No. 98-10

In the Supreme Court of the United States

OCTOBER TERM, 1998

JEFFERSON COUNTY, ALABAMA, PETITIONER

v.

WILLIAM M. ACKER AND U. W. CLEMON

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether there was subject matter jurisdiction over this action in the district court.

2. Whether a county government may impose a nondiscriminatory "occupational" tax upon the pay or compensation of federal judges.

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INTEREST OF THE UNITED STATES

This case involves the effort of an Alabama county to collect its local "occupational" tax from the federal district judges who work in that county. After the County commenced this tax collection case in state court, the federal judges removed the case to federal district court. This Court has directed the parties to address (i) the effect of the Tax Injunction Act, 28 U.S.C. 1341, on this suit and (ii) whether the county tax is constitutional as applied to the federal judges. The United States has a substantial interest in both of the questions presented and, in response to this Court's invitation, filed a brief in response to the petition at an earlier stage of this case.

STATEMENT

1. In 1967, the State of Alabama authorized its counties to impose "a license or privilege tax upon any person" who engages in a business or profession within the county and who is not required by any other law to pay such a tax to the county or the State (1967 Ala. Acts No. 406, § 4; Pet. App. 126-127). Pursuant to that authority, the Jefferson County Commission enacted the "Occupational Tax of Jefferson County, Alabama" in 1987 (Jeff. Cty. Ord. 1120 (Sept. 29, 1987); Pet. App. 129-139). Section 2 of the Ordinance states that it (Pet. App. 132):

> shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession * * * within the County * * * without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (l/2%) of the gross receipts of each such person.

The term "gross receipts" is defined by Section 1(F) of the Ordinance (Pet. App. 131) to include:

> the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered.

The term "gross receipts" does not include any compensation earned outside Jefferson County. Jeff. Cty. Ord. 1120, § 3; Pet. App. 132-133.

Jefferson County ordinarily collects its "occupational" tax from employers, who withhold the tax from

employee wages. In the absence of withholding, however, employees are required to remit the taxes directly to the County. Jeff. Cty. Ord. 1120, §§ 4, 5; Pet. App. 133-135. Persons who fail to comply with the Ordinance are subject to interest and penalties on the unpaid balance of the taxes. Jeff. Cty. Ord. 1120, § 10; Pet. App. 137-138. There are no criminal penalties for failing to pay the County's occupation tax (Pet. App. 31).

2. Respondents are federal district judges for the Northern District of Alabama. Many, but not all, of their duties as federal judges are performed at the federal courthouse located in Jefferson County. Pet. App. 32-33. The Jefferson County Ordinance therefore applies to respondents and obligates them to pay an "occupational" tax of one-half of one percent of their "gross receipts" from the services they perform within the County. Jeff. Cty. Ord. 1120, § 2; Pet. App. 32. The Administrative Office of the United States Courts has not withheld the county taxes from respondents' wages (*id.* at 30), and respondents have not paid the taxes directly (*id.* at 3, 32).

3. a. The County brought suit against respondents in the state district court for Jefferson County to collect the unpaid taxes (Pet. App. 3). Invoking 28 U.S.C. 1442(a)(3), respondents removed the action to the United States District Court for the Northern District of Alabama (Pet. App. 3, 32-33, 82). That statute authorizes the removal to federal court of any civil or criminal proceeding commenced in a state court against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties." 28 U.S.C. 1442(a)(3).

b. On cross motions for summary judgment, the district court held the county "occupational" tax to be

unconstitutional as applied to federal judges (Pet. App. 82-116). The court reasoned that, even though the tax was calculated by reference to the income earned by respondents and was not imposed on the United States, the tax directly interfered with the operations of the federal judiciary and therefore violated the "intergovernmental tax immunity" doctrine derived from the Supremacy Clause of Article VI of the Constitution (Pet. App. 91-105). The court further concluded that application of the county tax to respondents would effect a reduction in their compensation in violation of the Compensation Clause of Article III of the Constitution (Pet. App. 105-111).

4. A panel of the court of appeals reversed. 61 F.3d 848 (1995). The panel noted that the county tax (i) applies to all forms of employment and does not discriminate against federal judges (*id.* at 852-853) and (ii) is not imposed on the federal government directly (*id.* at 853-856). The panel concluded that the county tax is constitutional because, both in operation and effect, it taxes only the income that respondents derive from employment (*id.* at 855):

> [O]nly if a federal employee is compensated [does] he or she become[] liable to Jefferson County for the occupational tax. A federal employee in Jefferson County could refuse to pay any license fees and still lawfully perform his or her federal duties under the ordinance *so long as that employee received no income from performing those duties.* Consequently, the occupational tax is not a *precondition* to the performance of any federal government functions but a *consequence* of receiving any compensation therefor.

Because the county has simply imposed a nondiscriminatory "income tax" on respondents (*id.* at 856), the panel concluded that the tax does not violate the intergovernmental tax immunity doctrine and does not unconstitutionally diminish respondents' compensation (*id.* at 856-857).

