No. ________

In The
Supreme Court of the United States

CITY OF AUSTIN, TEXAS, and ELAINE HART,
in her official capacity as Austin Interim City Manager,

Petitioners,

v.

REAGAN NATIONAL ADVERTISING OF AUSTIN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Third District Of Texas

PETITION FOR A WRIT OF CERTIORARI

ANNE L. MORGAN,
City Attorney
MEGHAN L. RILEY,
Chief – Litigation
PATRICIA L. LINK,
Assistant City Attorney
CITY OF AUSTIN –
LAW DEPARTMENT
P.O. Box 1546
Austin, Texas 78767

RENEA HICKS
Counsel of Record
LAW OFFICE OF
MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703
(512) 480-8231
rhicks@renea-hicks.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

A billboard company sued the City of Austin twice – first in federal court, then in state court – for refund of billboard registration fees paid under protest. Both times, the company claimed that the registration fee is an invalid tax under the Texas Constitution. In the first-filed suit, the federal district court dismissed the company's claim without prejudice for lack of jurisdiction, because it found the fee to be a tax under the Tax Injunction Act, 28 U.S.C. § 1341. In the second-filed suit, in reversing a trial court finding that the fee is not a tax, the state appeals court held that the prior federal dismissal under the Tax Injunction Act preclusively determined that the billboard fee is a tax under Texas law and, hence, invalid under the Texas Constitution. The question presented is:

> Whether a federal court's dismissal of a state tax law claim for lack of jurisdiction under the federal Tax Injunction Act may be interposed as a matter of federal law to preclusively determine the same state tax law claim in a subsequent state case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Austin, Texas, and Austin Interim City Manager Elaine Hart (together, "Austin" or "the City") respectfully petition the Court for a writ of certiorari to review the judgment of the Court of Appeals for the Third District of Texas, in favor of Respondent Reagan National Advertising of Austin, Inc. d/b/a Reagan National Advertising ("Reagan").

OPINIONS BELOW

The decision of the Court of Appeals for the Third District of Texas is reported at 498 S.W.3d 236 and reproduced in the appendix to this petition at App. 1a-20a. The state district court's findings of fact and conclusions of law, and its judgment, are reproduced at App. 24a-42a.

JURISDICTION

The Court of Appeals for the Third District of Texas issued its judgment on June 15, 2016. App. 21a-22a. The Supreme Court of Texas denied the City of Austin's timely-filed petition for review on September 1, 2017. App. 23a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

FEDERAL STATUTE AND STATE CONSTITUTIONAL PROVISION INVOLVED

28 U.S.C. § 1341, the Tax Injunction Act, provides as follows:

> 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.

Article VIII, § 1(f) of the Texas Constitution provides as follows:

> The occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the State for the same period on such profession or business.

INTRODUCTION

The ruling below contradicts the purpose of the Tax Injunction Act, which is "to limit drastically federal district 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). In a decision that turns the Tax Injunction Act inside out, the state appeals court applied the federal law of issue preclusion to reach an extraordinary result that is simultaneously at odds with both the Tax Injunction Act *and* the federal common law of issue preclusion.

This Court has warned lower courts that they must "guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Arkansas v. Farm Credit Svcs. of Central Arkansas*, 520 U.S. 821, 827 (1997). The appeals court ruling runs directly counter to this directive and to the Congressional policy embodied in the Tax Injunction Act. The state appeals court has created a mechanism for eroding the federalism constraints Congress established in the Tax Injunction Act by using state courts to transmute federal court rulings into the opposite of what the federal courts decided. This inverts federalism.

The Reagan billboard company had asked a federal court to invalidate a municipal fee on the ground that the fee was a tax rendered illegal by the Texas Constitution. The federal court on its own raised the question of whether the Tax Injunction Act deprived it of subject-matter jurisdiction because such tax issues – "tax[es] under State law," *see* 28 U.S.C. § 1341 – are beyond the purview of federal courts. Whereupon, the billboard company did an abrupt about-face and argued that, as it just happens to turn out, the claim it had brought was not within the federal court's jurisdiction and the case therefore should be dismissed without prejudice.

