No. 13-1032

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND GOVERNMENT FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. In The Age Of Electronic Commerce, The Inability Of States And Local Governments To Assess And Collect Sales And Use Taxes On Remote Sales Has Had A Catastrophic Impact On Their Revenues And Fiscal Stability	5
A. The Rise of Internet Sales	5
B. The Nature of Sales and Use Taxes	6
C. The *Quill* Effect on State and Local Revenues	7
D. Lost Opportunity: The Marketplace Fairness Act	11
E. State Efforts to Recapture Remote Sales Tax Revenues	12
II. This Case Is A Backdoor Effort To Restrain Lawful State Authority To Assess And Collect Use Tax In Violation Of The Tax Injunction Act	15
A. The Colorado Law Was Enacted to Enable It to Assess and Collect Use Tax	15

TABLE OF CONTENTS—Continued

Page

B. Granting the Relief Sought by Petitioner Would Enjoin, Suspend, or Restrain both the "Assessment" and "Collection" of State Taxes in Violation of the TIA 16

C. A Cramped Interpretation of the TIA as Applying Solely to Challenges to State Tax Assessment and Collection Efforts Brought By Taxpayers Would Place Form Over Substance and Defeat Its Essential Purpose 19

CONCLUSION 22

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CASES Page(s)

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872 F.2d 327 (9th Cir. 1989)..................... 18

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457 U.S. 393 (1982).................................. 16, 21

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478 F.3d 1236 (10th Cir. 2007)................ 20

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739 F.3d 1273 (11th Cir. 2014)................ 21

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306 U.S. 531 (1939).................................. 19, 20

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STATEMENT OF INTEREST[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the Clerk's Office.

partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

Collectively, *amici curiae* are organizations whose members include state and local governments and officials from throughout the United States. These

organizations regularly file *amicus* briefs in cases, like this one, raising issues of concern to their members. This case implicates an issue of federal jurisdiction with unique and existential importance to the sovereign interests of States and local governments that need to assess and collect tax revenues free from unwarranted federal interference in order to fund vital benefits and services for their residents.

Amici have united to urge this Court to affirm the Tenth Circuit's proper application of the Tax Injunction Act, 28 U.S.C. § 1341, to dismiss Petitioner's claims and allow them instead to be litigated in the Colorado courts, where Congress, with good reason, requires such claims to be resolved.

SUMMARY OF ARGUMENT

The increasing prevalence of electronic commerce has produced a deepening crisis for States and local governments whose solvency depend in large part on sales and use tax revenues. States have long required in-state merchants to collect and remit sales and use taxes from their customers. Due to this Court's decisions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), however, out-of-state merchants are exempt from this requirement. As online and mail-order shopping have continued to expand, without any power to require remote sellers to collect and remit sales and use tax, States and local governments are now losing an estimated $23 billion in annual tax revenue to these remote sales.

In response to this fiscal calamity, the State of Colorado enacted legislation requiring out-of-state merchants to summarize their total annual sales to each Colorado customer and report the information to

the Colorado Department of Revenue. Third-party reporting requirements are a proven method for the assessment and collection of taxes in situations where the taxing authority must otherwise rely on taxpayers to self-report and voluntarily pay tax on those transactions. The Colorado law thus represents the best available method for the State to assess and collect the applicable use tax from its residents owed on remote sales.

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, forbids federal district courts from assuming jurisdiction over claims seeking to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law[.]" In violation of this prohibition, Petitioner's lawsuit seeks to have the federal courts declare Colorado's chosen method for assessing and collecting use tax from its residents to be void and unenforceable.

Invalidation of the Colorado law requiring remote sellers to report their in-state sales would deprive the State of the information necessary to determine and record any and all use tax liability for those sales, assessments that would then trigger its levy and collection efforts. Granting relief to Petitioner thus would operate to restrain Colorado's assessment of use taxes on remote sales, assessments that otherwise would initiate collections, thereby depriving the State of tens of millions in annual tax revenue in violation of the TIA's broad jurisdictional bar.

