

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RICHARD A. LEVIN, TAX :

4 COMMISSIONER OF OHIO, :

5 Petitioner : No. 09-223

6 v. :

7 COMMERCE ENERGY, INC., ET AL. :

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9 Washington, D.C.

10 Monday, March 22, 2010

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:56 a.m.

15 APPEARANCES:

16 BENJAMIN C. MIZER, ESQ., Solicitor General, Columbus,
17 Ohio; on behalf of Petitioner.

18 STEPHEN C. FITCH, ESQ., Columbus, Ohio; on behalf
19 of Respondents.

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P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-223, Levin, the Tax Commissioner, v. Commerce Energy.

Mr. Mizer.

ORAL ARGUMENT OF BENJAMIN C. MIZER

ON BEHALF OF THE PETITIONER

MR. MIZER: Mr. Chief Justice, and may it please the Court:

Respondents are natural gas suppliers who object to the way Ohio taxes them. Their suit belongs in State court rather than Federal court for two independent reasons. First, principles of comity and federalism dictate that the State court should resolve challenges to the validity of their own tax laws. And second, the Tax Injunction Act squarely prohibits Federal courts from issuing declaratory judgments holding State tax laws unconstitutional.

Although either of these grounds would independently support reversal of the Sixth Circuit here, the analysis can really begin and end with the comity doctrine, because that is where the lower courts have shown confusion in the --

JUSTICE BREYER: Before you get into that, I

1 have a question that there may be an obvious answer to,
2 but I haven't found it. My understanding is -- it's a
3 standing question. My understanding is that they are
4 asking as relief, and the only relief they ask for, is
5 to raise the taxes of a competitor. Am I right?

6 MR. MIZER: That is how they have -- that is
7 the case, correct.

8 JUSTICE BREYER: Okay. If that's correct, I
9 have found no case that -- I haven't looked that hard,
10 but certainly no case in this Court -- that said there
11 is standing for a firm to challenge the taxes of a
12 competitor where the remedy is: Raise his taxes. If
13 there were standing for such a thing, it would -- I'm
14 surprised that there aren't competitors all over the
15 country doing business out of State bringing diversity
16 cases in Federal court, saying: My competitor's taxes
17 should increase; it's all very complicated, but the
18 Commissioner didn't properly follow State law.

19 Now, I have found no case, certainly not in
20 this Court, which said: Where all you want is to raise
21 the tax of a competitor, you have standing. So perhaps
22 this is well-settled that you can do it, but I thought I
23 would raise that for both of you at the beginning in
24 case there is something you want to say about it, which
25 might save me a little time looking it all up.

1 MR. MIZER: Well, I think there is a good
2 reason that there -- there aren't cases in the Federal
3 courts to that effect, but it's not a standing problem.
4 And to address the standing point directly, it's because
5 they do claim an injury that is cognizable. Under
6 Dennis v. Higgins, they are claiming a dormant Commerce
7 Clause injury.

8 JUSTICE BREYER: I have no doubt, and the
9 standing rule I think is clear, that if we're saying
10 because I am injured, and they have injury, you can't --
11 you must give me reduction in my tax. That's what those
12 cases say. I have no problem with that. Absolutely
13 clear. You can do it.

14 But where all you want is to raise somebody
15 else's taxes, that I had thought -- and probably
16 wrongly, but I had thought there is a prudential
17 standing rule that says you cannot bring such a lawsuit.
18 And I don't see why you should be able to. It seems to
19 me it would be a nightmare if you could, which doesn't
20 surprise.

21 So there we are. That's the question. And
22 you will tell me: No, it's all clear; they can do it.
23 And I would like some citation or something and explain
24 why they should be able to do it. But you don't want
25 to, anyway. It's really for them.

1 MR. MIZER: I am not aware of any prudential
2 standing rule, Your Honor, any case, but that's because
3 the Tax Injunction Act and the comity doctrine have
4 always prohibited such a case. And so that's why
5 there's a lack of citation in the --

6 JUSTICE KENNEDY: Well, I suppose in
7 discrimination cases, if there is a discrimination men
8 versus women one way to resolve it would be to have
9 either -- either rule apply to both sides.

10 MR. MIZER: That's right. And the Court has
11 said that in cases like Davis and McKesson, where a tax
12 credit has been struck down as unconstitutional for
13 either dormant Commerce Clause or equal protection
14 reasons. And this Court, in Davis and McKesson, said:
15 Well, you can extend the credit if you wish or you can
16 also contract the credit, but either way --

17 JUSTICE SCALIA: On the other hand, until
18 the Administrative Procedure Act was enacted, which --
19 which eliminated all prudential bars to standing -- it
20 clearly was the law that you could not complain about
21 preference, unlawful preference, being given by the
22 government under regulatory provisions to a competitor.
23 The law was: That's tough. There was no standing. And
24 that was a prudential law, I assume. And I don't know
25 why it's any different from the tax law.

1 MR. MIZER: And cases would have existed
2 challenging State tax laws, regardless of the APA for
3 Federal challenges, because the -- and those cases all
4 would have been adjudicated in the State courts, because
5 that is where State tax laws and State administrative
6 procedures are best challenged.

7 The -- the rule of comity holds that the
8 Federal courts should not entertain a challenge to a
9 State tax law where that challenge would either disrupt
10 the operation of the State tax regime or would intrude
11 into the meaning or application of the State tax law.
12 Both of those elements are true here. This suit is
13 disruptive because the suit goes to the very core --

14 JUSTICE SOTOMAYOR: -- State law is unclear
15 here that would require Federal interpretation?

16 MR. MIZER: At pages 27 to 33 of the blue
17 brief, we identify all of the ways in which the parties,
18 the State and the Respondents, dispute the application
19 and meaning of State tax law, particularly as to what
20 taxes should be compared for apples and oranges
21 purposes.

22 And the tax -- the Ohio tax question that's
23 at issue is: What is a franchise tax versus what is a
24 State tax?

25 There is also the disruption of the

1 application of State tax law here, because any remedy
2 that would be afforded would necessarily alter the way
3 that the State can -- can tax.

4 JUSTICE SOTOMAYOR: So why can't the Pullman
5 doctrine or the Burford doctrine, abstention doctrines,
6 be enough to counsel Federal abstention in this case?
7 Why do we have to create another exception to Hibbs and
8 not go to another established abstention doctrine?

9 MR. MIZER: The Court doesn't have to create
10 anything, Your Honor, because Fair Assessment and Great
11 Lakes already say that the Burford and Pullman
12 principles get sort of bonus points in the tax context.
13 And then --

14 JUSTICE SOTOMAYOR: So why did you -- did
15 you argue Pullman in the court below?

16 MR. MIZER: Yes, the principles of
17 abstention were argued in the district court and --

18 JUSTICE SOTOMAYOR: No, no, no, no. Did you
19 cite Pullman and did you argue it on a Pullman
20 abstention basis?

21 MR. MIZER: To be frank, I don't know if
22 Pullman was -- was specifically cited, but that's
23 because Fair Assessment itself, which was heavily cited
24 in the lower courts, incorporates the principles of
25 Pullman and Burford and says that these tax questions

1 raise -- that these tax challenges raise questions about
2 the meaning of State law, about the operation of a
3 complicated regulatory regime, and so they are better
4 left to the State court.

