12-4659-cv

In the United States Court of Appeals for the Second Circuit

ENTERGY NUCLEAR VERMONT YANKEE, LLC; ENTERGY NUCLEAR OPERATIONS, INC.,

Plaintiffs-Appellants,

v.

PETER SHUMLIN, in his official capacity as Governor of the State of Vermont; WILLIAM SORRELL, in his official capacity as the Attorney General of the State of Vermont; MARY N. PETERSON, in her official capacity as the Commissioner of the Department of Taxes of the State of Vermont,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR APPELLEES

JONATHAN T. ROSE
DANFORTH CARDOZO, III
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-0392

LAWRENCE S. ROBBINS
MARK T. STANCIL
JOSHUA S. BOLIAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, DC 20006
(202) 775-4500

Counsel for Defendants-Appellees
Peter Shumlin, William Sorrell, and Mary N. Peterson

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PRELIMINARY STATEMENT

In this case, the plaintiff is challenging the validity of a state tax. The case therefore belongs in state court under the Tax Injunction Act (TIA), 28 U.S.C. § 1341, and the principles of federal-state comity that animate it.

In 1968, Vermont enacted the Electrical Energy Generating Tax (Generating Tax) on high-capacity power plants. Vermont Yankee, a nuclear power plant, has been subject to the Generating Tax since it began operation in 1972. In 2012, Vermont's legislature changed the statutory formula in a way that increased the tax burden on Vermont Yankee. The plant's current owners (collectively, Entergy) brought this suit to enjoin the increase, alleging that the Generating Tax, as amended, violates the Commerce Clause, the Equal Protection Clause, the Contract Clause, and a federal statute governing state taxation of electricity.

Federal courts long have held that they lack jurisdiction over such challenges to state taxes, and Congress explicitly codified this principle in the TIA. Entergy asserts that the TIA does not apply because, in its view, the Generating Tax is not really a "tax" and Vermont does not offer a means to challenge it in state court. As the district court correctly held, both contentions are demonstrably wrong. The Generating Tax is just as much a tax today as when it was first enacted: It is imposed by the Vermont legislature, it applies to electricity generators above a clearly defined threshold, and it generates revenue for Vermont's general fund. Entergy

may not like the fact that Vermont Yankee is the only power plant in the State large enough to fall within the Generating Tax (its output triples the threshold of the Generating Tax), but that has been true for four decades and does not transform the Generating Tax into something other than a "tax."

Nor is Entergy without a remedy in state court to dispute the application of the Generating Tax. The Generating Tax itself expressly invites taxpayer challenges through well-trodden administrative paths, with full review of any federal-law challenges in superior court. Indeed, the prior owner of Vermont Yankee used this exact procedure in 1996 to raise similar challenges to the Generating Tax. And, even if those paths were not available, Entergy could seek a declaratory judgment in state court under similarly well-established statutes.

JURISDICTION

On October 25, 2012, the district court held that it lacked jurisdiction under 28 U.S.C. § 1341. The next day, the district court entered a judgment dismissing the case. Entergy filed a notice of appeal on November 19, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does the Generating Tax, which for decades has raised revenue for Vermont's general fund and is imposed by the legislature and collected through the tax system, constitute a "tax" within the meaning of the Tax Injunction Act?

2. Does any one of the three state-court procedures that Vermont statutes provide for challenges to the Generating Tax constitute a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act?

3. Even if the Tax Injunction Act does not apply, does the "more embracive" doctrine of federal-state comity counsel federal courts to abstain from interfering with Vermont's fiscal operations?

STATEMENT OF THE CASE

Entergy sued three officers of the State of Vermont in their official capacities (collectively, the State), alleging that the Generating Tax is invalid on constitutional and federal statutory grounds. The State moved to dismiss for lack of jurisdiction, relying on the Tax Injunction Act (TIA), 28 U.S.C. § 1341, and principles of federal-state comity. On October 25, 2012, the district court held that the TIA deprived it of jurisdiction and accordingly dismissed the case.

STATEMENT OF FACTS

A. The Generating Tax

The subject of this suit is Vermont's Electrical Energy Generating Tax (Generating Tax), 32 V.S.A. § 8661. Entergy refers to the Generating Tax as the "New Levy." Conspicuously absent is any mention of the "Old Levy."

The Vermont legislature first enacted the Generating Tax in 1968. 1967 Vt. Acts & Resolves No. 376. Then—as now—the Generating Tax applied to "electric

generating plants constructed in the state by any electric utility subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more." *Id.*; see 32 V.S.A. § 8661(a). Over the years, the legislature has changed both the method of calculating the Generating Tax and the rate of the Generating Tax. *E.g.*, 2003 Vt. Acts & Resolves No. 50 (changing base from appraised value to output); 1991 Vt. Acts & Resolves No. 32 § 35 (increasing rate from 1.9% to 3.5% of appraised value). The Vermont Yankee nuclear power plant has a capacity of over 600,000 kilowatts. Dist. Ct. Opinion ("Op."), A-432. It thus has been subject to the Generating Tax since it began operation in 1972.

The "new" aspect of the Generating Tax, of which Entergy complains in this lawsuit, is a 2012 rate increase. (Entergy does not challenge the Generating Tax insofar as it is limited to its pre-2012 amount. Mot. for Prelim. Injunction, Dist. Ct. Dkt. 3, at 12 n.9.) Specifically, the legislature abolished a separate property tax that previously had applied to Vermont Yankee, and, in its place, increased the rate of the Generating Tax. 2011 Vt. Acts & Resolves No. 143 ("Act 143"). In Act 143, the legislature revised the Generating Tax as follows:

> § 8661. TAX LEVY
>
> (a) There is hereby assessed ~~each year~~ upon electric generating plants constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more, a state tax ~~in accordance with the following table:~~ at the rate of $0.0025 per kWh of electrical energy produced.

~~If megawatt hour production is:~~	~~tax is:~~
~~Less than 2,300,000 megawatt hours~~	~~$2.0 million~~
~~2,300,000 to 3,800,000 megawatt hours~~	~~$2.0 million plus $0.40 per megawatt hour over 2,300,000~~
~~3,800,001 to 4,200,000 megawatt hours~~	~~$2.6 million~~
~~Over 4,200,000 megawatt hours~~	~~$2.6 million plus $0.40 per megawatt hour over 4,200,000~~

~~For purposes of this section, "megawatt hour production" means the average of net production for sale in the three most recent preceding calendar years.~~ The tax imposed by this section shall be paid to the commissioner ~~in equal quarterly installments~~ on the electrical energy generated in the prior quarter on or before the 25th day of the calendar month succeeding the quarter ending on the last day of March, June, September, and December by the person or corporation then owning or operating such electric generating plant.

. . .

~~(c)~~ (b) A person or corporation failing to make returns or pay the tax imposed by this section within the time required shall be subject to and governed by the provisions of sections 3202~~, 3203, 5868,~~ and ~~5873~~ 3203 of this title.