The Tenth Circuit thus correctly held that the Tax Injunction Act barred the federal courts from entertaining this lawsuit. The peculiarized exceptions that Petitioner, for its benefit, asks this Court to read into the TIA conflict with precedent and have no basis in the statute's text or longstanding purpose to

comprehensively divest federal courts of jurisdiction to interfere with state tax laws aimed at the assessment and collection of revenue.

This Court should affirm.

ARGUMENT

I. In The Age Of Electronic Commerce, The Inability Of States And Local Governments To Assess And Collect Sales And Use Taxes On Remote Sales Has Had A Catastrophic Impact On Their Revenues And Fiscal Stability.

A. The Rise of Internet Sales.

The 21st Century has seen a fundamental transformation in the methods by which commerce is conducted. Most Americans now shop online, and "e-commerce" has claimed an increasingly large share of sales in the United States. Online purchases total more than $4 trillion annually, representing more than 15 percent of all sales in the retail, wholesale, manufacturing, and service sectors. A recent PricewaterhouseCoopers study concluded that 67 percent of U.S. consumers made Internet purchases in 2011.[2] Another study found that 70 percent of consumers shopped online in 2013, with almost 30 percent making 12 or more purchases.[3] In 2014, a

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[2] PRICEWATERHOUSECOOPERS, UNDERSTANDING HOW U.S. ONLINE SHOPPERS ARE RESHAPING THE RETAIL EXPERIENCE, (Mar. 2012), http://www.pwc.com/en_us/us/retail-consumer/publications/assets/pwc-us-multichannel-shopping-survey.pdf.

[3] Cyber Monday Ahead: Study Highlights Online Consumers, THE MEDIA AUDIT (Nov. 2013), http://view.exacttarget.com/?j=fe5817727d63077b7112&m=fef91672736d07&ls=fde71c75726d0

Walker Sands Communications study reported that 94 percent of consumers make online purchases at least four times per year, 62 percent do so at least once per month, and less than one percent have never shopped online.[4] The explosion of electronic commerce has visited profoundly negative consequences on state budgets that depend, as do most, on collection of sales and use taxes imposed on transactions involving the buying and selling of goods.

B. The Nature of Sales and Use Taxes.

Though conceptually distinct, sales and use taxes operate in complimentary fashion. A "sales tax" is assessed on the sale of a product to a consumer and typically collected and remitted to the State by the merchant. Under our federal system, however, one State may not impose a tax on a sale that occurs in another State. In order to permissibly capture the tax revenue associated with sales to its residents by out-of-state vendors, most States have enacted use taxes. A "use tax" is assessed on the use, storage, or consumption of a product (or service) purchased by a consumer in those instances where the seller does not collect and remit sales tax on the same transaction. In practical terms, then, where sales tax is not collected and remitted by the seller on a particular sale, use tax is owed by the purchaser for that transaction at the same rate. Together, sales and use taxes provide for a uniform method of taxation upon tangible personal

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07c72127975&l=fe6415767660057e7010&s=fe2c1572736203787 51676&jb=ffcf14&ju=fe2c17797461057b771577.

[4] WALKER SANDS COMMUNICATIONS, REINVENTING RETAIL: WHAT BUSINESSES NEED TO KNOW FOR 2014 (2014), http://www.walkersands.com/futureofretail.

property that is sold or purchased in a particular jurisdiction.

C. The *Quill* Effect on State and Local Revenues.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court doubled down on its earlier decision in *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967), and held that, until Congress enacts legislation providing otherwise, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, mandates that before a State can require an out-of-state seller to collect sales or use taxes from its residents, the seller must have a physical "nexus" or presence in the State. As a result, a State generally may not require vendors located outside of its borders to collect and remit taxes on "remote sales"—including online, home shopping, or mail-order sales—to resident customers.

Typically, state sales and use tax rates range from five to ten percent. In practical terms, this means that local merchants, personified by the "brick and mortar" store on Main Street, are starting at a five to ten percent competitive disadvantage to remote sellers. This regime of systematic discrimination enforced by the *Quill* decision hurts local economies and costs jobs.

