No. 13-1032

In The
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), provides that "[t]he 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 Tenth Circuit Court of Appeals held that the TIA precludes the exercise of federal court jurisdiction over a suit brought by the Petitioner challenging the constitutionality of a Colorado law which imposes notice and reporting requirements, and substantial penalties for non-compliance, on out-of-state retailers that do not collect Colorado sales tax. The question presented is:

Whether the TIA bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.

PARTIES TO THE PROCEEDING

Petitioner Direct Marketing Association was the plaintiff and appellee in the proceedings below. Respondent Barbara Brohl, the appellant below, is the Executive Director of the Colorado Department of Revenue. The defendant in the District Court proceedings was the former Executive Director, Roxy Huber. Ms. Brohl was substituted for Ms. Huber for purposes of the appeal before the Tenth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Direct Marketing Association ("DMA") states the following:

Direct Marketing Association is a not-for-profit corporation, and, as such, has no parent corporation and has issued no stock held by any publicly-traded corporation.

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INTRODUCTION

The DMA's suit challenging the constitutionality of Colo. Rev. Stat. §§ 39-21-112(3.5)(c)&(d) ("the Colorado Act") does not seek to "enjoin, suspend or restrain the assessment, levy or collection" of any state tax. The Colorado Act does not impose a tax, or a tax collection obligation, upon out-of-state retailers. Nor does the DMA contest the use tax obligations of the Colorado businesses and consumers who purchase products from out-of-state retailers subject to the Colorado Act. The DMA's suit does not call into question the validity of the Colorado use tax, or the authority of the Executive Director of the Colorado Department of Revenue ("Department") to assess the use tax against Colorado purchasers. Moreover, the DMA does not seek to prevent the Department from pursuing collection of the tax from Colorado taxpayers.

Rather, the DMA contests the imposition of a set of informational notice and reporting obligations upon its affected members, a group of non-taxpayers located outside of Colorado, on whom Colorado sales and use tax obligations are not (and may not be, consistent with *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)) imposed under Colorado law. Indeed, as the Tenth Circuit acknowledged, the obligations of the Colorado law are expressly *not* tax obligations, but are imposed *in lieu of* the sales and use tax obligations to which the targeted group of out-of-state retailers are not subject. *See* Appendix to Petition for a Writ of Certiorari ("Pet.App.") at A-26. The purpose of the DMA's challenge is, therefore, not to "enjoin, suspend or restrain the assessment, levy or collection" of Colorado use taxes, but rather to prevent the imposition of discriminatory and burdensome regulatory obligations upon an affected segment of its membership.

Despite the non-tax nature of the DMA's challenge, the Tenth Circuit held that the suit could not be brought in federal court because of the TIA. According to the Tenth Circuit, the TIA's jurisdictional bar extends to any suit that "would enjoin a procedure required by the state's taxing statutes and regulations that *aims to enforce and increase* tax collection." Pet.App. at A-19 (italics added). No other court decision has sought to extend the jurisdictional bar of the TIA this far. The Tenth Circuit's ruling, if allowed to stand, would preclude federal courts from exercising jurisdiction over any suit challenging a regulatory provision that the state claims, no matter how indirectly or speculatively, is intended to promote or facilitate the voluntary payment of taxes. Neither the language nor the purpose of the TIA supports such an expansive interpretation.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet.App. at A-1 – A-33) is reported at 735 F.3d 904. The Tenth Circuit's order denying rehearing (Pet.App. D-1 – D-2) is not reported. The order of the United States District

Court for the District of Colorado granting the DMA's motion for summary judgment and entering a permanent injunction (Pet.App. B-1 – B-25) is not reported. The order of the District Court granting a preliminary injunction (Pet.App. C-1 – C-17) is not reported.

JURISDICTION

The DMA's petition for a writ of certiorari to the Tenth Circuit was granted on July 1, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The TIA provides that "[t]he 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." 28 U.S.C. § 1341. The relevant provisions of the Colorado Revised Statutes are reproduced at Pet.App. E-1 – E-4.

STATEMENT

A. Statutory and Regulatory Background

1. Enacted by Congress in 1937, the TIA was "one of several statutes reflecting congressional

hostility to federal injunctions issued against state officials in the aftermath" of the Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908) (holding that state officials were subject to suit in federal court for constitutional violations notwithstanding the Eleventh Amendment). *See Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 522 n.28 (1981) (discussing enactment of the TIA). The TIA was an amendment to the grant of jurisdiction to the federal district courts set forth in the Judicial Code, 28 U.S.C. § 41(1) (1937), which provided, in pertinent part:

> The District Court shall have original jurisdiction . . . [o]f all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects. . . . *Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*

See H.R. Rep. 1504, 75th Cong., 1st Sess., at 4 (1937) (italics in original) (set forth in the Appendix to Petitioner's Brief ("Br.App.") at 26-28). The TIA was re-codified in 1948 at 28 U.S.C. § 1341.

Three similar statutes based on like principles had already been enacted by the Congress at the time the TIA became law. *See* 81 Cong. Rec. at 1415-16 (Feb. 19, 1937) (Br.App. at 3-4). The earliest of the related statutes, the so called Anti-Injunction Act ("AIA"), was enacted in 1867 as part of the internal revenue code. Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475; *Snyder v. Marks*, 109 U.S. 189, 191-92 (1883) (explaining circumstances of AIA's enactment). As now codified at 26 U.S.C. § 7421(a), the AIA provides in pertinent part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The AIA limits federal and state court jurisdiction over suits challenging federal taxes. The operative language of the AIA has remained essentially unchanged throughout its history. *Bob Jones Univ. v. Simon,* 416 U.S. 725, 731 n.6 (1974).