Act 143 § 58. The effect of these changes is that, if Vermont Yankee operates at its typical capacity, its Generating Tax burden increases by about 150%, to about $12 million per year. A-10-11, A-19. Like most other state taxes, Generating Tax revenues go into Vermont's general fund. 32 V.S.A. § 435(b)(3).

The rate increase in Act 143 served several purposes. It raised revenue while remaining in line with comparable taxes in other states. In particular, as explained to the Senate Finance Committee (A-267; A-273), Act 143 raised taxes

only to the level that Connecticut charges its generators of nonrenewable energy. Compare 32 V.S.A. § 8661(a) (tax of $0.0025/kWh) with Conn. Gen. Stat. § 12-268s(b)(1) (same). "So it puts us in the same ballpark as Connecticut." A-282 (statement of Bill Johnson, Department of Taxes). Revenue was necessary because Vermont faced a budget shortfall for various reasons, including costs associated with the extensive damage caused by Tropical Storm Irene in August 2011, termination of federal stimulus spending under the American Recovery and Reinvestment Act, and repeal of the education property tax previously assessed on Vermont Yankee. *See, e.g.*, Governor Peter Shumlin, FY 2013 Executive Budget Recommendations 1, 6 (Jan. 12, 2012), *available at* http://finance.vermont.gov/sites/finance/files/pdf/state budget/FY 2013 ExecBudgetRecommendSumm_web.pdf. As counsel for the Department of Taxes explained, "[l]ike most taxes, this is being raised to fill a budget hole." A-277.

B. The MOUs

Entergy successfully bid to acquire Vermont Yankee in 2001, A-14, when the rate of the Generating Tax was lower. On two occasions since then, Entergy sought the State's approval to modify Vermont Yankee. Each occasion led to a Memorandum of Understanding (MOU) between Entergy and the State that, among other things, provided for payments to the State.

In 2003, Entergy sought and obtained approval to increase the capacity of, or "uprate," Vermont Yankee. Op., A-433. As part of the process, Entergy agreed to pay a portion of uprate-derived revenues into certain public funds. A-56-61 ("2003 MOU"). In particular, in the 2003 MOU, Entergy agreed to pay a set dollar amount (which varied by year) per megawatt-hour of "uprate power." These MOU payments were divided among an Environmental Benefit Fund, a Low Income Benefit Fund, and a Fund for Economic Benefit. A-56-57. Payments under the 2003 MOU continued until March 2012, at which point the license of Vermont Yankee was set to expire.

In 2005, Entergy sought and received approval to build dry fuel storage facilities for Vermont Yankee. Op., A-433. At that time, Entergy agreed to make quarterly payments of $625,000 into Vermont's Clean Energy Development Fund (CEDF). A-72-74 ("2005 MOU"). The CEDF, established at the same time, funds "the development and deployment of cost-effective and environmentally sustainable electric power and thermal energy or geothermal resources for the long-term benefit of Vermont consumers." 30 V.S.A. § 8015(c). Payments under the 2005 MOU continued until January 2012, again based on the anticipated expiration of Vermont Yankee's license.

Unlike the Generating Tax, neither the 2003 MOU nor the 2005 MOU provided for payment into the State's general fund. And neither MOU required

payment per kilowatt-hour of total output, as the Generating Tax does. Entergy's first payments under the revised Generating Tax came due in October 2012.

C. This Case

Entergy filed this action in the district court on September 11, 2012. It alleged that the Generating Tax, as amended by Act 143, violates the Commerce Clause, the Equal Protection Clause, the Contract Clause, and 15 U.S.C. § 391, which addresses state taxation of electricity. A-20-25. On those grounds, Entergy sought a declaration that the amended Generating Tax is invalid and a preliminary injunction against enforcement of the Generating Tax. A-25-26.

The State moved to dismiss, contending that the Tax Injunction Act and federal-state comity preclude federal courts from asserting jurisdiction. It explained that the Generating Tax is a "tax" within the meaning of the TIA, even though its burden, at present, falls only on Vermont Yankee. Moreover, the State asserted, Entergy enjoyed a "plain, speedy and efficient" remedy because the Generating Tax provides for administrative review by the Commissioner of Taxes, appealable to superior court. The previous owner of Vermont Yankee had used this process to assert similar challenges to the Generating Tax. In the alternative, Vermont law authorizes Entergy to seek a declaratory judgment in state court.

The district court agreed and dismissed this case in October 2012.

STANDARD OF REVIEW

On appeal from a dismissal for lack of jurisdiction, this Court reviews factual findings for clear error, accepting the plaintiff's allegations as true, and legal conclusions *de novo*. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Id.* The party seeking to invoke federal jurisdiction bears the burden of establishing it. *Id.*

SUMMARY OF ARGUMENT

The TIA divests federal courts of jurisdiction where (i) the challenged assessment is a "tax," and (ii) state courts offer a "plain, speedy and efficient" remedial procedure. Both requisites are met here.

I. The Supreme Court repeatedly has held that courts must construe the TIA's jurisdictional bar broadly. Accordingly, courts use a broad, flexible inquiry to determine whether an impost is a "tax" within the meaning of the TIA.

A. This Court has held that a measure is a "tax" if its purpose, as determined by the revenue's ultimate use, is to raise revenue for the general public. Here, the Generating Tax raises revenue for the State's general fund. Thus, it is a "tax." Entergy's effort to link the Generating Tax to the Clean Energy Development Fund has no basis in the law, and, in any event, that Fund benefits the public

at large. Considering the other two factors that courts often use does not change the result. Like other taxes, the Generating Tax is levied by the legislature and collected by the Department of Taxes. And, like other taxes, it is imposed on a necessarily small group of utilities, consistent with the legislature's discretion to draw distinctions among taxpayers.

B. Entergy contends that the factors commonly used by courts do not fit the Generating Tax. These factors, it argues, are pertinent only where an exaction is either a "tax" or a "fee"; here, Entergy insists, the Generating Tax is more akin to contract payments. It therefore invokes a "tax vs. contract" test applied in the bankruptcy context. But, even under this test, the Generating Tax is a "tax"—it is an involuntary exaction, not a voluntary deal.

II. In addition to requiring that the challenged measure be a "tax," the TIA also requires that state courts offer a "plain, speedy and efficient" remedy. Broadly construing this language, the Supreme Court has instructed that a state-court remedy is "plain, speedy and efficient" if it provides a forum to mount federal-law challenges. The requirement is procedural, and the Court has looked to the procedures that state courts actually use. Vermont law provides three procedures for the review sought here, each of which is independently sufficient to satisfy the TIA's requirement.

A. Entergy may petition the Commissioner of Taxes for a refund. After exhausting that remedy, Entergy may raise all federal challenges in superior court. Sovereign immunity cannot bar a refund action for an unconstitutional tax. And no court has construed the word "determination" in the relevant Vermont statute to preclude review of federal challenges in superior court.

B. Entergy may instead decline to pay the Generating Tax, then challenge the Commissioner's notice of deficiency. This procedure offers the same route to review of federal-law claims that a refund action does.

C. If Entergy could not challenge the Generating Tax before the Commissioner, it could seek a declaratory judgment to invalidate the Generating Tax.

