

No. 12-1175

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In the  
**United States Court of Appeals**  
for the Tenth Circuit

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DIRECT MARKETING ASSOCIATION, *Plaintiff-Appellee*,

v.

BARBARA BROHL, in her capacity as Executive Director,  
Colorado Department of Revenue, *Defendant-Appellant*.

On Appeal from the United States District Court for the District of Colorado - Denver  
1:10-CV-01546-REB-CBS  
Robert E. Blackburn, U.S. District Judge

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

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## **IDENTITY AND INTEREST OF *AMICI CURIAE***

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 the U.S. Supreme 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 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 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 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 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.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The 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 States 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. The ability to collect use tax from remote sales is of paramount importance to States and local governments that need this revenue to provide vital benefits and services for their residents. *Amici* urge this Court to rule that Colorado's notice and reporting requirements are constitutional.

#### **AUTHORITY TO FILE *AMICI* BRIEF**

Counsel of record for Colorado has consented to filing this brief. Fed. R. App. P. 29(a). Counsel of record for the Direct Marketing Association has not consented to filing this brief. *Amici curiae* has filed a motion for leave to file this brief with this Court. Fed. R. App. P. 29(b).

## **AUTHORSHIP AND FUNDING OF *AMICI* BRIEF**

Counsel for *amici* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The increasing prevalence of electronic commerce has produced a deepening crisis for States and local governments whose solvency depends 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 the Supreme 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 expanded at an explosive rate, 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. This loss of revenue has real consequences for States and local governments that are not able to provide dollars necessary to adequately fund education, infrastructure, public safety, and other government services.

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 one reasonable method for the State to assess and collect the applicable use tax that residents owe on remote sales.

The district court incorrectly concluded that *Quill* applies to and invalidates Colorado's notice and reporting requirements and that the notice and reporting requirements are discriminatory. *Quill* only applies to sales tax collection. This Court should not extend its applicability to notice and reporting requirements when *Quill's* very vitality is in question. The notice and reporting requirements applicable to out-of-state vendors are not discriminatory when compared to sales tax assessment, collection, remittance, and record-keeping burdens placed upon in-state vendors.

This court should reverse the district court's grant of a permanent injunction against Colorado.

## 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 21<sup>st</sup> 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.<sup>1</sup> Another study found that 70 percent of consumers shopped online in 2013, with almost 30 percent making 12 or more purchases.<sup>2</sup> In 2014, a 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

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<sup>1</sup> 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](http://www.pwc.com/en_us/us/retail-consumer/publications/assets/pwc-us-multichannel-shopping-survey.pdf).

<sup>2</sup> Cyber Monday Ahead: Study Highlights Online Consumers, THE MEDIA AUDIT (Nov. 2013), <http://view.exacttarget.com/?j=fe5817727d63077b7112&m=fef91672736d07&ls=fde71c75726d007c72127975&l=fe6415767660057e7010&s=fe2c157273620378751676&jb=ffcf14&ju=fe2c17797461057b771577>.

shopped online.<sup>3</sup> The trend of online shopping is expected to continue indefinitely as online vendors use new technology to make it quicker and easier to buy goods online.<sup>4</sup> The explosion of electronic commerce has visited profoundly negative consequences on State budgets that depend, as most do, 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 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

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<sup>3</sup> WALKER SANDS COMMUNICATIONS, REINVENTING RETAIL: WHAT BUSINESSES NEED TO KNOW FOR 2014 (2014), <http://www.walkersands.com/futureofretail>.

<sup>4</sup> VEND, 12 RETAIL TRENDS AND PREDICATIONS FOR 2015, <https://www.vendhq.com/university/retail-trends-and-predictions-2015> (last visited May 6, 2015) (“Mobile will show no signs of slowing down next year and we anticipate smartphones and tablets to play bigger roles in the shopping journey.”).

purchaser for that transaction at the same rate. Together, sales and use taxes provide for a uniform method of taxation upon tangible personal 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), the Supreme Court declined to abrogate 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 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 *Bellas Hess* rule hurts local economies and costs jobs.

Its 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 taxes account 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).<sup>5</sup> 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.<sup>6</sup> When out-of-

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<sup>5</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL), STATE EFFORTS TO COLLECT REMOTE SALES TAXES (Feb. 2014), [http://www.ncsl.org/documents/statefed/MFA\\_intheStatesFeb2014.pdf](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>.

<sup>6</sup> *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](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 (Sept. 2008), [http://www.taxadmin.org/fta/meet/08rev\\_est/papers/hoheisel2.pdf](http://www.taxadmin.org/fta/meet/08rev_est/papers/hoheisel2.pdf) (indicating that



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 many States only a tiny fraction of households report any use tax at all, with compliance often as low as zero to five percent.<sup>7</sup> As Justice Kennedy noted in his concurring opinion in *Direct Marketing Association v. Brohl*, California estimates it collects about four percent of use taxes due on sales from out-of-state vendors. 135 S. Ct. 1124, 1135 (2015) (Kennedy, J. concurring).<sup>8</sup> 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. This weak, almost non-existent reporting rate reflects the structural hurdles States encounter in assessing and collecting use tax on remote purchases by their residents.

