# SUPREME COURT OF THE UNITED STATES

No. 09–223

RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO, PETITIONER *v.* COMMERCE ENERGY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 1, 2010]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Although I, too, remain skeptical of the Court's decision in *Hibbs* v. *Winn*, 542 U. S. 88 (2004), see *ante*, at 1 (KENNEDY, J., concurring), I agree that it is not necessary for us to revisit that decision to hold that this case belongs in state court. As the Court rightly concludes, *Hibbs* permits not just the application of comity principles to the litigation here, but also application of the Tax Injunction Act (TIA or Act), 28 U. S. C. §1341. See *ante*, at 17. I concur only in the judgment because where, as here, the same analysis supports both jurisdictional and nonjurisdictional grounds for dismissal (the TIA imposes a jurisdictional bar, see, *e.g.*, *Hibbs*, *supra*, at 104), the "proper course" under our precedents is to dismiss for lack of jurisdiction. *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U. S. 422, 435 (2007).

Congress enacted the TIA's prohibition on federal jurisdiction over certain cases involving state tax issues because federal courts had proved unable to exercise jurisdiction over such cases in the restrained manner that comity requires. See *ante*, at 7. As the Court explains, Congress' decision to prohibit federal jurisdiction over cases within the Act's scope did not disturb that jurisdiction, or the comity principles that guide its exercise, in

cases outside the Act's purview. See *ante,* at 7–8; 12–17. I therefore agree with the Court that nothing in the Act or in *Hibbs* affects the application of comity principles to cases not covered by the Act. I disagree that this conclusion moots the need for us to decide "whether the TIA would itself block th[is] suit." *Ante*, at 16.

The Court posits that because comity is available as a ground for dismissal even where the Act is not, the Act's application to this case is irrelevant if comity would also support sending the case to state court. See *ante,* at 16–17. The Court rests this analysis on our recent holding in *Sinochem* that a court *may* dismiss a case on a nonmerits ground such as comity without first resolving an accompanying jurisdictional issue. See *ante*, at 16–17 (citing 549 U. S., at 425). The Court's reliance on *Sinochem* is misplaced, however, because it confuses the fact that a court *may* do that with whether, and when, it *should*. As *Sinochem* itself explains, courts should *not* dismiss cases on nonjurisdictional grounds where "jurisdiction . . . 'involve[s] no arduous inquiry'" and deciding it would not substantially undermine "judicial economy." 549 U. S., at 436 (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 587–588 (1999)). In such circumstances, *Sinochem* reiterates the settled rule that "the proper course" is to dismiss for lack of jurisdiction. 549 U. S., at 436. That is the proper course here.

The TIA prohibits federal courts from exercising jurisdiction over any action that would "suspend or restrain the assessment, levy or collection of [a] tax under State law." §1341. As the Court appears to agree, see *ante*, at 17, n. 13, this is such a case even under the crabbed construction of the Act in *Hibbs*, which the Court accurately describes as holding only that the Act does "not preclude a federal challenge by a third party who object[s] to a tax credit received by others, but in no way object[s] to her own liability under any revenue-raising tax provision,"

*ante*, at 14–15 (emphasizing that the "plaintiffs in *Hibbs* were outsiders to the tax expenditure, 'third parties' whose own tax liability was not a relevant factor"). This is not such a case, because the respondents here are in no sense "outsiders" to the revenue-raising state-tax regime they ask the federal courts to restrain. *Ibid.;* see also *Hibbs*, *supra*, at 104. Respondents compete with entities who receive tax exemptions under that regime in providing services whose cost is affected by the exemptions. Respondents thus *do* object to their own liability in a very real and economically significant way: The liability the state tax regime imposes on them but not on their competitors makes it more difficult for respondents to match or beat their competitors' prices. The fact that they raise this objection through the expedient of contesting their competitors' exemptions is plainly not enough to qualify them as *Hibbs*-like "outsiders" to the state revenue-raising scheme they wish to enjoin. If it were, application of the Act's jurisdictional bar would depend on little more than a pleading game. The Act would bar a federal suit challenging a state tax scheme that requires the challenger to pay more taxes than his competitor if the challenger styles the suit as an objection to his own tax liability, but would not bar the suit if he styles it as an objection to the competitor's exemption.

Because the Court appears to agree that even *Hibbs* does not endorse such a narrow view of the Act's jurisdictional bar, see *ante*, at 14–15, 17, n. 13, the "proper course" is to dismiss this suit under the statute and not reach the comity principles that the Court correctly holds independently support the same result, *Sinochem*, *supra*, at 436. Here, unlike in *Sinochem*, there is no economy to deciding the case on the nonjurisdictional ground: The same analysis that supports dismissal for comity reasons subjects this case to the Act's jurisdictional prohibition, even as construed in *Hibbs*. Compare *ante*, at 5–17, with

*Sinochem*, *supra*, at 435–436 (approving dismissal of a suit on *forum non conveniens* grounds because dismissal on personal jurisdiction grounds would have required the "expense and delay" of a minitrial on forum contacts). Given this, I see only one explanation for the Court's decision to dismiss on a "prudential" ground (comity), *ante,* at 16–17, rather than a mandatory one (jurisdiction): The Court wishes to leave the door open to doing in future cases what it did in *Hibbs*, namely, retain federal jurisdiction over constitutional claims that the Court simply does not believe Congress should have entrusted to state judges under the Act, see 542 U. S., at 113–128 (KENNEDY, J., dissenting).

That is not a legitimate approach to this important area of the law, see *ibid*., and the Court's assertion that our civil rights precedents require it does not withstand scrutiny. If it is indeed true (which it may have been in the civil rights cases) that federal jurisdiction is necessary to ensure a fair forum in which to litigate an allegedly unconstitutional state tax scheme, the Act itself permits federal courts to retain jurisdiction on the ground that "a plain, speedy and efficient remedy" cannot be had in state court. §1341. But where, as here and in *Hibbs*, such a remedy can be had in state court, the Court should apply the Act as written. See 542 U. S., at 113–128 (KENNEDY, J., dissenting).

Because I believe the Act forbids the approach to federal jurisdiction over state tax issues that the Court adopted in *Hibbs*, I would not decide this case in a way that leaves the door open to it even if the Court could find a doorstop that accords with, rather than upends, the settled principle that judges presented with multiple nonmerits grounds for dismissal should dismiss on jurisdictional grounds first. But the tension the Court's decision creates with this settled principle should be enough to convince even those who do not share my view of the TIA that the

proper course here is to dismiss this case for lack of jurisdiction because *Hibbs'* construction of the Act applies at most to the type of true third-party suit that *Hibbs* describes, and thus does not save this case from the statute's jurisdictional bar.