III. If the TIA does not apply, federal-state comity nonetheless warrants dismissal. The comity doctrine counsels federal abstention in cases that offend the principles of federalism even beyond the TIA's explicit safeguards. In particular, comity applies when there is no need for heightened scrutiny; when the plaintiff is not a true third party; and when the state courts are better equipped to provide a remedy. This case bears all three of these hallmarks.

ARGUMENT

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Act reflects two bedrock principles of American law: that the States and the federal government are independent sovereigns, each with its own sphere of sovereignty; and that taxation is the core prerogative of a sovereign. For these reasons, since long before the TIA, federal courts have declined to adjudicate state tax issues. *See Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870). The doctrine of federal-state comity continues to embody this rule even in contexts where the TIA does not apply.

Courts have viewed the TIA through this lens. "[F]irst and foremost," the TIA is "a vehicle 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 826 (1997) (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982)). This limitation follows from "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981) (quotation marks omitted). These axioms have their basis in practical concerns, such as the regularity of state tax administration and the proper construction of state law by state courts. *Grace Brethren Church*, 457 U.S. at 410. In short, "principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administra-

tion." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995).

These precepts inform the TIA's scope and application. The Supreme Court consistently has "interpreted and applied the Tax Injunction Act as a 'jurisdictional rule' and a 'broad jurisdictional barrier.'" *Farm Credit Servs.*, 520 U.S. at 825 (citation omitted). Therefore, federal injunctive relief from state taxation "should be denied in every case where the asserted federal right may be preserved without it." *Fair Assessment*, 454 U.S. at 108 (quotation marks omitted). "[F]ederal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Farm Credit Servs.*, 520 U.S. at 827.

With this background in mind, we proceed in three parts. Parts I and II address, respectively, "two conditions" that "must exist before the TIA can be invoked": (i) the Generating Tax must be a "tax," and (ii) "the state remedies available to plaintiffs must be 'plain, speedy and efficient.'" *Hattem v. Schwarzenegger*, 449 F.3d 423, 427 (2d Cir. 2006) (additional quotation marks omitted). Part III explains why, even if the TIA does not apply, federal-state comity counsels that federal courts should allow state courts to resolve this case.

I. THE GENERATING TAX IS A "TAX" WITHIN THE MEANING OF THE TIA

As this Court has held, "the word 'tax' under the TIA 'encompasses any state or local revenue collection device.'" *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713

(2d Cir. 1993) (citation omitted), *rev'd on other grounds*, *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).[1] Owing to the TIA's role in our federal system, "the term 'tax' is subject to a 'broader' interpretation when reviewed under the aegis of the TIA" than in other contexts. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (citation omitted). Whether an assessment is a "tax" is a question of federal law, not state law. *Robinson Protective Alarm Co. v. City of Philadelphia,* 581 F.2d 371, 374-75 (3d Cir. 1978).

The Generating Tax is a "tax" for purposes of the TIA. Indeed, as the district court observed, the very arguments Entergy urges on the merits support this conclusion. Op., A-438-39. For example, Entergy claims that the Generating Tax violates 15 U.S.C. § 391, which, by its terms, applies only to "*taxes*."[2] Likewise, Entergy's claim under the "dormant" Commerce Clause rests on the four-part test for determining whether the Clause voids a state *tax*. A-22 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Notwithstanding its merits

[1] The TIA holding of *Cuomo* indisputably remains good law. *Hattem*, 449 F.3d at 427 n.3.

[2] "No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." 15 U.S.C. § 391.

arguments, Entergy contends that the Generating Tax is not a "tax" for purposes of the TIA.

Failing to find a definition of "tax" that it likes in the 76-year history of the TIA,[3] Entergy tells the Court not "to look any further than" two particular facts it believes to be helpful to its cause. Entergy Br. 25. But, as we explain in section I.A below, Entergy's invitation ignores the factors that this Court and others repeatedly have held are definitive. In any event, as we explain in section I.B, Entergy fails even its own proposed test. Regardless of the mode of analysis, the question is not—as Entergy tacitly suggests—whether the Generating Tax is a wise tax or even a constitutional tax, but whether it is a tax at all. The answer is yes.

A. Under the Factors Widely Accepted by the Courts of Appeals, the Generating Tax Is a "Tax"

To distinguish "taxes" from other charges, courts of appeals have relied on factors articulated by then-Judge Breyer in *San Juan Cellular Telephone Co. v. Public Service Commission*, 967 F.2d 683 (1st Cir. 1992).[4] These factors are: (1) the nature of the entity that imposes the charge; (2) the population subject to the

[3] *See* Act of Aug. 21, 1937, Pub. L. No. 75-332, § 1, 50 Stat. 738.

[4] *See, e.g.*, *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (deeming *San Juan* "[t]he leading case in this area"); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (same); *Hexom v. Or. Dep't of Transp.*, 177 F.3d 1134, 1136 (9th Cir. 1999) (same).

charge; and (3) whether the charge is expended for general public purposes, or used for the regulation or benefit of those upon whom the charge is imposed.

These factors confirm what had gone unquestioned for the 45 years of the Generating Tax's existence: It is a "tax." We begin with the third factor, which courts have recognized is "the most salient factor in the decisional mix." *See Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 947 (1st Cir. 1997); *accord San Juan*, 967 F.2d at 685 ("Courts facing cases that lie near the middle of th[e] spectrum have tended . . . to emphasize the revenue's ultimate use.").

1. The Purpose of the Generating Tax, Evinced by the Ultimate Use of Its Revenue, Is To Raise Revenue for the Public as a Whole

"[T]he purpose and ultimate use of the assessment" is "the heart of the inquiry." *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997). By the yardstick of this factor, the Generating Tax is a "tax" because its revenues are deposited in the State's general fund and thereby support the needs of the public at large.

As this Court's leading opinion discussing the "tax" criterion of the TIA explained, this factor bears heavy emphasis. *See Cuomo*, 14 F.3d at 713-14. Entergy complains that *Cuomo* "fail[ed] to consider" the other factors, Entergy Br. 28, and thus spills much ink trying to discredit *Cuomo* itself. Indeed, Entergy insinuates that the district court should not have "viewed" *Cuomo* as "controlling

precedent," (*id.* at 26), and opines that the case warrants little deference because its "discussion" of the issue "is quite brief." *Id.* at 27; *see also id.* at 28-30. Needless to say, both the district court and this panel are bound to follow *Cuomo* in the absence of an intervening *en banc* or Supreme Court decision. *Anderson v. Recore*, 317 F.3d 194, 201 (2d Cir. 2003).