But *Quill*'s negative impact on state and local tax revenues is even more dramatic. States and local governments "giv[e] security to life, liberty and the other privileges of dwelling in a civilized community." *Maguire v. Trefry*, 253 U.S. 12, 14 (1920) (quotation marks omitted). Without tax revenues, these governments cannot exist. Sales tax accounts for more than a third of all revenues for most States, including *half* of all tax collections in six States (Arkansas, Hawaii,

Louisiana, Nevada, South Dakota, and Tennessee).[5] Consumers have increased their tendency to shop online not only with commercial titans such as Amazon and L.L. Bean, but also with sellers of any size that maintain a webpage. States and local governments have lost their ability to assess and collect tax revenues associated with those purchases where the vendor does not have a sufficient physical presence in the State.

While compliance with sales tax laws for purchases within a State is quite high, often approaching 100 percent, compliance by household consumers with state use tax imposed upon remote sales is correspondingly low.[6] When out-of-state vendors do not collect tax on purchases made by state residents, the State must rely on its residents to self-report and pay use tax on those remote sales.

Although required under existing laws to pay use tax on purchases from out-of-state merchants, most people do not do so. Experience has shown that in

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[5] NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL), STATE EFFORTS TO COLLECT REMOTE SALES TAXES (Feb. 2014), http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf; *see also* Ryan Forster & Kail Padgitt, *Where Do State and Local Governments Get Their Tax Revenue?* 242 FISCAL NOTE Table 2 (Aug. 27, 2010), http://taxfoundation.org/article/where-do-state-and-local-governments-get-their-tax-revenue-0.

[6] *See, e.g.,* WASH. DEP'T OF REVENUE, DEPARTMENT OF REVENUE COMPLIANCE STUDY (2010), http://dor.wa.gov/Docs/Reports/Compliance_Study/compliance_study_2010.pdf (indicating that registered retailers properly collected and remitted 99 percent of all sales taxes due in 2006), ROB HOHEISEL, MINNESOTA CONSUMPTION TAX MODEL AND SALES TAX GAP (September 15, 2008), *available at* http://www.taxadmin.org/fta/meet/ 08rev_est/papers/hoheisel2.pdf (indicating that registered retailers properly collected and remitted 95.9 percent of all sales taxes due in 2004).

many states only a tiny fraction of households report any use tax at all, with compliance often as low as zero to five percent.[7] This is because most people are unfamiliar with use tax, simply assume that any tax owed has been collected by the retailer, and do not even keep track of their online or mail order purchases. The weak, almost non-existent reporting rate reflects the structural hurdles States encounter in assessing and collecting use tax on remote purchases by their residents.

The skyrocketing growth in e-commerce—combined with the systematic inability of States to accurately assess or collect use tax from residents making remote purchases—has resulted in a critical sales and use tax gap, or remote sales tax loophole, in the assessment and collection of these revenues. Studies reveal that annual revenue lost by States from uncollected tax on remote sales grew nationally from $16.1 billion in 2003 to $23.2 billion in 2012, of which $11.4 billion was due solely to Internet sales.[8] In 2013, the year-over-year

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[7] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SALES TAXES: ELECTRONIC COMMERCE GROWTH PRESENTS CHALLENGES; REVENUE LOSS ARE UNCERTAIN (June 2000), http://www.gao.gov/new.items/g600165.pdf (noting widespread consensus among state officials and economists that use tax compliance by individual purchasers was extremely low). The GAO study's estimate of zero to five percent compliance among individual purchasers excluded motor vehicle purchases, for which state laws typically require sales and use taxes to be collected when the vehicle is registered with the state.

[8] DONALD BRUCE ET AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE (Apr. 13, 2009), http://cber.utk.edu/ecomm/ecom0409.pdf; *see also Estimated Uncollected Use Tax From All Remote Sales*, NCSL, http://www.ncsl.org/research/fiscal-policy/collecting-ecommerce-taxes-an-interactive-map.aspx#2 (last visited Oct. 21, 2014).

trend in retail sales growth was nearly three times higher for Internet and mail order shopping (11.57 percent adjusted) than for overall retail (4.31 percent adjusted).[9] And as online shopping continues to expand in coming years, so too will the losses in revenue.