5. a. On rehearing en banc, the court of appeals vacated the panel decision and affirmed the district court (Pet. App. 26-61), with three judges dissenting (*id.* at 62-74). The court of appeals acknowledged that, under this Court's decision in *Graves* v. *New York*, 306 U.S. 466 (1939), if the county tax were merely an "income tax" on federal employees, it would not violate the doctrine of intergovernmental tax immunity (Pet. App. 44). The court further recognized that it is a question of federal law whether the county tax is, in substance, an "income tax" for this purpose. The court nonetheless concluded that it would look to state law to determine "the attributes comprising the substance" of the county tax (*ibid.*).

The court noted that, in *McPheeter* v. *City of Auburn*, 259 So. 2d 833 (1972), the Alabama Supreme Court stated that a local occupational tax constitutes a license or "privilege" tax—rather than an income tax—under state law (Pet. App. 44-45). Based upon the theory that the county tax is imposed on the "privilege" of performing the federal judicial function, rather than on the "income" of the federal judges, the court of appeals held that the tax violates the doctrine of intergovernmental tax immunity (*id.* at 45-46):

> The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance

> No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Although the court acknowledged that the "legal incidence" of the county tax falls on respondents as individuals, the court concluded that the actual incidence of the tax is on the "privilege" of performing judicial duties. *Id.* at 47-48, 50. The court stated that federal judges are "federal instrumentalities" in their performance of judicial duties and that the county tax thus "amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine." *Id.* at 50.

b. The court of appeals then considered whether Congress has consented to the imposition of such taxes. The court held that the Public Salary Tax Act—in which Congress consented to taxation of the "pay or compensation" of federal officers or employees (4 U.S.C. 111)—does not consent to imposition of a "privilege" tax on federal judges (Pet. App. 54-56). The court distinguished *United States* v. *City of Pittsburgh*, 757 F.2d 43, 47 (1985), in which the Third Circuit held that a local "privilege" tax was, in substance, an "income tax" that could be imposed under the Public Salary Tax Act on the official transcript fees received by a federal court reporter (Pet. App. 56-57 n.19). The court of appeals stated, without elaboration, that the ordinance involved in *City of Pittsburgh* "did not include the factors" that made the Jefferson County ordinance a "privilege" tax (*ibid.*).

The court of appeals also held that the Buck Act does not consent to the imposition of a "privilege" tax on federal judges (Pet. App. 57-61). That statute provides

that "[n]o person" is to be relieved of liability for a state or local "income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 106(a)). The statute defines the term "income tax" to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c). The court of appeals acknowledged that the county tax is "within the Buck Act's definition of an 'income tax'" (Pet. App. 58). The court stated, however, that the Jefferson County tax on the "privilege" of working as a federal judge is a direct tax on "the United States or an[] instrumentality thereof" (4 U.S.C. 107(a)) and is therefore prohibited by the express terms of the Act (Pet. App. 58).

In reaching this conclusion, the court of appeals sought to distinguish this Court's decision in *Howard* v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, the Court held that the Buck Act authorized application of a Louisville tax on the "privilege" of conducting business to persons who were employed at a naval ordnance plant located within the city. *Id.* at 627-629. The court of appeals stated that the sole question in *Howard* was whether "Louisville lacked jurisdiction to tax in a federal area" (Pet. App. 60). By contrast, the court stated, the issue in this case is whether the local tax is a direct tax on a federal instrumentality that violates the intergovernmental immunity of the United States (*ibid.*). The court stated that the fact "that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges" (*id.* at 61). The court explained that (*ibid.*):

> Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties.

c. Because the court of appeals concluded that the challenged tax violates the intergovernmental tax immunity of the United States, and is not authorized by the Public Salary Tax Act or the Buck Act, the court stated that it was unnecessary to address the question whether the tax also violates the Compensation Clause of Article III of the Constitution (Pet. App. 35).

6. On Jefferson County's petition for a writ of certiorari (No. 96-896), this Court invited the Solicitor General to file a brief stating the views of the United States. In our brief in response to the Court's invitation (Pet. App. 176-196), we agreed with petitioner that the court of appeals erred in concluding that the county tax is unconstitutional as applied to federal judges. Because the decision in this case conflicted with the decision of another circuit, we suggested that the petition for certiorari be granted.[1]

On June 9, 1997, this Court granted the County's petition for a writ of certiorari, vacated the judgment and remanded the case to the court of appeals for further consideration in light of the Court's recent decision in *Arkansas* v. *Farm Credit Services*, 520 U.S.

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[1] We also noted (Pet. App. 184-185) that the parties and the court below had not addressed whether the suit had been properly removed under 28 U.S.C. 1442(a)(3). That statute authorizes removal only if the claim against the federal court officer was "for any act under color of office or in the performance of his duties." *Ibid.* We suggested that the receipt of personal income may not be an "act under color of office or in the performance of * * * duties" and that this jurisdictional issue should be addressed if certiorari were granted.