5 The -- the application of the State law here
6 is particularly disruptive, because the tax laws being
7 challenged intersect integrally with the regulatory
8 regime. Just to give one example, among the taxes that
9 Respondents are objecting to is the gross receipts tax,
10 which public utilities, the local distribution
11 companies, pay, but the non-public utilities like
12 Respondents do not pay.

13 The gross receipts tax is relevant on both
14 the tax and regulatory side of the ledger, because it's
15 a tax but it's then also a cost that as we explain at
16 page 6 of the blue brief, may be included in the gas
17 cost recovery formula for the rate that the public
18 utilities may charge their customers. And those rates
19 are approved by the Public Utilities Commission of Ohio.

20 So if the gross receipts tax is eliminated,
21 it will affect the regulatory side of things as well.
22 And that distinguishes this case from Hibbs.

23 JUSTICE ALITO: Do you think it's -- it's
24 correct -- in relation to Hibbs, is it accurate to say
25 that you think that this case is different from Hibbs

1 for essentially three reasons: That this one involves a
2 complicated analysis of State law and Hibbs did not;
3 that this one would potentially have a substantial
4 financial effect on the State and in Hibbs that would
5 not happen; and this case involves claims under the
6 dormant Commerce Clause and equal protection rather than
7 the Establishment Clause? Does that -- are those --
8 does that capture it or is there something more?

9 MR. MIZER: The first two especially capture
10 it, Your Honor. And I think the third point is really
11 just an additional explanation of the first two points,
12 because in an establishment clause challenge like Hibbs,
13 the remedy is often going to be very simple.

14 In Hibbs, for example, there was a credit
15 being challenged. And the Federal court could simply
16 pull the thread of that credit, and the rest of the
17 fabric of the Arizona tax scheme would remain intact.
18 Here, by contrast, if the thread of the gross
19 receipts -- sorry, of the sales tax and the commercial
20 activities tax is pulled, the fabric of the State's
21 taxation and regulatory regime will unravel.

22 JUSTICE ALITO: Well, suppose if this -- you
23 have the dormant Commerce Clause claim and it doesn't
24 require a complicated analysis of State law. You have
25 different rates of taxation, let's say, for two

1 different categories of entities, and it's really not a
2 very important tax credit, so pulling the thread isn't
3 going to have much effect. And this case -- then the
4 case would come out differently? Comity would not bar
5 that action?

6 MR. MIZER: I think it would be a much
7 closer case, Your Honor, but still there would be an
8 interest in allowing the State courts to resolve that
9 challenge, because as the Court has explained, when a
10 State court is -- is trying to address a constitutional
11 challenge that involves the application of State law, it
12 can engage in constitutional avoidance in ways that the
13 Federal courts cannot.

14 The State courts also have greater
15 competency, of course, with their own tax law, and they
16 have a greater remedial panoply available to them.

17 So, in your hypothetical, Justice Alito,
18 the -- the Federal court could not order a decrease in
19 the taxes of the challenger because that, as Hibbs
20 explains, would be revenue depleting, whereas if it were
21 in State court, the State court could decrease the
22 revenue -- sorry -- decrease the taxes of the
23 challenger, and then that would allow the State courts
24 most naturally to remedy the --

25 JUSTICE SOTOMAYOR: Let's assume that States

1 have a law that said, we are going to do different tax
2 schemes for African Americans than from whites. And
3 they do exactly what is done here. They are going to
4 tax on one thing but not on another. They are going to
5 give an exemption in one area, but not another.

6 Is that a case that would have to be -- an
7 equal protection challenge that would have to be decided
8 in State court?

9 MR. MIZER: Fair Assessment says in footnote
10 4 that if it doesn't -- if such a challenge doesn't
11 require scrutiny of the meaning and application of State
12 laws, then it may -- Fair Assessment suggests that such
13 a case might be able to proceed in Federal court.

14 But if the -- if the challenge does require
15 scrutiny of State law or resolution of -- of unclear
16 State law questions, then it should be in State court,
17 and there is no reason --

18 JUSTICE SOTOMAYOR: I don't know if that is
19 an answer to my question or not. I -- I -- the only
20 thing I changed in the hypothetical was that the
21 challenge was an equal protection challenge race --
22 based on a suspect classification. But the credit
23 system is no different. Would or would not that
24 require --

25 MR. MIZER: I see, Your Honor. And if it

1 were equally complicated, then it is a challenge that
2 should go to the State courts, because there is no doubt
3 that the State court can handle Federal constitutional
4 questions and along the way, they might be able to
5 construe the State law in a way that avoids the
6 constitutional shoals --

7 JUSTICE KENNEDY: And you reach that
8 conclusion under the comity principles of Fair
9 Assessment?

10 MR. MIZER: I do, but also because the Tax
11 Injunction Act would exclude the case if it would have
12 revenue depleting effects --

13 JUSTICE KENNEDY: Revenue depleting.

14 MR. MIZER: -- on the State coffers. And
15 the remedy might, in that case, have such an effect
16 if -- if the -- if the result is to tilt the balance
17 heavily against a party who then needs to have its own
18 taxes assessed.

19 JUSTICE KENNEDY: I am curious to know why
20 neither opinion in Hibbs addressed the comity principle
21 and I would like your view on that. I know what you are
22 thinking. Your answer is: Well, you tell me, --

23 (Laughter.)

24 JUSTICE KENNEDY: -- but, why wasn't that
25 addressed in your view?

1 MR. MIZER: Well, it was fully briefed in
2 Hibbs, and that is I think why the Court addressed
3 comity in footnote 9. And footnote 9 of Hibbs simply
4 says that the comity doctrine doesn't cover such a
5 challenge. And the explanation, I think, of footnote 9
6 is that the Court cited both Fair Assessment and Great
7 Lakes. And those cases stand for the proposition that
8 when a -- a tax challenge has a disruptive effect, for
9 all practical purposes, on the collection or
10 administration of the State tax regime, then comity bars
11 it.

12 And so when the Court in footnote 9 of Hibbs
13 said challenges are barred by comity if they arrest or
14 countermand State tax collection, it was -- it was
15 speaking about the kind of cases at issue.

16 JUSTICE GINSBURG: It wasn't brought up --
17 comity wasn't brought up in Hibbs because if the -- if
18 there was an alleged constitutional violation, then
19 there was only one way to go. The parochial -- the
20 payments to the parochial schools could not be -- had to
21 be eliminated, so there was no question of abstention
22 versus invalidation or doing something else that was
23 fancy. That's -- that's why this case is nothing like
24 that, because there was only one way -- only one cure.