Already amounting to several hundred billion dollars, this lost revenue in the form of taxes legally owed but never assessed or collected has had a debilitating effect on state and local budgets during already perilous fiscal times. At the same time that state and local governments are losing an increasing amount of their tax revenue base to remote sales, primarily in the form of e-commerce, the costs of meeting obligations to their residents have been increasing exponentially. According to the National Conference of State Legislature's survey of state legislative fiscal officers, between fiscal years 2008-2013, States closed a cumulative budget gap of $527.7 billion, primarily through spending and program reductions.[10] In FY 2012 alone, States had to close over $72 billion in budget deficits.[11]

And these obligations are only expected to increase. To cite but one example, according to National Association of State Budget Officers' (NASBO) 2013 STATE EXPENDITURE REPORT, Medicaid accounts for

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[9] UNITED STATES CENSUS, MONTHLY RETAIL TRADE SURVEY, www.census.gov/mrts/www/data/excel/mrtssales92-present.xls (last visited Oct 16, 2014).

[10] NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

[11] Submitted Statement of Senator Pamela Althoff (IL), Delegate Sheila Hixson (MD), Senator Deb Peters (SD), and Senator Curt Bramble (UT) on behalf of NCSL before U.S. Senate Finance Committee, *Hearing on Tax Reform: What It Means for State and Local Tax and Fiscal Policy* (Apr. 25, 2012).

almost 25 percent of total state spending from all fund sources, the single largest portion of total state expenditures, and 19 percent of general fund expenditures.[12] NASBO's most recent FISCAL SURVEY OF STATES found that total Medicaid spending increased by 4.2 percent in FY 2013, is estimated to balloon to 13 percent in FY 2014, and from 2013 to 2022 is projected to continue to significantly outpace overall growth in state general fund budgets.[13] With little public appetite to increase taxes in a sluggish economy, state and local governments now—more than ever—must act with resolve to protect existing revenue streams.

D. Lost Opportunity: The Marketplace Fairness Act.

This Court has stressed that federal legislation authorizing States to require vendors with no physical presence to collect and remit use tax on goods sold to residents and delivered to the State would be a valid exercise of the commerce power granted to Congress by the Constitution. *See Quill*, 504 U.S. at 318 (explaining that the issue "is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve" because "[n]o matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions"). More than twenty years later, Con-

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[12] NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS (NASBO), STATE EXPENDITURE REPORT 44 (2011-2013), http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202011-2013%20Data%29.pdf.

[13] NASBO, THE FISCAL SURVEY OF STATES 54-56 (Spring 2014), http://www.nasbo.org/FISCAL-SURVEY-OF-STATES-SPRING-2014.

gress continues to struggle with whether or not to accept this Court's invitation by enacting legislation. In response to this predicament, *amici* have long supported the Marketplace Fairness Act (MFA), congressional legislation that would level the playing field for local retailers and allow state and local governments to recapture revenue lost to remote sales.

The MFA would remove the *Quill*-imposed preferential treatment of Internet vendors and other remote sellers by giving state and local governments the ability to require out-of-state merchants to collect the same taxes from residents that local merchants are required to collect. This would close the remote sales tax loophole and enable States to recover the estimated $23 billion owed in taxes on remote sales each year, revenue that could be dedicated to providing important public services such as infrastructure, education, health care, and public safety. Although it passed the U.S. Senate with broad bipartisan support (69-27) in 2013, the MFA[14] has yet to be enacted into law.

E. State Efforts to Recapture Remote Sales Tax Revenues.

It is critical that States be able "to raise revenue to defray the expenses of government and to distribute its burdens equally among those who enjoy its benefits." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279 (1932). States are entitled to considerable deference and flexibility in choosing the best methods of tax assessment and collection. Indeed, "[t]he rights of the several States to exercise the widest liberty with respect to the imposition of internal taxes always has been

[14] S.743, Marketplace Fairness Act of 2013, Roll Call Vote No. 113, 113th Cong. 1st Sess. (May 6, 2013).

recognized in the decisions of this court." *Schaffer v. Carter*, 252 U.S. 37, 51 (1920).