821 (1997). See 520 U.S. 1261 (1997). The *Farm Credit Services* case involved the Tax Injunction Act, 28 U.S.C. 1341, which directs federal district courts not to "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." In *Farm Credit Services*, the Court reaffirmed its longstanding conclusion that this Act does not apply to suits brought by the United States on behalf of itself or its instrumentalities. 520 U.S. at 823-824. The Court further held, however, that entities such as Production Credit Associations—which engage in commercial activity and do not exercise governmental authority—are subject to the prohibitions of the Tax Injunction Act unless the United States joins the suit as a co-plaintiff. *Id.* at 824, 826-832.

7. On remand, the en banc court of appeals held that the Tax Injunction Act does not bar the district court from proceeding in this case. Adhering to its prior decision on the merits of the case, the court again affirmed the judgment of the district court (Pet. App. 1-23). Four judges dissented on the merits and three judges dissented on the application of the Tax Injunction Act (*id.* at 23-25).

The majority first concluded that jurisdiction exists in this case under 28 U.S.C. 1442(a)(3), which authorizes the removal to federal district court of any "civil action * * * commenced in a State court" against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties." The court held that it may proceed in this case notwithstanding the Tax Injunction Act because the federal judges who removed the case to federal court qualify as "instrumentalities" of the United States. The court reasoned that, "[a]s one of the three branches of

the federal government, the federal judiciary's interests are congruent with, if not identical to, those of the United States" (Pet. App. 20) and that, when a federal judge performs his judicial function, he is exercising the judicial power of the United States (*ibid.*).

SUMMARY OF ARGUMENT

1. The Tax Injunction Act generally provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. 1341. As some courts have noted, this statute does not on its face bar federal jurisdiction over a "suit * * * filed to collect a state tax, rather than enjoin, suspend, or restrain the collection of taxes." *Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir.), cert. denied, 498 U.S. 897 (1990). Because this case was brought by the county to collect its tax, and was not brought by respondents to enjoin collection, the text of the Tax Injunction Act is not directly applicable here.

Nor is the underlying purpose of the Tax Injunction Act implicated in such a suit. In enacting this statute in 1937, Congress expressly modeled it upon the similar text of the federal statute which, since 1867, has deprived courts of jurisdiction over suits brought "for the purpose of restraining the assessment or collection" of any federal tax (26 U.S.C. 7421(a)). That ancient federal statute plainly does not bar jurisdiction over suits brought by the United States in federal courts to *obtain* collection of federal taxes; it bars only suits brought by taxpayers seeking to *restrain* the United States from assessing or collecting such taxes. The history of the Tax Injunction Act similarly reflects a concern only with actions filed by taxpayers to enjoin

state collection, not with actions brought by governments to obtain collection of taxes.

If, however, the Tax Injunction Act were applicable to this tax collection case, respondents would not qualify for the exception that may be available to an "instrumentality" of the United States under this Court's decision in *Arkansas* v. *Farm Credit Services*, 520 U.S. 821 (1997). A federal judge is not acting as an "instrumentality" of the United States in challenging a nondiscriminatory tax that has been assessed against the judge personally, rather than against the United States. A nondiscriminatory tax assessed on the personal income of a federal officer is not a tax imposed on an instrumentality of the United States.

For similar reasons, the district court in any event lacked jurisdiction in this case under the federal removal statues. A state or local tax imposed on income received by a federal judge does not challenge any action taken by the judge "under color of office" (28 U.S.C. 1442(a)(3)). Because an action to collect taxes owed on the personal income of federal judges is not within the removal jurisdiction of the federal courts, this case should be remanded to state court.

2. On the merits, the tax imposed by the County upon the wages of federal judges does not violate the Supremacy Clause. Congress has expressly consented to the imposition of local taxes on the income of federal judges and all other federal officers and employees in the Public Salary Tax Act, 4 U.S.C. 111. Under that Act, "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensa-

tion." *Ibid.* This Act was enacted by Congress for the very purpose of authorizing the sort of nondiscriminatory state and local tax on income imposed in this case.

The court of appeals erred in reasoning that the county tax is imposed on the occupational "privilege" of working as a federal judge, rather than on the "pay or compensation" of such a judge. As this Court has consistently held, whether a local tax is imposed upon "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act depends upon the practical operation of the tax. In its practical operation, the tax challenged in this case is not on the "privilege" of being a judge but is on the "pay or compensation" received by a judge. It thus falls squarely within the consent to local taxation of federal employees that Congress provided in the Public Salary Tax Act.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION IN THIS CASE

1. a. The Tax Injunction Act was first enacted in 1937. It specifies that, so long as a "plain, speedy and efficient remedy" is available in state court, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" (28 U.S.C. 1341). In decisions such as *Arkansas* v. *Farm Credit Services*, 520 U.S. 821, 826-827 (1997), this Court has emphasized that this statutory text "is to be enforced according to its terms" and should be interpreted to advance "its purpose" of "confin[ing] federal-court intervention in state government." Accordingly, because there "is little practical difference" between an injunction and anticipatory relief in the form of a declaratory judgment, the Court has concluded that declaratory relief is encompassed within the express

statutory bar against injunctions. *California* v. *Grace Brethren Church*, 457 U.S. 393, 408 (1982).