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registered retailers properly collected and remitted 95.9 percent of all sales taxes due in 2004).

<sup>7</sup> 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.

*See* CALIFORNIA STATE BOARD OF EQUALIZATION, REVENUE ESTIMATE: ELECTRONIC COMMERCE AND MAIL ORDER SALES 7 (2013) (Table 3).

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 \$23.3 billion in 2012, of which \$11.4 billion was due solely to Internet sales.<sup>9</sup> In 2013, the trend in booming Internet sales continued with retail sales growth nearly three times higher for Internet and mail order shopping (11.57 percent adjusted) than for overall retail (4.31 percent adjusted).<sup>10</sup> 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 States and local governments are losing an increasing amount of their tax

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<sup>9</sup> DONALD BRUCE ET AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE (Apr. 13, 2009), <http://cber.utk.edu/ecommerce/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 May 5, 2015).

<sup>10</sup> UNITED STATES CENSUS, MONTHLY RETAIL TRADE SURVEY, [www.census.gov/mrts/www/data/excel/mrtssales92-present.xls](http://www.census.gov/mrts/www/data/excel/mrtssales92-present.xls) (last visited Oct. 16, 2014).

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 Legislatures'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.<sup>11</sup> In FY 2012 alone, States had to close over \$72 billion in budget deficits.<sup>12</sup> States and local governments have struggled to cope with revenue losses by cutting funding for vital government services including education, infrastructure, and public safety.

And these obligations are only expected to increase. To cite but one example, the National Association of State Budget Officers (NASBO) estimates that the costs for Medicaid in fiscal year 2014 account for almost 26 percent of total state spending from all fund sources—which is the single largest portion of total state expenditures—and 19 percent of general fund expenditures.<sup>13</sup> NASBO's most recent Fiscal Survey of States estimated an 11.3 percent increase in Medicaid

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<sup>11</sup> NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

<sup>12</sup> 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 (Apr. 25, 2012).

<sup>13</sup> NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS (NASBO), STATE EXPENDITURE REPORT 46 (2012-2014), <http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202012-2014%29S.pdf>.

spending from fiscal year 2013 to fiscal year 2014.<sup>14</sup> With little public appetite to increase taxes in a sluggish economy, States and local governments now—more than ever—must act with resolve to protect existing revenue streams.

Another harm States and local governments experience as a result of a failure to collect use tax on remote purchases is stunted economic growth. A number of state studies illustrate significant loss of opportunity for economic growth in the States—many obvious, some less so.<sup>15</sup> The California study estimated that 18,300 jobs were lost in 2010 in the State because of on-line sales, 34,100 will be lost in 2015, and 63,400 in 2020.<sup>16</sup> Loss of jobs means loss of income (which means less spending which means fewer tax dollars). Arizona’s study estimated \$302.5 million in lost wages in the State in 2015 due to uncollected e-commerce taxes.<sup>17</sup> The Tennessee study noted 15 jobs, many in the private sector, are supported within Tennessee each year by every \$1 million States

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<sup>14</sup> NASBO, THE FISCAL SURVEY OF STATES 26 (Fall 2014), <http://www.nasbo.org/sites/default/files/NASBO%20Fall%202014%20Fiscal%20Survey%20of%20States.pdf>.

<sup>15</sup> See all the studies at *Issue Resources*, STAND WITH MAINSTREET, <http://standwithmainstreet.com/content.aspx?page=issueresources> (last visited May 16, 2015).

<sup>16</sup> RICHARD A. PARKER, FLAWED SYSTEM: ONLINE SALES TAX COLLECTION ECONOMIC IMPACT UPON CALIFORNIA BUSINESSES AND EMPLOYERS iv (Aug. 2010), <https://media.gractions.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/1d71e284-6837-4452-a1f4-0a2f90faaf4c.pdf>.