The language of the AIA, while serving a purpose similar to the TIA, *see Enochs v. Williams Packing & Navigation Co*., 370 U.S. 1, 6-7 and n.6 (1962), differs from the TIA in certain key respects. The AIA bars jurisdiction over any suit "for the purpose of restraining any tax" under the federal tax code. 26 U.S.C. § 7421(a). The TIA, in contrast, is more targeted and precludes the exercise of federal court jurisdiction "to enjoin, suspend or restrain" three specific functions performed by state tax officials, *i.e.*, "the assessment, levy or collection" of any state tax. 28 U.S.C. § 1341. The TIA thus more precisely defines and limits the scope of its jurisdictional bar.

The Butler Act was enacted in 1927 as a restriction on jurisdiction over suits challenging Puerto Rico taxes. Act of Mar. 4, 1927, 44 Stat. 1421 (now codified at 48 U.S.C. § 872). Under the Butler Act, "[n]o suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico."

The Johnson Act was an earlier amendment to the Judicial Code enacted shortly before the TIA in 1934, and became the statute upon which the TIA was "modeled." *Rosewell*, 450 U.S. at 513-14. The Johnson Act originally precluded federal jurisdiction over any suit "to enjoin, suspend or restrain" the "enforcement, operation, or execution of," or any action taken "in compliance with," orders of state and local public utility commissions affecting rates. *See* Br.App. at 27-28. It now precludes interference with the "operation of, or compliance with" such orders. *See* 28 U.S.C. § 1342.

The meaning of each of these jurisdiction-limiting statutes is best understood in light of the language, interpretation and application of the others. *See Hibbs v. Winn*, 542 U.S. 88, 102-05 (2004) (explaining the influence of the AIA on the TIA); *Williams Packing*, 370 U.S. at 6-7 and n.6 (interpreting the AIA in light of the TIA); *Rosewell*, 450 U.S. at 513-14 (TIA modeled in part on the Johnson Act); *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 330-31 and n.11 (1st Cir. 2003) ("*UPS*") (interpreting the Butler Act consistent with the TIA).

In accordance with the purpose of the TIA, its "broad prophylactic language" has been consistently interpreted to foreclose federal court equity jurisdiction over suits by taxpayers seeking to circumvent available state procedures (most notably, refund actions) for determining their liability for state taxes. *See Rosewell*, 450 U.S. at 523-24. The TIA, however, is not an absolute prohibition on federal court review of "all aspects of state tax administration." *Hibbs*, 542 U.S. at 104-05 (discussing history of TIA). In suits not presenting claims by taxpayers attempting to prevent the imposition of state taxes, courts have properly defined the limits of the Act's jurisdictional bar.

Thus, for example, lower courts have held that the TIA does not preclude federal court jurisdiction over a suit challenging a law that conditions state licensure on the payment of state taxes (*e.g., Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975)), or that imposes restrictions on passing through the cost of state taxes to customers of a taxpayer (*Mobil Oil Corp. v. Tully*, 639 F.2d 912, 918 (2d Cir.), *cert. denied sub nom. Tully v. New England Petroleum Corp.*, 452 U.S. 967 (1981)). Similarly, the First Circuit has ruled that the Butler Act does not exclude from federal district court a suit contesting third-party reporting obligations imposed on a common carrier delivering goods purchased from outside of the jurisdiction by Puerto Rico consumers, even though the measures were intended to promote the payment of Puerto Rico excise taxes. *UPS*, 318 F.3d at 331. Most recently, the AIA has been held not to preclude a challenge by financial institutions to federal regulations requiring the reporting of interest earned by foreign citizens on U.S. bank accounts, even though the IRS asserted that such information would enhance U.S. tax compliance. *Florida Bankers Ass'n v. United States Dep't of Treasury*, 2014 WL 114519 at *6-*7, ___ F.Supp.2d ___ (D.D.C. Jan. 13, 2014).

2. Enacted by the Colorado General Assembly in February 2010, the provisions of the Colorado Act impose notice and reporting obligations on "each retailer that does not collect Colorado sales tax." Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(II)(A). The Colorado Act is intended to apply solely to retailers who are protected from the imposition of Colorado sales and use tax collection obligations under *Quill, i.e.*, "non-collecting" retailers located outside the state.

In June 2010, the Department adopted regulations to implement the Colorado Act. 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) ("the Regulations"). The Colorado Act and Regulations establish three separate obligations for non-collecting retailers:

a. The Transactional Notice

In connection with each sale to a "Colorado purchaser," an affected retailer is required to notify the purchaser that although the retailer does not collect Colorado sales tax, the purchaser is obligated to self-report Colorado use tax (referred to by the parties as the "Transactional Notice"). Colo. Rev. Stat. § 39-21-112(3.5)(c)(I); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(2)(a). A "Colorado purchaser" includes not only a Colorado resident, but also any purchaser located outside of Colorado who requests that products be delivered to a recipient in Colorado. 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(b). The Regulations set forth detailed requirements with respect to the content, placement and timing of the Transactional Notice. *Id.* §§ 201-1:39-21-112.3.5(2)(a)-(e).