This Court has never suggested, however, that the express limitations in the statutory text may simply be ignored. By prohibiting actions to enjoin, restrain or suspend state tax collection, the statute unquestionably evidences a broad intention to bar "anticipatory relief against state tax officials in federal court." *California* v. *Grace Brethren Church*, 457 U.S. at 408. The plain text of the statute "does not, however, preclude federal court jurisdiction over a suit brought to collect a state tax rather than to enjoin, suspend, or restrain the collection of taxes." *Irving Indep. Sch. Dist.* v. *Packard Properties, Ltd.*, 741 F. Supp. 120, 122 (N.D. Tex. 1990), aff'd, 970 F.2d 58 (5th Cir. 1992). Accord, *Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir.), cert. denied, 498 U.S. 897 (1990); *Pendleton* v. *Heard*, 824 F.2d 448, 451 (5th Cir. 1987). "While a suit seeking declaratory relief can fall within the scope of [the statute's] prohibition, * * * [28 U.S.C.] 1341 is inapplicable" to cases that seek "not to inhibit the collection of taxes, but to require the collection of additional taxes." *Appling County* v. *Municipal Elec. Auth.*, 621 F.2d 1301, 1303-1304 (5th Cir.), cert. denied, 449 U.S. 1015 (1980).

b. In *Keleher* v. *New England Telephone & Telegraph Co.*, 947 F.2d 547 (2d Cir. 1991), however, when a city brought an action in federal court to obtain a declaration that its tax was enforceable and also to obtain the back taxes due, the Second Circuit concluded that the Tax Injunction Act barred the entire case from federal court. Relying on its perception of the historical

objectives of the statute, the court concluded (*id.* at 551):[2]

> [I]n removing the federal courts' power to "enjoin, suspend or restrain" state and local taxes, [Congress] necessarily intended for federal courts to abstain from hearing tax enforcement actions in which the validity of a state or local tax might reasonably be raised as a defense.

The history of the Tax Injunction Act, however, does not reflect an intention that the statute be interpreted in a manner that deprives its textual limitations of meaning. Although the Act plainly sought to limit the ability of federal courts "to interfere with so important a local concern as the collection of taxes" (*Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338 (1990) (quoting *Roswell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981)), the Act also plainly did not seek entirely to divest the federal courts of any and all jurisdiction over state tax matters. Instead, Congress chose a more narrowly formulated text that reflects its particular legislative concerns.

In drafting this statute in 1937, Congress expressly modeled it upon "statutes of similar import" previously enacted by Congress that parallel the state laws that "forbid actions in state courts to enjoin the collection of

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[2] The court further stated in the *Keleher* case that "[e]ven if Congress did not intend the Act's jurisdictional bar to reach so far, * * * we believe that general principles of federal court abstention would nonetheless require us to stay our hand here." 947 F.2d at 551. In *Keleher*, however, unlike in the present case, the merits of the tax controversy turned on "difficult questions of state law" (*ibid.* (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976))) rather than on the interpretation of federal statutory and constitutional provisions.

State and county taxes" and that remit taxpayers to "refund actions after payment under protest." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). The federal statute "of similar import" upon which the Tax Injunction Act was thus modeled is Section 10 of Chapter 169 of the Act of March 2, 1867, 14 Stat. 475, which is now codified at 26 U.S.C. 7421(a). In language that Congress incorporated into the text of the Tax Injunction Act, this ancient statute has specified since 1867 that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." *Ibid.* It is, of course, obvious that this longstanding provision of federal law does not preclude a suit *by the United States* to obtain *collection* of a tax. The state laws to which Congress referred in enacting the Tax Injunction Act (S. Rep. No. 1035, *supra*, at 1) also obviously do not preclude the States from enforcing their taxes in the courts. The state and federal provisions upon which Congress modeled the Tax Injunction Act bar only anticipatory actions brought by taxpayers that seek to enjoin the government from taking the ordinary steps required to obtain collection of the tax. These state and federal statutes have never been interpreted to preclude a taxpayer from *defending* a suit brought by a government to obtain collection of the tax.

Nor does the history of the Tax Injunction Act support a conclusion that its express textual limitations should be ignored. The two principal concerns expressed in the legislative history were (i) the elimination of unjust discrimination between citizens of the State who were precluded by state laws from obtaining pre-enforcement injunctive relief (S. Rep. No. 1035, *supra*, at 2) and (ii) the need to prevent foreign corporations from commencing an injunction action as a shield

for a refusal to pay taxes as they come due (*ibid.*). See also H.R. Rep. No. 1503, 75th Cong., 1st Sess. 1-2 (1937). In emphasizing that such suits for anticipatory or injunctive relief would be precluded under the Tax Injunction Act, the House Report on that Act further noted that various types of *non*-injunctive actions involving state taxes could properly arise in federal courts. The Report noted that "[t]he right under State law to recover illegal taxes may be enforced in Federal court if jurisdictional elements exist" and quoted the holding of this Court in *Singer Sewing Machine Co.* v. *Benedict*, 229 U.S. 481, 486 (1913), that a state tax refund suit may be brought in federal court, "no less than in the State courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy were present" (H.R. Rep. No. 1503, *supra*, at 3).

