictional bar—could the Sixth Circuit have allowed a federal court to proceed with a suit that, as explained in Part B.1 below, requires an intrusive review of Ohio's taxation and regulation of natural gas sellers.

Regardless of whether the Sixth Circuit left comity dead or merely on life support, however, two things remain clear. First, *Hibbs* has thrown the precedential force of *Fair Assessment* and *Great Lakes* into substantial doubt. Second, the circuits are divided as to the scope and vitality of the comity doctrine in the wake of *Hibbs*. Not only have several circuit courts acknowledged that division, but the litmus test for a circuit split is satisfied here: This case would have come out differently in the Fourth Circuit, under a straightforward application of *Fair Assessment*, from the way it did in the Sixth. That division of authority and the confusion among the circuits make this case worthy of review.

B. The decision below conflicts with the Court's decisions in *Fair Assessment* and *Hibbs*.

While the division of authority among the circuits is reason enough to grant the Petition, the need for review is strengthened by the conflict between the Sixth Circuit's opinion and this Court's decisions in *Fair Assessment* and *Hibbs*.

1. The decision below conflicts with *Fair Assessment*.

First, by allowing an intrusive federal review of Ohio's tax system, the decision below squarely conflicts with the Court's protection of state sovereignty in *Fair Assessment*. That is certainly true if, as the State submits (and the Fourth Circuit held), *Hibbs* did not narrow or eliminate the comity rule. Under *Fair Assessment*'s robust formulation of the doctrine, this case crosses the comity line because it asks the federal courts to review details of Ohio's taxation of different types of natural gas sellers and declare that one group has an unfair advantage over another. Even if *Hibbs* narrowed

Fair Assessment, however, any remnant of a comity bar cannot be squared with allowing this intrusive review of Ohio's tax laws to proceed.

Three different aspects of this case demonstrate the intrusiveness of Respondents' suit. First, to assess Respondents' claims of discriminatory taxation, the district court will need to undertake a granular analysis of Ohio tax law. For example, the district court would need to understand the operation of different state taxes in order to determine which taxes to compare for equal protection purposes. Specifically, Respondent Commerce Energy argues that the "gross receipts tax" ("GRT"), which LDCs pay, should be compared to the sales tax. But under State law, the GRT is analogous to the State's commercial activity tax, or CAT, as both the GRT and CAT are franchise taxes imposed on the privilege of doing business. Further, to fully resolve Respondents' claims of differential treatment, the district court would also need to review the details of two other taxes that the LDCs, but not IMs such as Respondents, must pay—the "MCF tax," charged on the volume of gas sold, and a personal property tax. Ohio Rev. Code § 5727.811; § 5727.06.

Second, in evaluating Respondents' claims, the district court also would need to scrutinize closely the State's public utility law. For example, Respondent Commerce Energy complains that its customers must pay sales tax of up to 7.5 percent, while customers of other gas sellers—the LDCs—pay only the passed-along "gross receipts tax" ("GRT") of 4.75 percent. There is a critical difference, however, in the way Ohio law imposes the two taxes. Under the sales tax, the end consumer pays the tax; the natural gas retailer is merely the collection agent for the State. Under the GRT, by contrast, the LDC is the taxpayer, and, as a matter of state tax law, the tax stops there. To the extent the tax is "passed on" to the consumer, it is the result not of tax law, but of state utilities law. See Ohio Admin. Code § 4901:1-14-05 (specifying formula for "gas cost recovery rate" and authorizing "other factors" to be specified in appendix to cited rule).

Third, even if the district court were to find an equal protection or dormant Commerce Clause violation, any remedy it might craft would necessarily offend comity principles. To begin with, "an order of a federal court requiring [State] officials to collect taxes which its legislature has not seen fit to impose on its citizens" is "a particularly inappropriate involvement in a state's management of its fiscal operations." *U.S. Brewers,* 592 F.2d at 1215. Moreover, Ohio law ensures that no company pays two gross-receipts taxes on the privilege of doing business. The CAT, which covers most business, does not single out LDCs for an exemption; rather, it exempts all businesses that already pay an industry-specific gross-receipts tax (such as the GRT on LDCs or specific taxes on insurance companies and financial institutions). See Ohio Rev. Code § 5751.01(E). Thus, any attempt to "level the playing field" as to the CAT exemption would require the federal court to consider state laws against duplicate taxation of gross receipts.

Recent similar cases out of Ohio demonstrate that, when properly handled, tax challenges such as Respondents' require a close inspection of state tax law. For instance, in *Tracy,* 519 U.S. 278, a customer of an independent marketer brought equal protection and dormant Commerce Clause challenges to the different ways that Ohio law taxed LDCs and IMs at the time. In resolving the case, this Court carefully reviewed Ohio's tax and utility regimes. *Id.* at 295-98. And just last year, the Ohio Supreme Court rejected a similar suit brought by another type of company in the natural gas market, an "interstate pipeline company." That challenge also turned on differences between IMs and LDCs and on details of Ohio law. *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St. 3d 122 (2008), cert. denied, 129 S. Ct. 896 (2009).

If Respondents' challenge goes forward in federal court, the discovery and decision will be much like those in *Tracy* and *Columbia Gas.* The suit would require the federal court to delve into the intricacies of both Ohio's tax law and the public utility regulatory scheme. This case therefore presents a textbook example of the comity concerns that animated *Fair Assessment*, and any claim that the Sixth Circuit afforded comity a "somewhat . . . broad[er]" scope than the TIA cannot be taken seriously.