The federal court then analyzed the question of whether the billboard company's case presented a question of the validity of a state tax that would trigger the Tax Injunction Act's withdrawal of federal jurisdiction over such matters. It determined that the Tax

Injunction Act denied it the authority to adjudicate the validity of the challenged municipal fee under the Texas Constitution and dismissed the company's case without prejudice. In other words, the federal court declined to decide any state law issues Reagan had presented about Austin's registration fee because Congress had denied the court jurisdiction to do so.

From this federal district court decision *not* to decide Reagan's state tax law claims, the state appeals court drew the paradoxical conclusion that, as a matter of federal law, the federal court *did* decide those very state tax law claims. Under the lower court ruling, the Texas court seized a federal court decision declining under the Tax Injunction Act to decide a state tax issue and converted it into an outcome-determinative decision binding Texas courts. In this way, the state appeals court retroactively turned federal court adherence to the Tax Injunction Act into a violation of it. Not deciding the state tax issue in federal court decided it – but only later, when a state court said so.

Applying federal law, the state appeals court has opened a gaping, and quite inviting, hole in the wall erected by the Tax Injunction Act to keep federal courts out of state taxation matters. In doing so, it has converted a federal court virtue into a vice. Under the appeals court ruling, a federal court anxious (as it should and must be) to observe the jurisdictional limits of the Tax Injunction Act must do so while facing the fact that it is also setting in motion litigation events that can end with the federal court having determined the merits of the dispute it expressly refused to decide.

The Court should rescue lower federal courts from being confronted with this jurisprudential dilemma. Summary reversal of the ruling below is well-warranted, but, regardless, a writ of certiorari should issue to review it.

STATEMENT OF THE CASE

1. Texas law authorizes Austin to regulate billboards and other off-premise signs located in the City and its extraterritorial jurisdiction. Tex. Loc. Gov't Code § 216.901(a). Under this authority and its powers as a home rule city, Austin requires that billboards be registered with its Code Compliance Department. App. 26a (Stip. 20), 56a-57a. Registrants also must pay the City a fee to help defray inspection and other costs associated with billboard regulation. *Id*. Over 500 billboards are subject to Austin's registration system. P. Exh. 13.

Reagan is an outdoor advertising company that owns and operates billboards. App. 24a-25a (Stip. 5). It is the largest billboard operator in the Austin area and owns about 80% of the billboards subject to the City's regulatory program. P. Exh. 13.

In the years before 2009, the billboard program required owners of the land where billboards are situated to register them and pay the associated fees. App. 25a (Stip. 12). The program operated on a two-year cycle, with biennial registration and a fee of $220 per billboard. *Id*. (Stips. 12, 13).

2. The billboard program changed with the mid-2008 passage of a new ordinance. *Id*. (Stip. 14). Starting in 2009, the obligation to register billboards and pay registration fees switched from owners of the land to owners of the billboards. App. 26a (Stip. 16). Operation of the program changed to a one-year cycle, with registration and fee payment required annually rather than biennially. *Id*.

Registration fees were re-set at $200 per billboard per year, the fee level that remained in place for the four-year period of 2009-2012. *Id*. For 2013 and 2014, the fee level was lowered slightly, to $190 per billboard per year. *Id*. (Stip. 18).[1] Reagan disputed the new fee levels. Starting in 2009, it paid the fees for its billboards but under protest. App. 29a (Stips. 38-43).

3. In 2010, Reagan sued the City in federal court, where it "challeng[ed] the constitutionality of the City's billboard registration fee." App. 28a (Stip. 34); *see* App. 89a-98a (Reagan's federal complaint). Asserting only federal question jurisdiction, App. 90a (¶ 5),[2]

[1] Austin's current fee-setting ordinance for billboard registration, City of Austin Ordinance No. 20120405-007, is reproduced at App. 56a-58a.

[2] The only basis for federal jurisdiction over Reagan's claim was either 28 U.S.C. § 1331 or 28 U.S.C. § 1343(a)(3). Reagan did not allege diversity jurisdiction under 28 U.S.C. § 1332 or supplemental jurisdiction under 28 U.S.C. § 1367(a). Its only cited sources of federal court jurisdiction, the Fourteenth Amendment and 42 U.S.C. § 1983, are not jurisdictional provisions. Section 1983 provides only a cause of action for alleged violations of federal rights, including rights asserted under the Fourteenth Amendment. *See*, *e.g.*, *Davis v. Passman*, 442 U.S. 228, 238 n.16

Reagan sought injunctive relief and requested a court-ordered refund of the fees it had paid in 2009 and 2010. App. 36a.

