No. 02-1809

In The
Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether either the Tax Injunction Act, 28 U.S.C. § 1341, or principles of federal-state comity deprive district courts of jurisdiction to consider challenges to unconstitutional state tax credits.

STATEMENT OF THE CASE

The Arizona Private-School Tax-Credit Program

This case involves an Establishment Clause challenge to an unusual Arizona statute, enacted in 1997, that uses state income-tax credits to provide tuition funding for non-public primary and secondary school education, but that does so in a way that does not permit parents full freedom to use the funding at non-religious schools.[1] Under the statute, all Arizona individual taxpayers, whether or not they have children in school, may satisfy part or all of their state income-tax liability each year by paying up to $500[2] of the income taxes due to the state for that year to a "school tuition organization" (STO), rather than to the Arizona Department of Revenue. Each taxpayer who makes such a payment receives a credit against income taxes for the entire amount transferred to the STO. The STO, in turn, must use those tax payments to provide scholarships for students attending non-public schools, including religious schools.

At the time suit was brought in this case, approximately thirty-five STOs had been established to take advantage of the Arizona tax-credit program. Almost all of these STOs have been established by religious organizations and are specifically religious in nature – they make scholarship grants only to students attending schools of a particular religious denomination and they may restrict their grants to students of that denomination. Joint Appendix (J.A.) 12. In fact, the STO that received the largest amount of tax-credit revenues in 1998 (the first year of the statute's operation) was the Catholic Tuition Organization of the Diocese of Phoenix, which restricts its scholarship grants to students attending Diocese schools. Joint Appendix (J.A.) 10-11. The second largest STO recipient of tax-credit revenues that year was the Arizona Christian School Tuition Organization, which restricts its scholarships to students attending "evangelical" Christian schools in

Arizona. J.A. 11. The third largest recipient was the Brophy Community Foundation, which restricts scholarships to students attending one of two single-sex Catholic schools in Phoenix. J.A. 11. Other STOs include the Christian Scholarship of Arizona, the Northern Arizona Christian School Scholarship, and the Higher Education Lutheran Program. J.A. 12. In the first full year of the Arizona statute's operation, at least 94% of the tax-credit funds transferred to STOs went to such religion specific STOs. J.A. 10. Individuals who owe income taxes to the state may thus direct that a substantial portion of those taxes be used to support only students of a particular religious denomination or only students attending religious schools of a particular religious denomination. Taxpayers may even designate the particular student or students who are to receive scholarships out of their taxes, so long as they do not designate their own dependents. A.R.S. § 43-1089(D).

As the Arizona tax-credit program is administered, it differs significantly from the Ohio voucher program upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Unlike the voucher program in *Zelman*, in Arizona STOs may not defray public school academic fees[3] and they are permitted to grant private-school scholarships without regard either to financial need or the quality of the public school a student applicant would otherwise attend. In Arizona, tax-credit revenues may be and are used to subsidize religious-school tuition for students from affluent families, for students who are already attending religious schools, and for students in public school districts with excellent schools.[4] The Arizona program also does not insure that scholarships will be

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1 Ariz. Rev. Stat. § 43-1089. The text of § 1089 is reproduced in the Appendix to the Petition for Certiorari (Pet. App.) 37-38.

2 The amount for married taxpayers filing jointly is $625. Ariz. Rev. Stat. § 42-1089(A)(2); Pet. App. 37.

3 Arizona does have a separate program under which a smaller tax credit ($200) is given for payments supporting public school extracurricular (not curricular) activities, such as class trips. Ariz. Rev. Stat. § 43-1089.01. Parents can use these credits to pay activity fees so that the fees are paid by the state, at no cost to the parent.

4 Parents whose children attend a religious school may also engage in a "contribution exchange," where the parents of student A designate a $625 scholarship at the school for student B, while the parents of B do the same for student A. Each of these $625 "contributions" lowers each couples' state income taxes by $625 with the result that, at no cost to themselves, each couple lowers its religious-school tuition costs by $625, and the state's income tax revenues decline by $1,250. J.A. 13-14. Parents may defray their entire religious-school tuition cost if they get a sufficient

available to students wishing to attend non-religious schools. Since almost all tax-credit funds are controlled by religion specific STOs, parents who wish to send their child to a non-religious private school may be unable to find an STO willing or able to make a grant to a student attending that school. J.A. 13.

The History of This Litigation

Respondents challenged the Arizona program, as applied, in the United States District Court for the District of Arizona.[5] Basing their federal cause of action on 42 U.S.C. § 1983, and federal jurisdiction on 28 U.S.C. §§ 1331 and 1342 (a), respondents sought declaratory and injunctive relief against the Director of the Arizona Department of Revenue prohibiting the continued use of tax-credits to fund religious education. J.A. 7-16. Petitioner moved to dismiss on the basis of the federal Tax Injunction Act, 28 U.S.C. § 1341, and the Eleventh Amendment. J.A. 17. The district court granted this motion, holding that respondents' suit constituted an attempt, barred by the Act, to have the federal district court restrain the "assessment" of state taxes. The court held, alternatively, that principles of federal-state comity prohibit federal district courts from interfering with a state's

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number of taxpaying friends and associates to designate their child as the recipient of an STO scholarship. The $625 "contributions" to this scholarship come at absolutely no cost to the "donors."

5 Prior to the effective date of the Arizona statute, litigation challenging it on its face was brought, via special action, directly in the Arizona Supreme Court. That court held, by a three to two vote, that § 1089 was not unconstitutional under either the Arizona or United States Constitution. *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). The administration of § 1089, however, differs significantly from assumptions made by the Arizona Supreme Court in *Kotterman* regarding the operation of the statute. Among other things, the *Kotterman* court appeared to assume that all STOs would make scholarships available without regard to the religious or non-religious character of the private school a student wished to attend. The *Kotterman* court also had no information before it regarding whether STOs would take financial need, public school quality or religious affiliation into account in awarding scholarships, nor did it know of the overwhelming percentage of tax-credit scholarship aid that would be channeled through religion-specific STOs, with the result that tax-credit scholarships to non-religious schools may not be available. The case now before the Court challenges § 1089 as applied, relying in large part on these aspects of the statute's application.

Neither the current plaintiffs nor the Arizona Civil Liberties Union were parties to the *Kotterman* litigation in the Arizona Supreme Court. Petitioner did not invoke the *Kotterman* litigation as a basis for his motion to dismiss, but relied entirely upon the Tax Injunction Act and the Eleventh Amendment. J.A. 17-26. The district court relied solely on the Act and comity in finding a lack of subject-matter jurisdiction, without reaching the Eleventh Amendment contention. Pet. App. 36. The issues presented to the Court in this case are therefore identical to those that would arise had § 1089 never been facially challenged in state court.

ability "to administer its taxing system in accordance with the state's priorities and needs." Pet. App. 27-23.

The court of appeals unanimously reversed. Pet. App. 11-26. It held that the district court's decision that respondents' suit sought to restrain the "assessment" of Arizona's income tax within the meaning of the Tax Injunction Act was "supported neither by any precedent interpreting 'assessment' in this manner, nor by the meaning of the word itself." Pet. App. 16. Nor did respondents' suit involve any "violation of the purposes or policy underlying the Tax Injunction Act," which were to bar federal district courts from preventing a state's collection of tax revenues. Pet. App. 18. The court explained that the invalidation of a tax credit, unlike the invalidation of a tax or a collection method, "does not adversely affect the state's ability to raise revenue." Pet. App. 20.

The court of appeals also rejected the district court's alternative use of the principle of federal-state comity to preclude federal jurisdiction. Pet. App. 23-25. The appeals court recognized that this Court has twice used comity to bar district court jurisdiction in cases in which the constitutionality of a state tax law was challenged.[6] Both of these cases, however, were ones "in which the plaintiffs sought to stop the collection of a tax." Pet. App. 23. The tax provision challenged in the instant case, by contrast, "is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes . . . and would, in fact, produce substantial additional revenue for the state." Pet. App. 26. Arizona had identified "no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional." *Ibid*.

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6 The cases are *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943), and *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), discussed at _____, infra

Petitioner did not file a petition for rehearing or rehearing *en banc* in the court of appeals. After the time to petition for rehearing had expired, the court of appeals, at the *sua sponte* request of a judge of the circuit, directed the parties to file briefs regarding whether the case should be reheard *en banc*. Pet. App. 1. With Judges Kleinfeld and O'Scannlain dissenting, Pet. App. 2-10, the court voted against *en banc* reconsideration. Pet. App. 1.