b. The Annual Purchase Summary

A non-collecting retailer must provide certain Colorado purchasers annually, by First Class Mail, a detailed listing of their purchases, while also informing the customer that the purchaser is obligated to report use tax on such purchases (the "Annual Purchase Summary"). Colo. Rev. Stat. §§ 39-21-112(3.5)(d)(I)(A)&(B); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(3)(a)&(b). The Regulations contain provisions concerning the content, placement, and delivery of the Annual Purchase Summary. 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(3)(a)(i)-(vii). A retailer may, if it complies with certain requirements, elect to send such Annual Purchase Summaries only to those Colorado purchasers whose total Colorado purchases are more than $500 for the prior calendar year. *Id.* § 201-1:39-21-112.3.5(3)(c).

c. The Customer Information Report

Any retailer that is required to mail at least one Annual Purchase Summary to any Colorado purchaser for a calendar year must also file an annual report with the Department containing the name, billing address, all shipping addresses, and the total amount of purchases of each of its Colorado purchasers, without regard to the dollar amount of their purchases (the "Customer Information Report"). *See* Colo. Rev. Stat. § 39-21-112(3.5)(d)(II)(A); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(4). The Regulations provide detailed requirements for the content and format of the Customer Information Report. 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(4)(a)-(c). No other state has adopted a similar requirement.

Failure to comply with the notice and reporting requirements of the Colorado Act and Regulations exposes a non-collecting retailer to substantial penalties. *See* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(II), (d)(III); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which no Transactional Notice is given), (3)(d) ($10 penalty per Annual Purchase Summary not mailed), (4)(f) ($10 penalty per name not included on a Customer Information Report).

An expert retained by the Executive Director projected that the Colorado law would apply to as many as 10,000 retailers nationwide. *See* C.A. App. at 1702, 3158-60.

The Colorado Act does not, however, apply to in-state, Colorado retailers. Indeed, because retailers doing business in Colorado are required, under Colorado law, to collect the sales tax from the purchaser at the time of the sale, the Colorado Act necessarily excludes in-state retailers from its requirements. *See* Colo. Rev. Stat. §§ 39-26-103(1)(a), 39-26-106(2)(a).

B. Procedural Background

1. The Direct Marketing Association, is a not-for-profit corporation with headquarters in New York. C.A. App. at 48 (*First Amended Complaint ("Compl.")* ¶ 2). The DMA is the leading trade association of businesses and organizations using and supporting multichannel marketing methods, with members from all fifty states and numerous foreign countries. *Id.* Members of the DMA market their products directly to consumers via catalogs, print advertisements, broadcast media, and the Internet. *Id.*

Many DMA members have no store, property, employees or other physical presence in Colorado. C.A. App. at 52. As a result, these non-Colorado retailers are not obligated under state law to collect Colorado sales or use taxes on retail sales to Colorado consumers and, moreover, are protected against the imposition of a sales/use tax collection obligation under *Quill*. Many DMA members with no physical presence in Colorado do not collect Colorado sales tax. *Id*. The Colorado Act targets these DMA members and other out-of-state, non-collecting retailers with the obligations of the Transactional Notice, Annual Purchase Summary and Customer Information Report.

2. The DMA in June 2010 filed a Complaint (amended in July 2010) in the federal District Court for the District of Colorado challenging the constitutionality of the Colorado Act and Regulations. *See* J.A. at 2 (Dckt. 10). Jurisdiction in the District Court was based on 28 U.S.C. § 1331. The DMA alleged multiple constitutional violations resulting from the Colorado Act, including claims under the Commerce Clause, the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause.

In August 2010, the DMA moved for a preliminary injunction against the law's enforcement based on its Commerce Clause claims. J.A. at 2 (Dckt. 15). At the same time, the Executive Director filed a motion to dismiss the DMA's non-Commerce Clause claims. *Id.* (Dckt. 14). The Executive Director's motion, which was predicated largely on her contention the DMA lacked standing to pursue its non-Commerce Clause claims, made no mention of the TIA. *Id.*; *see* C.A. App. at 3204-40.

On January 26, 2011, the District Court granted the DMA's motion. Pet.App. C-1 – C-17. The Court enjoined the Executive Director from enforcing the Colorado Act and Regulations, pending further order by the Court. *See id.* at C-15 – C-17.

In March 2011, the parties agreed to file cross-motions for summary judgment on the DMA's

Commerce Clause claims, with a stay of proceedings on all remaining claims. J.A. at 11 (Dckt. 91). In May 2011, the parties filed their respective motions for summary judgment. *Id*. at 12 (Dckt. 98, 99).

In March 2012, the District Court granted summary judgment in favor of the DMA on both of its Commerce Clause claims and entered a permanent injunction enjoining enforcement of the Colorado Act and Regulations. *See* App. B-1 – B-25.

3. The Executive Director appealed the entry of the permanent injunction on the merits. J.A. at 14 (Dckt. 106). In their briefs filed with the Court of Appeals, neither party contested federal court jurisdiction. The Defendant addressed the TIA only in a footnote in each brief she filed, asserting that the Court could exercise jurisdiction without running afoul of the TIA. *See* Appellant's Brief at 31 n.3; Appellant's Reply Brief at 16 n.8. The DMA, in a two-page discussion in its jurisdictional statement, addressed those aspects of the TIA necessary to demonstrate its inapplicability. Appellee's Brief at 3-4.

