05-4083-cv(L)

06-0093-cv(CON)
06-0704-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER TUPAZ and LOURDES TUPAZ,
Plaintiffs-Appellants,

v.

CLINTON COUNTY, NEW YORK and
JANET DUPREY, in her Individual Capacity and
in her Official Capacity as Clinton County Treasurer,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN, INC.,
IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND ARGUING FOR REVERSAL

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May 12, 2006

RULE 26.1 DISCLOSURE STATEMENT

Public Citizen, Inc., is a non-profit, non-stock corporation. It has no parent corporation, no publicly held corporation has an ownership interest in it, and it has not issued shares.

Dated: May 12, 2006

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Public Citizen, Inc., a non-profit advocacy organization with approximately 100,000 members nationwide, files this brief with the consent of all parties. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues, including access to the courts and fundamental constitutional protections. One of Public Citizen's particular interests is ensuring that governments comply with constitutional requirements that protect ordinary citizens.

Public Citizen attorneys have served as lead counsel for the plaintiffs-petitioners in the two most recent Supreme Court cases on due process notice requirements, *Jones v. Flowers,* 126 S. Ct. 1708 (2006), and *Dusenbery v. United States*, 534 U.S. 161 (2002). Public Citizen is filing this brief in support of plaintiffs-appellants because the district court's sweeping interpretation of the Tax Injunction Act would improperly deny citizens whose property is taken without due process the ability to vindicate their federal rights in federal courts.

STATEMENT

A. Background

Plaintiffs Alexander and Lourdes Tupaz filed this action under 42 U.S.C. § 1983, claiming that Clinton County violated their constitutional rights by taking their property without sufficient notice. Their complaint sought, among other things,

a declaration that the County had violated their due process rights and an order requiring the County to release their property "in return for payment of unpaid taxes, interest, and reasonable costs." JA 7.

The parties filed cross-motions for summary judgment on the merits of plaintiffs' constitutional claims. Neither party mentioned the Tax Injunction Act of 1937 (TIA), which provides, in its entirety, that "[t]he 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. At oral argument on the motions, the district court, *sua sponte*, raised the possibility that the TIA might bar plaintiffs from pursuing their constitutional claims in federal court:

> Let me ask you guys before you start in with all the mailings and nonreceipts and all the stuff that usually comes up on this, you guys have been at this for a long time. You've gone to higher courts. You've been successful, both sides have been, depending on the facts of the certain case. What about the Tax Injunction Act? Now, I know you didn't brief it. If you guys—I'm springing this on you without prior notice, I promise I won't grill you on it.

JA 218. The subsequent discussion of the TIA took up less than one page of the transcript. The judge instructed the parties to proceed with their arguments on the merits, and the TIA was not mentioned again during the argument.

B. Decision Below

Immediately following oral argument, the district court ruled from the bench, holding that plaintiffs' suit was barred by the TIA. "Although the parties briefed the substantive merits of their respective cases," the court held, it was "not prepared to go that far" because it concluded that the TIA barred the plaintiffs' challenge as a matter of subject matter jurisdiction. JA 5 (noting that "both parties apparently assume such jurisdiction to exist").

The district court construed the TIA broadly, describing it as withdrawing federal-court jurisdiction "over suits relating to the collection of state taxes" and concluding that plaintiffs' due process challenge, because it arose in the context of a tax forfeiture, was "precisely the type of lawsuit prohibited by the Tax Injunction Act and its related principle of comity." JA 17. The district court acknowledged that this Court has decided the merits of nearly identical "due process claims without addressing the Tax Injunction Act" and speculated that "perhaps the Circuit overlooked that jurisdictional issue." JA 20 (citing *Akey v. Clinton County*, 375 F.3d 231 (2d Cir. 2004)).

ARGUMENT

The question presented is whether the TIA, 28 U.S.C. § 1341, bars the federal courts from adjudicating plaintiffs' claim that defendants violated the Constitution

by taking their property without due process. The district court concluded that it lacked jurisdiction over plaintiffs' § 1983 suit on the ground that plaintiffs seek to restrain the "collection" of their taxes within the meaning of the TIA. Plaintiffs seek no such relief. To the contrary, plaintiffs seek an opportunity to pay their back taxes and redeem their property, just as they would have done had they received constitutionally sufficient notice. Indeed, plaintiffs have tried to tender their taxes to defendants, and defendants have refused to accept payment.