The company's sole claim was that the registration fee imposed on it by the City was actually a tax rendered invalid by Article VIII, § 1(f), of the Texas Constitution and that this state constitutional violation was a violation of its right to due process under the Fourteenth Amendment. App. 92a-93a (¶¶ 13-14).[3] The premise of Reagan's claim was that the fees were taxes because the revenue generated by the fees substantially exceeded the regulatory costs to the City. App. 91a-92a. Reagan argued that the fees thus were illegal occupation taxes because the state constitutional provision limits local occupation taxes to one-half the rate of occupation taxes levied by the State on the same activity and, since Texas does not levy an occupation tax on billboard operators, the City's fees necessarily exceeded the state constitutional limit. App. 92a.

4. The parties proceeded to a bench trial on Reagan's claims but the district court *sua sponte* raised the question of whether the federal Tax Injunction Act

(1979). It is not jurisdictional. *Hagans v. Lavine*, 415 U.S. 528, 535 (1974).

[3] The federal district court dismissed the case without addressing the question of whether Reagan could bootstrap a state law violation into a federal due process violation in this way. It could not under governing Fifth Circuit case law. "Converting alleged violations of state law into federal . . . due process claims improperly bootstraps state law into the Constitution." *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1056 (5th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1108 (1986).

deprived it of subject-matter jurisdiction over the case. App. 37a-38a.[4] At this point, Reagan, which brought the case into federal court in the first place, took the position that its case had to be dismissed without prejudice because the challenged fee was a tax, and the Tax Injunction Act deprived the federal court of jurisdiction. App. 39a. For its part, Austin argued that the billboard fee "is a proper regulatory fee under the [Tax Injunction] Act," and the federal court had jurisdiction. *Id*.

The court's analysis of whether the billboard assessment was a fee or a tax focused entirely on federal law. Texas case law and Texas statutory and constitutional rules played no role in the analysis. Article VIII, § 1(f), of the Texas Constitution was not even cited. Drawing from its conclusion that the purpose of the Tax Injunction Act is to prevent federal courts from "interfering with the administration of state and local tax systems," the federal district court held that the $200 annual fee was a tax "for purposes of the [Tax Injunction] Act." App. 51a.[5] It further found that the Tax Injunction Act's additional requirement, that Texas state courts have to provide taxpayers a "plain, speedy, and efficient remedy," was met. App. 52a.

Accordingly, the court dismissed the case "without prejudice for lack of jurisdiction." App. 55a. It pointedly

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[4] The court cited the Tax Injunction Act as "28 U.S.C. § *1371*," App. 38a (emphasis added), but meant 28 U.S.C. § *1341*.

[5] The federal judgment issued in late 2011, before the City had lowered the annual fee to $190 starting in 2013, so the court had before it only the $200 annual fee.

– and, futilely – concluded its analysis by clarifying the limited future impact of the jurisdictional ruling: “A dismissal for lack of subject-matter jurisdiction is not a merits determination, and therefore cannot have a *res judicata* effect.” App. 52a n.6. There was no appeal. App. 8a (“neither party appeal[ed] the judgment”).

5. Almost five months later, Reagan re-asserted its challenge to Austin’s billboard registration fees by filing suit against the City, this time in a Texas district court.[6] Reagan made the same claim against the City, alleging that Austin’s billboard registration fee is a tax under Texas law because it significantly exceeds the regulatory costs of the program. App. 80a. As its only support for the claim, Reagan repeated the argument in its federal complaint: because Texas does not levy an occupation tax on billboards, and, because of the 50% constraint on local taxing authority in Article VIII, § 1(f), of the Texas Constitution, the fee *qua* tax therefore was illegal. App. 80a.[7]

6. The state district court conducted a bench trial and issued final judgment in favor of the City, upholding the billboard registration fee against Reagan’s

[6] Whether Reagan’s state court case was time-barred under Texas law was disputed below, but resolved in Reagan’s favor. App. 11a. This issue of state limitations law is not brought before the Court for review and is not further discussed in this petition.