SUMMARY OF ARGUMENT

Congress did not intend the Tax Injunction Act to prohibit federal district courts from exercising jurisdiction in all cases concerning the constitutionality of state tax laws. The Act applies, instead, only to federal lawsuits in which the relief sought would temporarily or permanently stop a state from collecting taxes. The Act, therefore, and the associated principle of federal-state comity on which petitioner in this case alternatively relies, do not prohibit federal district courts from adjudicating constitutional challenges to state tax credits, since the invalidation of a credit will not ordinarily interfere in any way with a state's ability to continue to assess, levy and collect its tax revenue.

Petitioner and his *amici* contend that tax credit challenges are subject to the Tax Injunction Act (or the associated principles of comity) because the Act applies whenever the relief sought in federal court would either affect the "bottom line" tax liability of any state taxpayer, or "any aspect" of state tax administration. These contentions are erroneous. The text, legislative history and consistent judicial interpretation and application of the Act show that it applies only when a lawsuit seeks temporarily or permanently to withhold taxes from a state—relief that a constitutional challenge to a tax credit does not request.

The text of the Act does not support petitioner's contention. The Act provides that a district court shall not enjoin, the "assessment, levy or collection" of state taxes. This Court has correctly and repeatedly held that this language means to bar district court jurisdiction only when suits would "stop…the collection of taxes." Suits seeking to invalidate tax credits have no such effect.

The legislative history of the Act confirms this interpretation. Congress enacted the Tax Injunction Act in 1937 to prevent state taxpayers from using federal court litigation to enable them to withhold taxes from the state "thereby disrupting government finances." This explicit revenue-protective purpose has no application to a tax credit challenge like that in the present case.

Judicial interpretations and applications of the Tax Injunction Act are in complete accord. This Court has, on numerous occasions, explained that the Act is a "vehicle to limit [] federal court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). The Court has itself on at least three occasions adjudicated the merits of important federal-court constitutional challenges to state tax credits or deductions. A large number of cases have challenged state tax credits or exclusions in federal court, without objection to jurisdiction by the state defendants. In the rare cases in which district court jurisdiction has been challenged, its existence has been confirmed. With the exception of one Fifth Circuit decision rendered after the petition for certiorari here was filed, the courts of appeals have uniformly held that the Tax Injunction Act applies only when district courts are requested to "interfere with the collection of state taxes." *See, e.g.*, *Dunn v. Carey*, 808 F.2d 555, 557 (7th Cir. 1986) (Easterbrook, J.). No case prior to the district court decision in this case had ever applied the Tax Injunction Act to a federal challenge to a state tax credit.

Petitioner contends that the decision below is in conflict with settled law, citing cases in the First, Fifth, Sixth and Eleventh Circuits. The settled law, however, prior to the district court decision below and the recent Fifth Circuit decision, has been that the Act does not bar such challenges. The cited cases from the First, Sixth and Eleventh Circuits do not involve constitutional challenges to tax credits and are clearly distinguishable on other grounds from the present case. The Fifth Circuit case, decided after the court of appeals opinion in this case, is the only Court of Appeals decision applying the Tax Injunction Act to a tax benefit challenge.

In its *amicus* brief, the United States correctly contends that the meaning of the Tax Injunction Act is informed by the interpretations that have been given to the 1867 federal Anti-Injunction Act, 26 U.S.C. § 7421(a), which uses similar language to deprive district courts of jurisdiction to restrain the collection of federal taxes. Interpretations and applications of that Act,

however, have repeatedly and expressly *excluded* attacks on the validity of federal tax credits, deductions and exemptions from the ambit of the Anti-Injunction Act.

Petitioner argues that, even if the Tax Injunction Act does not bar district court jurisdiction here, principles of federal-state comity preclude the district court from addressing the merits of respondents' constitutional challenge. This Court's cases applying comity to state tax cases, however, do so only because the relief requested in those cases would have directly interfered with a state's ability to collect tax revenue. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). No aspects of the relief requested in the present case would create any undue burden on, or intrusion into, state affairs.

Finally, the inapplicability of the Tax Injunction Act is particularly important because tax credits have, in the past, been a device through which states and localities have at times sought to avoid compliance with federal constitutional commands. In the wake of *Brown v. Board of Education,* 347 U.S. 483 (1954), for example, resistance took the form of tax credits for contributions to racially discriminatory schools, or tax exemptions for racially segregated institutions. Arizona, in this case, has used tax credits to implement a school voucher scheme that differs significantly from that approved by the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As administered, the Arizona scheme does not provide parents with full freedom to use state tuition support at non-religious as well as religious private schools. State funding programs should not be immunized from federal judicial jurisdiction because they use tax credits, rather than more traditional funding mechanisms.

ARGUMENT

I. THE TAX INJUNCTION ACT DOES NOT PRECLUDE FEDERAL DISTRICT COURT CHALLENGES TO UNCONSTITUTIONAL STATE TAX CREDITS

Introduction

Respondents have invoked the civil rights jurisdiction of the federal District Court for the District of Arizona in order to challenge the constitutionality, under the First Amendment's Establishment Clause, of Arizona's use of state income-tax credits to fund religious-school education. Original federal jurisdiction has, without objection, repeatedly been invoked for that and similar purposes despite the enactment of the Tax Injunction Act in 1937. Indeed, this Court's two leading cases addressing the constitutionality under the Establishment Clause of state income-tax credits and deductions for religious school tuition – *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (tax credits), and *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions) – were both initiated through litigation begun in district courts. And in *Griffin v. Prince Edward County*, 377 U.S. 218, 232-233 (1964), a constitutional challenge to state tax credits used to support school racial segregation, the Court had "no doubt of the power" of the district court.

The explanation for the continued recognition of this federal district court jurisdiction, despite the 1937 enactment of the Tax Injunction Act, is straightforward. That Act withdraws district court jurisdiction over suits by taxpayers only if such suits seek to "enjoin, suspend or restrain" the "assessment, levy or collection" of "any tax under state law." 28 U.S.C. § 1341.[7] The Act was meant to prevent state taxpayers from using the federal courts to prevent the state from imposing or collecting taxes from them. Constitutional challenges to state tax credits, deductions and similar tax benefits, however, are not suits by taxpayers seeking to postpone or avoid the payment of state taxes. Such suits thus do not seek to "enjoin, suspend or restrain" the "assessment,

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7 The Act applies only where "a plain, speedy and efficient remedy may be had" in the courts of the state. 28 U.S.C. § 1341. That issue is not involved in this case.

levy or collection" of taxes. They seek, instead, to prohibit the state from unconstitutionally excusing some taxpayers from paying taxes that would otherwise be due. If a challenge to a tax credit is successful, the tax in question is not enjoined, restrained or suspended – it remains in full force.

In this Court's most recent statement on the subject – Justice Ginsburg's opinion for a unanimous Court in *Jefferson County v. Acker*, 527 U.S. 423, 433 (1999) – the Court thus explained that the Tax Injunction Act applies only to suits "to stop . . . the collection of taxes." Identical explanations appear in this Court's opinions in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (Brennan, J.) (Tax Injunction Act is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a concern as the collection of taxes"); *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (O'Connor, J.) (Declaratory judgment that state taxes are unconstitutional is prohibited by the Tax Injunction Act because such a judgment "'may in every practical sense operate to suspend collection of state taxes until the litigation is ended'" (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943))); *Arkansas v. Farm Credit Servs. of Cent. Arkansas,* 520 U.S. 821, 823 (1997) (Kennedy, J.) (Tax Injunction Act restricts the "power of federal district courts to prevent collection or enforcement of state taxes"); *see also Dunn v. Carey*, 808 F.2d 555, 557 (7th Cir. 1986) (Easterbrook, J.) ("The Tax Injunction Act applies only to requests that federal courts interfere with the collection of state taxes"); *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (Friendly, J.) (Congress meant to forbid federal restraint of "methods . . . that would produce money or other property directly [to the state]").

Neither the Tax Injunction Act nor the associated principle of comity upon which petitioner alternatively relies had thus ever been used, prior to the district court's decision this case, to deprive federal courts of original jurisdiction to consider challenges to the constitutionality of state tax

credits. On the contrary, such challenges have repeatedly been brought and adjudicated in federal district courts, reviewed on the merits in the courts of appeal, and, on at least three occasions, reviewed on the merits in this Court, without federal jurisdiction being questioned by the state litigants and without any court ever having held (or any opinion ever having argued) that federal jurisdiction was precluded.[8] In the rare case where federal jurisdiction has been questioned by a state defendant, jurisdiction has been affirmed. *See*, *e.g.*, *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996). In *Rojas* the Tax Injunction Act was held to be inapplicable to a constitutional challenge to a tax exemption because the suit would not "'operate to suspend collection of taxes'". *Id.* at 159 (quoting *Grace Brethren Church,* 457 U.S. at 408).