25 But you mentioned here there were various

1 things. What -- the Federal court could -- is -- is
2 being asked to increase somebody else's taxes. That's a
3 very strange notion. But what could the State court do?
4 The same case in State court -- and let's assume there
5 is a constitutional violation, either the Commerce
6 Clause or the equal protection. What could the State
7 court do that a Federal court couldn't?

8 MR. MIZER: I think there are three options
9 available to the State court. First, it could decrease
10 the -- the taxes on the challengers, even if they don't
11 ask for such a decrease.

12 They could also increase the challenges --
13 the taxes on the local distribution companies, or they
14 can do what the Ohio Supreme Court has done in the
15 education context, for example, which is to declare
16 unconstitutionality and then leave it for the General
17 Assembly, the Ohio legislature, to fix the problem and
18 then come back with a remedy.

19 If -- if that kind of relief were ordered by
20 the Federal court, it would mean Federal court oversight
21 essentially of Ohio budgetary processes, which this
22 Court has repeatedly discouraged.

23 JUSTICE ALITO: May I come back to your
24 answer to Justice Ginsburg's question? Would it be
25 beyond the ability of the Arizona courts, had that case

1 been -- had Hibbs been brought in Arizona, to hold that
2 under whatever principles of severability Arizona has,
3 the tax credits for some private schools could not be
4 stricken without striking the entire provision?

5 MR. MIZER: I think the entire provision
6 would have to be stricken in Hibbs because of the nature
7 of the as-applied challenge there. They were saying
8 that all the money was going to private schools, private
9 religious schools.

10 JUSTICE ALITO: The point is that -- that
11 one possible -- if there was an Establishment Clause
12 violation, one remedy would be to prohibit credits for
13 payments made to religiously affiliated schools, but
14 allow the credits for other private schools. But under
15 principles of severability, couldn't an Arizona court
16 say that can't be severed from -- from allowing the
17 credits for payments to secular private schools?

18 MR. MIZER: That's probably right, Your
19 Honor, and the -- what it illustrates is that often
20 State courts have available to them remedies that
21 Federal courts may not, particularly when plaintiffs
22 have pleaded the case in such a way as to tie one hand
23 behind the Federal court's back.

24 JUSTICE ALITO: Doesn't that suggest Hibbs
25 should have come out the other way?

1 MR. MIZER: Well, to be frank, Your Honor,
2 the State of Ohio joined an amicus brief urging the
3 opposite outcome in Hibbs. But we are not urging the
4 overrule of Hibbs here. We think that, even on Hibbs'
5 own terms, the Tax Injunction Act applies here to
6 preclude this challenge in Federal court. And to return
7 to Justice --

8 JUSTICE KENNEDY: If -- just one more. If
9 the remedy is likely to be we will leave it up to the
10 legislature -- you had -- you had two or three different
11 optional remedies -- would we say that that is an
12 adequate State remedy?

13 MR. MIZER: Yes, I believe so, Your Honor.
14 Because so long as the challenger would be able then to
15 -- to seek some sort of contempt action if the -- if the
16 remedy were not --

17 JUSTICE KENNEDY: Contempt of the
18 legislature? Contempt did you say?

19 MR. MIZER: Of the -- of the tax
20 commissioner. If the tax commissioner is continuing to
21 collect unconstitutionally unbalanced taxes, then I
22 should think that there should be some enforceability
23 there.

24 But the adequacy of the challenge available
25 is -- is measured, as this Court explained in Rosewell,

1 purely by procedural measures. And so for -- in
2 Rosewell the question was whether or not the parties
3 could go to State court and would procedurally be able
4 to get access to State court to resolve their claim and
5 that is clearly true and no one contests that here.

6 The -- to return to Justice Sotomayor's
7 question about the -- the racial cases, that may seem
8 troubling, if a racial challenge is excluded from
9 Federal court, but -- but there is no doubt that State
10 courts can resolve such claims and in fact the Ohio
11 Supreme Court handles tax cases as a routine matter.

12 JUSTICE GINSBURG: Where is -- the cases
13 running up to Hibbs, those were all cases that involved
14 racial discrimination, and they were in the Federal
15 courts.

16 MR. MIZER: They were, Your Honor, and in --
17 in every case that we have examined one of two things
18 was true: Either the party was claiming standing not
19 based on the fact that he himself was subject to
20 unconstitutional taxes; or the party was not -- did not
21 have an adequate remedy in the State court. For
22 example, in the Griffin case this Court said that the
23 problem was that in Virginia nothing was being done to
24 remedy the -- the unconstitutional burdens imposed
25 there. And so the lack of an adequate remedy both under

1 the comity doctrine and under the Tax Injunction Act
2 allowed the plaintiffs there access to the Federal
3 court.

4 And so the comity rule that we are
5 advocating, which is clearly laid out in both Fair
6 Assessment and Great Lakes, would not have any effect on
7 those cases because of the lack of an adequate remedy.

8 JUSTICE BREYER: Is there anything -- I see
9 in their complaint, they ask for "such other relief to
10 which plaintiffs are entitled," and therefore the judge,
11 despite what they say, might just say: Well what you
12 are entitled to is you are entitled to pay fewer taxes.

13 Is that a plausible thing, in which case it
14 would interfere with the revenue collection of the
15 State.

16 MR. MIZER: We think --

17 JUSTICE BREYER: What is -- what's your --
18 you better give me your accurate assessment, not just
19 agree with me, because I would like to know what you --
20 I want to know both sides.

21 MR. MIZER: The Tax Injunction Act would bar
22 the Court, I think, from entering an order that says the
23 taxes on the challengers are decreased, which
24 illustrates the reason that the State of Ohio with its
25 sovereign interest in its own tax policy --

1 JUSTICE BREYER: But I have no idea -- why I
2 am asking the question is I have no idea or little idea
3 of the underlying State law merits. And my suspicion is
4 in about 10 or 15 minutes I will hear that the State law
5 merits are such that it's virtually impossible that they
6 are going to say to us: Pay fewer taxes. Rather they
7 will say to our competitors: Pay more taxes. So now is
8 your chance to reply to that hypothetical argument just
9 in case they make it.

10 (Laughter.)

11 MR. MIZER: Well, first of all, Your Honor,
12 the -- the merits of this case are very much like the
13 merits of General Motors Corporation v. Tracy, which
14 this Court decided about 13 years ago. But the merits
15 also illustrate the complexity of any remedy that --
16 that would be ordered in this case, because if it's so
17 simple as the Federal court simply saying that the local
18 distribution companies, the public utilities, now must
19 pay the sales tax and the commercial activities tax,
20 then suddenly those entities would be subject to five
21 taxes, a -- a much greater burden than is imposed on the
22 Respondents.