[7] The text’s citations to Reagan’s allegations are to its third amended petition, which was the company’s live state court pleading. By the time of the decision below, Reagan had narrowed its suit to only the Article VIII, § 1(f) claim. App. 4a n.2.

challenge. App. 33a-34a. The trial court found as a fact that the billboard fee "is based on the City's costs for actual activities performed" related to the billboard registration program. App. 31a (FF 51, 52). Consistent with the federal court's clarifying footnote on preclusion, the trial court concluded that the federal Tax Injunction Act ruling was "not res judicata" in the suit before it, that there was a reasonable relationship between the amount of the fee and costs to the City, and that the primary purpose of the fee is for regulation. App. 31a (CL 2-4). Therefore, it upheld the fee as reasonable and constitutional. App. 31a (CL 5).

7. The state court judgment was reversed on appeal. Framing the question as one of issue, rather than claim, preclusion, the appeals court recognized that, since the first judgment was federal, federal issue preclusion law controls. App. 11a-12a. It then described the question posed as "whether the federal court's decision that the billboard assessment constitutes a tax has preclusive effect in state court," and resolved it as a matter of law. App. 12a-13a.

The appeals court's answer to the preclusion question was "yes." It held that the federal court dismissal on the ground that the registration fee was a tax under the federal Tax Injunction Act established as a matter of federal preclusion law that the fee was a tax under Texas law:

> [I]ssue preclusion applies and . . . the federal court's determinations should have precluded relitigation in the trial court of whether the

> billboard assessment is a tax under article VIII, section 1(f) of the Texas Constitution.

App. 18a. The appeals court ordered the City to refund Reagan nearly $200,000 in fees paid under protest during the 2009-2014 period and remanded the case to the district court for consideration of Reagan's claim for attorney fees under Texas law. App. 21a-22a.

8. The City petitioned the Supreme Court of Texas for review of the appeals court judgment. App. 59a-74a (pertinent excerpts of City's petition for review). Its first issue specifically asked the Texas Supreme Court to grant review on the federal question of what preclusive effect the federal court's prior dismissal under the Tax Injunction Act has on whether the City's fee is an illegal tax under Texas law. App. 62a.[8] The bulk of the petition's discussion was devoted to this federal issue. *See* App. 62a-73a.

The Texas Supreme Court denied review, App. 23a, and Austin now seeks a writ of certiorari from the Court to review the appeals court judgment on the

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[8] The specific issue presented was:

> May a federal court decision that it lacks jurisdiction under the federal Tax Injunction Act to decide a challenge to a municipal fee be used offensively in state court to preclusively establish as a matter of law that the municipal fee is an illegal tax under state law?

A related second issue asked the court to clarify whether it would apply federal or state issue preclusion law. App. 62a.

question of federal issue preclusion law under the Tax Injunction Act that is presented by this case.[9]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Inconsistent With This Court's Precedents.

The question here is whether the law of issue preclusion[10] allows use of the earlier federal court Tax Injunction Act dismissal to dictate as a matter of law a later state court determination about whether Austin's fee is an invalid tax under the Texas Constitution. The court below disregarded this Court's precedents and provided an answer that is inconsistent with them.

A. Answering the question requires application of federal law, because the preclusive effect of federal court judgments is determined by federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008), citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001). State courts are obligated to follow this federal common law and give federal judgments "the effect that this Court prescribes." *Semtek*, 531 U.S. at

[9] The appeals court mandate issued on October 30, 2017, after it denied the City's motion to stay the mandate's issuance pending this Court's disposition of the petition for a writ of certiorari.

[10] The term "issue preclusion" is used here in the sense described in *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984), as referring "to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Id*. at 77 n.1.

507.[11] The court below gave no more than lip service to these principles. It acknowledged that federal law controlled the question of the preclusive effect owed in state court to the prior federal court judgment dismissing Reagan's suit without prejudice, App. 11a, but then applied the law inconsistently with governing precedent of this Court.

The Court uses the Restatement (Second) of Judgments as its touchstone for applying the elements of issue preclusion. *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1303 (2015). The basic elements are:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (1982) at 250, quoted in *B & B Hardware*, 135 S.Ct. at 1303. The Court has further fleshed out the basic contours of the issue preclusion doctrine.

First, it is a necessary precondition for issue preclusion's applicability that the first decision have been rendered by a "court of competent jurisdiction."

[11] The Supremacy Clause requires this. *See* H. M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 989 (1998) ("Federal law of . . . issue preclusion . . . binds the state courts under the Supremacy Clause.").