Despite this completely settled law, petitioner and his *amici* now seek to have the Court hold that the Act prohibits federal challenges to the constitutionality of state tax credits because the Act applies whenever any taxpayer's liability would be changed or whenever any "aspect[] of state tax administration" is involved, regardless of whether there is any "interference with the collection of revenue." Pet. Br. 20. If this contention is correct, the Court's landmark Establishment Clause decisions in *Mueller v. Allen* and *Committee for Public Education v. Nyquist* were rendered without subject-matter jurisdiction, as was the Court's desegregation ruling in *Griffin v. Prince Edward County.* Likewise, the large number of lower federal court cases adjudicating constitutional challenges to state tax credits since enactment of the Tax Injunction Act were all similarly decided without subject-matter jurisdiction.[9]

Petitioner's proposed new interpretation of the Tax Injunction Act is, however, demonstrably incorrect. The text and legislative history of the Act make clear that this and other courts have

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8 *See infra*, at _____.

accurately concluded that the Act bars federal jurisdiction over constitutional attacks on state tax laws only when those attacks would temporarily or permanently stop the state from collecting tax revenue. Federal courts have acted on that assumption for more than sixty-five years. If the well-established federal jurisdiction to prevent states from using tax credits to accomplish unconstitutional purposes is now, for some reason, to be withdrawn or modified, that decision lies with Congress, not this Court.

A. The Text And Legislative History Of The Tax Injunction Act Show That The Act Does Not Apply To Challenges To Tax Credits, But Only Where The Relief Sought Would Prevent A State From Collecting Tax Revenue.

The Statutory Text

The Tax Injunction Act 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.

28 U.S.C. § 1341.

On their face, these words have no application to a federal constitutional challenge to a state tax credit. In such suits, the district court is asked to order state tax officials not to permit taxpayers to claim the challenged credit when computing their tax liability. That kind of judicial relief in no way "enjoin[s], suspend[s] or restrain[s]" a state from "assess[ing], levy[ing] or collect[ing]" its income tax. *Id.* As the Court explained in *Jefferson County v. Acker*, the Act "[b]y its terms" bars "suits *to stop* ('enjoin, suspend or restrain') the collection of taxes." 527 U.S. 423, 433 (1999) (emphasis added). The invalidation of a tax credit does not stop, or in any way suspend or interrupt, the assessment, levy or collection of a state tax.

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9 Although the Tax Injunction Act's language restricting the district courts' "jurisdiction" was removed in the 1948 statutory revision, "the Act continues to be interpreted as 'jurisdictional' and hence nonwaivable." FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4TH ED. 1996) p. 1217.

Petitioner argues at length (Pet. Br. 10-19) that a taxpayer's claim of an income-tax credit is part of the process of "assessing" the income tax due for purposes of the Tax Injunction Act. Petitioner reads "assessment" as referring to " 'the process of calculating a person's final tax bill, after all deductions and credits are accounted for.'" Pet. Br. 11-12. "Assessment," in petitioner's view, is "any calculation or adjustment that affects the taxpayer's bottom-line liability." *Id*. at 16.

The term "assessment" is used in the law of taxation in a wide variety of ways. In the property-tax context, "assessment" ordinarily refers to the process through which the taxing authority assigns a taxable value to the real or personal property to be taxed. The assessed value is then multiplied by the applicable tax rate in order to calculate the amount of taxes due.

Income taxes, however, are commonly self-assessed – the taxpayer, rather than the taxing authority, makes the relevant calculations in the first instance. If the term "assessment" is to be applied to a part of the income taxing process in the same way as it is ordinarily applied to property taxes, the "assessment" of income taxes would appear to be the determination (either initially by the taxpayer or subsequently by a government auditor) of the amount of taxable income. The income-tax rate is applied to that assessed amount of taxable income to arrive at the amount of tax. Under that approach, tax credits, which are applied to lower the taxpayer's tax bill after the amount of tax is computed, have nothing whatsoever to do with the "assessment" of the income tax.

But even if petitioner is correct is arguing, as he does, that "assessment" occurs in the income-taxing process only in the calculation of "a person's final tax bill, after all deductions and credits are accounted for," the fact remains that a suit challenging the constitutional validity of an income tax credit does not seek "enjoin, suspend or restrain" that assessment. In *Jefferson County,* the Court explained that those words refer to suits seeking "to stop" the collection of taxes. 527 U.S. at 433. As we demonstrate in the next section of this brief, preventing district courts from stopping the collection of taxes was clearly the purpose of Congress in enacting the Tax Injunction Act. If a

suit to invalidate tax credits is successful, however, the state's tax assessment process will not be stopped; the assessment will instead proceed with full effectiveness: Every taxpayer who would have been assessed income taxes if the challenged credit were not invalidated will still be assessed income taxes; some taxpayers will be assessed a greater amount of taxes, and some taxpayers who would not be assessed taxes at all if permitted to use the credit will, instead, be subject to an income-tax assessment. The amount of tax payable by some taxpayers would increase, but that can hardly be characterized as a suspension or restraint to the assessment process. *See* 12 MOORE'S FEDERAL PRACTICE § 57.25[2][b] (3d ed. 2003) ("A suit to *collect* tax is not one brought to restrain state action" within the meaning of the Tax Injunction Act.)

As an alternative to his argument based on the meaning of the statutory term "assessment," petitioner departs completely from the language of the Tax Injunction Act and contends that Congress intended the Act to prevent federal court interference with "all aspects of state tax administration," whether or not there is any federal court "interference with the collection of revenue." Pet. Br. 20. Petitioner would thus rewrite the Tax Injunction Act to provide that the district courts shall not enjoin, suspend or restrain "the assessment, levy, collection, *or any other aspect of the administration*, of any tax under State law. . . " (emphasis added). Congress could certainly have written and enacted such a statute, but it did not. Compare, for example, Congress's 1935 amendment to the Declaratory Judgment Act, 28 U.S.C. § 2201, providing that declaratory judgments should not be available "with respect to federal taxes." It would have been quite simple for Congress simply to have provided two years later that federal jurisdiction should not exist "with respect to state taxes," if that was what Congress intended. Congress deliberately chose instead to

address only those attacks on state tax laws that would stop the state from assessing, levying or collecting tax revenue.[10]

The Legislative History

The legislative history of the Tax Injunction Act is completely unambiguous. The 1937 Act had two express and closely-related state revenue-protective purposes – (1) to prevent "out of state corporations asserting diversity jurisdiction" from using the federal courts to avoid state-court "pay first and litigate later" rules, and (2) to prevent "taxpayers, with the aid of a federal injunction" from "withhold[ing] large sums, thereby disrupting government finances." FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1216-1217 (4th ed. 1996). The three-page Senate Judiciary Committee Report recommending passage of the Act thus begins by explaining that the bill that became the Act would amend the Judicial Code "with respect to the jurisdiction of the district courts of the United States over suits relating to the *collection of State taxes.*" S.REP. No. 75-1035 at 1 (1937) (emphasis added).

The Report then explains that, with regard to the first of the reasons for the Act's passage, it is "common practice" for state statutes to require that taxpayers be able to "contest their taxes only in refund actions after payment under protest;" that such statutes "make[] it possible for the states and their various agencies to survive while long-drawn out tax litigation is in progress;" and that "[i]f those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair practice is presented to the citizen of the state being required to pay first and

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10 Petitioner urges the Court to model its construction of the Tax Injunction Act on the meaning of the Johnson Act, 28 U.S.C. 1342, which provides that "[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with" public utility rate orders made by state regulatory bodies. The language of the two statutes, however, is significantly different. The Tax Injunction Act prohibits interference, not with "the operation of" state tax laws, but only with those aspects of state tax laws (assessment, levy and collection) that are needed to produce revenue. Petitioner's argument would be convincing if the Tax Injunction Act provided that the district courts should not enjoin, suspend or restrain the "operation of state tax laws."

then litigate, while those privileged to sue in federal courts need only pay what they choose and withhold the balance during the period of litigation." *Id*. at 1-2.

With regard to the Act's second purpose, the Report explains:

> The existing practice of the federal courts in entertaining tax-injunction suits against state officers makes it possible for foreign corporations doing business in such states to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt state and county finances. The pressing needs of those states for this tax money is so great that in many instances they have been compelled to compromise those suits, as a result of which substantial portions of the tax have been lost to the states without a judicial examination into the real merits of the controversy.[11]

S. REP. 75-1035 at 2 (1937).

It is simply impossible to read this language as supporting the application of the Tax Injunction Act to bar original federal jurisdiction over challenges to the constitutionality of state tax credits. Such suits do not in any way constitute an end run around state "pay first, litigate later" policies. They do not permit taxpayers to withhold state taxes prior to, during, or after litigation. They do not disrupt state finances or deprive states of tax revenues.