While Congress was thus plainly aware that state tax issues could arise and be litigated in several different contexts, the language that Congress utilized in the Tax Injunction Act bars federal courts only from the type of pre-collection injunction suits that other state and federal statutes had already addressed. While anticipatory suits seeking to *restrain* collection are barred under these statutes, they (i) do not bar actions brought by the government to *obtain* collection, (ii) do not prevent a taxpayer from defending in a collection suit by contending that the tax is invalid, and (iii) do not preclude an independent action by a taxpayer to sue for a refund of taxes already paid.[3] Notwithstanding

[3] While the Tax Injunction Act does not, by its terms, bar suits in federal court for the refund of state taxes, federal courts apply "principles of abstention that were developed before enactment of the Tax Injunction Act" to allow state courts to resolve questions

Congress's express awareness of these alternative forms of action, neither the history nor the text of the Tax Injunction Act reflects an intention to preclude such non-injunction actions in federal court.

2. If this Court were nonetheless to conclude that the Tax Injunction Act applies to a tax collection action brought by the taxing authority, the Act would then bar the present suit. Respondents do not qualify for any exception to that Act.

In *Arkansas* v. *Farm Credit Services*, 520 U.S. at 824, 828-831, this Court noted that the Tax Injunction Act does not bar an action by the United States to challenge a state tax and that, in some circumstances,

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of state law presented in such cases. *Kistner* v. *Milliken*, 432 F. Supp. 1001, 1005 (E.D. Mich. 1977) (citing, *e.g.*, *Matthews* v. *Rodgers*, 284 U.S. 521 (1932)). But see *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323, 327 (5th Cir. 1979) (refund suits barred by Tax Injunction Act). As the court explained in *Kistner* v. *Milliken*, 432 F. Supp. at 1005:

> Being an action for monetary compensation, a refund action does not pose the same threat to the state's fiscal integrity as does an action for anticipatory relief. In an action for refund, the court is not bound by the jurisdictional bar of the Tax Injunction Act, but by the judicial doctrine of abstention, and there may be cases in which a court should exercise its discretion to accept jurisdiction of a refund action.

In *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 115 (1981), this Court held that the doctrine of "comity" precludes federal courts from considering damage claims against state governments under 42 U.S.C. 1983 for the unconstitutional administration of state tax provisions. In so holding, the Court made clear that it relied on principles that pre-dated enactment of the Tax Injunction Act and not on that Act "standing alone." 454 U.S. at 107. More recently, the Court explained that the *Fair Assessment* case concerned only "the scope of the 1983 cause of action * * *, not the abstention doctrines." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 719 (1996).

an "instrumentality" of the United States may also be entitled to bring a similar suit. The Court has not decided whether a federal "instrumentality" could proceed in such a suit without the United States joining as a co-plaintiff. *Id.* at 831. The Court has concluded, however, that, to qualify as an "instrumentality," the claimant must, at a minimum, be exercising governmental authority and not be involved in matters that concern only "private" or "commercial interests." *Ibid.*

It is, of course, beyond question that federal judges exercise governmental authority when acting in their official capacity. It is also, of course, evident that judges, in the management of their personal affairs, sometimes act in their own private or commercial interest. In challenging a nondiscriminatory local tax imposed on their private incomes, judges are acting in their private, not official capacities. They are therefore not acting as "instrumentalities" of the United States in this suit.

A tax imposed on a judge's private income is not imposed directly or indirectly on the United States or upon any government activity. This Court has long held that imposition of a nondiscriminatory state tax on the income of federal officers and employees does not implicate the sovereign interests of the United States and does not derogate from federal government authority. Since the decision in *Graves* v. *New York*, 306 U.S. 466, 480 (1939), this Court has made clear that "only those taxes that [are] imposed directly on one sovereign by the other or that discriminate[] against a sovereign or those with whom it deal[s]" implicate the sovereign interests of the United States. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 811 (1989). See pp. 21-23, *infra*.

The application of a nondiscriminatory state tax to the wages of federal officers or employees thus does not fall upon, or implicate the governmental interests of, the United States or its instrumentalities. A suit brought by respondents to challenge application of the tax to them personally would not represent a suit by a federal "instrumentality" and would not qualify under any exception to the Tax Injunction Act.

3. For essentially the same reasons, this case was not properly removed from state court. The applicable removal statute permits removal only when a federal officer is sued in state court for actions taken "under color of office or in the performance of his duties." 28 U.S.C. 1442(a)(3). Respondents cannot maintain that their "duties" required them to refuse to pay the nondiscriminatory local tax; nor can they maintain that their refusal to pay that tax was an act taken "under color of office." It was a private action based upon the claim of respondents that federal law precludes imposition of the tax.