23 And then the General Assembly would have to
24 go back to the drawing board to adjust the taxes on the
25 local distribution companies. So even if the simple

1 remedy that they ask for is entered by the Federal
2 courts, still the State of Ohio has to respond by
3 readjusting its sales tax and its commercial activities
4 tax; and in that event it first of all could easily end
5 up in a net revenue loss for the coffers of the State of
6 Ohio.

7 It also would mean that the regulatory side
8 of thing would be affected, which brings us back to the
9 Burford principles we discussed earlier, because the
10 taxes, as I said, are integrally connected to the way
11 Ohio regulates public utilities. And those public
12 utilities have obligations to a captive market that the
13 Respondents don't have to meet. They serve customers in
14 their area no matter what, whereas Respondents don't
15 have to --

16 JUSTICE SCALIA: Yes, but this -- but this
17 doctrine, I -- I am not very sympathetic to that
18 argument because this is a doctrine that is directed to
19 the State collecting taxes, not to interfering with
20 State regulation. That -- that's a different doctrine.

21 MR. MIZER: But Your Honor, I think that
22 Great Lakes and Fair Assessment stand for the
23 proposition that when a Federal court issues an order
24 that invalidates a State tax law, that has a disruptive
25 effect on the collection of taxes; and that would be

1 true here because the State of Ohio would no longer be
2 able -- would not be able to collect five different
3 taxes from local distribution companies without being --
4 turning around and facing a new challenge on -- on
5 unconstitutionality of that burden by the local
6 distribution companies.

7 And so the -- the complicated nature of the
8 tax-regulation interplay here is all the more reason
9 that this case belongs in State court, for the State
10 courts to resolve those interconnected questions in ways
11 that they are fully equipped to answer.

12 The other factor that was relevant to the
13 Court's analysis --

14 JUSTICE STEVENS: I'm just a little puzzled.
15 I think you are giving the State court an awful lot of
16 power. Can it do it without new legislation? They have
17 to adjust these other taxes, maybe the expenses they
18 deduct in their regulatory filings and all the rest.
19 But I don't know that the State court has any more
20 authority to grant a judicial remedy than the Federal
21 court would have.

22 MR. MIZER: The State court might be able to
23 enter a remedy, Justice Stevens, that is so simple as
24 enjoining the sales tax exemption and the commercial
25 activities tax exemption for local distribution

1 companies, and then also saying that because the LDCs
2 have to pay those taxes they no longer have to pay the
3 gross receipts tax and the other two taxes that are
4 imposed on them. That's an order that the Federal court
5 couldn't issue because under principles of both the Tax
6 Injunction Act and the -- and comity --

7 JUSTICE STEVENS: But the Tax Injunction Act
8 goes to the authority or the jurisdiction of the court
9 to entertain the case in the first place. I'm not sure
10 the Tax Injunction Act prohibits the remedy that you
11 describe, because there is a difference between filing
12 the suit and entering relief after the suit's been
13 filed.

14 MR. MIZER: With respect, Your Honor, I
15 think that Great -- that Grace Brethren squarely stands
16 for the proposition that a Federal court shouldn't enter
17 an order that says that the State tax law is -- that
18 declares the State tax law unconstitutional and then
19 enjoins it. And that is exactly what would be required
20 in order to eliminate the additional taxes on local
21 distribution companies. And that analysis is done at
22 the front end, not at the end after the Court has
23 resolved the constitutional merits and then says, well,
24 I guess I am not able to enter the order that makes the
25 most sense here to resolve the constitutional question.

1 If there are no further questions I would
2 like to reserve the balance.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Fitch.

5 ORAL ARGUMENT OF STEPHEN C. FITCH
6 ON BEHALF OF THE RESPONDENTS

7 MR. FITCH: Mr. Chief Justice, and may it
8 please the Court:

9 Justice Breyer, if I can go directly to your
10 question with respect to standing. Standing has never
11 been raised in this --

12 JUSTICE BREYER: That's all right. It's in
13 the jurisdictional amount.

14 MR. FITCH: I understand, Your Honor. But
15 because it has never been raised. I do not have a good
16 answer for you. What I can say to the Court is that in
17 Hibbs -- recognizing Hibbs was an Establishment Clause
18 claim -- the Court struck down the credit. There is a
19 recent case out of the First Circuit in Coors where
20 Coors reversed their prior case out of -- involving the
21 Butler Act out of Puerto Rico, and that involved beer
22 distributors challenging a credit or an exemption that
23 Puerto Rico was --

24 JUSTICE BREYER: They might want to -- in
25 all the Court's cases, the challenger wanted -- he said:

1 I don't care; either make them pay or give me my money
2 back.

3 MR. FITCH: Well --

4 JUSTICE BREYER: So that -- that should be
5 your case, I would have thought. But you're not saying
6 it so you can get into Federal court. Now, that's how I
7 read it. And that seems -- that's worrying to me.

8 MR. FITCH: Well, Justice Breyer, so -- what
9 I would say is that --

10 JUSTICE BREYER: The Establishment Clause, I
11 would add, there is a lot of reason for thinking it's
12 special in respect to standing, because there is no
13 other way to challenge the Establishment Clause. And
14 that is a long-festering disagreement within this Court,
15 but I'm not sure you can apply these rules to everything
16 else.

17 MR. FITCH: And I understand that, Your
18 Honor. And I guess the point that I'm trying to make is
19 because that issue was not raised, based upon Hibbs,
20 based upon the decision in Coors, we did not see a
21 standing issue based upon this competitive situation
22 you're talking about. If in fact that is an appropriate
23 question for additional briefing, we would obviously
24 welcome that opportunity.

25 JUSTICE BREYER: But you see what is

1 worrying me. What's worrying me is, is there are
2 businesses all over the country and there's Federal tax
3 law, too. And suddenly people begin to think: Hey,
4 this is a terrific idea; I am going to go through my
5 competitor's tax returns and I will discover taxes they
6 should have paid but didn't, and all of a sudden we will
7 face a lot of lawsuits challenging other people's taxes.
8 That's what is worrying.

9 MR. FITCH: Okay. And I would disagree with
10 you, Justice Breyer, for this reason. There are already
11 substantial limitations on when this type of case can be
12 brought. We start with the TIA. It says if we are --
13 we can't restrain the collection of taxes. We have the
14 abstention doctrines that have been mentioned. We have
15 the fact that the Court in a merits situation has to
16 give deference to the States.

17 And so the point I'm trying to make is that
18 we believe this is a very narrow window. There is only
19 a very narrow window open. What we are doing is
20 challenging an exemption granted to a competitor.

21 JUSTICE BREYER: And this is not true of the
22 other cases. What do you think of the other half of
23 their argument? I'll have to think about the standing
24 thing to see if I want to press it or not. But the
25 other half is: Look at your case. Your case would just

1 be like -- just like the other cases, if you just said:
2 Give us a refund, as they did in the other cases.

