Supreme Court, U.S.
FILED
OCT 2 - 2009
OFFICE OF THE CLERK

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

All parties appear to agree that a circuit split exists on the question whether the comity doctrine extends beyond the bounds of the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341. Respondents argue that the Court need not resolve this acknowledged division of authority, however, because it is lopsided and will dissipate on its own. Yet the current four-to-one circuit split shows no signs of going away, and could easily broaden. But even if Respondents are correct and the majority view is on its way to becoming unanimous, this Court's review is all the more warranted, for then the death knell will truly have sounded for the comity doctrine. If *Hibbs v. Winn*, 542 U.S. 88 (2004), meant to overrule more than a century of case law recognizing an independent comity bar to federal jurisdiction over state tax challenges, then the Court should say as much.

In addition to the circuit split, the Court should grant review to clarify the scope of the TIA. This case bears all the hallmarks of cases to which *Hibbs* itself intended to keep the federal courthouse doors closed: It requires a federal court to undertake a detailed analysis of state taxation and regulatory policy in order to adjudicate a claim by a group of taxpayers that, because the State taxes them unevenly, they are entitled to an order altering the State's tax regime. The TIA commits such cases to the state courts.

The Court should grant review to restore the proper federalism balance.

A. The division of authority among the circuits warrants this Court's review.

Respondents appear to offer alternative arguments regarding the division among the circuits. On the one hand, they acknowledge the circuit split but assert that it will resolve itself. (Opp. 4-6.) On the other hand, they say that the Fourth Circuit's opinion in *DirecTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008), is either reconcilable with the Sixth Circuit's opinion or simply wrong. (Opp. 7-9.) Respondents are only partially right.

The circuits are divided on the scope of the comity doctrine in the wake of *Hibbs*. (Pet. 15-21.) Four courts of appeals, including the Sixth Circuit here, take the view that *Hibbs* made the comity doctrine coextensive with the TIA, such that the two apply only where the plaintiff seeks "'to arrest or countermand state tax collection.'" *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) (quoting *Hibbs*, 542 U.S. at 107 n.9); accord App. 11a (6th Cir.); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 17-18 (1st Cir. 2009); *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007). The Fourth Circuit, by contrast, has held that "the comity principle underlying the TIA is broader than the Act itself, and its scope is not restricted by § 1341," even after *Hibbs*. *DirecTV*, 513 F.3d at 127 (citing *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110 (1981)). The First and Sixth Circuits have acknowledged but expressly rejected the Fourth Circuit's different view. App. 10a-11a; *Coors Brewing*, 562 F.3d at 17.

The division of authority makes a difference in this case. Under the Fourth Circuit's approach, comity principles would bar Respondents' suit

because it seeks a "heavy-handed" federal court order affecting "intrastate taxation authority." *DirecTV*, 513 F.3d at 127. By the same token, the circuits taking the majority view would have resolved the *DirecTV* dispute differently from the Fourth Circuit, because the plaintiffs in that case did not seek to lessen their own tax burden. *Id.* at 125, 127.

Respondents' effort to reconcile the opinion below with *DirecTV* falls short. Respondents assert that *DirecTV* is on all fours with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), because in both cases the circuits used the comity doctrine to reject a large class of third-party taxpayers' broad challenge to a state tax regime. (Opp. 7-8.) And Respondents say that their case can be reconciled with *DirecTV* because they request narrower relief that would affect "only four other taxpayers." (Resp. Question Presented.) The Sixth Circuit agreed. App. 14a.

The notion that Respondents seek narrow relief affecting "only four other taxpayers" is wrong on multiple levels. It is premised on the fact that Respondents object to the tax treatment of the natural gas producers, or LDCs, which, by virtue of their natural monopoly and public utility status, are Ohio's sole means of delivering natural gas to Ohio homes. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 284-85 (1997). A challenge to "only" four LDCs' tax treatment, then, is a challenge to *all* LDCs' tax treatment, because those four entities are the only game in town. Respondents' argument is therefore akin to saying that a change to the rules of Major League Baseball will affect "only" two leagues—American and National.

More to the point, Respondents' "only four" argument disregards the fact that they independently challenge the sales tax. See Compl. ¶ 45. And the sales tax is levied on the LDCs' customers—the end consumer—*not* on the LDCs themselves. See Ohio Rev. Code § 5739.03(A) (requiring sales tax to be collected by the natural gas vendors from consumers). Thus, Respondents are asking a federal court to invalidate a sales-tax exemption for, and thereby raise taxes on, *millions* of Ohio taxpayers, not just four.

Respondents also discount the extent to which their suit requires the federal court intrusively to review Ohio's tax and regulatory regime. Respondents make no effort to dispute the Petition's showing that their complaint requires a granular analysis of Ohio tax and public-utilities law. (Pet. 22-23.) And even if Respondents are correct that relief in this case would not necessarily involve extending a tax exemption to Respondents—a dubious proposition, given this Court's precedent (Pet. 26)—they ignore the fact that the district court cannot "level the playing field" without either enjoining the LDCs' substitute tax or taking a scalpel to Ohio's sales tax. (Pet. 27.)