On August 20, 2013, the Tenth Circuit issued its opinion and judgment. Pet.App. A-1 – A-33. The Court ruled that the TIA divested the District Court of jurisdiction to enjoin enforcement of the Colorado Act. *Id.* at A-33. The Court, therefore, did not reach the merits of the DMA's Commerce Clause claims. *Id.* at A-3.

The Court of Appeals acknowledged that the DMA's suit "differs from the prototypical TIA case."

Id. at A-18. The Court further conceded that "[e]ven if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." *Id.* However, focusing on the word "restrain" in the TIA, the Court determined that the DMA's challenge to the Colorado Act was subject to the TIA because the suit "if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." *Id.* at A-17. The Tenth Circuit concluded that the TIA applies "both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's use tax statutes and regulations that aims to enforce and increase use tax collection." *Id.* at A-19.

4. On September 18, 2013, the DMA filed a petition for rehearing en banc by the Tenth Circuit. On October 1, 2013, the Court of Appeals denied the request. Pet.App. D-1 – D-2.

5. On February 25, 2014, the DMA filed its petition for a writ of certiorari to the Tenth Circuit. The Court granted the DMA's petition on July 1, 2014.

6. In addition to filing a petition for certiorari, the DMA on November 5, 2013, filed suit in Colorado state court in an effort to reestablish the injunction against the Colorado Act before the annual requirements imposed on non-collecting retailers (*i.e.*, the mailing of Annual Purchase Summaries and the filing of Customer Information Reports with the

Department) took effect. *See Direct Marketing Ass'n v. Department of Revenue and Barbara Brohl*, Case No. 13 CV 34855 (District Court for the City and County of Denver). On February 18, 2014, the state court granted the DMA's motion for a preliminary injunction and enjoined enforcement of the Colorado Act.

On July 10, 2014, the state district court stayed all further proceedings before it, pending resolution of this appeal.

SUMMARY OF ARGUMENT

I. The purpose of the TIA is to foreclose federal court jurisdiction over suits brought by taxpayers seeking to invoke federal equity jurisdiction as a means of circumventing standard state administrative procedures for contesting state tax liability. The TIA is not a "sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Hibbs*, 542 U.S. at 105 (citation omitted). Challenges, like the DMA's, brought by non-taxpayers who contest neither their own tax liability, nor anyone else's, and which present none of the elements of the prototypical TIA case, are not barred. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430 (2010) (explaining that the TIA does not apply to suits by "outsiders" whose tax liability is not a relevant factor).

II.A. The language of the TIA must be construed in context. The Tenth Circuit misinterpreted the term "restrain" in the TIA by using recent, selected dictionary definitions without reference to the overall statutory scheme. The Tenth Circuit's preferred meaning of "restrict, limit, or hold back" is inconsistent with the inclusion in the TIA of the related terms "enjoin" and "suspend."

The terms "enjoin, suspend or restrain" are used in the TIA as terms of art with reference to federal court equitable remedies. Together, these terms bar federal court jurisdiction to grant any form of equitable relief that would prevent the assessment, levy or collection of a state tax. The TIA's language describes a more targeted jurisdictional limitation than the AIA. The TIA does not extend to every suit having the potential, however remote, of impeding the payment of taxes by taxpayers.

B. The Tenth Circuit's repeated reference to the notice and reporting requirements of the Colorado Act as "collection methods" is a mischaracterization. The TIA refers to three specific taxing functions performed by state tax officials: assessment (the recording of liability), levy (the seizure of property), and collection (measures for recovery of tax amounts). The third-party notice and reporting obligations challenged by the DMA in this case do not require the DMA's affected members to collect, report or pay any state tax, nor do the law's provisions constitute "the assessment, levy, or collection" of a tax by the Colorado Department of Revenue.

Prior decisions regarding similar state laws demonstrate that the TIA does not bar a suit brought by non-taxpayers against notice and reporting provisions like those imposed under the Colorado Act. *E.g., UPS*, 318 F.3d at 330-32 (Butler Act does not require dismissal of suit contesting law imposing regulatory obligations on non-taxpayer); *Florida Bankers*, 2014 WL 114519, at *6-*7 (AIA does not bar suit against information reporting statute). Moreover, the Tenth Circuit's interpretation of the "collection" of a tax as covering any provision "enacted to ensure compliance" with state taxes (Pet.App. at A-17) would shield any state law purporting to have some bearing on tax payment from review in federal court. *See Wells*, 510 F.2d at 77 (TIA does not preclude challenge to every measure intended to secure tax payment).

III. The value of access to federal court is an appropriate factor in interpreting and applying the TIA. State courts are capable of protecting federal rights, but access to federal courts is a significant factor in promoting confidence in our nation's judicial system.

IV. The "more embracive" doctrine of comity does not require dismissal of the DMA's claims. The Executive Director did not raise comity in the district court or before the Tenth Circuit. None of the concerns of comity in state tax cases are presented by the DMA's challenge to the non-tax, notice and reporting provisions of the Colorado law. Nor are the "confluence of factors" described in *Levin*, 560 U.S. at 431-32, applicable to the DMA's suit.

ARGUMENT

I. THE TIA DOES NOT BAR JURISDICTION OVER SUITS BY "OUTSIDERS" CHALLENGING PROVISIONS ONLY INDIRECTLY RELATED TO STATE TAX ADMINISTRATION.