3 But you haven't said that, because that
4 would run afoul of the Tax Injunction Act. Rather, what
5 you have said is: Raise their taxes. So the point of
6 the State is: Now, wait a minute. Leaving all of the
7 things aside, you asked for other appropriate relief,
8 and it's highly probable in such situations that a Court
9 could -- would say: Give them the exemption. And if
10 it's going to say, give them the exemption, hey, this is
11 now not within Hibbs. So what's your response to that?

12 MR. FITCH: Your Honor, I don't -- as my
13 friend Mr. Mizer said, I don't believe a court could
14 say: Give them an exemption.

15 JUSTICE BREYER: Why not?

16 MR. FITCH: It would be in violation of the
17 TIA.

18 JUSTICE BREYER: No, no. There's a lot of
19 things they could say --

20 MR. FITCH: It would interrupt -- interrupt
21 -- it would impede the collection of taxes.

22 JUSTICE BREYER: Of course. Of course.
23 Absolutely right. That's what worrying me. That isn't
24 the answer. That's the question. And -- and the --
25 it's what Justice Kennedy said in respect to

1 discrimination problems. Usually, either remedy is at
2 issue. You can't control the remedy because you asked
3 for all other appropriate relief. Ergo, it falls afoul
4 of the Tax Injunction Act. What's your response to
5 that?

6 MR. FITCH: And I -- I'm -- I'm sorry,
7 Justice Breyer. We are saying that if we ask for the
8 other relief, if we ask for us to get the exemption,
9 that would impede State taxes.

10 JUSTICE BREYER: You didn't ask only for the
11 other relief. You asked for such other relief to which
12 plaintiffs are entitled. And what they say -- now I
13 repeat the argument. Okay.

14 MR. FITCH: We did include that phrase. The
15 relief we are seeking, Your Honor, is the declaratory
16 relief and injunctive relief that we have spelled out
17 with respect to the exemption.

18 JUSTICE SCALIA: I think your --

19 JUSTICE GINSBURG: Suppose the answer --
20 suppose the answer --

21 JUSTICE SCALIA: I think your answer is that
22 relief that would violate the Tax Injunction Act is not
23 appropriate relief.

24 MR. FITCH: That's correct, Your Honor.

25 JUSTICE SCALIA: And therefore not covered

1 by your plea.

2 MR. FITCH: And that was not what we were
3 seeking.

4 JUSTICE SCALIA: Makes sense to me.

5 JUSTICE GINSBURG: Well, there's another
6 little problem. Do you know of any case where a benefit
7 that A enjoys is taken away from A in a suit where A is
8 not a party? I mean, you are fighting the Ohio tax
9 commissioner. You want to take a benefit away from
10 these LDCs, but they are not in the suit. Don't --
11 isn't there a little due process problem with that?

12 MR. FITCH: The response, Justice Ginsburg,
13 is this. Number one, in part it takes away a tax
14 benefit from the LDC; in part it takes away a tax
15 benefit from the customers of the LDC. I know that
16 doesn't make us any more sympathetic. But the sales tax
17 is paid by the customer.

18 Now, with respect to the joinder of
19 necessary parties, the motion that was filed by the
20 State, which started all of this 3 years ago after a
21 complaint, also included a motion to dismiss for failure
22 to join necessary parties. That has also never been
23 addressed. We responded to that. The court decided not
24 to refer to it. We made an argument that it was not
25 necessary in this case to join the LDC's. The Court has

1 deferred and did not rule.

2 JUSTICE GINSBURG: What was that argument?
3 That you're taking a benefit -- you're saying: The only
4 relief we want is to take this benefit away from people
5 who are not in the lawsuit?

6 MR. FITCH: Well, our argument was simply,
7 Your Honor, that we are challenging the exemption issued
8 by the State. If the -- two points, quickly. If the
9 LDCs -- at that time, four; now two -- were -- wanted to
10 be involved, they could certainly move to intervene.
11 The second point was if the Court, of course, ruled that
12 they were necessary parties, then we would have the
13 opportunity to adjoin them.

14 JUSTICE ALITO: Well, in Hibbs, were all the
15 beneficiaries of the provision that was challenged
16 parties --

17 MR. FITCH: I'm sorry?

18 JUSTICE ALITO: In Hibbs, were all of the
19 beneficiaries of the provision that was challenged
20 parties in that case?

21 MR. FITCH: They were not, Your Honor. They
22 were not.

23 JUSTICE ALITO: Was there a due process
24 problem there because of that?

25 MR. FITCH: I cannot identify a due process

1 problem there, Your Honor. There is an issue that has
2 been raised by several of the justices I'd like to
3 address, I think Justice Stevens in particular, with
4 respect to: What if this went to State court? And I
5 would disagree with my friend. If this went to State
6 court, we believe that under State law in the education
7 cases that Mr. Mizer were referring to. It's called the
8 Duroff case, and we have the citation if the Court would
9 like it. What the Court said was, once we declare the
10 matter unconstitutional, our job is at an end; that it
11 had to go back to the legislature. We challenged the
12 proposition raised in the amicus brief and raised today,
13 the notion that if this was in a State court, that a
14 State court could go rewrite this statute.

15 CHIEF JUSTICE ROBERTS: You conceded -- I'm
16 sorry. You conceded below, to quote footnote 2 of the
17 opinion below, that there is an adequate State court
18 remedy available.

19 MR. FITCH: In State court. We conceded
20 that we could bring this action in State court. We
21 could seek the injunction in State court. We could seek
22 the declaratory judgment in State court. But when we
23 speak to remedy, the point that we are trying to make,
24 Your Honor, because it is the remedy where the Federal
25 court interference becomes the greatest. What we are

1 saying is: We do not believe a State court has
2 necessarily brought our remedies. And our --

3 JUSTICE SOTOMAYOR: So you are claiming that
4 the Federal court could only power -- only power would
5 be to declare it unconstitutional and send it back the
6 State legislature to decide what to do? Or you are
7 claiming the Federal court has a power the State court
8 doesn't have, which is to order the exemption to be
9 rescinded? I'm not sure what your point is.

10 MR. FITCH: Okay. The point, Your Honor, is
11 this: We believe the Federal court and the State court
12 would have the power to declare under the dormant
13 Commerce Clause and Equal Protection Clause, that this
14 exemption is unconstitutional, that either court could,
15 at that point, enjoin prospectively the operation of
16 that exemption. The question then becomes: What
17 happens then?

18 JUSTICE BREYER: So then, in your opinion,
19 your next-door law firm, next to you, brings a case and
20 says: Mr. Fitch should pay \$1,000 more taxes next year
21 because he deducted \$2,000 that was illegal. You see
22 that? You see? Now I'm trying to bring it home. There
23 is something wrong with this picture, and I can't quite
24 put my finger on it.

25 JUSTICE SCALIA: Your next-door neighbor has

1 to be a competitor of yours before it would be an exact
2 parallel, right?