<sup>17</sup> ELLIOTT D. POLLACK & COMPANY, ECONOMIC AND FISCAL IMPACT OF UNCOLLECTED TAXES ON E-COMMERCE IN ARIZONA i (Jan. 2012), <https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf>.

and local governments spend.<sup>18</sup> In 2012 Tennessee was projected to lose \$456.1 million in uncollected use tax totaling 6,899 jobs.<sup>19</sup> The Ohio report estimates that e-commerce has caused a \$10 million decrease in commercial rent revenues annually, representing a \$120 million decrease in property value.<sup>20</sup> The Pennsylvania study describes how increased sales at brick-and-mortar stores will lead to an “economic multiplier effect” in the State where spending generates additional economic activity.<sup>21</sup>

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<sup>18</sup> YOUNGER ASSOCIATES, THE IMPACT OF SALES TAX LOSS TO E-COMMERCE IN THE STATE OF TENNESSEE 2-3 (Sept. 2011), <https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/8ff4a98d-a85f-4d1e-8f56-24dd8e27891d.pdf>.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> UNIVERSITY OF CINCINNATI, ECONOMIC ANALYSIS OF TAX REVENUE FROM E-COMMERCE IN OHIO 1 (Oct. 2011), <https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/a0e8c783-da4c-4406-883b-6dd703322be0.pdf>.

<sup>21</sup> ROBERT P. STRAUSS THE IMPACT OF NOT COLLECTING SALES AND USE TAXES FROM INTERNET SALES INTO PENNSYLVANIA 28 (Apr. 2011), <https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/7e7fa6a8-2600-4a57-8117-bab99e5ca7db.pdf> (“As a result of this increased spending, brick-and-mortar retailers must purchase goods and services from other businesses in the region, resulting in those firms increasing production. In turn, the firms supplying the retailers will need to increase purchases from their suppliers to meet their new orders. The sum of all these expenditures comprises the indirect spending associated with increased activity. All of the economic activity resulting from the increased sales by brick-and mortar retailers in Pennsylvania, whether direct or indirect, results in increased employment. Some of the earnings by these new employees will be spent at businesses within the region on various goods and services, creating another round of economic activity like that described above.”).

#### **D. State Efforts to Recapture Remote Use 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 recognized in the decisions of this court.” *Schaffer v. Carter*, 252 U.S. 37, 51 (1920).

In the absence of congressional action, States 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. 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.

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.<sup>22</sup> In the case of remote sales, without such information, States 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.<sup>23</sup> 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.

#### **E. Justice Kennedy Suggests *Quill* Should be Overturned**

In a much-noticed<sup>24</sup> concurring opinion in *Direct Marketing Association v. Brohl*, Justice Kennedy wrote that it is time for the U.S. Supreme Court to

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<sup>22</sup> KIM M. BLOOMQUIST, TRENDS AS CHANGES IN VARIANCE: THE CASE OF TAX NONCOMPLIANCE (June 2003), <http://www.irs.gov/pub/irs-soi/bloomquist.pdf>.

<sup>23</sup> See NCSL, STATE EFFORTS TO COLLECT REMOTE SALES TAXES, *supra* note 5.

<sup>24</sup> See Adam Liptak, *Upholding Internet Sales Tax Law, A Justice Invites A New Case*, NEW YORK TIMES, Mar. 3, 2015, [http://www.nytimes.com/2015/03/04/business/supreme-court-backs-trade-groups-challenge-to-internet-sales-tax-law.html?\\_r=0](http://www.nytimes.com/2015/03/04/business/supreme-court-backs-trade-groups-challenge-to-internet-sales-tax-law.html?_r=0); Denver Post Editorial Board, *Glimmer of Hope in Supreme Court's*

reconsider *Quill*. 135 S. Ct. 1124, 1135 (2015) (Kennedy, J. concurring). According to Justice Kennedy: “[i]t should be left in place only if a powerful showing can be made that its rationale is still correct.” *Id.* Justice Kennedy questioned whether *Quill* was decided correctly at the time given developments in Commerce Clause jurisprudence post-*Bellas Hess*. *Id.* at 1134-35. And “dramatic technological and social changes”—more significant in 2015 than 1992—indicate that *Quill* was wrongly decided. *Id.* “There is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.” *Id.* at 1135. Justice Kennedy asked the legal system to “find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.” *Id.* Justice Kennedy’s writing concisely summarizes why *Quill* was wrongly decided and should not be extended in this case to apply to Colorado’s notice and reporting requirements.

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“*Amazon Tax*” *Ruling*, DENVER POST (Mar. 4, 2015, 11:19 AM), [http://www.denverpost.com/editorials/ci\\_27644908/glimmer-hope-supreme-courts-amazon-tax-ruling](http://www.denverpost.com/editorials/ci_27644908/glimmer-hope-supreme-courts-amazon-tax-ruling).



## **II. Colorado’s Notice And Reporting Requirements Do Not Violate *Quill* Or Discriminate.**

### **A. *Quill* Does Not Apply to Colorado’s Notice and Reporting Requirements**

As Colorado argues, *Quill* applies to sales tax collection and not to Colorado’s notice and reporting requirements. *Quill* has always had a weak constitution. *Stare decisis* kept it alive in 1992. *Quill*, 504 U.S. at 311 (“contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today”). As the district court acknowledged, lower courts have not extended it to other taxes much less to tax administration. *Direct Marketing Association v. Huber*, No. 10-CV-01546-REB-CBS, 2012 WL 1079175, at \*8, (D. Colo. Mar. 20, 2012). And just a few months ago, Justice Kennedy questioned whether *Quill* has a pulse left: “Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*.” *Direct Marketing Association v. Brohl*, 135 S. Ct. at 1135.