By design, the TIA restricts federal court jurisdiction over challenges brought by taxpayers who seek to contest their liability for state taxes by circumventing available state administrative procedures. The principal purpose of the TIA was elucidated by the Court in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). As the Court explained, under established equity practice pre-dating the TIA, federal courts routinely declined to protect private parties through equitable relief when "the exercise of [the court's] jurisdiction would be prejudicial to the public interest." *Id.* at 297 (brackets added). In particular, "assaults in the federal courts on the validity of state taxation" through injunctive relief "restraining collection of state taxes" were understood to interfere unduly with a state's fiscal affairs, at least where the state provided a taxpayer an adequate remedy at law to contest such taxes. *Id.* at 298. In sanctioning this established practice of withholding equitable relief to aggrieved taxpayers, the TIA "was predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid." *Id.* at 301 (*citing* Senate and House reports regarding the TIA) (copies of which are included in the Br.App. at 19-28).

Since *Great Lakes* was decided, the Court has consistently articulated the TIA's limitation on interference with state tax collection as designed to prevent a taxpayer from invoking the equity jurisdiction of the federal court as an alternative avenue for disputing state tax liability. *See, e.g., Tully v. Griffin*, 429 U.S. 68, 73 (1976) (*citing Great Lakes*); *Rosewell*, 450 U.S. at 523-24 (concluding that Congress intended to require taxpayers in all circumstances to pursue available state refund claims before obtaining access to federal courts); *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 435 (1999) ("The Tax Injunction Act was thus shaped by state and federal provisions barring anticipatory actions by taxpayers *to stop the tax collector from initiating collection proceedings*.") (italics added). In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), the Court explained that the principle of "non-interference" is necessary because, "[i]f federal [equitable] relief were available *to test state tax assessments*, state tax administration might be thrown into disarray, and *taxpayers might escape the ordinary procedural requirements imposed by state law*." *Id.* at 410 (*quoting Perez v. Ledesma,* 401 U.S. 82, 127 n.17 (1971)) (Brennan, J., concurring in part, dissenting in part) (brackets and italics added). Most recently, in *Hibbs,* the Court reiterated that "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." 542 U.S. at 104-05.

This focus on preventing taxpayers from using federal courts as an alternative forum for contesting the validity or amount of a tax is confirmed by the Anti-Injunction Act, on which the TIA was, in part, based. In *Williams Packing*, the Court explained that the AIA's "manifest purpose" is to allow the United States to "assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." 370 U.S. at 7 and n.6 (noting the parallel purpose of the TIA); *see also Howland v. Soule*, Deady 413, 12 F.Cas. 743, 744 (D. Cal. 1868) (the AIA "prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved by the collection thereof to the ordinary and usual remedy – an action at law to recover back the amount paid").

Based on the central purpose of the TIA, the prototypical suit over which the TIA bars federal court jurisdiction is an action brought (1) by a taxpayer, who is (2) contesting the validity of, or liability for, state taxes, by (3) invoking federal equity jurisdiction as a means of circumventing available state administrative procedures for determining such tax liability. These elements, when present, clearly trigger the TIA's jurisdictional bar, so long as the State affords a "plain, speedy and efficient remedy" to the taxpayer. The TIA has, for example, been held to preclude federal court jurisdiction over suits brought by taxpayers to restrain state court collection proceedings on grounds that the tax in question was invalid (*Kohn v. Central Distributing Co.*, 306 U.S. 531, 532 (1939)); to stay state administrative tax appeal procedures based on the contention that the state lacked the authority to impose a sales tax collection obligation on the plaintiff (*Tully*, 429 U.S. at 69-70); and to prevent publication of a notice of sale for non-payment of property tax alleged to be assessed in violation of the federal and state constitutions (*Rosewell*, 450 U.S. at 510).

The TIA is not, however, a sweeping prohibition against "federal-court interference with all aspects of state tax administration." *Hibbs*, 542 U.S. at 105. In challenges brought by tax "outsiders," *see Levin,* 560 U.S. at 430, who contest *no one's* tax liability and whose claims present none of the elements of a prototypical TIA case, neither the language nor the purpose of the statute require a district court to dismiss the suit on jurisdictional grounds.

II. THE TENTH CIRCUIT MISINTERPRETED THE TIA.

A proper understanding of the TIA begins with the words of the statute, which must be construed, understood in context, and applied consistent with the underlying purpose of the Act. *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356-57 (2012) (where words may have more than one meaning, statutory language "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (*quoting Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

There are two operative sets of words in the TIA: "enjoin, suspend or restrain" and "assessment, levy or collection." The Tenth Circuit relied entirely upon its reading of the term "restrain." Pet.App. at A-16 ("The issue is whether DMA's attack on Colorado's notice and reporting obligations would 'restrain' Colorado's tax collection."). The Tenth Circuit, however, misinterpreted the meaning of "restrain" as used in the TIA, and failed to acknowledge that none of the notice and reporting requirements of the Colorado Act constitute "the collection" of a tax as that taxing function is properly understood.