In *Cuomo*, following and specifically quoting *San Juan*, this Court ascertained whether an assessment is a "tax" by looking primarily to its purpose. If an assessment is "imposed primarily for revenue-raising purposes," it is a "tax"; if it is "assessed for regulatory or punitive purposes," it is not. 14 F.3d at 713 (quotation marks omitted). To determine the assessment's purpose, the Court examined the revenue's ultimate use. "[C]ourts 'have tended . . . to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.'" *Id.* (quoting *San Juan*, 967 F.2d at 685). Applying this test, the Court held that a New York assessment was a "tax" because its revenue was paid into the state's general fund. *Id.*

The district court here determined in the first instance that the Generating Tax is a "tax" by applying this factor, just as *Cuomo* did. Op., A-440. Determining the ultimate use of Generating Tax funds is simple. Unlike some other Vermont taxes, *e.g.*, 32 V.S.A. § 9610 (directing portion of revenue collected to property

valuation and review fund), nothing in the Generating Tax designates a specific destination for its revenue. Instead, the revenue flows into the State's general fund, from which it is appropriated for myriad public purposes. *Id.* § 435(b)(3) (stating expressly that Generating Tax revenue goes into the general fund). Thus, because the "revenue's ultimate use . . . provides a general benefit to the public," *Cuomo*, 14 F.3d at 713 (quotation marks omitted), the Generating Tax is a "tax."

Entergy attempts to muddy these waters with spurious connections between the Generating Tax and the CEDF. Entergy claims that "the [Generating Tax] is the reason the CEDF was funded in 2013" and that, "if Entergy did not pay the [Generating Tax], the CEDF would not be funded." Entergy Br. 40.

Trouble is, these connections do not exist—even within the allegations of the complaint. First, it is true that—for 2013, in legislation wholly separate from the Generating Tax legislation—Vermont appropriated $3 million to the CEDF from the general fund. 2011 Vt. Acts & Resolves No. 162 § D.108(a)(2).[5] But, in the same Act, the legislature appropriated approximately $3 million to tourism, *id.* § B.805, and about $3 million to forestry, *id.* § B.704, each from the general fund. Entergy does not contend that the Generating Tax "funds" tourism or forestry. But

[5] Act 162 was an omnibus bill that fills 207 pages and appropriated over $5 billion to a wide variety of State programs.

those line items are not different from the CEDF line item; money is fungible.[6] Second, there is no quantitative relationship between the amounts of the Generating Tax and the amounts of the CEDF appropriation. The Generating Tax varies with electricity output; the CEDF appropriation is a fixed sum and does not mention output by any particular energy producer. Finally, the CEDF appropriation might well change from year to year. The Generating Tax, though, will exist regardless of how much the legislature appropriates. Indeed, it will exist if the legislature decides not to fund the CEDF at all.

Moreover, to our knowledge, no court has tried to draw lines between taxes and appropriations that the legislature has left undrawn. The First Circuit, for example, invalidated on Commerce Clause grounds a Maine surcharge on milk, the proceeds of which had subsidized Maine farmers. *Cumberland Farms*, 116 F.3d at 944. The Maine legislature then re-enacted the charge but directed its revenue to the state's general fund. At the same time, it appropriated money from the general fund to subsidize farmers. The First Circuit held that the TIA deprived it of jurisdiction to hear a taxpayer's challenge to the measure. Linking the surcharge with the appropriation, it explained, "*might* be appropriate on the merits." *Id.* at 947. But "there is neither any precedent nor any plausible jurisprudential basis for

[6] To the extent that a release by the Vermont Department of Public Service suggests otherwise, see Entergy Br. 29-30, it is incorrect. The Department of Public Service does not establish taxation or appropriation.

analyzing separate tax and subsidy statutes as an integrated unit under the Tax Injunction Act." *Id.*

Cases that Entergy cites, Br. 41-42, are not to the contrary—each involved a nominal user fee designed to offset identified administrative or maintenance costs, not to raise revenue generally. *See Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000) ($5 fee for disabled parking placards); *Hexom v. Or. Dep't of Transp.*, 177 F.3d 1134 (9th Cir. 1999) ($4 fee for disabled parking placards); *Hager v. City of W. Peoria*, 84 F.3d 865 (7th Cir. 1996) ($20-per-truckload road use fee).

Lastly, even if the legislature did fund the CEDF with revenues generated by the Generating Tax, that would not alchemize the Generating Tax into something other than a "tax." The CEDF benefits the public at large; it does not fund "narrow benefits to regulated companies or defray[] [an] agency's costs of regulation." *See Cuomo*, 14 F.3d at 713 (quotation marks omitted). It promotes technologies that the legislature has deemed socially valuable; it regulates no one. "States routinely subsidize favored activities—not by taxing the persons or firms engaged in the activities, which would make the 'tax' a fee and negate the subsidy, but by taxing someone else." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 731 (7th Cir. 2011) (en banc); *see also id.* ("That the revenue is ear-marked for a particular purpose is hardly unusual; think of the social security tax."). Many assessments that fund particular programs to benefit the entire public

are "taxes" for purposes of the TIA. *E.g.*, *Club Ass'n v. Wise*, 293 F.3d 723, 726 (4th Cir. 2002) (per curiam), *aff'g* 156 F. Supp. 2d 599 (S.D.W. Va. 2001) (fund for education and police); *Hedgepeth v. Tennessee*, 215 F.3d 608, 613 (6th Cir. 2000) (highway fund and police pay fund); *Schneider Transp., Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981) (transportation fund).

2. Like Other Taxes, the Legislature Imposes the Generating Tax, and the Department of Taxes Collects It

Another factor commonly used in this analysis recognizes that most taxes are imposed by the legislature and collected by state revenue departments. By contrast, administrative agency fees, exactions levied by courts, and the purchase costs of government wares tend not to be taxes. "An assessment imposed directly by a legislature is more likely to be a tax than one imposed by an administrative agency. If responsibility for administering and collecting the assessment lies with the general tax assessor, it is more likely to be a tax; if this responsibility lies with a regulatory agency, it is more likely to be a fee." *Collins Holding*, 123 F.3d at 800 (citations omitted).

Entergy concedes that this factor weighs in favor of the conclusion that the Generating Tax is a "tax." "[T]he Vermont General Assembly is the entity that imposes the [Generating Tax] and . . . the Department [of Taxes] collects the [Generating Tax]." Entergy Br. 33. The remainder of Entergy's short discussion tries to sweep aside this fact, which courts correctly have deemed important. *See,*

e.g., *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 839 (6th Cir. 1999); *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996). That other factors might outweigh it in some cases, such as *GenOn Mid-Atlantic, LLC v. Montgomery County*, 650 F.3d 1021, 1024 (4th Cir. 2011) (cited in Entergy Br. 33), does not make it irrelevant. Nor does the fact that courts often weigh the three factors in a flexible, non-mechanical way. If it is promulgated like a tax and collected like a tax, then it probably is a tax. Both are true of the Generating Tax.

3. The Population Subject to the Generating Tax Is Consistent With the Goals of Taxation

The final factor considers the population subject to the assessment. "An assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class." *Bidart Bros.*, 73 F.3d at 931. This factor is not dispositive. "[A]n assessment upon a narrow class of parties can still be characterized as a tax under the TIA." *Id.* (citing examples).