To deprive litigants who are not seeking to withhold taxes from the state of a federal forum for challenging tax credits that violate the federal constitution would thus be to enlarge the scope of the Tax Injunction Act far beyond both of Congress's explicit revenue-protective purposes. All scholarly authorities on federal jurisdiction agree. *See* 17A MOORE'S FEDERAL PRACTICE § 121.41[1] (3d ed. 2003) (Act "seeks to avoid interference by federal courts that would 'threaten the flow of general revenue to or the budgets of state governments.'" (quoting *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 930 (9th Cir. 1996)); 12 MOORE'S FEDERAL PRACTICE § 57.25[2] [6] (3d ed. 2003)("A suit to collect tax is not one brought to restrain state action; therefore, it is not

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11 For the Court's convenience, we have reproduced the entire three-page Report in an appendix to this brief. There is nothing in the Report that in any way detracts from the clear meaning of the Report language quoted in the text. The remarks on the Senate floor of Senator Bone, the primary sponsor of the Act, are entirely consistent with the language of the Senate Report. *See* 81 CONG. REC. S1415-1416 (1937).

within the Act's description of suits that are bound from adjudication by federal courts"); WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4237 (2d ed. 2001) (Tax Injunction Act was "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." (quoting *Rosewell v. LaSalle Nat'l. Bank*, 450 U.S. 503, 522 (1981)); *see also* FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1216-1217 (4th ed. 1996) (Act was designed to prevent avoidance of state pay first, litigate later, rules and to prevent taxpayers using federal injunctions to "withhold large sums, thereby disrupting government finances.")

B. Federal Courts, Including This Court, Have Uniformly Not Applied The Tax Injunction Act To Constitutional Challenges To State Tax Credits

As noted above, on at least three occasions since the enactment of the Tax Injunction Act this Court has adjudicated the merits of important constitutional challenges to state tax credits or deductions that were initiated in federal district courts. Two of these cases, *Committee for Public Educ. and Religious Liberty v. Nyquist*, and *Mueller v. Allen*, were, like the present case, challenges based on the Establishment Clause. In both of those cases, plaintiffs invoked original federal district court jurisdiction. *See Nyquist,* 350 F. Supp. 655 (S.D.N.Y. 1972) (three-judge court); *Mueller,* 514 F. Supp. 998 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982). *Nyquist* was a challenge to a New York state income-tax credit for private and religious school expenses. *Mueller* attacked a Minnesota income-tax deduction for public, private and religious school expenses.

If petitioner's interpretation of the Tax Injunction Act is correct, neither this Court nor the lower courts had subject matter jurisdiction in either *Mueller* or *Nyquist* since these cases unquestionably involved aspects of the administration of state tax laws, and both also concerned tax "assessments," as petitioner would define that term. Such a lack of subject-matter jurisdiction would

not have been waivable by the parties.[12] Yet none of the lawyers for the states in either case suggested a lack of jurisdiction at any level, nor did any of the judges or Justices who participated in the five separate adjudications that took place in the two cases. This omission is especially striking with regard to *Mueller*. The Court's opinion there was written by then-Justice Rehnquist less than two years after he wrote the Court's opinion in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). The *Fair Assessment* opinion contained a comprehensive analysis of the history, purposes and scope of the Tax Injunction Act. It is perhaps theoretically possible that, despite the Court's *Fair Assessment* opinion in 1981, everyone involved in *Mueller* in 1983 simply forgot about or ignored the lack of subject-matter jurisdiction. The much more likely explanation is that no one involved in *Mueller* (including the state defendant) believed that there was any basis for contending (as petitioner and *amici* now contend) that the Tax Injunction Act or comity principles precluded federal jurisdiction.

Petitioner's reading of the Tax Injunction Act would have significance beyond Establishment Clause cases. In *Griffin v. Prince Edward County*, *supra*, *aff'g Allen v. County School Bd.*, 198 F. Supp. 497 (E.D. Va. 1961), the federal district court was faced with Virginia's persistent attempts to avoid public-school racial desegregation after *Brown v. Board of Education*. One component of this resistance was the county's[13] allowance of property-tax credits for contributions to racially segregated private schools. The district court enjoined the county from permitting taxpayers to claim those tax credits. Petitioner and his *amici* contend that such relief was beyond the jurisdiction of the district court. In an opinion by Justice Black, however, a unanimous Court held that the district court's injunction against "giving tax credits" was both "appropriate and necessary." *Griffin,*

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12 *See, e.g.*, WRIGHT, ET AL, *supra* § 4237 (Tax Injunction Act "withdraws jurisdiction . . . and, as a jurisdictional limitation, it is not waivable"); FALLON, ET AL., supra _____ n. _____ (application of Act is "'jurisdictional'" and hence nonwaivable.")

377 U.S. at 233. The Court also had "no doubt of the power of the [district] court" to enjoin county officials from "giving tax exemptions . . . to enforce the discontinuance of the county's racially discriminatory practices." *Id.* at 232-233.

Prior to the present case,[14] the courts of appeal had uniformly rejected applying the Tax Injunction Act to litigation merely because it was tax related. For example, in *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986), the district court had ruled, as petitioner contends, that the Act "applies to any federal litigation touching on the subject of state taxes." Judge Easterbrook's opinion for the Seventh Circuit concluded, however, that

> neither the language nor the legislative history of the statute supports this interpretation. The text of § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes. The legislative history . . . shows that § 1341 is designed to ensure that federal courts do not interfere with states' collection of taxes . . . . There was no articulated [congressional] concern about federal courts' flogging state and local governments to collect additional taxes.

Id.

To the same effect is Judge Friendly's opinion for the Second Circuit in *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975), observing that the "context and the legislative history" of the Tax Injunction Act

> lead us to conclude that, in speaking of "collection," Congress was referring to methods similar to assessment and levy, e.g., distress or execution . . . that would produce money or other property directly. . . . Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed on them.

Id.

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13 The Tax Injunction Act applies to federal suits challenging the validity of county and local, as well as statewide, taxes. *See* WRIGHT, ET AL, *supra*, § 4237.

14 One week after the petition for certiorari in this case was filed, a panel of the Fifth Circuit adopted petitioner's position, noting that its decision was inconsistent with the Ninth Circuit decision here. *ACLU Found. of Louisiana v. Bridges*, 334 F.3d 416 (5th Cir. 2003). *Bridges* appears to be inconsistent with prior Fifth Circuit cases. See the next paragraph of the text.

Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980), is a case analytically identical to the present case. Plaintiff there (a county and individual citizens and taxpayers) brought suit in federal district court challenging a state tax exemption claimed by the defendant electric authority on a nuclear power plant located in the county. Plaintiffs' challenge involved both defendant's "bottom-line tax liability" and an "aspect of state tax administration." Under petitioner's proposed new interpretation, therefore, the district court had no subject matter jurisdiction. The Fifth Circuit, however, affirmed the district court's holding that the Act "is inapplicable to the present action because it seeks not to inhibit the collection of taxes, but to require the collection of additional taxes." *Id.* at 1303-04. *Appling County* was subsequently relied on by the Fifth Circuit in *Hargrave v. McKinney*, 413 F.2d 320, 326 (5th Cir. 1969), where the court, in rejecting an application of the Tax Injunction Act, noted "the myriad of cases holding generally that Section 1341 should be applied so as to protect the integrity of the state treasury." And see *In re Jackson County*, 834 F.2d 150, 151 (8th Cir. 1987), a school desegregation case in which the court explained that the Tax Injunction Act "has been held to be inapplicable to efforts to require collection of additional taxes, as opposed to efforts to inhibit the collection of taxers."

Without exception district courts have, prior to this case, held the Tax Injunction Act inapplicable to constitutional challenges to state tax credits. In *Moton v. Lambert*, 508 F. Supp. 367 (N.D. Miss. 1981), parents of black children attending public schools in Mississippi sued county and municipal taxing authorities to prevent them from granting sales or property taxes exemptions to private schools practicing racial discrimination in the selection of students or faculty. The district court held the Tax Injunction Act inapplicable:

> It has long been established by the Fifth Circuit. . . that § 1341 does not apply to suits wherein the requested remedy is the collection of additional taxes and not the enjoining or suspension of taxes [citing *Hargrove* and *Appling County, supra*]. Since plaintiffs demand that taxes be collected and not enjoined, it is quite clear that § 1341 does not operate to bar this action.