In the absence of congressional action, state and local governments have been forced to seek out their own solutions to the remote sales tax loophole to try to recapture lost revenues and protect their budgets, as well as their local economies. Many States have enacted streamlined sales and use tax systems to simplify collection without creating an undue burden on retailers.[15] In response to such efforts, some remote sellers have voluntarily agreed to begin collecting and remitting taxes. Other States have enacted affiliate nexus or "Amazon" laws declaring that the connection between a remote seller and in-state entities that perform certain work that can be attributed to the seller constitutes a sufficient "nexus" to the State to require the collection of use tax.[16]

Unfortunately, States and local governments are hamstrung in their ability to improve e-commerce use tax compliance because remote sales generally have not been subject to third-party reporting of information to tax authorities. Third-party reporting works quite well in achieving tax compliance because both the taxpayer and taxing authority receive the same information about what should be reported and each understands that the other has the same information.

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[15] Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Rhode Island, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

[16] Alabama, Arkansas, California, Georgia, Illinois, Iowa, Kansas, Maine, Minnesota, Missouri, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota, Vermont, and West Virginia. *See id.*

It is no surprise that, as the Internal Revenue Service has concluded, where taxable transactions are subject to third-party reporting requirements, compliance is very high, while in the absence of such requirements compliance is poor.[17] In the case of remote sales, without such information, state and local governments have no effective or efficient method by which to assess and collect use tax from their residents.

At least four states (Colorado, Oklahoma, South Dakota, and Vermont) have recently enacted certain reporting requirements on remote sellers.[18] Reporting laws enacted in the latter three States simply require remote sellers to provide notice to consumers that they may owe state use tax on the transaction.

Colorado's reporting law is more ambitious and pragmatically tailored to the task. It seeks to require remote sellers—not to collect and remit use taxes—but simply to report information on their remote sales to Colorado residents and the Colorado Department of Revenue. This will enable the State to assess and collect the applicable use tax from those residents.

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[17] KIM M. BLOOMQUIST, TRENDS AS CHANGES IN VARIANCE: THE CASE OF TAX NONCOMPLIANCE (June 2003), http://www.irs.gov/pub/irs-soi/bloomquist.pdf.

[18] *See* NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

II. This Case Is A Backdoor Effort To Restrain Lawful State Authority To Assess And Collect Use Tax In Violation Of The Tax Injunction Act.

A. The Colorado Law Was Enacted to Enable It to Assess and Collect Use Tax.

In this case, Petitioner seeks to have the federal courts declare that a law enacted by the Colorado Legislature in 2010 is invalid and enjoin its enforcement. Pet. App. E-1-E-4. The law is intended to enable the Colorado Department of Revenue to assess and collect use tax from residents who make purchases from retailers based outside of the State that are currently exempted, courtesy of *Quill*, from the requirement imposed on in-state merchants to collect and remit tax from their customers.

The Colorado law imposes three main requirements on non-resident retailers with at least $100,000 in gross annual sales to its residents: (1) they must tell Colorado customers that they may be liable for sales or use tax on a purchase; (2) they must give Colorado customers an annual summary of their purchases; and (3) they must file an annual report with the Colorado Department of Revenue listing total sales to each Colorado customer with at least $500 in purchases. COLO. REV. STAT. § 39-21-112(3.5)(c)-(d). The annual report to be filed with the Department of Revenue, in particular, provides the State with an effective means of identifying remote purchases subject to use tax, where they would otherwise go undetected, so that such taxes may be assessed and collected from the taxpayer.

In enacting this law, Colorado sensibly reasoned that requiring non-resident retailers to report accurate and complete information about annual remote purchases both to the consumer and the Department of Revenue would substantially improve the ability of the State to assess and collect use taxes from its residents. The Colorado law, then, is intended to transform the state use tax imposed upon remote sales from a largely unassessed and uncollected tax obligation into a meaningful source of state revenue.

B. Granting the Relief Sought by Petitioner Would Enjoin, Suspend, or Restrain both the "Assessment" and "Collection" of State Taxes in Violation of the TIA.

To refresh, the Tax Injunction Act prohibits federal district courts from entertaining jurisdiction over any claim seeking to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law[.]" 28 U.S.C. § 1341. As this Court has recognized, the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). The TIA is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Id*. (citing 81 CONG. REC. 1415 (1937)); *see also California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982).