Since its enactment in 1968, the Generating Tax has been imposed on any power plant constructed after July 1, 1965, "having a name plate generating capacity of 200,000 kilowatts, or more." 32 V.S.A. § 8661(a); *see* 1967 Vt. Acts & Resolves No. 376. Vermont Yankee—with a capacity of over 600,000 kilowatts, three times the triggering threshold and almost twelve times the capacity of Vermont's next largest plant, A-13—remains the only plant subject to the Generating

Tax.[7] Most of the energy sources that Vermont has developed in recent decades are lower-output plants, such as hydroelectric plants.

It makes perfect sense that a plant the size of Vermont Yankee in a State the size of Vermont finds itself alone in its tax bracket. Distinctions among taxpayers comprise the bulk of every tax code, and "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quotation marks omitted). The legislature of Vermont has drawn a variety of distinctions among power plants. In addition to the Generating Tax on very large plants, Vermont imposes different taxes on small plants. *See* 32 V.S.A. § 5402c (wind); *id.* § 5404b (hydroelectric); *id.* § 8701(b) (solar). The wind tax, like the Generating Tax, is calculated per kilowatt-hour, but the rate of the wind tax is *higher*. Compare 32 V.S.A. § 5402c(b) ($0.003 per kWh for wind) with *id.* § 8661(a) ($0.0025 per kWh for the Generating Tax). The number of taxpayers in each category is necessarily small. If this fact rendered these imposts something other than taxes, then Vermont would not be "taxing" its power plants at all, which is manifestly untrue.

[7] Entergy points out that one Representative (out of 180 members of the Vermont legislature), concerned about a hydroelectric dam near his district, argued that the Generating Tax should not apply to that dam. *See* Entergy Br. 35. But any such concern was misplaced—the 2012 amendment changed only the rate of the Generating Tax, not its scope.

For similar reasons, courts have held that charges on utilities—necessarily few in number—constitute "taxes" under the TIA. Just as Vermont Yankee differs from small power plants, utilities differ from other taxpayers in important ways. Thus, legislatures often impose charges that fall only on utilities. That there often are only a few utilities in each jurisdiction does not put these charges beyond the ambit of the TIA. *E.g.*, *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2d Cir. 1991) (tax on utilities in Burlington, Vermont), *abrogated on other grounds*, *Jefferson County v. Acker*, 527 U.S. 423 (1999); *Robinson Protective Alarm*, 581 F.2d at 372 (five central alarm station companies); *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 820 F. Supp. 1403 (N.D. Ga. 1992) (only electric cooperative serving small town), *aff'd on other grounds*, 989 F.2d 429 (11th Cir. 1993). The district court cited examples from other contexts of "taxes" that fall on small classes. Op., A-442.

Entergy contends that, by distinguishing *GenOn*, the district court "short-circuited" its analysis. Entergy Br. 37. Not so. The district court was entitled to rely on other authority holding that a tax may apply to a very small class of taxpayers. While the other cases involve a few taxpayers, and *GenOn* involved only one, nothing in the TIA suggests that federal jurisdiction turns on the difference between "a few" and "one." In addition, the assessment in *GenOn* had a "plainly regulatory purpose," 650 F.3d at 1025, and it was unclear from the court's opinion

whether the county even taxed its other power plants. As Entergy emphasizes elsewhere, Br. 32, the TIA requires a flexible, multi-factor test—and one that must be applied *in favor* of the TIA's broad reach. It would turn that test on its head to impose a firm rule that class-of-one taxes are not "taxes" after all—especially where the taxed entity is unlike anything else in Vermont.

B. Even Under the Inapposite Standard That Entergy Urges, the Generating Tax Is a "Tax," Not Payments Under a Contract

Entergy contends that the Generating Tax cannot be evaluated under the factors actually used by courts to define a "tax" under the TIA. Entergy Br. 21-26. Instead, citing isolated comments by a few of the 180 members of the Vermont legislature (Entergy Br. 25), Entergy urges that payments under the Generating Tax are really disguised contract payments under the MOUs.

As an initial matter, Entergy's account of the "real" legislative purpose is mistaken. It is rare that a legislature is "motivated solely by a single concern," or even that "a particular purpose was the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *accord Michael M. v. Superior Court*, 450 U.S. 464, 469-70 (1981). And, to the extent that "the legislature's purpose" is relevant, the text is the dispositive indicator—and the text says this is a tax. *Cumberland Farms*, 116 F.3d at 947; *see also Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184, 191 (2d Cir. 2012) (courts "look[] primarily to the objective purpose clear on the face of the

enactment, not to allegations about individual officials' motivations in adopting the policy").

Nonetheless, even if the singular, "real" purpose of the Generating Tax was to replace the MOUs, the Tax Injunction Act analysis would not change. Entergy urges this Court to apply a test that distinguishes taxes from contracts, but even courts that suggest there are limitations on the traditional factors nonetheless rely on them. *See GenOn*, 650 F.3d at 1023; *Hexom*, 177 F.3d at 1137-38; *Bidart Bros.*, 73 F.3d at 931. In any event, the Generating Tax is a "tax" even under Entergy's proposed "tax vs. contract" analysis.

To support its proffered approach, Entergy relies on *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). In that case, the court applied a test used in bankruptcy to distinguish taxes from ordinary contract debts. *Id.* at 373-75. The difference, according to *Bredesen*, is that taxes are obligatory, whereas contract debts are voluntary: "'Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government . . . . The consent of the taxpayer is not necessary to their enforcement.'" *Id.* at 373-74 (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)). Applying this approach, the court held that a State's charge for specialty license plates was not a "tax": "Instead of using its sovereign power to coerce

sales, Tennessee induces willing purchases as would any ordinary market participant." *Id.* at 374.

As the First Circuit has explained, the bankruptcy-based rule applied in *Bredesen* is a cousin of the three-factor TIA test. *Boston Reg'l Med. Ctr. v. Mass. Div. of Health Care Fin. & Policy*, 365 F.3d 51, 59 (1st Cir. 2004). But, even if *Bredesen* actually states a different test, the Generating Tax is a "tax," not a contractual obligation. It is "a pecuniary burden laid upon individuals or property for the purpose of supporting the government," "capable of being enforced by action against the will of the taxpayer." *Anderson*, 203 U.S. at 492. In this sense, the Generating Tax is fundamentally different from the payments at issue in *Bredesen*, which were voluntary purchases. *See* 441 F.3d at 374. If *Bredesen* is "of particular relevance to this case," as Entergy claims, Entergy Br. 22, its logic and its holding foreclose Entergy's assertion that the Generating Tax is not a "tax."

At bottom, Entergy's effort to turn the Generating Tax into an extension of the MOU contracts simply reprises its merits argument that the Generating Tax violates the Contract Clause. Whether a tax is legally invalid, however, has nothing to do with whether it is a tax—which is the issue in this appeal. Moreover, and in any event, courts considering claims that a tax interferes with a contract have not held that it is anything but a "tax." *See, e.g.*, *Merrion v. Jicarilla Apache Tribe*,

455 U.S. 130, 147-48 (1982). Whatever spin Entergy wants to put on it, the Generating Tax is a "tax."

II. VERMONT LAW AFFORDS ENTERGY THREE INDEPENDENTLY SUFFICIENT "PLAIN, SPEEDY AND EFFICIENT" REMEDIES WITHIN THE MEANING OF THE TIA

Entergy has a "plain, speedy and efficient remedy" for its complaint "in the courts of" Vermont. 28 U.S.C. § 1341. To meet that criterion, "[a] state need only provide a 'full hearing and judicial determination at which [a taxpayer] may raise any and all constitutional objections to the tax.'" *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 431 (2d Cir. 1989) (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514 (1981)) (modification in original). The word "remedy" does not mandate a particular form of substantive relief. To the contrary, the Supreme Court has emphasized that the TIA embodies only "certain minimal *procedural* criteria." *Rosewell*, 450 U.S. at 512.