3 MR. FITCH: I believe that is correct,
4 Justice Scalia.

5 JUSTICE BREYER: I mean, your next-door
6 neighbor in your business, which would be a competing
7 law firm.

8 MR. FITCH: Yes. Yes. But if I can try to
9 bring that point home, because I --

10 JUSTICE BREYER: But they don't actually
11 bring you into the case.

12 (Laughter.)

13 MR. FITCH: If I could try to bring that
14 point home, Justice Sotomayor. What we say is we are
15 asking the Federal court to rule on the
16 constitutionality on our Federal claims, enjoin this
17 exemption and the court's work is at an end at that
18 point. What we believe will happen at that point is
19 that the legislature will be faced with a choice. How
20 to deal with this --

21 JUSTICE GINSBURG: Why should -- why should
22 the Federal court make that choice? I mean, in the --
23 in the Federal cases where extension versus invalidation
24 has come up, those were all Federal laws and the court
25 said in the interim, we are going to extend the benefit,

1 we are not going to take away benefits from anyone.
2 Every one of those cases they extended a benefit
3 until -- unless and until Congress acts, but there was
4 some comfort there because they were dealing -- the
5 Federal court is dealing with Federal legislation.

6 It seems to me that -- that there is that
7 choice, the State courts are much better equipped to say
8 what should happen in the interim until the legislature
9 acts.

10 MR. FITCH: We do not believe that the
11 Federal court could extend that benefit. I think we are
12 in agreement there, Justice Ginsburg. We --

13 JUSTICE GINSBURG: The State court could.

14 MR. FITCH: We questioned whether the State
15 could. We questioned whether if the State court found
16 it constitutional, whether under Ohio law the State
17 court could extend that benefit. We think this is a
18 legislative issue. And there is a point I need to make,
19 because in the briefs and in the argument today you are
20 saying there are two choice. The two choices are you
21 either extend the exemption to everyone or you eliminate
22 the exemption.

23 I need to make this point tying into
24 Mr. Mizer's comments about regulation. There is another
25 option which is the regulatory option. What we are

1 dealing with here is our utility mandate. It may be
2 that the legislature opts on a regulatory basis to
3 eliminate this problem and that goes to footnote -- the
4 footnote we have in the brief --

5 JUSTICE STEVENS: That raises another --
6 another problem for me. Your basic standing is
7 similarly situated competitors, one is being taxed and
8 the other is not. But you are not similarly situated
9 competitors because they are regulated utilities and you
10 are unregulated. Isn't that right?

11 MR. FITCH: No, Your Honor. No, Justice
12 Stevens, that's -- that is not correct and that is the
13 whole basis for our filing this complaint, if you looked
14 at the complaint. That is what the Court said in
15 General Motors v. Tracy.

16 JUSTICE STEVENS: Right.

17 MR. FITCH: And what our -- what our
18 complaint lays out is sea change of change, we have gone
19 from a regulated situation to essentially an unregulated
20 situation on the gas commodity piece. There are two
21 pieces. There is delivery, there is gas commodity. The
22 gas commodity piece has been essentially deregulated and
23 that is what the Court was focused on in Tracy.

24 What our complaint very clearly lays out is
25 we believe there has been a change, a factual change in

1 circumstance that will result in a different ruling in
2 Tracy.

3 JUSTICE SCALIA: Counsel, I -- I hate to
4 introduce another procedural glitch into this thing, but
5 as I -- as I understand it, the State's motion to
6 dismiss was under -- under 12(b)(1), which is a motion
7 to dismiss for lack of subject matter jurisdiction, and
8 that was granted by the court. The TIA is assuredly a
9 jurisdictional statute, but I had never thought that the
10 comity doctrine was a doctrine of jurisdiction. In
11 fact, by -- almost by definition it says the court has
12 jurisdictions but nonetheless should decline to exercise
13 any. You didn't make that objection, though.

14 MR. FITCH: I'm sorry, Your Honor?

15 JUSTICE SCALIA: You did not make that
16 objection.

17 MR. FITCH: We did not -- we did not make
18 that objection, I do not believe. That is the entire
19 discussion of Justice Brennan in his concurring opinion
20 in Fair Assessment, and we think it is an -- an
21 extremely important point.

22 The district court has jurisdiction in this
23 case. It has jurisdiction. The question is, does
24 comity -- should comity tell it not to use that
25 jurisdiction. And what we are really fighting about

1 here is what are those standards that a district court
2 is going to use to decide whether to -- to use comity to
3 not exercise that jurisdiction.

4 And what we are saying -- what we are saying
5 in our case is Hibbs did address comity. The issue was
6 before the Court in comity and Hibbs said, and now four
7 circuits have followed that ruling in Hibbs as well as
8 lower courts and have said, if you are not seeking to
9 impede State tax collection, comity does not bar --

10 JUSTICE GINSBURG: But that's because there
11 was only one way to go. Either the benefit is removed
12 or it's not. There wasn't the other possibility of
13 decreasing the taxes on your client. There wasn't an
14 extension versus invalidation. It was if the
15 constitutional claim was good, it had to be invalidated,
16 the credit had to be invalidated.

17 MR. FITCH: And -- and I think what we are
18 trying to say, Justice Ginsburg, in our -- in our case
19 is we are not trying to seek invalidation. We -- we --
20 we are not going to seek the benefit for us.

21 JUSTICE GINSBURG: It is not up to you to
22 make that decision, if the State can go either way. I
23 mean in the extension versus invalidation cases this
24 Court made it very clear, you could go one way or the
25 other, and that was a decision for the court to make,

1 not the litigant.

2 MR. FITCH: But, Your Honor, the point we
3 are making is that some court somewhere has to make the
4 decision whether this exemption violates the dormant
5 Commerce Clause in the equal protection case. And it
6 was our judgment that the best forum for that was in
7 Federal court.

8 And again, and I -- and I -- if I am not
9 responsive to your question, I apologize, but what we
10 are saying is that, we want to reach the merits on that
11 question of constitutionality.

12 And once that is done, the remedy is going
13 to lie with the State. We are not going to ask the
14 Federal judge to decrease our taxes. We question
15 whether a State judge could decrease our taxes. We want
16 that declaration and we want that injunction. That's
17 what -- that's what we are seeking in this case. And
18 we --

19 JUSTICE ALITO: Do you -- do you recognize
20 that comity is broader than the Tax Injunction Act, and
21 if it is, how do you justify your argument that would
22 essentially limit the comity doctrine to the contours of
23 the Tax Injunction Act?

24 MR. FITCH: Justice Alito, what the court
25 has said, not only this Court but the First Circuit said

1 in Coors, is what the Sixth Circuit says is that comity
2 extends broader than the TIA. What they point to
3 repeatedly is Fair Assessment, because Fair Assessment
4 got damages and it was on a comity basis that the Court
5 held in Fair Assessment that you couldn't get around
6 your own liability by bringing a damage claim. So
7 there's one example.