Montana v. United States, 440 U.S. 147, 153 (1979). This principle is fundamental to the doctrine:

> A judgment may properly be rendered against a party *only if the court has authority to adjudicate the type of controversy invoked in the action*.

Restatement (Second) of Judgments § 11 (1982) at 108 (emphasis added).

Second, the concept is inapplicable if the party targeted by the preclusion claim "did not have a 'full and fair opportunity' to litigate th[e] issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980). This requirement extends to the availability of appellate review, which is a "key factor" in the civil litigation context. *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 358 (2016).

B. The first court did not have jurisdiction over the state tax issue. The appeals court decision below conflicts with the requirement that the first court have jurisdiction to decide the issue that is said to preclude litigation of the same issue in the later case. The first court here – the federal district court – specifically held that it did not have jurisdiction to decide the state fee-versus-tax issue Reagan had raised. Its judgment of dismissal rested entirely on its determination that the Tax Injunction Act deprived it of jurisdiction. *That* decision – that is, the federal court's decision that it did not have jurisdiction – is not subject to collateral attack. *See*, *e.g.*, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (federal district court determinations of their jurisdiction "may not be assailed collaterally"). The Tax Injunction Act, in any event, withdraws jurisdiction over state and local tax administration matters from federal court jurisdiction. *See*, *e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 107 (2004); *Farm Credit Svcs.*, *supra*, 520 U.S. at 825 (Act establishes a "jurisdictional rule").

The unavailability of the earlier federal court decision for preclusive use is made still more obvious by two other related aspects of the judgment. First, the court expressly provided that Reagan's claim was "dismissed without prejudice." Such a dismissal "does not 'operate as an adjudication upon the merits,' . . . and thus *does not have res judicata effect*." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (emphasis added) (citation omitted); *see also Semtek*, *supra*, 531 U.S. at 505 (juxtaposing Fed. R. Civ. Proc. 41(b) with Fed. R. Civ. Proc. 41(a) and observing that "an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice'"). And second, the federal court was at pains to clarify that its jurisdictional ruling would not – indeed, "could not" – have *res judicata* effect. App. 52a n.6. This warning alone should have sufficed to make the state appeals court take heed and observe the limits of the federal judgment:

> A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim . . . that was advanced in the first action should be effective to forestall preclusion.

18 Wright & Miller, Federal Practice and Procedure § 4413 (3d ed. 2012).

C. The unavailability of appellate review of the federal court dismissal made the judgment unworthy of the preclusive effect given it by the state appeals court. *Bravo-Fernandez v. United States*, *supra*, emphasizes that the ability to challenge the earlier order on appeal in civil cases is key to the applicability of issue preclusion under federal law. This rule is consistent with the Restatement (Second) of Judgments. If the "party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action," the initial judgment is not to be given preclusive effect. Restatement (Second) of Judgments § 28(1) (1982) at 273.

Austin is the "party against whom preclusion is sought," and it could not have appealed the federal court's dismissal for lack of jurisdiction. The City was the defendant, not the plaintiff, in that earlier action and, though it resisted the Tax Injunction Act dismissal, it was the party that prevailed in the case. The judgment dismissed Reagan's claim and sent the parties back to square one. In federal court, prevailing parties have no standing to appeal, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980), because appellate courts review judgments, not opinions or statements in opinions. *Jennings v. Stephens*, 135 S.Ct. 793, 799 (2015); *Calif. v. Romney*, 483 U.S. 307, 311 (1987). A party in Austin's situation after the first federal judgment could not separate out the district court's findings and appeal just them. *Lindheimer v. Bell Tel. Co.*, 292 U.S. 151, 176 (1934).

Since Austin could not have appealed the federal judgment, the judgment cannot be given preclusive effect against it.

D. This Court's precedents on the non-preclusive effect of judgments entered without prejudice due to lack of jurisdiction, and of rulings that were unappealable by the party targeted by a preclusion assertion, directly contradict the basis for the appeals court ruling.[12] The latter cannot be reconciled with governing precedent from this Court on federal issue preclusion law.