While the remedial procedure must be "plain," federal courts accord state statutes some flexibility in keeping with the TIA's overarching principles. For example, where New York statutes confined a taxpayer's remedy to an administrative determination, the Supreme Court recognized that New York courts, in practice, afforded plaintiffs other options. *Tully v. Griffin, Inc.*, 429 U.S. 68, 75 (1976). The Court held that those other options—in particular, a declaratory judgment action—were adequate. *Id.* at 76; *see also Hedgepeth*, 215 F.3d at 616. By no

means does the TIA "require that state courts have previously confronted similar facts and rendered therein the relief a plaintiff now seeks." *Dillon v. State of Montana*, 634 F.2d 463, 468 (9th Cir. 1980). A plaintiff cannot carry its burden to show that a remedy is unavailable with "mere speculation." *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 341 (1990). And principles of federalism do not countenance a straitjacketed reading of state laws. Put simply, courts "must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act." *Grace Brethren Church*, 457 U.S. at 413.

Vermont courts offer Entergy no fewer than *three* remedies—each of which alone would suffice under the TIA. First, Entergy may petition the Commissioner of Taxes for a refund, then seek review of its facial challenges in superior court. Second, Entergy may withhold payment and petition the Commissioner for a determination of its deficiency. Here, too, the superior court could review any federal-law claims. Third, even if the State is incorrect about the first two, Entergy may seek a declaratory judgment. All three remedies exist and are fully adequate.

A. Vermont Law Affords Entergy a Petition for a Refund

First, Entergy may petition the Commissioner for a refund. It could then appeal to superior court, which has the power to resolve all of Entergy's claims. Entergy does not dispute the adequacy of this remedy. Rather, it disputes that Vermont law authorizes the procedure at all.

As the district court recognized, the statutes lay out three steps:

1. *Refund claim.* First, Entergy would claim a refund. "If the commissioner finds that any taxpayer . . . has claimed a refund in error . . . , the commissioner shall notify the taxpayer of the . . . denial of refund . . . by mail." 32 V.S.A. § 3203. This provision, section 3203, is expressly incorporated by the Generating Tax, 32 V.S.A. § 8661(b).

2. *Petition for review.* Entergy would petition for review by the Commissioner. "Upon receipt of a notice . . . under section 3203 of this title, the taxpayer may, within 60 days after the date of mailing of the notice or assessment, petition the commissioner in writing for a determination of that . . . refund . . . ." 32 V.S.A. § 5883. The section 3203 notice triggers this right.

3. *Appeal to superior court.* After the Commissioner renders a determination, Entergy would appeal to superior court. "Any aggrieved taxpayer may, within 30 days after a determination by the commissioner concerning a . . . claim to refund, appeal that determination to the Washington [County] superior court or the superior court of the county in which the taxpayer resides or has a place of business." 32 V.S.A. § 5885(b).

The previous owner of Vermont Yankee used precisely these procedures to bring a similar challenge to the Generating Tax. *See* A-412-30. While lacking the authority to consider facial challenges to the statute's validity, the Commissioner addressed the validity of the Generating Tax as applied to the taxpayer. A-425. It appears that the previous owner did not take advantage of its right to appeal the Commissioner's determination to superior court, which could have considered both an as-applied and facial challenge.

Entergy's efforts to avoid this precedent are unavailing. First, it observes that the determination involved a "*prior* owner" of the plant and a "*prior* version" of the Generating Tax. Entergy Br. 51. Entergy offers no reason why that matters,

and there is none. Second, Entergy complains that the determination did not "explain how Vermont's sovereign immunity was waived." *Id.* But, as the Commissioner's decision makes plain, the prior proceeding was a request for a refund pursuant to the statutes cited above. *See* A-412-30. A statute that authorizes a tax refund waives sovereign immunity. At any rate, as we explain immediately below (*infra* pp. 31-32), sovereign immunity would not bar Entergy's refund claim. Finally, Entergy states that the Commissioner's decision did not explicitly refer to a right of appeal. Entergy Br. at 52. But this omission does not nullify 32 V.S.A. § 5885(b) any more than district courts nullify 28 U.S.C. § 1291 by failing to tell parties that they may appeal.

Entergy objects to the refund remedy on two additional grounds—that sovereign immunity would bar any recovery, and that the superior court cannot address constitutional claims on appeal from the Commissioner. Both lack merit.

1. Sovereign Immunity Would Not Bar Entergy's Request for a Tax Refund Should Entergy Prevail on the Merits

A statute authorizing a tribunal to hear a tax refund claim waives sovereign immunity as to the refund request. *See United States v. Forma*, 42 F.3d 759, 763 (2d Cir. 1994). Indeed, the statute would serve little purpose otherwise. In this case, 32 V.S.A. § 5883 expressly authorizes the Commissioner to award refunds, and 32 V.S.A. § 5885(b) provides for an "appeal" to superior court of a "claim to refund." And Entergy would be entitled to interest on any improperly assessed

taxes under 32 V.S.A. § 5884. These statutes operate as waivers of sovereign immunity to refund requests, so long as the taxpayer follows the required process.

Even if these statutes were not on the books, due process requires the State to provide a reasonable opportunity for a taxpayer to obtain a refund of taxes deemed unconstitutional. "If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (footnotes omitted). The Vermont Supreme Court has recognized that *McKesson* can override the State's defense of sovereign immunity. *Williams v. State*, 589 A.2d 840, 848 (Vt. 1990). Therefore, the State either must offer refunds through its administrative process, as it did in *Williams*, or permit a court of general jurisdiction to award refunds.

2. The Commissioner's Jurisdiction Does Not Confine the Superior Court's Jurisdiction

Taxpayers may "appeal" the "determination" of the Commissioner to superior court. 32 V.S.A. § 5885(b). Because the Commissioner lacks jurisdiction to resolve facial challenges to statutes, Entergy asserts that her "determination" would not include those claims. As a consequence, Entergy maintains, the superior court

could not address constitutional arguments. Entergy Br. 55-59, 64.[8] This assertion overlooks both the governing standard and the plain meaning of "determination."