8 We believe to some extent, National Private
9 Truck Council is an example. Because in National
10 Private Truck Council, recall we are dealing with a
11 State court action, not a Federal court action. In a
12 National Private Truck Council what the court held was
13 under 1983, a State court -- a -- a -- a Federal court
14 would not order -- a State court was not obligated to
15 grant injunctive relief to grant attorneys fees under
16 1988, and that was based on comity.

17 In that case there was still an issue of tax
18 collection and impeding tax collection, but certainly
19 that appeared to us to be at least an example of where
20 comity would be brought in to TIA, because the TIA
21 didn't apply in -- in National Private Truck Council.

22 There was reference to Burford before, as
23 Justice Scalia mentioned. This is not an abstention
24 case. There is no question of State law that has to be
25 interpreted here. There is no doubt who pays the tax

1 and who doesn't pay the tax. There is no doubt who is
2 an LDC and who is not an LDC.

3 JUSTICE STEVENS: Let me just go back to my
4 question before. I understand your point about
5 regulation and nonregulation, but -- but your
6 competitors are subject to a different taxing regime
7 than you are; is that correct?

8 MR. FITCH: They are, Your Honor.

9 JUSTICE STEVENS: And isn't -- is not the
10 reason they are subject to a different tax regime is
11 historically they were in regulated utilities?

12 MR. FITCH: To -- to -- to some extent I
13 believe that's correct, Justice Stevens, but my response
14 would be this: If we want to get into them, what taxes
15 do they pay, versus what taxes do we pay -- that's a
16 merits question. That's a merits question.

17 Is this a compensatory tax? I mean, have we
18 made our case -- do they have a defense because they pay
19 different taxes than we do -- that we do, and therefore
20 the State should be permitted to do that? We would like
21 to reach that question. But that's a merits question,
22 that's not a -- not a jurisdictional question.

23 JUSTICE SOTOMAYOR: And you don't think that
24 the very question of what taxes you compare and don't
25 compare is a matter of interpreting State law? You

1 don't think that the meaning of State law in terms of
2 what is comparable or not, is not implicated by any of
3 these questions?

4 MR. FITCH: We -- we believe it is not,
5 Justice Sotomayor. You can -- you can look at the taxes
6 and see who they apply to. It -- it is not a matter --
7 I -- I strongly disagree with -- with my counterpart.
8 This is not a matter of interpretation. And one of the
9 justices asked the question about, was extension -- was
10 Pullman -- was Pullman ever raised? Pullman was never
11 raised. My recollection is that in the original motion,
12 they raised Younger, but they quickly dropped Younger
13 because there is no, you know, pending State -- pending
14 State proceeding.

15 JUSTICE GINSBURG: But the other view was
16 the Federal court should abstain. Abstention doctrines
17 are not the most easy to grant, so -- but they did bring
18 up abstention.

19 MR. FITCH: Well, but -- very early on they
20 raised it. They dropped it. It was -- it was not
21 followed up on, Your Honor.

22 So -- so the point we are -- we are --
23 here's the point we are trying to make, as we see it.
24 We believe the footnote in Hibbs was correct; in all of
25 the Court's prior cases there has been an issue of a

1 taxpayer trying to avoid their own tax and thus impede
2 State tax collection. We read Hibbs to say under the
3 TIA or comity, you are not precluded from original
4 Federal court jurisdiction if you are not attempting to
5 impede State tax collection.

6 We do not believe there is any significant
7 difference between our case or that analysis and the --
8 the case in Hibbs. As I said, that -- we now have four
9 circuits that have followed that.

10 But if I -- if I can bring us --

11 JUSTICE SOTOMAYOR: When you say that there
12 is no impeding of State court process or taxes, because
13 neither a Federal or State court could order the
14 reduction of the exemption --

15 MR. FITCH: That -- that is correct, Your
16 Honor.

17 JUSTICE SOTOMAYOR: That is -- even though
18 the practical consequence is that that is a remedy that
19 the State could choose, or must consider.

20 MR. FITCH: It -- it could, Your Honor.

21 But -- but --

22 JUSTICE SOTOMAYOR: That wasn't an issue,
23 however, in Hibbs.

24 MR. FITCH: That -- that's right. And the
25 line that is repeated in a number of cases is, the net

1 effect, whether you are talking about the credit in
2 Hibbs or whether you're talking about the exemption in
3 our case, is if the Court puts on that order and the
4 legislature does not come up with a remedy, is that the
5 State would have more money. In fact it is a question
6 to us, why -- since we have chosen to limit our remedies
7 by seeking a Federal court forum, it -- it --

8 JUSTICE BREYER: Or why isn't this a Hibbs?
9 You read the -- clearly the other side says to read the
10 footnote, not as destroying the comity principle. You
11 know, this is right on the merits. It still exists,
12 comity. And you say a strong case for withholding the
13 -- the Federal court's jurisdiction on grounds of comity
14 or withhold -- not hearing the case, is the natural
15 remedy -- which is to give you a refund -- is available
16 in State court. Go apply for a refund. No problem.

17 And that --- and the answer, you know, and
18 then you don't get into all the problem of trying to
19 assess somebody else's liability, et cetera. What is
20 wrong with that, precisely?

21 MR. FITCH: What's wrong with it, Your
22 Honor, is because what we are trying to do is fix a
23 problem. The question is, are we forced -- are we
24 limited only to seeking a refund?

25 JUSTICE BREYER: Why not?

1 MR. FITCH: What we're -- because that's
2 not.

3 JUSTICE BREYER: So not give it -- up to the
4 State? You could say give us a refund or raise their
5 taxes, one or the other. What's wrong with that?

6 MR. FITCH: The point that we tried to get
7 across in our brief, Your Honor, is that we are in a
8 competitive situation where we are trying to solve a
9 problem, the problem of policy that has been adopted in
10 Ohio or freeing up this --

11 JUSTICE BREYER: If doesn't solve the
12 problem for you if you get a refund?

13 MR. FITCH: It does not.

14 JUSTICE BREYER: Why not?

15 MR. FITCH: The problem remains.

16 JUSTICE BREYER: Why?

17 MR. FITCH: Well, the problem remains
18 because the exemption still exists.

19 JUSTICE BREYER: Well, no, no, you have it,
20 too -- they -- they work it out, so it equally applies
21 to everybody including your clients, so you are all on
22 the same footing. Now what is the problem with that?

23 MR. FITCH: And I guess we have to be
24 careful with the term "refund," because what I am saying
25 is -- is that we are dealing with primarily -- we have

1 three taxes to deal with. One of them is the sales tax,
2 that's what is paid by the consumer; that would require
3 all the consumers to seek, you know, refunds. It's much
4 cleaner in our view to simply go and get a determination
5 whether this exemption was unconstitutional.

6 We have forgone the --the request for
7 damages, we have forgone request for attorneys fees
8 because we have not alleged the 1983 claim. We are
9 trying to fix a problem.