Respondents' arguments lose sight of at least one hundred years of precedent recognizing that comity principles preclude federal court review of state tax law challenges. See, e.g., *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). This Court has also made clear that the comity doctrine exists independently of the TIA. See *Fair Assessment*, 454 U.S. at 110; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

Because Petitioner seeks nothing more than a proper restoration of that long-existing doctrine, his position would not, as Respondents suggest, "effectively bar any federal court jurisdiction involving a state tax-related matter." (Opp. 6.) This case is precisely the kind to which the comity rule has always applied: a challenge hinging on tax doctrine, not on the Establishment Clause or the like, brought by parties who claim that their *own* tax treatment, not that of third parties, is unconstitutional.

Given the scope and invasiveness of Respondents' requested relief, the Sixth Circuit's decision allowing the suit to proceed eliminates the independent comity bar. Any lip service that the Sixth Circuit and Respondents pay to comity (App. 18a; Opp. 7) cannot be squared either with their approach to this case or with their embrace of the Seventh Circuit's opinion superimposing the TIA's parameters on the comity doctrine. *Levy*, 510 F.3d at 761.

This Court's review is needed to preserve the comity rule.

B. The Sixth Circuit's narrowing of the TIA's scope independently merits the Court's attention.

This case warrants the Court's attention for a second reason: The Sixth Circuit distorted and expanded *Hibbs* to allow federal court review of a state tax law challenge that the TIA precludes, irrespective of the comity doctrine.

To begin with, this case is not *Hibbs*. In determining when the TIA does not apply, the *Hibbs* Court focused on three factors, none of which is

present here: (1) the suit there was brought by third parties who did not seek to reduce their own tax bill; (2) the remedy would not have reduced state revenue; and (3) the suit challenged a tax credit on subject-matter grounds traditionally handled in federal courts. 542 U.S. at 93. Respondents, by contrast, complain about the unevenness of Ohio's tax as applied to them vis-à-vis LDCs. To remedy that purported inequity, the federal court would either have to extend a tax benefit to Respondents (thereby reducing state revenues) or painstakingly alter the way Ohio taxes LDCs. And Respondents' objections derive not from the Establishment Clause or concerns of racial discrimination, but from the administration of tax and regulatory doctrine.

Respondents assert that Petitioner has not identified a decision from another circuit that conflicts with the Sixth Circuit's decision (Opp. 3), but that argument misses the point. The problem with the Sixth Circuit's decision is that it allows a business entity to proceed in federal court with a challenge, under a dormant Commerce Clause or equal protection theory, to the way the State taxes it relative to its competitors. Petitioner is aware of no other case—and Respondents cite none—that has proceeded on the same lines. The Sixth Circuit's decision, then, is not a misapplication of settled law; it is a novel extension of this Court's precedent in a way that warps a federal statute and destabilizes the federal-state balance.

If Respondents are correct, however, and *Hibbs* permits the result here, then that is all the more reason for the Court to clarify that the TIA prevents federal court review of state tax law

challenges that are as disruptive as this one. With respect to a remedy, the Petition demonstrated that one of two things would necessarily occur if Respondents succeed on the merits: either the federal court would extend the challenged tax exemption to Respondents, or it would achieve parity by engaging in detailed tailoring of the way Ohio taxes LDCs. (Pet. 26-28.) Respondents assert that the former is a specious claim, but they ignore this Court's explanation that "extension, rather than nullification," is the default remedy for constitutional claims grounded in unequal treatment. *Califano v. Westcott*, 443 U.S. 76, 89 (1979). Meanwhile, Respondents altogether ignore Petitioner's argument that the federal court could not achieve parity by simply eliminating the exemption, and their silence is deafening. Given the structure of the LDC taxes and the intersection with public-utilities regulations, there could be no simple, nonintrusive fix. The TIA bar therefore applies.

Finally, Respondents cite *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), as an example of Ohio's purported fair-weather federalism (Opp. 9-10), but that case only confirms that review is needed here. Respondents assert that Ohio consented to removal in *Cuno*—like this case, a dormant Commerce Clause challenge to a state tax law—but in fact Ohio simply conceded there that one oddly situated plaintiff "arguably" had standing in the lower federal courts. See Brief for Petitioners, *Wilkins v. Cuno*, No. 04-1724, at 27, 2005 U.S. S. Ct. Briefs Lexis 861, **51. Ohio steadfastly objected to federal jurisdiction for all other parties on standing grounds, and this Court unanimously endorsed that view. *Cuno*, 547 U.S. at 342-46. There is nothing

inconsistent in objecting to federal jurisdiction on one ground (standing) rather than another (TIA or comity).

That is not to say, of course, that Respondents lack an appropriate forum for their complaint. Respondents assert that Ohio has changed the way it regulates natural gas sales, citing both *Tracy*, 519 U.S. 278, and *Columbia Gas Transmission Corp. v. Levin*, 882 N.E.2d 400 (Ohio 2008), cert. denied, 129 S. Ct. 896 (2009). (Opp. 1.) What Respondents overlook is that both of those cases originated *in the Ohio courts*. Respondents do not suggest that the state courts (or this Court) inadequately adjudicated those disputes, nor do they explain why the state courts cannot handle this case as well. Instead, they simply argue that they are entitled to hale the State of Ohio into federal court to undertake a searching examination of the way the State taxes and regulates natural gas sellers. But neither principles of comity nor the TIA permit a federal court to entertain such a challenge.

CONCLUSION

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

Respectfully submitted,

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October 2, 2009