A. The TIA Applies Only Where Taxpayers Seek to Avoid Paying Taxes.

In *Hibbs v. Winn*, 542 U.S. 88 (2004), the Supreme Court concluded that the TIA did not deprive the federal courts of jurisdiction to hear a constitutional challenge to a statute permitting parochial school tax credits. The Supreme Court explained that, to determine whether a case "falls within the TIA's prohibition, it is appropriate, first, to identify the relief sought." *Id.* at 99. The plaintiffs in *Hibbs* did not contest their tax liability or seek to impede the state's receipt of tax revenues; rather, they challenged a tax credit as incompatible with the Establishment Clause.

Here, plaintiffs do not challenge the validity of a tax, contest the amount of their tax liability, ask for a refund of paid taxes, or seek an injunction to avoid paying their taxes in the future. Rather, plaintiffs claim that the County failed to provide them with constitutionally sufficient notice before taking their property. The only

injunctive relief sought by plaintiffs is an order requiring the County to release their property "in return for payment of unpaid taxes, interest, and reasonable costs." JA 7. *Hibbs* makes clear that the relief plaintiffs seek does not implicate the TIA.

Hibbs examined the legislative history of the statute and concluded that, "in enacting the TIA, Congress trained its attention on taxpayers who sought to *avoid paying* their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Id.* at 104-05 (emphasis added). Relying on the Senate Report, the Court found that

> the Act had two closely related, state-revenue-protective objectives: (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.

Id. at 104. The Court concluded that the TIA applies "only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107.

In reaching this holding, *Hibbs* rejected the state's position that the TIA and the Supreme Court's prior decisions invoking it had prevented "federal-court interference with all aspects of state tax administration," noting that the earlier decisions "[a]ll involved plaintiffs who mounted federal litigation to avoid paying

state taxes (or to gain a refund of such taxes)" and that the Act's scope is confined to such circumstances. *Id.* at 106. The decision below, however—which reads the Act as barring federal court jurisdiction in any suit "relating to" state tax collection (JA 17) or challenging state action "in collecting property taxes and enforcing the tax foreclosure scheme" (JA 18)—expands the TIA beyond its "state-revenue-protective moorings." 542 U.S. at 106. Because plaintiffs do not seek relief that would allow them to avoid paying their taxes—indeed, plaintiffs seek an opportunity to *pay* their taxes—the TIA does not bar the district court from considering plaintiffs' constitutional challenge to the taking of their property without sufficient notice. If plaintiffs prevail, Clinton County will not lose any tax revenue. Thus, the TIA does not apply. *See May Trucking Co. v. Oregon Dep't of Trans.*, 388 F.3d 1261, 1267 (9th Cir. 2004) ("After *Hibbs*, the dispositive question in determining whether the [TIA]'s jurisdictional bar applies is whether '[f]ederal court relief . . . would have operated to reduce the flow of state tax revenue.'") (quoting *Hibbs*, 542 U.S. at 106).

Indeed, in a decision cited approvingly in *Hibbs*, this Court rejected a broad reading of the TIA's use of the term "collection." *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975). The plaintiffs in *Wells* claimed that Vermont's practice of suspending the driver's license of individuals who failed to pay their motor vehicle taxes violated the Equal Protection Clause. Based on the TIA's context and legislative history,

Judge Friendly's opinion for the Court in *Wells* concluded that Congress intended to bar federal-court jurisdiction "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 upon them," but not to bar constitutional challenges to a state's method of securing payment. *Id.* (emphasis added). In this case, plaintiffs do not challenge the validity of the taxes they owe, but only the taking of their property without due process.

In the aftermath of *Hibbs*, other courts have similarly held that actions seeking relief that will not directly reduce state tax revenues do not seek to restrain tax "collection" within the meaning of the TIA. *See Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) (holding that "the district court erroneously dismissed the case on TIA grounds" because the relief sought "would not have operated to reduce the flow of [the state's] tax revenues"); *Felton v. Icon Props.*, 2004 WL 2381513, at *4 (E.D. La. 2004) (holding that, under *Hibbs*, the TIA applies "only where a state taxpayer seeks a federal-court order enabling him to avoid paying taxes" and, therefore, the TIA did not bar a federal court challenge to the taking of tax-delinquent property without sufficient notice); *Budlong v. Graham*, 414 F. Supp. 2d 1222, 1226-27 (N.D. Ga. 2006) (relying on *Hibbs* and holding that the TIA applies "only [to] those cases in which state taxpayers seek federal-court orders enabling them to *avoid*

paying state taxes") (emphasis in original, internal citations omitted); *see also ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 373 n.1 (6th Cir. 2006) (noting *Hibbs*'s holding that the TIA applies only to federal litigation brought in an attempt to avoid paying state taxes).