Application of issue preclusion principles is a basic tool of adjudication "central to the purpose for which civil courts have been established." *Montana v. United States*, *supra*, 440 U.S. at 153. The Texas appeals court's striking departure from this Court's precedents

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[12] The state appeals court ruling also is inconsistent with other issue preclusion principles less obviously in conflict with this Court's precedents. One of these is the requirement that the issue decided in the first action must be the same as the issue to be decided in the second action. The federal court's ruling that the City's billboard registration fee was a tax was done as a matter of federal law, specifically the meaning of the phrase "tax under State law" in the Tax Injunction Act. The federal court undertook no evaluation of the separate question of whether the registration fee constituted a tax under *Texas* law. In fact, its decision was that it could not address the latter issue. Consequently, the first and second cases did not present the same issue, and the preclusion doctrine should not apply.

on an issue of federal law so basic to the daily operation of courts warrants issuance of a writ of certiorari.

II. The Ruling Below Creates A Federal-State Imbalance Inimical To The Supremacy Clause And The Purposes Of The Tax Injunction Act.

A. The ruling below establishes a legal regime that elevates state court determinations of federal law above federal court determinations – and thus runs counter to the Supremacy Clause. In *Stoll v. Gottlieb*, 305 U.S. 165 (1938), this Court held that, while the Supremacy Clause itself does not directly address the issue in so many words, state courts nonetheless are constitutionally obligated to give full effect to federal court judgments. *Id*. at 170. The principle laid down in *Stoll* is, in the words of a scholarly examination of *res judicata* doctrine, "indispensable to federalism." R. E. Degnan, *Federalized Res Judicata*, 85 Yale L. J. 741, 749 (1976).

The ruling below violates the *Stoll* principle. It took a federal court judgment that was without prejudice and transformed it by state judicial fiat into a judgment that was most definitively *with* prejudice, albeit inversely so. By so fundamentally transforming the federal judgment, and doing it so long after the federal judgment issued – the lapse was four-and-a-half years – the ruling of the state appeals court turns the Supremacy Clause on its head. Only this Court remains to reinstate the initial federal court judgment as it was decided instead of as it was rewritten by the court below. The federal court-state court imbalance created by the appeals court judgment should not be left in place to work future legal mischief.

B. The ruling below also establishes another kind of federal-state imbalance. It threatens to create a legal regime that turns federal courts into involuntary accomplices to forum-shopping by those seeking to escape local regulatory fees but fearful that their local courts will not be friendly to their effort.

Unlike most state courts, federal courts are courts of limited jurisdiction. They must take care to observe the limits placed on their authority by the Constitution and Congress. *See*, *e.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), citing *Turner v. Bank of North America*, 4 U.S. (Dall.) 8, 11 (1799) (presumption *against* federal jurisdiction). The Tax Injunction Act is one of these limitations.

The ruling below allows putative forum-shoppers to play the limited jurisdiction principles binding the federal judiciary to their litigation advantage. By repairing to the federal courts in the first instance to level a claim that a local fee is really a tax, the challengers can, as happened here, quickly switch positions and argue that the very nature of their claim is such as to trigger the Tax Injunction Act and require a jurisdictional dismissal. Being courts of limited jurisdiction, and required to be anxious not to exceed their jurisdictional limits, the federal courts will tend to oblige the position-switching challenger and dismiss the case for lack of jurisdiction. With the legal principle established by the ruling below in place, the erstwhile federal challenger then can repair to state court and turn the federal court ruling into a preclusive determination that the fee indeed is a tax.

The effect would unjustifiably expand the reach of federal judicial power through application of a statute – the Tax Injunction Act – whose very purpose was to limit it. The ultimate arbiters of the reach of the Tax Injunction Act would become the state courts rather than the federal courts, since the state courts would have the later say on the import of an earlier federal Tax Injunction Act ruling.

The Court should take this case on certiorari to ensure that the federal-state balance is tipped back in the direction it should be, toward the supremacy of federal court judgments. The Tax Injunction Act is directed at constraining federal courts. It is not a statutory tool available to state courts to loosen that Congressional constraint.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RENEA HICKS
Counsel of Record
LAW OFFICE OF
MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703
(512) 480-8231
rhicks@renea-hicks.com

ANNE L. MORGAN,
City Attorney
MEGHAN L. RILEY,
Chief – Litigation
PATRICIA L. LINK,
Assistant City Attorney
CITY OF AUSTIN –
LAW DEPARTMENT
P. O. Box 1546
Austin, Texas 78767

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