Id. at 368.

And in *Rojas v. Fitch*, 928 F. Supp. 155, 159 (D.R.I. 1996), plaintiff brought a federal district court suit to challenge the exemption of religious organizations from the state's unemployment tax. The court held the contention that the Tax Injunction Act applied to be without merit:

> It is clear from the very text of the [Act] that it is not applicable in this instance. The present action is not an action to "enjoin, suspect or restrain" the collection of taxes. In fact, it is quite the opposite. This is, in essence, an action to compel the State of Rhode Island to collect taxes. . . . [B]ecause this action does not seek to enjoin or suspend the assessment and collection of taxes, the Tax Injunction Act does not apply.

Id. at 159-160 (citing *Moton*, 508 F. Supp. at 368).

In district court cases challenging state tax credits or deductions under the Establishment Clause it has been common for state defendants – including defendants from four states that have joined an *amicus* brief supporting petitioner in this case[15] – to not even invoke the Tax Injunction Act. *See Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972) (three-judge court) (challenging an Ohio statute providing tax credits for expenses for students attending non-public schools); *Public Funds for Public Schools v. Byrne*, 444 F. Supp. 1228 (D.N.J. 1978) (challenging a New Jersey state income-tax deduction of $1,000 per year for each dependent attending non-public schools); *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978) (three-judge court) (challenging a Minnesota statute permitting a state income-tax deduction of $700 per year for each child attending non-public school); *Rhode Island Fed'n of Teachers v. Norberg*, 479 F. Supp. 1364 (D.R.I. 1979) (challenging a state income-tax deduction for tuition and other expenses at non-public schools); and *Luthens v. Bair*, 788 F. Supp. 1032 (S.D. Iowa 1992) (challenging an Iowa statute authorizing state income-tax deductions or credits for non-public school tuition and textbooks).

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15 Brief of the States of California, et al. as *Amici Curiae* In Support of Petitioner in No. 02-1809

Although the state defendants did not question jurisdiction, none of these courts had subject-matter jurisdiction if petitioner's and his *amici*'s interpretation of the Tax Injunction Act is correct.

In the face of this overwhelming body of authority and uniform practice, petitioner and *amici* rely for their proposed new rule on isolated language in opinions of this Court in cases that concerned neither tax credits nor other tax benefits, but that dealt with taxpayer attempts to avoid paying state taxes. Petitioner thus invokes the statement in *California v. Grace Brethren Church*, 457 U.S. 393, 409 n.22 (1982) (an attack by religious schools seeking to prevent the state from requiring them to pay state unemployment taxes), that "the legislative history of the Tax Injunction Act demonstrates that Congress worried . . . about divesting the federal courts of jurisdiction to interfere with state tax administration." Petitioner also relies on the similar statement in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 588 (1995) (an attack by the Council seeking to prevent the state from imposing taxes on non-resident motor carriers), that "federal law generally will not interfere with administration of state taxes," and the statement in *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 826-27 (1997) (a challenge by a federal instrumentality seeking to avoid the payment of state taxes) that the Tax Injunction Act "reflects a congressional concern to confine federal court intervention in state government."

When taken out of context, these statements may seem to support petitioner's contention that the Tax Injunction Act prohibits district courts from entertaining challenges to "any aspect of state tax administration." In context, however, it is clear that the "interference with state tax administration" that the Court was referring to in *Grace Brethren* and *National Private Truck Council*, and the "intervention in state government" that the Court alluded to in *Farm Credit Services*, was interference with a state's ability to collect tax revenue from the plaintiffs, not interference with "any aspect" of tax administration. The statement from *Grace Brethren* relied upon by petitioner, for example, appears in a footnote explaining why the Tax Injunction Act applies

to declaratory judgment as well as injunctive actions. *See Grace Brethren*, 457 U.S. at 409 n.22. That footnote begins with the observation that "[t]o be sure, in enacting the Tax Injunction Act, Congress considered primarily injunctions against state officials because that form of anticipatory relief was *the principal weapon used by businesses to delay or avoid paying taxes*." *Id.* (emphasis added). The footnote, moreover, appears immediately after the quotation of a statement from *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981), that the principal purpose of the Tax Injunction Act was "'to limit drastically federal district court jurisdiction to interfere with so important a concern as the collection of taxes.'" *Grace Brethren*, 457 U.S. at 408-09. The Court held in *Grace Brethren* that the Act prohibits a declaratory judgment that a state tax is invalid because such a judgment "'may in every practical sense operate to suspend collection of the state taxes until the litigation is ended.'" *Id.* at 408 (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. at 299).

In cases like *Grace Brethren*, *Farm Credit Services* and *LaSalle Nat'l Bank*, in which the Court has held the Tax Injunction Act applicable, it has done so only after carefully examining the factual situation in each case to determine that the federal litigation would, "in every practical sense, operate to suspend the collection of state taxes." *Grace Brethren, supra*. If petitioner's and *amici's* proposed interpretation of the Act were correct, it would have been entirely unnecessary to consider this practical question, for each of these cases unquestionably affected an "aspect" of state tax administration.

C. There Is No Basis For Petitioner's Contentions That Settled Law Requires Application Of The Tax Injunction Act In This Case.

In his statement of the Question Presented, Pet. Br. i, petitioner claims that the decision of the Ninth Circuit below is in conflict with decisions in the First, Fifth, Sixth and Eleventh Circuits. In his Brief on the Merits, petitioner cites cases from the First, Fifth and Sixth Circuits, but none

from the Eleventh Circuit. The three allegedly conflicting cases petitioner cites are *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *ACLU Found. of La. v. Bridges*, 334 F.3d 416 (5th Cir. 2003); and *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). We assume that the uncited Eleventh Circuit case upon which he relies is *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (11th Cir. 1991), a case referred to in the Petition for Certiorari.

The *Gillis* and *Perez* decisions were not based upon the Tax Injunction Act, but upon principles of comity. Neither case involved a constitutional challenge to a tax credit and neither case supports petitioner's position here. *Gillis* and *Perez* are discussed in more detail in connection with our discussion of comity, *infra*, at _____.

Colonial Pipeline was a federal district court challenge by a public utility, not to a tax credit, but to the validity of Georgia's entire ad valorem tax system. Colonial alleged that property of "centrally assessed" taxpayers, like Colonial, was unconstitutionally assessed by Georgia at a higher rate than the property of non-centrally assessed taxpayers. *Colonial Pipeline Co.,* 921 F.2d at 1239. As a remedy, Colonial requested, among other things, that the state revenue commissioner be enjoined "from approving any county's tax digest from 1989 and onward until the digest is in complete compliance with Georgia constitutional and statutory requirements and the federal constitution." *Id.* The court of appeals held that Colonial's requested relief "would require a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system," *id.* at 1242, that Colonial's requested relief "boil[ed] down to the [] proposition that the federal courts should oversee a redistribution of the ad valorem tax burden in Georgia between centrally-assessed and non-centrally assessed taxpayers through a campaign of systematic reform," *id.,* and that "Colonial is asserting that the ad valorem tax burden in Georgia should be redistributed; that is, it should pay proportionately fewer taxes while non-centrally assessed taxpayers should pay proportionately more," *id*. at 1242 n.8. Such relief, the court concluded, would be "at least as

disruptive as the issuance of injunctive relief [against the assessment, levy or collection of ad valorem taxes]." *Id*. at 1243. Colonial's claims were therefore "subject to" the jurisdictional bar of the Tax Injunction Act. The court held, nonetheless, that district court jurisdiction was not precluded because no "plain, speedy, and efficient" remedy was available to Colonial in state courts. *Id.* at 1243-1246. *Colonial Pipeline* obviously does not conflict with the court of appeals decision below or in any way suggest that district courts have no jurisdiction to consider challenges to tax credits like that in this case.

ACLU Found. of La. v. Bridges, decided after the Petition for Certiorari was filed in this case, is the only court of appeals decision to have applied the Tax Injunction Act to a situation in any way comparable to that in the present case. *Bridges* involved a challenge to exemptions for religious activities in several Louisiana state taxing statutes. The district court, following established precedent, found that the Tax Injunction Act did not apply because plaintiff was not seeking to restrain the "assessment, levy or collection" of state taxes, but to eliminate unconstitutional tax exemptions. The Fifth Circuit reversed, broadly interpreting the Tax Injunction Act to bar any suit that seeks to have any portion of a state's tax system declared unconstitutional. As authority, however, the court relied entirely upon cases in which granting the relief sought would have directly restricted or diminished tax revenues. The *Bridges* court cited no decisions (other than the conflicting Ninth Circuit decision in this case) involving constitutional attacks on state tax credits. The *Bridges* decision is not only incorrect, it also conflicts with at least two prior Fifth Circuit cases. *See supra* at _____.