In dismissing this case for lack of federal jurisdiction, the Tenth Circuit held that Petitioner's claims seeking to enjoin the Colorado law fell within the TIA's broad prohibition on federal suits that would restrain the collection of a state tax. Pet. App. A-33.

That decision was unsurprising; indeed, in limiting its analysis to efforts to restrain state use tax "collection," the Tenth Circuit likely did not reach broadly enough. For this Court's decisions suggest that, if successful, Petitioner's challenge to the Colorado law imposing third-party reporting requirements on remote sellers would directly enjoin, suspend, or restrain Colorado's ability to issue any "assessment" of use taxes on remote sales.

As Justice Kennedy has explained, "[t]he terms 'enjoin, suspend, or restrain,' require little scrutiny. No doubt, they have discrete purposes in the context of the TIA; but they also have a common meaning. They refer to actions that restrict assessments to varying degrees." *Hibbs v. Winn*, 542 U.S. 88, 118 (2004) (Kennedy, J., dissenting). The *Hibbs* majority further recognized that under both the TIA and tax law generally, "the assessment is the official recording of liability that triggers levy and collection efforts" against a particular taxpayer. *Id*. at 101.

In other words, a law or regulation that imposes a tax does not constitute an "assessment." *See id*. at 102 (explaining that the term "assessment" is not "synonymous with the entire plan of taxation" but instead is related "to the term's collection-propelling function"). Rather, an assessment is the taxing authority's recording of tax liability for a particular transaction upon a particular taxpayer. *Accord id*. at 117 (Kennedy, J., dissenting) ("The record-keeping that equates to the determination of taxpayer liability on the State's tax rolls is the assessment, whatever the method.").

Petitioner's suit challenges Colorado's chosen method of assessing use taxes by imposing reporting requirements that provide the information necessary

to calculate and record tax assessments that would trigger collections. *See id*. at 103 n.5. Although the TIA does not prohibit interference with every possible aspect of state tax administration, it does concretely proscribe any interference "with those aspects of state tax regimes that are needed to produce revenue—i.e., assessment, levy, and collection." *Hibbs*, 542 U.S. at 105 n.7.

That is exactly what this case seeks to do. The relief it seeks would prevent state tax officials from carrying out the assessment and collection of state use tax on remote sales. Granting relief to Petitioner thus would operate to restrain Colorado's assessment of use taxes on remote sales, assessments that otherwise would initiate collections, thereby depriving the State of tens of millions in annual tax revenue. Pet. App. at A-5.

If Petitioner's suit is successful, then, "the practical effect of restraining the means of collecting state taxes would impede the only method available to the state to enforce payment." Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780, 789 (1946). Petitioner's claims thus directly implicate the TIA's broad jurisdictional bar. *See, e.g.*, *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989) (holding that TIA barred federal jurisdiction over suit seeking to prevent employer from providing earnings information to state taxing authorities where "requested injunction would preclude Idaho and Montana from taxing Burlington Northern employees because the states would be unable to obtain the information necessary for assessment"). As explained by one federal court applying the newly-minted TIA to dismiss a challenge brought by a remote seller to the cancellation of its state sales permit, "[a] suit to enjoin a tax and a suit to enjoin the

use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other." *Sears, Roebuck & Co. v. Roddewig*, 24 F. Supp. 321, 324 (S.D. Iowa 1938).

In the clearest sense, Petitioner's federal suit seeks to enjoin, suspend, or restrain the "assessment" and subsequent "collection" of use taxes under state law. The Tenth Circuit correctly held that the TIA barred the federal courts from entertaining it.

C. A Cramped Interpretation of the TIA as Applying Solely to Challenges to State Tax Assessment and Collection Efforts Brought By Taxpayers Would Place Form Over Substance and Defeat Its Essential Purpose.