In this context, federal courts ask what state courts actually do in practice. The Supreme Court, for example, considered a taxpayer's claim that a state statute, read in a hypertechnical way, barred it from state court. The Court rejected that argument: "We have been cited no case in which the California courts refused to hear a claim similar to the claims respondents want made by their subsidiaries, and there is authority to the contrary." *Franchise Tax Bd.*, 493 U.S. at 340. This Court followed suit in *Murray v. McDonald*, 157 F.3d 147 (2d Cir. 1998) (per curiam). *Murray* did not require the Vermont Supreme Court to explain precisely how "the [Vermont] courts, in fact, possessed the authority" to resolve federal challenges. *See* Entergy Br. 57 n.10. Instead, this Court observed that the Vermont Supreme Court actually *had* resolved federal challenges—and deemed it sufficient. *Murray*, 157 F.3d at 147-48 (citing *In re Williams*, 686 A.2d 964 (Vt. 1996)).

Entergy eventually concedes that Vermont courts have, in fact, resolved federal-law challenges to taxes on appeal from the Commissioner under 32 V.S.A. § 5885(b)—the very statute at issue in this case. Entergy Br. 57 n.10 (citing, *inter alia*, *Hirsch v. Vt. Dep't of Taxes*, 675 A.2d 1318 (Vt. 1995)). That is all that the

[8] Entergy lodges this complaint against the deficiency remedy, discussed *infra* at II.B. But sections 5883 and 5885 apply both to the deficiency remedy and to the refund remedy.

TIA requires. What is more, the Vermont Supreme Court has rejected a taxpayer's claim that it would be futile to petition the Commissioner in a constitutional challenge to a tax. *Stone v. Errecart*, 675 A.2d 1322 (Vt. 1996). The *Stone* court explained that the requirement to petition the Commissioner, even though she cannot invalidate a tax, aids the superior court's review in at least two ways. The proceedings before the Commissioner give the State time to "plan for the fiscal consequences of invalidation." *Id.* at 1326 (quotation marks omitted). In addition, the Commissioner facilitates superior-court review by first "determin[ing]" "the relevant facts." *Id.* at 1325.

Even if this Court accepted Entergy's invitation to second-guess the Vermont Supreme Court's authority under Vermont law, the word "determination" lacks the power that Entergy ascribes to it. "Determination" connotes finality; it is "[a] final decision by a court or administrative agency." *Black's Law Dictionary* (9th ed. 2009); *see also* I.R.C. § 1313(a)(1) (defining "determination" as "a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final"). It does not circumscribe appellate jurisdiction. In many contexts, including this one, "a court reviewing an agency determination . . . has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide." *Shalala v. Ill. Council on*

Long Term Care, Inc., 529 U.S. 1, 23 (2000); *see also Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2137-38 & n.8 (2012).

Thus, Entergy may petition the Commissioner for a refund under the Generating Tax, just as its predecessor did. Assuming Entergy follows the prescribed process, the superior court would have jurisdiction to consider its claims and authority to order a refund should Entergy prevail.

B. Vermont Law Affords Entergy a Petition for a Determination of Deficiency

Entergy also has a second way to mount its challenge. Rather than paying under the Generating Tax and requesting a refund, Entergy could decline to pay and then petition the Commissioner for a determination of its deficiency. It could then appeal to superior court, which could adjudicate Entergy's federal claims. As before, Entergy does not question the *adequacy* of this procedure, only its availability.

The Generating Tax itself, 32 V.S.A. § 8661(b), provides that a "corporation failing to make returns or pay the tax imposed by this section within the time required shall be subject to and governed by the provisions of sections 3202 and 3203 of this title." Section 3203 requires the Commissioner to mail a notice of deficiency. Then, "[u]pon receipt of a notice of deficiency . . . under section 3203 of this title," Entergy may petition the commissioner. 32 V.S.A. § 5883. Finally,

Entergy may "appeal" a "determination by the commissioner concerning a notice of deficiency" under section 5883 to superior court. 32 V.S.A. § 5885(b).

Neither of Entergy's two challenges to this avenue for review has merit. First, Entergy cites a particular tax that incorporates *all* of the administrative provisions of Chapter 151, which contains sections 5883 and 5885. Entergy Br. 55. But the Generating Tax need not incorporate *all* provisions to reach sections 5883 and 5885. It suffices that nonpayment of the Generating Tax triggers notices of deficiency under section 3203, which in turn triggers the opportunity to petition the Commissioner under section 5883. These statutory linkages are explicit. Second, Entergy asserts that the superior court's review of a "determination" under section 5885(b) excludes constitutional claims. *Id.* at 55-59. But, as we have explained above (section II.A.2 & n.8), that assertion is incorrect.

Entergy's claim that this procedure is "uncertain[]" is really just an assertion that no taxpayer has used this deficiency procedure to challenge the Generating Tax. *See* Entergy Br. 59. The TIA, however, requires not that a procedure be tried and true but that it be "plain." Vermont's deficiency procedure for the Generating Tax is plain.

C. If Neither Administrative Remedy Exists, Vermont Law Affords Entergy an Original Action for a Declaratory Judgment

If Entergy is for some reason unable to petition the Commissioner for a refund or a determination of deficiency, it may seek a declaratory judgment in

superior court. This Court has held—like every other court to have considered the issue—that a declaratory judgment action is adequate under the TIA. *Long Island Lighting*, 889 F.2d at 431; *accord Folio v. City of Clarksburg*, 134 F.3d 1211, 1216 (4th Cir. 1998); *Burris v. City of Little Rock*, 941 F.2d 717, 721 (8th Cir. 1991); *Dillon*, 634 F.2d at 467; *Ludwin v. City of Cambridge*, 592 F.2d 606, 609 (1st Cir. 1979); *Kiker v. Hefner*, 409 F.2d 1067, 1070 (5th Cir. 1969). And, as described above, the State must refund taxes already paid should a court declare the Generating Tax invalid. *See McKesson Corp.*, 496 U.S. at 31.

Vermont has adopted section 2 of the Uniform Declaratory Judgments Act (DJA) almost verbatim. It provides, in relevant part: "A person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute, . . . and obtain a declaration of rights, status or other legal relations thereunder." 12 V.S.A. § 4712. In other words, because the Generating Tax affects Entergy's rights, Entergy may seek a declaratory judgment regarding its validity in the event it is somehow determined that an administrative remedy is unavailable.

None of Entergy's three arguments against application of the DJA withstands scrutiny. First, section 2 of the DJA grants jurisdiction so long as the prerequisites of *justiciability* are satisfied—*i.e.*, that there is "a direct and imminent injury which results from the alleged unconstitutional provision." *McCaughtry v.*

City of Red Wing, 808 N.W.2d 331, 337 (Minn. 2011) (quotation marks omitted); *accord State ex rel. Edmisten v. Tucker*, 323 S.E.2d 294, 303 (N.C. 1984).[9] An imminent injury exists here; Entergy's tax obligations are ongoing. The opposite was true in *Williams v. State* because the taxpayers would not again move to Vermont from out of state and thus need to pay the vehicle tax again. *See* 589 A.2d at 850-51. Entergy confusingly suggests that jurisdiction requires an administrative action to be available. Entergy Br. 61. This gets the inquiry backward—the superior court can hear original actions under section 2 of the DJA (12 V.S.A. § 4712) only when *no* administrative action is available. *Travelers Indem. Co. v. Wallis*, 845 A.2d 316, 323-24 (Vt. 2003); *Williams*, 589 A.2d at 849-50.