By contrast, there is little post-*Hibbs* appellate precedent that points the other way.[1] To be sure, two reported pre-*Hibbs* cases from other circuits held that the TIA barred constitutional challenges in the tax sale context, but those decisions mechanically applied the TIA without determining, as *Hibbs* requires, whether the relief sought would have reduced state tax revenue. *See Coon v. Teasdale*, 567 F.2d 820 (8th Cir. 1977) (barring constitutional challenge to tax sale under the TIA, without discussing revenue impact); *Ayers v. Polk County*, 697 F.2d 1375, 1376 (11th

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[1]Although not directly on point, the most expansive construction of the TIA following *Hibbs* is *Henderson v. Stalder,* 407 F.3d 351 (5th Cir. 2005), *reh'g en banc denied*, 434 F.3d 352, *petition for cert. pending sub nom. Keeler v. Stalder*, No. 05-1222 (filed Mar. 21, 2006). *Henderson* held that fees for specialty license plates forwarded by the State of Louisiana to pro-life organizations constitute a "tax" under the TIA and, for that reason, the license plate program may not be challenged in federal court. Eight of the 18 Fifth Circuit judges forcefully dissented from denial of rehearing en banc on the grounds that the decision was wrong, 434 F.3d at 352, and the decision has been roundly criticized. *See, e.g., Bredesen*, 441 F.3d at 373 (rejecting *Henderson*'s holding); Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of An Expansive Interpretation of the Tax Injunction Act*, 115 Yale L. Rev. 727 (2005). Under *Henderson*'s reasoning, nearly any unconstitutional program implemented by a state might be insulated from federal-court review by including a "tax" as a feature of the program. *See id.* at 732-34.

Cir. 1983) (barring constitutional challenge to tax sale under principles of comity, without discussing revenue impact). Thus, these decisions cannot survive *Hibbs*. Properly construed, the TIA should bar enjoining enforcement of tax liens only when the injunction is sought based on a challenge to the validity of the underlying taxes. *See, e.g., Dawson v. Childs*, 665 F.2d 705 (5th Cir. 1982).

This Court should follow *Hibbs*, reject the district court's expansive reading, and "limit application of the TIA to the class of cases it was intended to cover—those in which individuals or corporations contest their own tax bill. That application is broad enough to protect the states' ability to raise revenue, but narrow enough to preserve the federal courts' role in protecting federal rights." Gorod, *Limiting the Federal Forum: The Dangers of An Expansive Interpretation of the Tax Injunction Act*, *supra*, at 734.

B. The District Court's Decision Upsets Settled Practice.

The TIA was enacted in 1937. In the nearly 70 years since, the federal courts—including this Court—have regularly reached the merits of due process challenges seeking to set aside tax sale deeds on the basis of insufficient notice, without mentioning the possibility that the TIA was intended to deprive the federal courts of subject matter jurisdiction over such challenges. *See, e.g., Karkouli's, Inc. v. Dohany*, 409 F.3d 279 (6th Cir. 2005); *Plemons v. Gale*, 396 F.3d 569 (4th Cir.

2005); *Akey v. Clinton County*, 375 F.3d 231 (2d Cir. 2004); *Weigner v. City of New York*, 852 F.2d 646 (2d Cir. 1988); *Bender v. City of Rochester*, 765 F.2d 7 (2d Cir. 1985); *Atuahene v. City of Hartford*, 2006 WL 539374 (D. Conn. 2006); *Bush v. SA Mortgage Serv. Co.*, 2005 WL 1155851 (E.D. La. 2005); *LaCoste Builders, L.C. v. Strain*, 2003 WL 22466233 (E.D. La. 2003); *Zachary v. Clinton County*, 2003 WL 24197685 (N.D.N.Y. 2003), *aff'd*, 86 Fed. App. 451 (2d Cir. 2004); *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612 (D. Md. 1998); *Acirema, N.V. v. Lilly*, 1997 WL 876738 (S.D. W. Va. 1997), *aff'd* 141 F.3d 1157 (4th Cir. 1998); *FDIC v. Lee*, 933 F. Supp. 577 (E.D. La. 1996), *aff'd* 130 F.3d 1139 (5th Cir. 1997); *Nitchie Barrett Realty Corp. v. Biderman*, 704 F. Supp. 369 (S.D.N.Y. 1988); *Cooper v. Makela*, 629 F. Supp. 658 (W.D.N.Y. 1986); *Harris v. Gaul*, 572 F. Supp. 1554 (N.D. Ohio 1983); *Wager v. Lind*, 389 F. Supp. 213 (S.D.N.Y. 1975). That several courts of appeals, including this Court, have expressed no concern about their jurisdiction to hear constitutional due process challenges to tax-related takings is particularly telling because "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244