If there was ever a time not to extend the reasoning of *Quill* from sales tax collection to notice and reporting requirements it is now. States and local governments need every tool at their disposal to recapture the \$23 billion in revenue that they are owed each year from remote sales but are unable to collect. States like Colorado are currently experimenting with a number of different

approaches to collect use tax owed. It makes no sense that *Quill* forecloses such laws simply because they place a small burden on out-of-state vendors. As discussed below, this burden is much less than the administrative burden imposed on in-state vendors through mandatory sales tax collection.

**B. Colorado’s Notice and Reporting Requirements Do Not Discriminate Because In-State Vendors Still Bear a Greater Administrative Burden than Out-of-State Vendors**

The Supreme Court’s most recent opinion concerning the nature of discrimination in the context of a tax—*Alabama Department of Revenue v. CSX Transportation*, 135 S. Ct. 1136 (2005)—was decided just one day after the Supreme Court decided *Direct Marketing Association v. Brohl*. Railroads in Alabama pay a four percent sales tax on diesel fuel while motor carriers pay an excise tax of 19 cents per gallon and no sales tax. *Id.* at 1140. CSX argued that the sales tax discriminated against railroads in violation of the Railroad Revitalization and Regulatory Reform Act (4-R Act) because motor carriers pay no sales tax. *Id.* at 1143. The Supreme Court refused CSX’s invitation to ignore the excise tax motor carriers pay and ordered the Eleventh Circuit to compare all of the taxes paid by railroads and motor carrier concluding, “[t]here is simply no discrimination when there are roughly comparable taxes.” *Id.* at 1144.

The principle of examining the entire picture to assess whether administrative burdens are roughly comparable applies with equal force in this

case. While *Alabama Department of Revenue v. CSX Transportation* was a 4-R Act case, the analytical framework the Court articulated applies equally to the dormant Commerce Clause challenge here. In that case the Court cited *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479–80 (1932), a dormant Commerce Clause case, not a 4-R Act case, when explaining that all taxes should be compared with each other to determine whether a tax is discriminatory.

Here, the district court only looked at the burdens added to out-of-state vendors by the notice and reporting requirements rather than comparing them to the burdens otherwise imposed on in-state vendors. A look at all of the administrative burdens reveals a bigger picture. This is not a case where all things are equal and Colorado is imposing burdens on out-of-state vendors by adding notice and reporting requirements. All things are not equal. In-state vendors face significant administrative burdens in assessing, collecting, and remitting sales tax not applicable to out-of-state vendors.

Colorado’s notice and reporting requirements level the playing field to some degree between out-of-state vendors and in-state vendors. In *Alabama Department of Revenue*, the Eleventh Circuit did not want to compare the sales tax railroads pay with the excise tax that motor carriers pay, calling the task “Sisyphean.” 135 S. Ct. at 1144. Common sense, rather than expertise in tax administration, is all that is needed to conclude that the notice and reporting obligations placed on out-

of-state vendors in this case are less than the sales tax assessment, collection, remittance, and record-keeping burdens placed upon in-state vendors.

In-state vendors must obtain a license, calculate the State and local sales tax due, including determining whether any exemptions apply, collect the tax at the time of the transaction, file a return, remit the tax collected to the State, and maintain records. *See* COLO. REV. STAT. §§ 39-26-101 to 39-26-127. Colorado's notice and reporting requirements essentially amount to requiring out-of-state vendors to let Colorado purchasers know electronically (for free) that they may owe use tax on their purchases and transmitting information out-of-state vendors already have to purchasers and the State once a year. Even with the addition of Colorado's notice and reporting requirements a much greater administrative burden falls on in-state vendors than out-of-state vendors.

If out-of-state retailers feel that the notice and reporting requirements are more burdensome than use tax assessment, collection, remittance, and record-keeping requirements, as Colorado points out, they have a choice. They can simply elect to collect use tax, like in-state vendors collect sales tax, and avoid the notice and reporting requirements altogether. *See* COLO. REV. STAT. § 39-21-113(3.5) (repeatedly stating "any retailer that does not collect Colorado sales tax" shall comply with information reporting requirements). This choice eliminates any possibility of discrimination in this case. Out-of-state retailers may situate

themselves identically to in-state retailers who have no such choice to opt out of sale tax assessment, collection, remittance, and record-keeping burdens.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court.

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May 20, 2015

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I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Tenth Circuit Rule 32, the above Brief is proportionately spaced, has a typeface of 14 points or more and contains 4,800 words.

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I hereby certify that with respect to the foregoing:

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on May 20, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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