Second, sovereign immunity would present no obstacle to Entergy's claim because Entergy could seek declaratory relief akin to that available in the federal courts under *Ex parte Young*, 209 U.S. 123 (1908). Of course, a declaratory judgment action cannot be used as a mere subterfuge to win relief that is otherwise prohibited. So it was in *Williams*, cited by Entergy, where a refund action was prohibited in superior court (by statute, the action had to be instituted at the administrative level) but the taxpayer sought from that same court a declaration of legal

[9] To be sure, the DJA does not vest jurisdiction in superior court when the law vests jurisdiction in a different forum. *See Trivento v. Comm'r of Corr.*, 380 A.2d 69, 71-72 (Vt. 1977) (cited in Entergy Br. 60); *Curtis v. O'Brien*, 84 A.2d 584, 586 (Vt. 1951) (same). But, where the validity of a statute is at stake, no other forum is designated to offer the relief provided for in section 2 of the DJA.

entitlement to a refund. 589 A.2d at 850 (declaratory judgment "would only advise the ultimate decision-maker on points of law necessary to get a refund"). In this case, by contrast, Entergy would seek a declaratory judgment only if there is no administrative remedy, not as an end-run around a prohibited remedy.[10]

Third, Entergy's assertion that it would need to exhaust administrative remedies is at odds with its claim that these remedies do not exist. Either Entergy may petition the Commissioner or it may not. If it may, and Entergy seeks a declaratory judgment, the superior court would require that Entergy first petition the Commissioner. *Rennie v. State*, 762 A.2d 1272, 1274 (Vt. 2000) ("[W]hen administrative remedies are established by statute or regulation, a party must pursue, or 'exhaust,' all such remedies before turning to the courts for relief."). And that is fine—as explained above, the administrative remedies suffice under the TIA. Only if Entergy for some reason may *not* petition the Commissioner does an original action for a declaratory judgment come into play. And, in that event, there could be no exhaustion requirement. No Vermont court will require a litigant to exhaust administrative remedies if there are no administrative remedies to exhaust. *See Town of Bridgewater v. Dep't of Taxes*, 787 A.2d 1234, 1236 (Vt. 2001).

[10] If there is no administrative remedy and Entergy succeeds in a declaratory judgment action, then Entergy could receive a refund. In that event, the rule of *McKesson* would apply. *See supra* section II.A.1.

In sum, there is no "guessing game" here. *See* Entergy Br. 65. Entergy may petition the Commissioner, whether after it pays or after it has declined to pay. From there, Vermont law provides for review in superior court. If the Commissioner determines that she lacks jurisdiction, Entergy may seek a declaratory judgment. Each of these procedures would offer Entergy "a full hearing and judicial determination at which [it] may raise any and all constitutional objections to the tax." *Rosewell*, 450 U.S. at 514 (quotation marks omitted).

III. EVEN IF THE TIA DOES NOT APPLY, PRINCIPLES OF FEDERAL-STATE COMITY DIRECT THAT STATE COURTS SHOULD RESOLVE THIS CHALLENGE

Broad as the TIA is, it codifies only a portion of the federal courts' "reluctance to interfere by injunction with [states'] fiscal operations." *See Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). For decades before the TIA, the Supreme Court had cautioned federal courts to "refrain" from "interfer[ing] by prevention with the fiscal operations of the state governments." *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909); *accord Dows*, 78 U.S. at 110-12.

The Court recently reaffirmed that this "comity doctrine" not only has survived the TIA but also is "[m]ore embracive" than the TIA. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2328 (2010). The Court therefore has ordered deference to state courts in many cases that do not fall squarely within the ambit of the

TIA. *E.g.*, *id.* (challenge to tax exemptions received by competitors); *Fair Assessment*, 454 U.S. 100 (action seeking money damages). And "[c]omity's constraint has particular force" where—as here—"lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Levin*, 130 S. Ct. at 2330.

Levin identified three factors that would counsel *against* invocation of the comity doctrine: (1) that the state legislation involves "'classifications subject to heightened scrutiny'" or impinges on "'fundamental rights'"; (2) that the plaintiffs are "true 'third parties whose own tax liability'" is not at issue; and (3) "both federal and state courts ha[ve] access to identical remedies." *Joseph v. Hyman*, 659 F.3d 215, 219 (2d Cir. 2011) (quoting *Levin*, 130 S. Ct. at 2333-35). As in *Joseph*, none of these factors is present in this case.

First, the Generating Tax distinguishes between large and small power plants, which hardly involves fundamental rights or heightened scrutiny. *Compare Hibbs v. Winn*, 542 U.S. 88 (2004) (declining to apply comity where plaintiff alleged that state revenue statute violated the Establishment Clause). In this context, courts have recognized that "states enjoy wide regulatory latitude over the administration of their tax systems." *Coors Brewing Co. v. Méndez-Torres*, 678 F.3d 15, 24 (1st Cir. 2012).

Second, Entergy is not a "third party" to the Generating Tax; to the contrary, Entergy's tax liability is directly established by the Generating Tax. Entergy contends that, because the Generating Tax is not a "tax," it could have no "tax liability" under this *Levin* factor. But, for the reasons above, the Generating Tax *is* a "tax." In any event, the substance of Entergy's complaint is that it is subject to the Generating Tax but its smaller competitors are not. Thus, the remedy Entergy seeks is either cutting its taxes or raising taxes on its competitors—that is, it seeks a readjustment of tax liability. That is precisely the sort of discriminatory conduct that this *Levin* factor contemplates. *See Coors Brewing*, 678 F.3d at 24 (tax could be lowered on plaintiff or raised on its smaller competitors); *Joseph*, 659 F.3d at 219-20 (tax could be lowered on non-Manhattan cars or raised on Manhattan cars). As in *Levin,* Entergy is not a third party to the Generating Tax but rather "seek[s] federal-court aid in an endeavor to improve [its] competitive position." 130 S. Ct. at 2336.

Third and finally, Vermont courts are better suited to remedy any infirmity "because they are more familiar with state legislative preferences." *Id.* And state courts might have remedial options that a federal court would lack. *See Joseph*, 659 F.3d at 220-21. For these reasons, and because federal courts have abstained from interfering with state fiscal operations for well over a century, the Court should decline jurisdiction even if it holds that the TIA does not apply.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

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Respectfully submitted,

By: /s/ Lawrence S. Robbins

JONATHAN T. ROSE
DANFORTH CARDOZO, III
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-0392

LAWRENCE S. ROBBINS
MARK T. STANCIL
JOSHUA S. BOLIAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, DC 20006
(202) 775-4500

Counsel for Defendants-Appellees
Peter Shumlin, William Sorrell, and Mary N. Peterson

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,399 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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Dated: May 7, 2013

/s/ Lawrence S. Robbins
Lawrence S. Robbins

CERTIFICATE OF SERVICE

I hereby certify that, on May 7, 2013, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by e-mail.

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Lawrence S. Robbins