10 Justice Breyer, if I can in wrapping this
11 up. We recognize -- we recognize that this Court has
12 competing interests that it has to weigh in resolving
13 this question. What we are trying to say is that as I
14 said a minute ago, if you put that in context, the
15 context is there are numerous protections that are
16 already in place for the State to protect them from
17 Federal court interference, and we believe that the
18 decision in Hibbs and the circuits that have followed
19 Hibbs strikes a proper balance for this reason: You --
20 you -- first of all you protect State tax collection,
21 which has been the historic concern of this Court.
22 Second, the broad jurisdiction that Congress has given
23 in 1331 in a declaratory judgment statute, is harmonized
24 with the historic comity concerns. Third, the Court --
25 as this Court spoke in -- in Hertz, just very recently,

1 as opposed to some vague intrusion test, you have got a
2 clear test that the Court can apply early on to decide
3 whether I got jurisdiction or not.

4 And finally, the historic right of a
5 plaintiff, which this Court has long recognized -- if
6 there is concurrent jurisdiction, the historic right of
7 a plaintiff to choose the forum in which to have their
8 claims adjudicated is preserved.

9 If there are no further questions I -- I
10 yield my time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Fitch.

13 MR. FITCH: Thank you, members of the Court.

14 CHIEF JUSTICE ROBERTS: Mr. Mizer, you have
15 five minutes remaining.

16 REBUTTAL ARGUMENT OF BENJAMIN C. MIZER

17 ON BEHALF OF THE PETITIONER

18 MR. MIZER: First off, Justice Scalia's
19 question about the 12(b)(1) dismissal motion. This
20 Court, just a couple of terms ago in the Sinochem case,
21 said that the -- that a Federal court can answer
22 questions of Younger abstention before answering
23 questions of Article 3 abstention. And so both of
24 these, both the comity and TIA questions in this case,
25 are threshold non-merits questions that can be reached

1 under -- under the Steel Company approach.

2 JUSTICE SCALIA: All threshold non-merits
3 questions are jurisdictional questions?

4 MR. MIZER: No. The point isn't that they
5 are jurisdictional; the point is that in Sinochem -- the
6 holding in Sinochem, for instance, was that --

7 JUSTICE SCALIA: What is the case you're
8 citing.

9 MR. MIZER: It's Sinochem v. Malaysian --
10 Malaysia International Shipping. And the holding was
11 that the -- the formula --

12 JUSTICE SCALIA: Do you have a volume
13 anywhere?

14 MR. MIZER: I don't have a volume number at
15 the moment.

16 JUSTICE SCALIA: Okay.

17 MR. MIZER: But the -- the holding was the
18 forum non conveniens doctrine can be addressed before
19 jurisdictional questions, and along the way the Court
20 said that Younger -- specifically said that Younger can
21 be answered before Article 3 standing.

22 JUSTICE SCALIA: Okay, fine. It can be
23 answered before jurisdictional questions, but you moved
24 to dismiss for want of jurisdiction.

25 MR. MIZER: Well --

1 JUSTICE SCALIA: And -- and that is not a
2 basis for dismissal here. The -- the basis is failure
3 to state a claim, I guess, on which a Federal court can
4 grant relief. But I -- anyway.

5 MR. MIZER: Well, in any event, Your Honor,
6 we do submit that the Tax Injunction Act and the
7 jurisdictional doctrine which would prevail.

8 JUSTICE SCALIA: That is so -- okay.

9 MR. MIZER: And on Justice Stevens' question
10 about the similarly situated or not similarly situated
11 nature of public utilities and nonpublic utilities,
12 Mr. Fitch has pointed to the continuing deregulation in
13 the wake of General Motors Corporation v. Tracy. But as
14 the Ohio Supreme Court just explained in the Columbia
15 Gas case that we cite in our brief, that continuing
16 deregulation does not change the -- the fundamental
17 holdings in Tracy: That when there is a regulatory
18 burden imposed on a public utility to serve a captive
19 market, that makes that entity not similarly situated to
20 other entities.

21 And the other point about Tracy and Columbia
22 Gas is that both of those challenges came up to this
23 Court through the lower courts, through the State courts
24 of Ohio. And so the State courts are perfectly capable
25 of handling this case.

1 JUSTICE SOTOMAYOR: Could you answer your
2 adversary's point that neither the Federal nor the State
3 courts would have the power to -- to order the reverse,
4 to order the exemption to be eliminated vis-à-vis -- or
5 to order them to have the exception? They are claiming
6 that's a -- even in State court, that would not be a
7 remedy that could be ordered.

8 MR. MIZER: I disagree with that contention,
9 Your Honor. The -- Ohio's courts have struck down tax
10 credits on dormant Commerce Clause and equal protection
11 grounds, and so there is precedent for Ohio courts
12 dealing with a challenge like this. It provides no
13 citation of the inability of State courts --

14 JUSTICE SOTOMAYOR: Can you -- can you give
15 me the cite for that case?

16 MR. MIZER: Sure. The MCI Telecom
17 Corporation v. Limbaugh. It's available at 625
18 Northeast 597, and that's a 1994 Ohio case. Also, SSA
19 Folio Collection v. Tracy at 73 Ohio State Third 119.
20 The Seligman citation, Justice Scalia, is at 549 United
21 States 422.

22 JUSTICE BREYER: Have you found any
23 authority on the following proposition: That a
24 plaintiff, an out-of-State company, brings a suit in
25 Federal court, where the normal relief would be to give

1 him a refund. He says: I don't want a refund; I just
2 want a declaration; I want to you declare this
3 unconstitutional. Have you found any case like that?

4 MR. MIZER: Yes. I think Mr. Fitch was
5 correct to cite the Coors Brewing and U.S. Brewers cases
6 out of the First Circuit. And those cases illustrate
7 the point that Justice Alito asked about, which was the
8 continuing scope of the comity doctrine, because --

9 JUSTICE BREYER: Wait. Wait. Forget
10 comity. I'm just asking you -- I want to read the right
11 authority. Can a person, in other words, get around the
12 Tax Injunction Act by pleading his claim and just
13 saying: I don't want an injunction; all I want is a
14 declaration? It seems to me it should have come up in
15 history. So I can have the First Circuit cases to look
16 at. Anything else?

17 MR. MIZER: The First Circuit cases are the
18 most on point, but the other sister circuits who have
19 joined the First Circuit in the circuit split at issue
20 in this case hold to the similar effect, and those --

21 JUSTICE BREYER: Well, then why don't they
22 win? Because their first thing, they say: Declaration.
23 They just want a declaration. Strike their second
24 claim. All they want is a declaration.

25 MR. MIZER: Because of Grace Brethren, Your

1 Honor. If we are talking about the Tax Injunction Act,
2 Grace Brethren holds that even a declaration of
3 unconstitutionality is problematic under the Tax
4 Injunction Act.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:55 a.m., the case in the
8 above-entitled matter was submitted.)

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