(1934)).[2] It is also significant that Congress, well aware that the federal courts do not perceive the TIA to be a jurisdictional bar to such cases, has taken no action to expand the TIA to reach those cases. *See Edelman v. Lynchburg College*, 535 U.S. 106, 117 (2002) (explaining that Congress is presumed to know of settled judicial treatment of an issue and lack of congressional action points to tacit approval).

The Supreme Court has emphasized the importance of such settled practice in interpreting the TIA. In *Hibbs*, the Court concluded that the TIA did not deprive the federal courts of jurisdiction to hear a constitutional challenge to a statute permitting parochial school tax credits and relied on the fact that "[n]umerous federal-court decisions—including decisions of this Court reviewing lower federal-court judgments—have reached the merits of" similar constitutional challenges "without mentioning the TIA." 542 U.S. at 110; *see also id.* at 93 ("In decisions spanning a near half century, courts in the federal system, including this Court, have entertained" such challenges, "without conceiving of [the TIA] as a jurisdictional barrier"); *id.* at 112 ("Consistent with this decades-long understanding prevailing on this issue, respondents' suit may proceed without any TIA impediment.").

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[2]This is not to suggest that the Court's prior practice bars consideration of the jurisdictional issue, *see Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974), but only that decades of settled practice regarding a 70-year-old statute should be taken into account.

In his concurring opinion, Justice Stevens expanded on this point. Justice Stevens took issue with an argument in Justice Kennedy's dissent that echoes the district court here—that "years of unexamined habit by litigants and courts" concerning the TIA should not stand in the way of a contrary interpretation of the statute. *Id.* at 126. But "prolonged congressional silence in response to a settled interpretation of a federal statute," Justice Stevens explained, "provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied." *Id.* at 112. Here, too, the district court's interpretation of the word "collection" would upset "rules on which judges and litigants have relied," barring all constitutional challenges to tax sales based on an unduly expansive interpretation of a 70-year-old statute. As Justice Stevens put it, "[i]n a contest between the dictionary and the doctrine of *stare decisis*, the latter clearly wins." *Id.*

C. Courts Should Be Especially Reluctant to Extend the Reach of the TIA to Preclude Suits Raising Constitutional Claims.

This Court should be particularly cautious about expanding the scope of the TIA beyond its "state-revenue-protective moorings," *Hibbs*, 542 U.S. at 106, to deprive the federal courts of jurisdiction over suits in which citizens seek to vindicate

fundamental constitutional rights—such as the due process rights at stake here—simply because those suits happen to arise in the tax enforcement context.

1. The Supreme Court has properly read the text of the TIA to bar federal jurisdiction over suits raising direct constitutional challenges to *state taxes themselves*. *See California v. Grace Brethren Church*, 457 U.S. 393 (1982) (suit by religious schools challenging unemployment insurance taxes); *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) (suit by out-of-state corporation challenging sales taxes). But where, as here, the constitutional challenge neither attacks the tax itself nor seeks to interrupt the flow of tax revenue, and therefore does not directly implicate the TIA's text or purpose, the courts should tread much more carefully.

In this case, plaintiffs' claims are based on the "elementary and fundamental requirement of due process [that] in *any proceeding* which is to be accorded finality," notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). Just last month, the Supreme Court reaffirmed that this "elementary and fundamental requirement" is no less applicable where the state seeks to sell someone's home in a tax sale. *Jones v. Flowers*, 126 S.Ct. 1708, 2006 WL 1082955, at *9 (2006). Notably, the Court drew a distinction between the issue

of constitutional notice and the collection of local tax revenue: Although "[t]here is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs," the Court observed, "[t]he same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them." *Id.* at *12.