In sum, it has, for many years, been settled law and established practice in federal courts at every level that the Tax Injunction Act does not preclude federal district court challenges to the constitutionality of state tax credits. Petitioner and *amici* ask the Court to change that rule in order to exempt from original federal jurisdiction all cases dealing with any aspect of state tax law or

administration or, alternatively, all cases affecting the "bottom line" taxes that any taxpayer must pay. This Court should not, however, undo the settled interpretation of a sixty-seven year-old federal jurisdictional statute that has uniformly been applied at all levels of the federal judiciary in complete accordance with the explicit objectives of the Congress that enacted it.[16]

D. Judicial Applications Of The Anti-Injunction Act, 26 U.S.C. § 7421(a), Support The Conclusion That The Tax Injunction Act Does Not Preclude District Court Challenges To The Constitutionality Of State Tax Credits.

In his *amicus* brief in support of petitioner, the Solicitor General calls the Court's attention to the fact that the text of the Tax Injunction Act was modeled on the text of a federal statute, enacted in 1867, that bars federal courts from exercising jurisdiction to restrain "the assessment or collection" of any federal tax. 26 U.S.C. § 7421(a). *See* Br. for the United States as *Amicus Curiae* in No. 02-1809, 1. The 1867 statute is commonly referred to as the Anti-Injunction Act. The Solicitor General urges the Court to give the Tax Injunction Act the same interpretation as federal courts have given the Anti-Injunction Act. *Id*. at 18-19. Respondents agree that interpretations and applications of the Anti-Injunction Act are relevant in interpreting the Tax Injunction Act. Contrary to the government's position, however, those applications show that constitutional challenges to tax credits are not precluded by either act.

In support of his assertion that the Anti-Injunction Act prohibits district court challenges to the constitutionality of federal tax credits, the Solicitor General cites three decisions of this Court: *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1 (1962); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); and *South Carolina v. Regan*, 465 U.S. 367 (1984). All three of these cases involved efforts by taxpayers to avoid the payment of federal taxes; none involved attacks on tax credits or tax benefits. In *Williams Packing,* plaintiff sought to enjoin the District Director of

16 If the established federal jurisdiction over tax-credit challenges has, for some reason, become unduly

Internal Revenue from collecting federal social security and unemployment taxes from it. The Court held that § 7421(a) barred the suit:

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.

Williams Packing, 370 U.S. at 7.

Bob Jones University involved a private sectarian college that attempted to enjoin the Internal Revenue Service from revoking a ruling letter, thus exposing the college to federal tax liability. The Court held the suit barred by the Anti-Injunction Act "because an injunction preventing the Service from withdrawing a § 501(c)(3) ruling letter would necessarily preclude the collection of FICA, FUTA, and possibly income taxes from the affected organization as well as the denial of . . . charitable deductions to donors to the organization." *Bob Jones Univ*., 416 U.S. at 732; *see also Alexander v. "Americans United*," *Inc*., 416 U.S. 752 (1974), decided on the same day as *Bob Jones Univ.* and to the same effect. In *South Carolina v. Regan*, 465 U.S. 367 (1984), the state sought to invoke the original jurisdiction of the Court in order to enjoin the Secretary of the Treasury from taxing certain state bonds. The Court held the Anti-Injunction Act inapplicable because "Congress ha[d] not provided the plaintiff with an alternative legal way to challenge the validity of the tax." *Id.* at 373.

In a footnote on the last page of its *amicus* brief, the United States cites a single case, *Haring v. Blumenthal*, 471 F. Supp. 1172, 1177-1178 (D.D.C. 1979), in which the government says § 7421(a) "has been applied in circumstances similar to those of the present case." Br. for the U.S. as *Amicus Curiae* 19, n. 10. That case held that an employee of the Internal Revenue Service did not

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burdensome to the states, their recourse, like the recourse of the states that, in 1937, prevailed upon Congress to enact the Tax Injunction Act, is to seek ameliorative federal legislation.

have standing to challenge the tax exempt status of abortion clinics. In dictum the court goes on to state that even if plaintiff had standing, § 7421(a) would prevent an injunction action "to challenge tax exemption rulings in favor of other taxpayers." *Haring*, 471 F. Supp. at 1178. As authority for this dictum the court cites *Bob Jones*, *"Americans United"* and *Williams Packing, supra*, none of which involved the situation described by Judge Greene.

While the United States relies on this unsupported dictum, it unaccountably fails to inform the Court about the substantial body of federal decisions (in which the United States or the Secretary of the Treasury were parties) holding squarely that the Anti-Injunction Act does *not* apply to suits challenging federal tax credits, exemptions, or deductions in favor of other taxpayers. In *McGlotten v. Connally*, 338 F. Supp. 448, (D.D.C. 1972) (three-judge court), for example, plaintiff sued to enjoin the Secretary of the Treasury from granting tax exemptions to fraternal orders that excluded nonwhites from membership. In holding that the action was not barred by the Anti-Injunction Act, Chief Judge Bazelon stated:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable" [citing *Williams Packing, supra,* and other cases]. In the present case, the central purpose is clearly inapplicable.

Id. at 453-454.

In *Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), plaintiffs challenged the legality of a rule which allowed contributors to political candidate committees to avoid the imposition of the federal gift tax on contributions in excess of $3,000. The Secretary of the Treasury sought dismissal under the Anti-Injunction Act. The court held the Anti-Injunction Act inapplicable:

> The language of the statute and its interpretation by the Supreme Court clearly indicates that this provision precludes suits to restrain the assessment or collection of taxes. It has no application to the instant situation in which plaintiffs seek not to restrain the Commissioner from collecting taxes, but rather to *require* him to collect *additional* taxes according to the mandates of the law.

Id. at 892.

In *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *rev'd on other grounds,* 426 U.S. 26 (1976), health and welfare organizations and indigent persons challenged the tax exempt status of private nonprofit hospitals that did not provide free or below-cost treatment to people unable to pay. The district court granted relief. Before reaching the merits, the court of appeals addressed and rejected the government's contention that the Anti-Injunction Act barred the case:

> It is apparent from a close analysis of the Anti-Injunction Act that it did not contemplate barring actions, such as this, where the litigation did not threaten to deny anticipated tax revenues to the Government.

Id. at 1284.

In *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982), *rev'd on other grounds*, 885 F.2d 1020 (2d Cir. 1989), plaintiffs challenged the constitutionality of granting tax exempt status to religious organizations that campaign for changes in abortion laws. The government's invocation of the Anti-Injunction Act was rejected:

> The majority of the courts that have considered the scope of the Anti-Injunction Act, . . . have declined to interpret its prohibitions as broadly as defendants suggest. The consistent theme in these decisions is that the statute only extends to those actions it expressly refers to and that its effect is to require that taxpayers who object to the payment of taxes pay the assessment and sue for a refund. Persuasive reasoning supports these decisions. Third party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present because third party suits are "few and far between." . . . In light of the clear language of the statute and the strong and compelling authority limiting application of the statute to actions

> to restrain tax collection, plaintiffs are not barred from proceeding by the Anti-Injunction Act.[17]

Id. at 489 (internal citations omitted).

Of particular interest, in view of the government's reliance on *Haring v. Blumenthal*, *supra*, is the opinion of the District of Columbia Circuit in *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), decided two years after *Haring*. In *Wright*, a mother of children attending Memphis public schools challenged the Secretary of the Treasury's extension of tax exemptions to private schools that operated on a racially discriminatory basis. The Anti-Injunction Act was not invoked by the Secretary. In reaching the merits of plaintiff's tax exemption challenge, however, then-Judge Ginsburg raised the issue herself. She observed that:

> A suit to restrain the allowance of tax benefits falls outside the literal reach of § 7421(a). Moreover, cases of this nature, ultimately raising nonfrivolous constitutional objections to IRS action, are "few and far between"; they do not threaten large interference by "public interest" litigants with the administrative process of collecting taxes.

Id. at 836 n.52.