The availability of a potential federal defense to a state cause of action does not alone justify removal. In addition to a "colorable" federal defense (*Mesa* v. *California*, 489 U.S. 121, 129-135 (1989)), the federal officer must show that the suit was brought in state court "out of the acts done by him under color of federal authority" (*id.* at 131-132 (quoting *Maryland* v. *Soper (No. 1)*, 270 U.S. 9, 33 (1926))). See also *Mesa* v. *California*, 489 U.S. at 135 (the suit must be brought "against a federal officer for acts done during the performance of his duties"); *Gay* v. *Ruff*, 292 U.S. 25, 33 (1934) (removal available "only when the person defending caused it to

appear that his defense was that in doing the acts charged he was doing no more than his duty").[4]

The court of appeals erred in concluding (Pet. App. 6-7) that respondents acted in their official capacity in refusing to pay the county tax. The tax on the income of respondents was imposed only upon them personally and not upon the United States or upon any instrumentality of the United States. In refusing to pay that tax, respondents have not acted under any direction from the United States or from any instrumentality of the United States. There is no statutory basis or other source for any "duty" of respondents not to pay the local tax. Nor can respondents properly assert that their private refusal to pay the local tax was done "under color of office" (28 U.S.C. 1442(a)(3)), for no judicial act or proceeding was implicated in their private actions. Any suggestion that respondents' refusal to pay nondiscriminatory local taxes on their personal incomes is "in the performance of [their] duties" is further refuted by the fact that they pay the nondiscriminatory state income tax on that same income without objection (Pet. App. 116).

No other basis for removal jurisdiction exists in this case. A federal question raised, as here, only as a defense to a state cause of action does not support removal jurisdiction under 28 U.S.C. 1441(a). *Mesa* v. *California*, 489 U.S. at 121. Because the district court lacked subject matter jurisdiction, the case should be remanded to state court. 28 U.S.C. 1447(c).

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[4] For example, federal law may provide a defense to a state tort suit by preempting the state law. A federal officer sued in state court for such a state tort would not be entitled to remove the case to federal court unless the suit arose "out of the acts done by him under color or federal authority." *Mesa* v. *California*, 489 U.S. at 131-132.

II. CONGRESS HAS CONSENTED TO THE TAX ON RESPONDENTS' INCOME AND, THEREFORE, THE SUPREMACY CLAUSE DOES NOT PROTECT THEM FROM THE JEFFERSON COUNTY TAX

1. a. The court of appeals erred in concluding that Congress has not consented to the challenged county tax.[5] The Public Salary Tax Act unequivocally provides that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. The history and the text of this provision indicate that a nondiscriminatory local tax imposed on compensation from employment may be applied to any "officer or employee of the United States" (*ibid.*) without regard to whether that tax is

[5] The court of appeals did not consider whether Congress has consented to the tax under the Public Salary Tax Act of 1939 (4 U.S.C. 111) or the Buck Act (4 U.S.C. 105 *et seq.*) until *after* the court had concluded that the tax violated the constitutional doctrine of intergovernmental tax immunity. As this Court has frequently observed, however, a constitutional issue should be reached only after non-constitutional bases for decision have been resolved. *Califano* v. *Yamasaki*, 442 U.S. 682, 692-693 (1979); *Bowen* v. *United States*, 422 U.S. 916, 920 (1975); *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960). This practice is rooted in the Court's reluctance to decide "abstract, hypothetical or contingent" constitutional questions. *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 284 (1969) (quoting *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). It is appropriate first to address the question whether Congress has consented to the challenged tax because, if such consent has been given, it is irrelevant whether, in the absence of such consent, the tax would be unconstitutional.

labeled, under state law, as an "occupational" tax, a "privilege" tax or an "income" tax.

The Public Salary Tax Act is intimately connected with the modern development of the constitutional doctrine of intergovernmental tax immunity. See *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. at 811-812. Under this doctrine, "States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977) (footnote omitted). For many years, the intergovernmental tax immunity doctrine was broadly applied to prohibit state taxation of the salaries of officers and employees of the United States (*Dobbins* v. *Commissioners*, 41 U.S. (16 Pet.) 434 (1842)) and to prohibit federal taxation of the salaries of state officials (*Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1870)). See *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. at 810-812. In *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), however, the Court declined to follow these authorities—and implicitly overruled *Collector* v. *Day*—by holding that the federal income tax could validly be imposed on employees of the New York Port Authority. One year later, in *Graves* v. *New York*, 306 U.S. at 480, the Court overruled the entire line of cases from *Dobbins* v. *Commissioners* through *Collector* v. *Day*. As this Court explained in *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. at 811:

> After *Graves* * * * intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

The Public Salary Tax Act was considered by Congress during the period when the Court was in the process of narrowing, and ultimately abandoning, the *Dobbins-Day* line of cases. After the Court held in 1938 in *Helvering* v. *Gerhardt*, *supra*, that the federal government could impose nondiscriminatory taxes on state employees, Congress determined that federal officers and employees should be subject to similar state taxes. In the Public Salary Tax Act (Act of Apr. 12, 1939, ch. 59, § 4, 53 Stat. 575), the predecessor of 4 U.S.C. 111, Congress therefore expressly consented to nondiscriminatory state taxation of the "pay or compensation" of federal officers and employees. See H.R. Rep. No. 26, 76th Cong., 1st Sess. (1939); S. Rep. No. 112, 76th Cong., 1st Sess. (1939).