A. "Enjoin," "Suspend" And "Restrain" Are Terms Of Art With Reference To Equity Jurisdiction.

In construing the term "restrain," the Tenth Circuit relied solely upon selected dictionary definitions for its conclusion that the word should be interpreted to mean "limit, restrict or hold back." *Id.* at A-17. In selecting its preferred meaning, however, the Court of Appeals cited three dictionaries that were unavailable when the TIA was enacted (from 1976, 2009, and 2011), and included a definition of the related form "restraint" contained in a recent edition of Black's Law Dictionary. *Id.*; *cf. Hibbs,* 542 U.S. at 116 (Kennedy, J., dissenting) (critiquing the lower court's reading of the term "assessment" in the TIA because the court relied solely on current sources, selected portions of definitions, and a variant of the word actually being defined). In choosing its definition, the Tenth Circuit also failed to note that other recently-published dictionaries give meanings of "restrain" that are stronger and more preclusive, including "to prevent (someone or something) from doing something" (Oxford Dictionaries 2014) (http://www.oxforddictionaries.com/us/definition/american_english/restrain) and "to control the actions or behavior of someone by force, esp. in order to stop that person from doing something." Cambridge Dictionaries Online, http://dictionary.cambridge.org/dictionary/american-english/restrain (Cambridge University Press 2014); *see also* American Heritage Dictionary of the English Language (5th ed. 2011) ("to prevent (a person or group) from doing something or acting in a certain way").[1]

Even more fundamentally, the Tenth Circuit's approach to statutory construction ignored the context

[1] The edition of Black's Law Dictionary in print when the TIA was enacted likewise contained both mild and stronger variations on the meaning of the word "restrain," listing possible definitions that included, alternatively, "to limit" and "restrict" or "to prohibit from action." Black's Law Dictionary at 1548 (3d ed. 1933). Merely referring to the "ordinary" dictionary definition, therefore, does not resolve the proper meaning of the term as used in the TIA. *Sea-Land Services*, 132 S. Ct. at 1356-57 (where "ordinary" meaning presents two viable alternatives, resort to context is required).

in which the word "restrain" is used in the TIA, both as it relates to the associated terms "enjoin" and "suspend,"[2] and with respect to the TIA's original placement in the Judicial Code. *See Davis*, 489 U.S. at 809 (words of a statute must be read with reference to their context and placement in the overall statutory scheme).

First, in light of the words "enjoin" and "suspend" in the TIA, the meaning of the term "restrain" adopted by the Tenth Circuit quickly leads to interpretive problems. If "restrain" encompasses any action that would "restrict," "limit" or "hold back" state tax officials from the "assessment, levy, or collection" of a state tax, the terms "enjoin" or "suspend" are rendered superfluous. *See Hibbs*, 542 U.S. at 101 (describing the rule against superfluities). Instead, the word "restrain," by itself, "would do all the necessary work" of describing relief that would prohibit action by state officials. *See id.* (noting that the juxtaposition of "levy" and "collection" in the TIA dictates a more narrow reading of "assessment"). Had Congress intended the words of the TIA to foreclose

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[2] In choosing among its preferred dictionary definitions, the Tenth Circuit purported to apply the principle that the use of the disjunctive term "or" in the TIA suggests that each term employed should be given a distinct meaning. Pet.App. at A-16. But the Court of Appeals assigned the *same* essential meaning to both "enjoin" and "suspend" (finding that both words mean "entirely arresting tax collection"), before electing to give the word "restrain" a different, and less precise, meaning. *See id.* at A-17.

jurisdiction over any suit that might "restrict" tax collection, it could have accomplished that objective with a single word; instead, Congress employed three distinct terms.

Moreover, when properly read in context, the words "enjoin, suspend or restrain" are used in the TIA as terms of art. Together, they describe an express carve-out from Congress' grant of authority to the district courts that can only be understood with reference to the courts' traditional exercise of equity jurisdiction. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 126 and n.13 (1981) (Brennan, J., concurring in the judgment) ("suspend" and "restrain" in the TIA "surely seem to evoke association with the language of equitable actions"); *see also Rettig Beverage Co. v. United States*, 13 F.2d 740, 742-43 (3d Cir. 1926) (use of the term "to enjoin" supports the conclusion that Congress intended to describe an equitable action and remedy under National Prohibition Act). As Justice Brennan explained in his concurrence in *Fair Assessment*, the terms of the TIA are not so "encompassing" as to implicate any suit that may "chill" state tax collection, but instead must be interpreted in accordance with their "specialized legal meaning" with regard to equity jurisdiction. 454 U.S. at 126 and n.13.

"[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (citations omitted); *see also Microsoft Corp. v. i4i Ltd. Partnership,* 131 S. Ct. 2238, 2245 (2011) (the understanding of a common law term of art displaces the word's ordinary meaning).

As used with respect to equity jurisdiction, there is a common thread running through the terms "enjoin, suspend or restrain." As the Court has noted, the terms refer, in general, to the exercise of a court's equitable powers to grant anticipatory relief, *i.e.*, "suits *to stop* ('enjoin, suspend or restrain') the collection of taxes." *Jefferson County,* 527 U.S. at 433 (italics added). Moreover, as used by courts and leading treatises, the terms "enjoin" and "restrain" are frequently employed interchangeably with regard to equitable relief to mean "to prevent." For example, in *Ex Parte Young*, the Court repeatedly uses both "enjoin" and "restrain" at different points to describe injunctive relief granted by a court to prevent the enforcement of unconstitutional state laws by state officials. *Compare,* 209 U.S. at 152 (discussing the general doctrine that federal courts will "*restrain* a state officer from executing an unconstitutional statute of the state" when to execute it will cause irreparable harm) (italics added) and 155-56 (explaining that state officers, vested with the requisite authority to enforce an unconstitutional act may be "*enjoined* by a Federal court of equity from such action") (italics added); *see also,* Joseph Story, Commentaries on Equity Jurisprudence, § 872, at 367 (3d English ed. 1920) (enumerating the "ordinary objects of the remedial writ of injunctions" for which the "relief consists in *restraining* the commission or the continuance of some act of the defendant") (italics added); Black's Law Dictionary at 1548 (3d ed. 1933) (definition of "restrain" means "[t]o enjoin (in equity.)").