Also relevant to the meaning of § 7421(a) are a group of cases holding the Anti-Injunction Act inapplicable to tax related challenges, other than challenges to tax credits or exemptions, that do not threaten the collection of federal taxes. *See Marcello v. Regan*, 574 F. Supp. 586 (D.R.I. 1983) (§7421(a) inapplicable to suit challenging the validity of statute under which the U.S. intercepts tax refund checks of persons delinquent on child support payments and sends checks to the state); *Coughlin v. Regan,* 584 F. Supp. 697 (D. Maine 1984) (refund interception case); *Sorenson v. Sec'y*

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17 *See also Apache Bend Apartments, Ltd. v. United States*, 702 F. Supp. 1285 (N.D. Tex. 1988), *rev'd on other grounds*, 987 F.2d 1174 (5th Cir. 1993). Plaintiffs sought an injunction against enforcement of the Tax Reform Act of 1986 on constitutional grounds. The court rejected the Government's assertion that the action was barred by the Anti-Injunction Act:

> …neither the literal meaning of the Anti-Injunction Act or the purposes of the Act are offended by proceeding to the merits on this case. This is not a suit which seeks to restrain the assessment or collection of taxes. Plaintiff does not request that taxes not be assessed against them or any other taxpayer. Nor do plaintiffs seek to prohibit taxes from being collected against them or any other taxpayer.

of the Treasury, 752 F.2d 1433 (9th Cir. 1985) (same); *Swaney v. Sec'y, United States Dep't of Educ*., 664 F. Supp. 172 (D. Del. 1987) (same); *Sea-Land Serv., Inc. v. United States,* 622 F. Supp. 769 (D.N.J. 1985) (§7421(a) does not bar suit by maritime employer seeking protection from liability for garnishment of wages of employees to satisfy tax liability). [18]

Contrary to the Solicitor General's assertion, therefore, the Anti-Injunction Act plainly has not been applied to preclude district court jurisdiction over suits attacking the constitutionality or legality of federal tax credits, exemptions or similar federal tax benefits.

II. PRINCIPLES OF FEDERAL-STATE COMITY DO NOT DEPRIVE THE DISTRICT COURT OF SUBJECT-MATTER JURISDICTION

A. Comity Precludes Federal Jurisdiction Only When A State's Ability To Collect Tax Revenue Has Been Directly Threatened.

This Court has, on two occasions, held that equity practice or comity principles precluded original federal district court jurisdiction over litigation related to state taxes. Petitioner relies on these cases to argue that comity should similarly preclude federal jurisdiction here, even if the Tax Injunction Act does not. Pet. Br. 26-29. The opinions in the two cases demonstrate, however, that the Court has used comity, as it has applied the Tax Injunction Act, to preclude federal court jurisdiction only when a district court is asked to stop a state from collecting tax revenue.

Id. at 1294.

18 Cases involving the Declaratory Injunction Act (28 U.S.C. § 2201) are also relevant. That Act authorizes federal courts to grant declaratory judgments "except with respect to Federal taxes." While the language of the tax exemption provision is broader than the language of the Anti-Injunction Act, a number of cases have held that a tax related lawsuit that is not barred by the Tax Injunction Act will not be barred by the Declaratory Judgment Act. *McGlotten, supra, Tax Analysts, supra, Eastern Kentucky Welfare, supra.* A number of cases hold that the tax suit exemption provision of the Declaratory Judgment Act does not bar a lawsuit just because an aspect of tax administration is involved. *Hoye v. United States,* 109 F. Supp. 685 (S.D. Cal. 1953) (City's challenge to a tax levy on money owed to a City employee not barred by Declaratory Judgment Act); *Joslin v. Sec'y of Dep't of Treasury,* 616 F. Supp. 1023 (D. Utah 1985) (Attorney's challenge to regulations governing standards of lawyers who prepare opinions on tax shelter offerings not barred by Declaratory Judgment Act); *Dominion Trust Co. of Tennessee v. United States,* 786 F. Supp. 1321 (M.D. Tenn. 1991) (Declaratory Judgment Act did not bar an interpleader action by a trustee against the United States seeking a determination of the trustee's duty to file federal and state income tax returns).

The first of the Court's comity cases was *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). The plaintiffs there sought a federal declaratory judgment that Louisiana's unemployment compensation tax, as applied to employees engaged in dredging navigable waterways, was pre-empted either by the federal government's power over navigation or by federal Social Security law. Both the district court and the court of appeals accepted jurisdiction, held the Louisiana tax to be constitutional, and dismissed plaintiffs' complaint on the merits. *Great Lakes Dredge & Dock Co. v. Charlet*, 43 F. Supp. 981 (E.D. La. 1942), *aff'd,* 134 F.2d 213 (5th Cir. 1943). This Court granted certiorari and affirmed on the ground that the lower courts should have exercised their equitable "discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." 319 U.S. at 298. Chief Justice Stone's opinion for the Court observed that plaintiffs sought to use their federal suit "as a barrier to the collection" of the Louisiana tax, *id*. at 296, and explained that federal equity courts "will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy," *id.* at 297. Because plaintiffs sought only a declaratory judgment and did not seek "an injunction or other coercive relief," the Court recognized that the Tax Injunction Act might not be applicable. The policy of the Act, however, was directly implicated because declaratory relief might "in every practical sense operate to suspend collection of the state taxes until the litigation is ended." *Id*. at 299. *Great Lakes* obviously has no application to litigation challenging a tax credit.

The Court's other comity decision, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), is equally clear in resting on the Court's decision on the fact that the federal relief requested would have directly interfered with the collection of state taxes. The plaintiff Missouri taxpayers were owners of newly-improved property. They alleged that the county's assessors and their supervisors, as well as the state's Director of Revenue and state tax commission members, had deprived them of equal protection and due process by assessing their property at 33½% of value,

while assessing properties without new improvements at 22% of value. Plaintiffs' federal suit sought compensatory damages for the increased taxes caused by the over-assessments, plus punitive damages of $75,000 from each defendant.

In an opinion by then-Justice Rehnquist, the Court held that principles of comity precluded the federal damage suit, even if the Tax Injunction Act "standing alone, would [not] require such a result." 454 U.S. at 107. The Court's opinion explained that, prior to the enactment of the Tax Injunction Act, cases like *Matthews v. Rodgers*, 284 U.S. 521 (1932), counseled federal court restraint when asked to "'enjoin the collection of a state tax.'" *Fair Assessment*, 454 U.S. at 108 (quoting *Rodgers*, 284 U.S. at 525 n.5). The Court had followed a comity "'policy of federal non-interference with state tax collection. . . .'" The Tax Injunction Act was a reflection of this policy. The federal court suit in *Fair Assessment* was precluded by comity because it would be "no less disruptive of Missouri's tax system than would the historic equitable efforts to enjoin the collection of taxes." *Id.* at 113. Respondent state officials, "faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorneys fees . . . would promptly cease the conduct found to have infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioner's action would 'in every practical sense operate to suspend collection of the state taxes. . . .'" *Id.* at 115 (quoting *Great Lakes*, 319 U.S. at 299). WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4244, similarly explains that comity principles have been used "when the exercise of jurisdiction by the federal court would . . . interfere with the collection of state taxes." He notes that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."

The Court's opinion in *Fair Assessment* recognized that Congress, in enacting 42 U.S.C. § 1983, "cut a broad swath" giving a federal cause of action "to prisoners, taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State." 454

U.S. at 103-04. *Fair Assessment* holds that comity principles limit this jurisdiction only where a district court is asked to stop or suspend a state's ability to collect tax revenue. The present case plainly raises no such concerns.[19]

B. Relief In This Case Would Not Otherwise Unduly Intrude On State Officials.

Petitioner's brief suggests that the exercise of federal jurisdiction here would result in an intolerable level of intrusion into state affairs. The "parade of horribles" presented by petitioner reflects basic misunderstandings about the nature of this case.

Petitioner insists that the Court must protect against "federal court interpretation of state tax law." Pet. Br. 21. Respondents, however, have not requested that the district court interpret any state law – there is no disagreement as to the effect of A.R.S. § 43-1089, only about whether, as applied, it violates the federal constitution.

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19 The district court below cited the Sixth Circuit's decision in *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and the Ninth Circuit's decision in *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986), as support for the application of comity principles in this case. That reliance was misplaced. *Ashton,* a suit to declare a state tax pre-empted by federal law, applied the Tax Injunction Act, not comity principles. It correctly read the Act as precluding "federal court interference with state revenue collection procedures." 780 F.2d at 822.

Gillis applied comity principles to preclude federal jurisdiction in a case challenging the entire ad valorem tax system of the state of Kentucky. The court of appeals noted that, if the plaintiffs had prevailed in *Gillis*, "the district court would [have been] forced to issue a declaratory judgment finding that virtually all property owners in the state of Kentucky had been deprived of their right to equal protection under the United States Constitution by the manner in which petitioners administered the state tax system." 836 F.2d at 1008. The *Gillis* court concluded that, in these circumstances, "the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax." *Id*. *Gillis* thus explicitly relies on the presence of the same revenue-preclusive factors that this Court recognized in *Fair Assessment* as the proper basis for the application of comity principles.