This Court entered its decision in *Graves* shortly before the Public Salary Tax Act was enacted. The practical effect of the Public Salary Tax Act was thus to codify the result in *Graves* and thereby foreclose "the possibility that subsequent judicial reconsideration of [*Graves*] might reestablish the broader interpretation of the immunity doctrine." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. at 812. The purpose of the Act is thus plainly to abandon, not preserve or extend, the immunity of federal officers and employees from nondiscriminatory state taxation.

b. The proper interpretation of the Public Salary Tax Act must, of course, begin with its language. See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Under this Act, the United States consents to nondiscriminatory state or local taxation of the "pay or compensation for personal service" received by any "officer or employee of the United States." 4 U.S.C. 111. Because the local ordinance challenged in this case taxes the "pay or compensation" that respondents receive for

the "personal service" they provide as officers of the United States, and does not discriminate in doing so, the tax comes within the plain language of the consent that Congress has given to state and local taxation.[6]

The language of the county ordinance, of course, does more than simply impose the tax. It also states that it is "unlawful for any person" to be employed within the County "without paying" the tax. Jeff. Cty. Ord. 1120, § 2; Pet. App. 132.[7] The court of appeals held that the tax is beyond the scope of the statutory consent because: (i) under state law, the ordinance imposes a tax on the "privilege" of working, rather than a tax on the "income" received from work (Pet. App. 54-56; see *id.* at 44-45 (citing *McPheeter* v. *City of Auburn*, 259 So. 2d 833 (Ala. 1972))); and (ii) a tax imposed on the "privilege" of working as a federal judge constitutes a direct tax on the United States to which Congress has not consented (*id.* at 56).

The court of appeals erred, however, in looking to the label, rather than the substance, of the challenged tax. Whether the County's occupational tax is imposed on "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act, 4 U.S.C. 111, is a question of federal law. See *Howard* v. *Commissioners*

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[6] The district court (Pet. App. 89-90) correctly held that the county tax does not "discriminate against the officer or employee because of the source of the pay or compensation" (4 U.S.C. 111). The en banc court of appeals stated that, "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it" (Pet. App. 34 n.9).

[7] The tax is imposed on the "gross receipts" from employment within the County. That term is defined to mean "compensation" and includes "the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind." Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 131.

of the Sinking Fund, 344 U.S. 624, 628-629 (1953); *United States* v. *City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985). This Court has emphasized that, in determining the validity of a state tax whose burden falls upon the federal government or its employees, "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932). It is therefore necessary to "look through form and behind labels to substance" (*City of Detroit* v. *Murray Corp. of Am.*, 355 U.S. 489, 492 (1958)) and to go beyond the "bare face of the taxing statute to consider all relevant circumstances" (*United States* v. *City of Detroit*, 355 U.S. 466, 469 (1958)). See also *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977) (constitutionality of a state tax on the "privilege of doing business" under the Commerce Clause does not turn merely on the legislative phrasing, for such "formalism merely obscures the question whether the tax produces a forbidden effect").

In its "practical operation" and effect, the county tax is simply a tax on the "pay or compensation" that respondents receive for their services to the United States. The tax is imposed only if a person earns "gross receipts" or receives "compensation" in the form of "salaries, wages, commissions, [or] bonuses" while employed within the County. Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 131. See note 7, *supra*. Even though phrased as a "privilege" tax, it is imposed only on income as it is received. The tax does not operate as a prerequisite or precondition of employment; it is therefore indistinguishable in its practical operation and effect from other forms of income taxation.

The court of appeals was unduly swayed by the language of the ordinance that makes it "unlawful" for a

person not to pay this "privilege" tax (Pet. App. 50-51). It is, by definition, "unlawful" for any person to fail to pay a tax imposed by law. If a State could not make it "unlawful" for a federal officer to fail to pay a tax, the tax could not be enforced; if the tax could not be enforced, it would then hardly be relevant whether Congress had, or had not, consented to it.