Petitioner has acknowledged, as it must, that "[t]axpayers (or their proxies) who challenge the process for obtaining information regarding their tax liability necessarily challenge the assessment of taxes against them." Pet. Br. at 49. Petitioner contends, however, that the Tax Injunction Act's jurisdictional bar applies solely to such actions brought by taxpayers contesting their personal tax liability. But no such limitation is found in the text of the statute, which removes from federal jurisdiction "any suit" within its purview, not just those suits brought by disaffected taxpayers. To begin enforcing such a judicially-created limitation now would contravene both the TIA's text and legislative intent.

This Court has previously applied the TIA's jurisdictional bar to a suit challenging the validity of a tax brought by a party other than the taxpayer. *See Kohn v. Central Distributing Co.*, 306 U.S. 531, 532-34 (1939) (affirming dismissal pursuant to TIA of

attachment suit challenging the State's original assessment of alcohol beverage tax imposed on whiskey distributor brought by third-party lienholder on property). Though not brought by the affected taxpayer, the dismissal in *Kohn* comported fully with both the text and purpose of the TIA.

As this Court explained in *Hibbs*, 542 U.S. at 106, the TIA's essential purpose is to remove from federal jurisdiction challenges to those aspects of state tax administration that, if successful, "would have operated to reduce the flow of state tax revenue." This Court's holding in that case was tied to its recognition that the suit in question did not seek to interfere with the assessment of taxes in a manner that would operate to reduce tax revenues, but rather in a manner that, if successful, would increase them. *See id*. If the third-party challenge to the assessment of taxes in *Hibbs* would have operated to *reduce* revenue brought into the State's coffers, the jurisdictional outcome would have been different.

Properly interpreted, the true limitation adopted in *Hibbs* is that the TIA bars any suit, whether brought by a taxpayer or an affected third-party, so long as the action attempts to enjoin, suspend, or restrain the assessment, levy, or collection of tax revenue. *See Kohn*, 306 U.S. at 532-34; *Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 339 (1990) (holding that TIA's jurisdictional bar applied to suit brought by taxpayer's shareholders); *Hill v. Kemp*, 478 F.3d 1236, 1249-50 (10th Cir. 2007) (holding that action was not excepted from TIA's jurisdictional bar on theory that plaintiffs were challenging assessment imposed on third parties).

Actions seeking to *increase* the assessment of taxes or collection of revenue, on the other hand, do not fall

within the jurisdictional barrier under the rationale adopted in *Hibbs*, 542 U.S. at 106-07 ("Our prior decisions are not fairly portrayed cut loose from their secure, state-revenue protective moorings"); 17A CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4237 (3d ed., 2007) (describing *Hibbs* holding that claims for relief were not barred by TIA as hinging on this Court's conclusion that phrase "assessment, levy or collection" was "designed to prohibit only interference with those aspects of state tax regimes that are needed to generate revenue"); *I.L. v. Alabama*, 739 F.3d 1273, 1283 (11th Cir. 2014) (explaining that *Hibbs* stands for proposition that "third-party challenges to the validity of state taxing schemes fall outside the ambit of the Tax Injunction Act if the challenges, were they to prove successful, would result in the increase of the tax liabilities of others (and therefore an increase in tax revenues to the state)").

Under this Court's precedent, the dispositive question in determining whether the TIA's jurisdictional bar applies thus is whether the plaintiff's action, if successful, would restrain the assessment, levy, or collection of state taxes so as to reduce the flow of revenue. That is the only reading of *Hibbs* consistent with both the purpose and text of the TIA. *See Grace Brethren Church*, 457 U.S. at 409 n.22 (explaining that "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration"); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (explaining that passage of the TIA reflected "background presumption that

federal law generally will not interfere with administration of state taxes").

"The federal courts have for most of their history been scrupulous in the exercise of their equitable powers to avoid unnecessary interference with the administration of state taxation." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 126 (1981). As the result of the Tenth Circuit's decision, Petitioner has now filed its claims in Colorado state court where they await resolution on the merits pending this Court's decision on the federal jurisdictional issue. In the binding view of Congress, as expressed by its enactment of the TIA, that is the forum in which those claims must be resolved.

CONCLUSION

For the foregoing reasons, this Court should affirm the Tenth Circuit's proper application of the Tax Injunction Act to dismiss Petitioner's claims.

Respectfully submitted,

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