United States Brewers Ass'n v. Perez, 592 F.2d 1212 (1st Cir. 1979), is the First Circuit case that petitioner apparently refers to in claiming, in his statement of the Question Presented, that a conflict in the circuits exists regarding the issues in this case. *Perez* was a suit brought by mainland United States beer producers and their trade association "to restrain Puerto Rican officials from collecting an increase in the internal revenue tax on beer" imposed by a then-recent Puerto Rican statute. 592 F.2d at 1213. In the alternative, plaintiffs sought to enjoin defendants from exempting small (and local) beer producers from the tax increase. The court of appeals held that the first claim for relief "clearly constitutes relief proscribed by the Butler Act [48 U.S.C. 872]," *Id.* at 1214, an analog to the Tax Injunction Act prohibiting the District Court for Puerto Rico from considering any "suit for the purpose of restraining the assessment or collection of any tax enjoined by the laws of Puerto Rico," 482 U.S.C. § 872. With regard to the second claim for relief, the court observed that plaintiffs there were asking the court to impose a new tax upon the small local brewers—a tax that the Commonwealth had not enacted. That situation is not involved in this case.

Petitioner maintains that if the court of appeals decision is affirmed, taxpayers, like respondents, "who do not want to go through the normal state tax [refund] proceedings" would engage in "clever pleading" and "jurisdictional gamesmanship" by going to the federal court, obtaining an order invalidating a tax credit or deduction allowed to other taxpayers, then "us[ing] the judgment as the basis for a tax refund claim in a state court proceeding." Pet. Br. 24. A taxpayer, however, could not use a judgment invalidating a tax credit claimed by other taxpayers in order to demand a refund of his or her own taxes.

Petitioner complains that this suit might "adversely affect state revenue" because the state might choose to remedy the constitutional infirmity in the current Arizona tax credit by applying the credit to public schools as well as to private schools. Applying state tax revenues to state public schools, however, does not reduce state revenues. Moreover, were a district court to hold a state tax credit unconstitutional for under-inclusiveness (as, for example, would be the case if a tax credit were afforded to male but not female taxpayers) the court would not in any sense prevent the state from collecting tax revenue. In response to the court's decision, the state could choose to extend the credit to all taxpayers, but it could also choose to eliminate it for everyone. The revenue-protective purpose of the Tax Injunction Act is not implicated in that situation.

Petitioner appears to misunderstand the fundamental difference between a suit that asks a federal court to invalidate a state tax *credit*, and one that seeks invalidation of a state *tax*. To use the example given by petitioner in his brief (Pet. Br. 23) there is an enormous practical difference to the state between (1) a federal suit seeking to invalidate a state tax on dividends received from out-of-state corporations, and (2) a federal suit seeking to invalidate a provision excluding the dividends of in-state corporations from a state tax on dividends. The relief sought in the first suit would prevent the state from collecting taxes and is barred by the Tax Injunction Act. The relief sought in the second suit, however, would not interfere with the collection of state tax revenue. The fact that both

suits may substantively rest on the same dormant commerce clause claim is irrelevant to the application of either the Tax Injunction Act or comity principles. Application of the Act and comity depend on the *relief* sought in the federal suit, not on the substantive basis for arguing that the state law is unconstitutional. The Act and comity prevent federal relief that interferes with the collection of tax revenue; they do not immunize state tax laws from original district court jurisdiction.

Finally, petitioner worries that it will have to allow "the parties to the [Arizona] state litigation" (in which the credit was upheld against a facial attack) to use the credit, but not allow "the parties to the federal ruling" to use the credit. Pet. Br. 29. Petitioner forgets that no taxpayers seeking to use the credit were parties to the state-court facial challenge – the plaintiff taxpayers in that case sought to invalidate the credit, not to use it. Similarly, none of the plaintiff taxpayers in this case will be harmed if they are not "allowed" to use the credit – because that is exactly the relief they request.

Petitioner's version of "comity" would prevent the district courts from interfering with any aspect of the "fiscal operations" of a state, whether or not the state's ability to collect tax revenue is involved. Unless the state's ability to collect revenue is directly threatened, however, there is no principled reason to distinguish between the interference caused by federal suits regarding state taxation and federal "court interference" on constitutional grounds with the administration of other state programs, such as state welfare programs, s*ee, e.g.*, *Goldberg v. Kelly,* 397 U.S. 254 (1970), or educational systems, *see, e.g.*, *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954). All of these programs impact state "fiscal operations" and involve important state policies. As this Court explained in *Fair Assessment in Real Estate Ass'n v. McNary*, *supra*, intrusion into the administration of state affairs is "undoubtedly present in every § 1983 claim." 454 U.S. at 114.

Respondents' prayer for relief in the district court sought only (a) injunctive relief prohibiting petitioner from allowing taxpayers to use the unconstitutional tax credit in the future; (b)

a declaration that the credit is unconstitutional; and (c) an order directing petitioner to inform STOs in possession of tax-credit revenues that such funds must be paid into the state general fund, rather than distributed as scholarships. J.A. 15. Petitioners do not seek to reopen any past tax years or require the return of any funds that have already been awarded as scholarships. Respondents' prayer for injunctive relief can be satisfied by simply eliminating the STO tax credit from the credits that can be claimed in future years on Arizona Form 301. *See* Arizona Resident Personal Income Tax Return, lines 29 and 30, J.A. 56. If granted, the relief requested in this case will impose no undue burden on the state or the administration of its tax system.

III. STATES AND LOCAL GOVERNMENTS SHOULD NOT BE EMPOWERED TO FRUSTRATE ORIGINAL FEDERAL JURISDICTION BY EFFECTUATING UNCONSTITUTIONAL POLICIES THROUGH TAX CREDITS

Griffin v. Prince Edward County, *supra*, is illustrative of an era when some states and local governments, in defiance of the Constitution and this Court's decision in *Brown v. Board of Education*, sought to use state tax credits to prevent racial desegregation of public schools. In *Griffin*, the county allowed property taxpayers to divert property-tax revenues to support segregated private schools. The district court enjoined that practice and this Court unanimously affirmed.

Under the overbroad interpretation of the Tax Injunction Act and comity principles used by petitioner, the United States, and other *amici* supporting petitioner, the district court would not have had jurisdiction to issue its injunction in *Griffin*. The black children who were the plaintiffs in *Griffin* would have been required, instead, to seek relief through Virginia's state court system, with recourse to this Court's jurisdiction available on certiorari only after all state-court remedies were exhausted. Had that been the law, it would not have been surprising if the unconstitutional credits – and the resulting massive state financial support for white-only schools – had remained in effect for several years. The Tax Injunction Act was never intended by Congress to have such a drastic negative impact on the ability of the federal courts to protect constitutional rights.

The state tax-credit program involved in this case is not wholly dissimilar from the tax-credit program invalidated in *Griffin*. In *Zelman v. Simmons-Harris*, *supra*, this Court upheld a state school-voucher program to help poor children in substandard Cleveland, Ohio, schools attend non-public schools of their choice. The Court described the Cleveland program as open, on a non-discriminatory basis, to children attending any participating non-public school in Cleveland, or any participating public school in the surrounding area. The constitutionality of a state or local school-voucher program that significantly departs from the *Zelman* model – for example by giving preference in awarding vouchers to children attending religious schools – would clearly be challengeable through the invocation of original federal jurisdiction under 42 U.S.C. § 1983.

Arizona has established a program to give state financial support to tuition at non-public schools. It has done so through state income-tax credits, rather than through state-issued vouchers. Arizona's program differs in important respects from the program upheld in *Zelman.* It is not limited to poor children; it applies to children already attending private school and to children living in school districts with excellent public schools, as well as to children attending substandard schools; it does not limit the size of the scholarships that may be awarded or the amount of the tuition that non-public schools accepting scholarship students may charge; and, perhaps most importantly, it does not guarantee free parental choice. Under the Arizona program, scholarships may be awarded on the basis of the religion of the scholarship applicant and on the basis of the religious denomination of the school the student wishes to attend.

If the Arizona program were a state-voucher program, state taxpayers objecting to the program on constitutional grounds could clearly invoke the original jurisdiction of the federal courts to determine whether these differences favoring religious-school education, have constitutional significance. Petitioner and his *amici* argue, however, that because Arizona uses state tax credits as the funding mechanism, rather than state vouchers, its program is immune from challenge in federal

district court. The Tax Injunction Act and its underlying comity principle were never intended to authorize that hyper-technical frustration of original federal jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit and remand the matter to the district court for further proceedings.

Respectfully submitted,

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