2. The decision below conflicts with *Hibbs.*

Second, even if the Sixth Circuit was correct that *Hibbs* sets identical standards for both the TIA and comity, the decision below nonetheless conflicts with *Hibbs* itself—and should be barred under the TIA—for several reasons. For one thing, the *Hibbs* Court explained that the plaintiffs there were "third parties"—outsiders to the tax credit at issue who did not object to their own tax treatment. 542 U.S. at 93, 108. Instead, the taxpayer-plaintiffs in *Hibbs* stated a generalized objection to having their tax money "spent" (in the form of credits or forgone revenue) on a program that they believed advanced religion in violation of the Establishment Clause. Respondents here, by contrast, complain that their own tax treatment is unfair, as compared to the tax treatment of the LDCs. Even if one accepts at face value that Respondents are seeking cancellation of the LDCs' benefits rather than tax exemptions of their own—a dubious assumption, for the reasons explained below—the fact remains that their complaint hinges on *their own tax treatment* vis-à-vis someone else's. At bottom, Respondents insist that they are being unfairly taxed as compared to the LDCs, and they want the federal courts to level the playing field. Their status is therefore not akin to the third-party plaintiffs in *Hibbs*.

Moreover, the suit here is not of the subject-matter type that *Hibbs* allowed to proceed under the TIA. The *Hibbs* Court stressed that the third-party plaintiffs' claims arose under the Establishment Clause, and that federal courts historically had adjudicated such challenges, like racial discrimination claims, without trenching on federalism concerns. 542 U.S. at 93-94, 110-12. Indeed, this Court in *Fair Assessment* left the same space open under the comity doctrine, expressly declining "to decide . . . whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." 454 U.S. at 107 n.4. Respondents' argument, by contrast, is that the State's tax law treats them differently from other natural gas suppliers. By its nature, that claim requires detailed scrutiny of Ohio's tax system and its utility-regulation scheme.

Respondents' requested relief also implicates the very "state-revenue-protective" purposes of the TIA underscored in *Hibbs*, 542 U.S. at 106. In *Hibbs*, the plaintiffs' demand to invalidate the challenged tax credits could not possibly have led to revenue reduction, because their claim—that allowing such credits offended the Establishment Clause—could not be alleviated by granting plaintiffs the same allegedly unconstitutional credit. Here, by contrast, Respondents demand equal tax treatment. And although they purport to seek only the cancellation of the LDCs' exemptions, the settled practice in such cases—regardless of Respondents' artful pleading—is to *extend* tax benefits rather than to cancel them. See *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) (explaining that "extension, rather than nullification, is the proper course" to remedy equal protection violation); *Cherry Hill Vineyards, LLC v. Schneider*, 553 F.3d 423, 435 (6th Cir. 2008) (same, for dormant Commerce Clause violation). Thus, if Respondents were to succeed on the merits, the district court in this case would most likely exempt them from the complained-of taxes, not terminate the LDCs' exemptions, regardless of how the complaint is framed. That relief is particularly likely given that the LDCs are not parties to the federal suit. (The State's motion to join the LDCs as indispensable parties remained pending when the district court dismissed the action on comity grounds.)

What is more, remedying Respondents' tax objection is not as simple as eliminating the LDCs' exemption or extending it to Respondents. Rather, Respondents complain that their customers pay a higher tax rate of up to 7.5% (differing by county), and that the competitor LDCs' customers pay a different, substitute tax—the GRT—at a rate of only 4.75%. The complaint says not that the LDCs' sales-tax exemption alone is discriminatory, but that the exemption, "at least an exemption over and above what is paid pursuant to the gross receipts tax," discriminates. Compl. ¶ 48. That means that a district court could not achieve parity by invalidating the LDCs' sales-tax exemption, because such invalidation alone would leave the LDCs with much higher taxes.

Instead, to level the playing field (as to the sales tax versus GRT claim), the federal court would need to do one of two things. The court could couple the invalidation of the LDCs' sales-tax exemption with an injunction against levying the GRT against the LDCs, so that both LDCs and IMs would equally pay the sales tax. But the TIA would squarely bar such an injunction, as such an order would of course "enjoin . . . collection of [a] tax under state law." Or the court could take a scalpel to the sales-tax exemption and reduce it by however many percentage points are needed, on a county-by-county basis, to eliminate the gap. But such careful tailoring of a state tax code is exactly the kind of federal court interference that the TIA and comity are designed to prevent.

The Sixth Circuit dismissed concerns about enjoining the LDCs' payment of the GRT by saying that it need not concern itself with what might happen in "a hypothetical future lawsuit" in which the LDCs might "seek[] to enjoin the imposition of other taxes," leading to lost revenue. But the Sixth Circuit was mistaken in attributing that injunction to a "hypothetical" second lawsuit. Surely no court would, in this case, invalidate only one tax exemption and tilt the field the other way, leaving it to the LDCs to start a new case to even things up. Any injunction enforcing "equality," as Commerce Energy posits it, would have to take account of the GRT in its disposition of *this case.*

Likewise, Respondents' claim regarding the CAT also cannot be resolved simply by invalidating the LDCs' exemption. As explained in Part B.1 above, both the CAT and the GRT are franchise taxes imposed on the privilege of doing business, and the amount assessed is based on gross receipts. Ohio law provides that no entity pays two such taxes; any entity paying the GRT or any other industry-specific gross receipts tax is exempt from the CAT. Thus, invalidating the exemption and forcing LDCs to pay the CAT would trigger a need either to enjoin a different state tax (in plain violation of the TIA) or to craft a new tax that fills the gap.

All of this shows that the Sixth Circuit was mistaken when it shoehorned this case into its reading of *Hibbs.* The decision below not only conflicts with both the TIA and the comity doctrine, but it also demonstrates the circuit courts' continuing conflict and confusion over both doctrines. The Court's review is therefore warranted to clarify the scope of both the TIA and comity in the wake of *Hibbs.*

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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