Consistent with the TIA's central purpose of precluding federal court jurisdiction over taxpayer suits contesting state tax liability, the common thread running through the terms "enjoin, suspend or restrain" in the TIA is thus a withdrawal of the courts' power to grant equitable relief preventing the assessment and collection of taxes by state officials.

At the same time, canons of construction dictate that terms connected in the disjunctive should be given separate meanings. *Garcia v. United States*, 469 U.S. 70, 73 (1984). In the case of the TIA, this interpretive rule is consistent with, and reinforcing of, the terms' shared meaning with reference to equitable remedies that prevent the assessment and collection of state taxes, because each term contributes distinctly to the TIA's objective of foreclosing the district courts' jurisdiction to grant such relief.

The words' distinct significance is apparent when analyzing the terms in conjunction with one another. Since the purpose of the TIA was to eliminate the equitable jurisdiction of the district courts over suits by taxpayers seeking to "stop" state tax collection, *Jefferson County*, 527 U.S. at 433, the term "enjoin," by itself, would be inadequate to accomplish that objective. A prohibition solely on the court's jurisdiction to "enjoin" state tax collection would invite other types of challenges, seeking forms of equitable relief other than injunctions, such as declaratory judgments, stays, constructive trusts, and claims for unjust enrichment of the state. In order to foreclose such other remedies, additional words are necessary. The inclusion of the words "suspend" and "restrain" achieves that result. *See Grace Brethren Church,* 457 U.S. at 408 (interpreting the terms "suspend" and "restrain" as expanding the scope of the TIA to cover declaratory judgment actions). A more detailed review of each term proves the point.

1. "Enjoin"

The term "enjoin" is commonly associated with injunctive relief that prohibits some act by the defendant. In addition to meaning "prohibit," however, the term "enjoin" also "has meaning in an affirmative sense." *Hibbs*, 542 U.S. at 118 (Kennedy, J., dissenting) (noting that, at the time the TIA was enacted, "enjoin" was defined to include "to require; command; [and] positively direct") (*citing* Black's Law Dictionary (3d ed. 1933)).[3] Thus, "enjoin" as used in the TIA

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[3] With reference to equity, the 1933 edition of Black's Law Dictionary further defines "enjoin" to mean "[t]o require a person, by writ of injunction from a court of equity, *to perform,* or to abstain or desist from, some act." Black's Law Dictionary at 663 (3d ed. 1933) (italics added).

would preclude a district court both from entering an injunction prohibiting tax collection, and from affirmatively commanding tax officials to provide certain types of tax relief which would also prevent the collection of taxes, such as ordering a "refund" of moneys paid, granting a tax exemption, or requiring the abatement of tax penalties.

2. "Suspend"

The term "suspend" connotes a temporary prohibition against some act and supplements the term "enjoin" by foreclosing preliminary injunctive relief. As it relates to equity, the term "suspend" had particular significance with reference to a temporary prevention of action by public officials. *See* Black's Law Dictionary at 1690 (3d ed. 1933) ("suspend" includes "[t]o forbid a public officer . . . from performing his duties or exercising his functions for a more or less definite interval of time").

In addition, other forms of non-injunctive, equitable relief could also result in temporary suspensions of state tax collection. At the time the TIA was enacted, the power to enter a stay of the proceedings of another tribunal was understood to be within the authority of a court sitting in equity, but not within the authority of a court sitting in law. *See Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 382 (1935) ("The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles.").[4] As the Court has more recently noted, "[a]n injunction and a stay have typically been understood to serve different purposes." *Nken v. Holder*, 556 U.S. 418, 428 (2009). While an injunction commands the action, or inaction, of an individual, a stay temporarily suspends a judicial (or other) proceeding, "by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.* (*citing* Black's Law Dictionary (6th ed. 1990) (defining "stay" as "a suspension of the case or some designated proceedings within it")).

Taxpayers seeking to stay a component of the tax collection process under state law have routinely been barred from proceeding in federal court by virtue of the TIA. *See, e.g., Tully*, 429 U.S. at 70 (suit seeking to stay the running of administrative appeal period applicable to state tax assessment barred by TIA); *Central Distributing*, 306 U.S. at 532-34 (TIA forecloses jurisdiction over action by taxpayer seeking to stay tax collection proceedings); *Forjone v. Leavitt*, 2008 WL 1926680 (W.D.N.Y. April 30, 2008) at *4 (TIA requires dismissal of suit seeking a stay of

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[4] Because a stay was a form of equitable relief, the Court in *Enelow* equated the entry of a stay with an injunction for purposes of interlocutory appeal, but the rule proved unworkable and *Enelow* was later overruled. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282-83 (1988). However, as a traditional form of equitable order, a stay is a type of relief that a court might enter to "suspend" the action of state tax officials.

property tax foreclosure proceedings). While the addition of "suspend" extends the TIA to equitable remedies temporarily prohibiting state tax collection, there are certain other forms of equitable relief that could bar state tax officials from performing their taxing functions, unless also addressed by the TIA.