The only "punishment" imposed for a failure to pay the county tax is interest and penalties on the unpaid tax. Jeff. Cty. Ord. 1120, § 10; Pet. App. 137-138. The fact that Ordinance 1120, in this manner, makes it "unlawful" for anyone to fail to pay the tax does not take the tax outside the scope of the statutory consent. The tax does not discriminate against federal officers and employees; it is imposed on the "pay or compensation" that they receive from their employment (4 U.S.C. 111); it is therefore within the scope of the statutory consent.

c. The court of appeals erred in distinguishing (Pet. App. 56-57 n.19) the tax imposed by Ordinance 1120 from the "business privilege tax" upheld in *United States* v. *City of Pittsburgh*, 757 F.2d at 47. There, the City of Pittsburgh imposed a "business privilege tax" on persons doing business in the city at the rate of five mills per dollar of gross receipts. The United States challenged the application of this "privilege" tax to the official transcript fees of a federal court reporter in the United States District Court for the Western District of Pennsylvania. The Third Circuit concluded, however, that the local "privilege" tax was within the scope of the consent provided by the Public Salary Tax Act, 4 U.S.C. 111.

In so holding, the court of appeals found it immaterial that the Pennsylvania Supreme Court had ruled that the local tax was a "privilege" tax rather than an "in-

come tax" under state law. 757 F.2d at 47. The court of appeals held that federal law, not state law, determines whether the local tax is imposed on the "pay or compensation" (4 U.S.C. 111) of a federal officer. 757 F.2d at 47. The court explained that, in enacting the Public Salary Tax Act, Congress intended that federal employees "should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations." *Ibid.* (quoting S. Rep. No. 112, *supra*, at 4). The court stated that the statutory consent to taxation of the "pay or compensation" of federal officers must be read broadly to comport with that legislative intent. *Ibid.* The court further noted that, in enacting the Public Salary Tax Act, Congress was aware "that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Ibid.* (citing S. Rep. No. 112, *supra*, at 6-10). Because the "business privilege tax" challenged in *City of Pittsburgh* was imposed on the "gross receipts or gross income from the [transcript] fees," the court concluded that Congress had consented to the imposition of the tax under 4 U.S.C. 111. 757 F.2d at 47.

2. The Buck Act, 4 U.S.C. 105 *et seq.*, reinforces this understanding of the scope of the consent to state taxation contained in the Public Salary Tax Act. Under the Buck Act, a person who receives "income from transactions occurring or services performed" in a "Federal area" is subject to "any income tax" levied by a state or local government "to the same extent" as if the income was received in an area that is "not a

Federal area." 4 U.S.C. 106(a).[8] The term "income tax" is defined for this purpose to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c).

The Buck Act (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059) and the Public Salary Tax Act were both enacted by the same Congress. In adopting the broad definition of the term "income tax" contained in the Buck Act, Congress was aware that States impose a variety of taxes on income that are designated by terms other than "income tax"—such as "corporate-franchise" taxes or "business-privilege" taxes. S. Rep. No. 1625, 76th Cong., 3d Sess. 5 (1940). Congress sought to ensure that state and local governments are authorized to impose taxes measured by the income or receipts from federal employment regardless of how the tax is labeled or described. *Ibid.*

In *Howard* v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), this Court held that the Buck Act

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[8] The term "Federal area" is defined broadly in the Buck Act to mean "any lands or premises held or acquired by or for the use of the United States." 4 U.S.C. 110(e). This definition appears, by its terms, to encompass premises used by the United States for the purposes of operating a federal courthouse. The origin and purpose of the Buck Act, however, were more limited: that statute was designed to ensure that federal officers and employees who reside or work within exclusive federal enclaves would be treated equally with those who reside and work outside such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940); *United States* v. *Lewisburg Area Sch.. Dist.*, 539 F.2d 301, 309 (3d Cir. 1976). Because the Public Salary Tax Act broadly consents to any tax imposed on the "pay or compensation" of federal employees (4 U.S.C. 111), it is unnecessary for the Court to decide in this case whether the Buck Act itself authorizes application of state and local "income tax[es]" to the salaries of federal judges as compensation for "services performed" in a "Federal area" (42 U.S.C. 106(a)).

consented to the imposition of a municipal "license fee" (of one percent of the wages and "other compensations earned by every person in the City") on employees who worked at a federal ordnance plant. 344 U.S. at 625 n.2. The employees had claimed in *Howard* that the local "license fee" was not an "income tax" within the scope of the Buck Act because the Kentucky Court of Appeals had held that "this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City" (*id.* at 628 (citing *City of Louisville* v. *Sebree*, 214 S.W.2d 248, 253-254 (1948))). This Court rejected that argument (344 U.S. at 628-629):

> [T]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts.

In dissent in *Howard*, Justice Douglas (joined by Justice Black) urged a contrary point of view that is echoed in the reasoning of the court of appeals in the present case (*id.* at 629 (citation omitted)):

> I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e.g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals

held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.

The decision of the court of appeals in this case errs for the same reason that the Court rejected the formalistic interpretation of the statute proposed by the dissent in *Howard*. Both in substance and practical effect, the county ordinance challenged in this case imposes a tax on income received from federal employment, and nothing more. Congress expressly consented to the imposition of such nondiscriminatory state and local taxes upon the "pay or compensation" of federal officers and employees. 4 U.S.C. 111.

CONCLUSION

If the Court concludes that jurisdiction does not exist in this case, the judgment of the court of appeals should be vacated and the case remanded to state court. If the Court concludes that jurisdiction exists in this case, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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