The taking of the property in *Jones*, like the taking here, was triggered by a tax delinquency. But, unlike suits that attack a tax itself, the essence of the constitutional claims here would be no different if the taking had arisen in some other context. *Id.* at *5 n.1 (noting that the same notice issues arise in the federal drug forfeiture context). As *Jones* observed, the Court's "leading cases on notice have evaluated the adequacy of notice" in a wide array of contexts, *id*, including the notice given to beneficiaries of a common trust fund, *Mullane*, 339 U.S. 306; a mortgagee, *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); owners of seized cash and automobiles, *Dusenbery*, 534 U.S. 161; *Robinson v. Hanrahan*, 409 U.S. 38 (1972); creditors of an estate, *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478 (1988); and tenants living in public housing, *Greene v. Lindsey*, 456 U.S. 444 (1982). Although the constitutional analysis may differ depending on the value of the

property and the cost of providing notice, it does not turn on the event giving rise to the taking.[3]

2. The Supreme Court has long affirmed its "established practice . . . to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and has stressed the importance of citizens' ability to "sue state officials in federal court for violating federal rights." *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring). To "deny any federal forum for claiming a deprivation of federal rights" is "an untoward result." *Id.; Monroe v. Pape*, 365 U.S. 167, 180 (1961) ("It is abundantly clear that one reason [Section 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, . . . the claims of citizens to the enjoyment of rights, privileges, and

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[3]The holding in *Jones*—that the state was required to take additional steps to notify the owner before taking the property after the state's tax sale notice was returned undelivered—rested on the Court's determination that additional efforts would not be unduly costly for the state, in part because the state in that case, Arkansas, "transfers the cost of notice to the taxpayer or the tax sale purchaser." *Id.* at *10. New York, like most states, does the same. N.Y. Real Prop. Tax Law § 1110(1). But for purposes of the TIA, concerns about administrative costs are immaterial because, "the TIA proscribes only those actions which would operate to decrease a state's *tax* revenue, not any lawsuit which might place financial burdens upon the State." *Wilbur*, 423 F.3d at 1110 (internal citations omitted) (emphasis in original) ("Whatever impact the [plaintiffs'] action might have on the State's litigation and enforcement costs, it surely will not reduce the State's tax revenues.").

immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”).

Because of the federal judiciary’s central role in protecting constitutional rights—and because jurisdiction-stripping can itself raise serious constitutional problems—the Court has repeatedly required that “where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.” *Demore v. Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *see generally* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1398-99 (1953) (identifying potential constitutional problems with Congress’ enactment of statutes implicitly limiting federal courts’ power to hear categories of constitutional cases). As long as “an alternative interpretation of the statute” that preserves the jurisdiction of federal courts over constitutional claims “is ‘fairly possible,’” courts are “obligated” to adopt that interpretation. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). This obligation obtains even where the jurisdiction-stripping interpretation might be “otherwise acceptable,” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), and “plausible,” *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 467 (1989). The jurisdiction-preserving

construction must be adopted unless it is "plainly contrary" to congressional intent. *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Thus, the Supreme Court has required a "heightened showing," *Webster*, 486 U.S. at 603, through "specific language or specific legislative history that is a reliable indicator of congressional intent," or specific congressional intent "fairly discernible in the detail of the legislative scheme." *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 349, 351 (1984) (internal quotations omitted). Although the cases in which the Supreme Court has announced these clear-statement requirements have generally been challenges to federal rather than state action, the same requirements apply equally here, particularly where, as discussed above, the federal courts have been regularly deciding similar constitutional claims for decades without objection from Congress.

The district court's interpretation of the TIA—a statute enacted for the purpose of protecting state tax revenue years before the emergence of modern due process jurisprudence—cannot satisfy these clear-statement requirements. Because the district court's interpretation exceeds the scope of the text, legislative purpose, and consistent judicial interpretation of the statute; because it would upset decades of settled practice; and because it would strip the federal courts of jurisdiction over constitutional claims, this Court should reject the district court's ruling.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and hold that the TIA does not bar federal-court jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for *Amicus Curiae* Public Citizen, Inc., complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief contains 4,163 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2006, two copies of the foregoing Brief for *Amicus Curiae* Public Citizen, Inc., were served by regular U.S. Mail on the following:

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