3. "Restrain"

The term "restrain" as used in the TIA serves to encompass, consistent with its widespread usage in traditional equity practice (*see supra* at 26-27), any other type of equitable remedy (*e.g.,* constructive trusts, rescission, writs of mandamus) that may be entered by the district courts to prevent state officials from collecting taxes. This Court has accordingly interpreted the TIA to prevent other forms of equitable relief. *See Grace Brethren Church*, 457 U.S. at 408 (terms "suspend" and "restrain" extend the scope of the TIA beyond injunctive relief to preclude entry of declaratory judgment); *cf. Radian Ins., Inc. v. Deutsche Bank Nat'l Trust Co*., 2009 WL 3163557 at *5 (E.D. Pa. Oct. 1, 2009) (FIRREA's bar against court taking "action . . . to restrain or affect" the powers of FDIC precludes equitable remedies including not only injunctions but also constructive trust, rescission, and specific performance) (collecting cases).

Taken together, the terms "enjoin, suspend or restrain" are properly interpreted to encompass all forms of equitable relief that might prevent state tax officials from carrying out the "assessment, levy or collection" of a state tax.

4. The Jurisdiction-Limiting Language of the TIA Differs from the AIA.

The TIA was adopted against a backdrop of other jurisdiction-limiting statutes, including the AIA, but there is an important difference between the TIA and the AIA with regard to the language used to circumscribe the court's jurisdiction. While the TIA precludes the exercise of equity jurisdiction by a federal court to "enjoin, suspend or restrain" state tax collection, the AIA more generally precludes courts, both federal and state, from exercising jurisdiction over any action "*for the purpose of restraining*" the collection of any federal tax. 26 U.S.C. § 7421(a) (italics added). The difference in the words chosen by Congress in this regard is significant.

First, the AIA does not juxtapose the word "restraining" against related terms such as "enjoin" and "suspend," indicating that it has a broader application than the term "restrain" as used in the TIA. In the TIA, "restrain" must have a meaning distinct from "enjoin" and "suspend," with reference to the exercise of equity jurisdiction by the federal court, which necessarily circumscribes its meaning.

Next, the phrase "for the purpose of" expands the scope of the AIA to consideration of the objectives of the plaintiff in filing suit, rather than directing the focus to the types of remedies a court may order in granting equitable relief, as is the case with the TIA. Courts have long emphasized that the purpose of the plaintiff in bringing suit is a significant factor in applying the jurisdictional limitation of the AIA. *See, e.g., Snyder,* 109 U.S. at 191 ("The sole object of the suit is to restrain the collection of a tax which purports to have been assessed under the internal revenue laws."); *Miles v. Johnson*, 59 F. 38, 40 (D. Ky. 1893) ("I must conclude the purpose of these suits is to restrain the collection of the taxes which are due. This would be the necessary effect of the relief if granted, and it must be the purpose, as the only contention is that no tax should be collected.").

This Court has noted that the AIA's reference to the suit's "purpose" expands the reach of the statute to actions that do not directly challenge the assessment or collection of taxes. In *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 760 (1974), the Court rejected the Court of Appeals' conclusion that a challenge to the withdrawal of the taxpayer's 501(c)(3) status would only have the "collateral effect" of restraining the collection of taxes from donors to the organization. The Court noted that the plaintiff "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors." *Id.* at 761. The Court concluded that "[u]nder any reasonable construction of the statutory term 'purpose,' the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors." *Id.* at 760.[5]

The difference in the language and scope of the two statutes in this regard is also consistent with their distinct objectives. The AIA was enacted in 1867 as part of the Internal Revenue Code to prevent challenges to federal taxes in both state and federal courts. *Williams Packing*, 370 U.S. at 5 (object of the AIA was to "withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes"). Congress did not adopt the AIA to correct perceived excesses in the exercise of federal court jurisdiction, in the way the TIA was meant to address conditions after the Court's decision in *Ex Parte Young,* through a carve-out from the statutory grant of jurisdiction to the federal district courts.

The AIA's more expansive prohibition on pre-enforcement relief is understandable. A taxpayer with

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[5] Even if the TIA were interpreted to apply to any suit filed "for the purpose of restraining" states taxes, it would still not bar the DMA's claims. The purpose of the DMA's suit is not to prevent the assessment of Colorado use tax, but rather to prevent the imposition of discriminatory notice and reporting obligations on its affected members. This is not a case, like '*Americans United*,' where the asserted purpose is merely a "restatement," in different words, of an actual purpose of preventing tax from being imposed on a third-party. *See 'Americans United*,' 416 U.S. at 760-61 (purported goal of preventing loss of donations was synonymous with ensuring donors could claim deductions and thereby reduce tax liability).

an objection concerning federal taxes will, through the normal administrative appeal process, eventually have access to a federal court (either the District Court, or the Tax Court) in order to present its claims. Under the TIA, by contrast, a taxpayer may be excluded from the federal district court altogether, so long as there is a "plain, speedy and efficient" remedy available in state court.[6]

Thus, contrary to the Tenth Circuit's conclusion, neither the language nor the purpose of the TIA support an interpretation of the Act as foreclosing jurisdiction based on a lawsuit's mere "potential to restrain tax collection." Pet.App. at A-18. Any procedure having even the most remote connection to the

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[6] To the extent there is a state court remedy available to out-of-state retailers for contesting the notice and reporting obligations imposed under the Colorado Act, it is a general declaratory judgment action under the state version of the Uniform Declaratory Judgments Law, Colo. Rev. Stat. § 13-51-101 *et seq.*, and not one "tailormade for taxpayers." *See Hibbs*, 542 U.S. at 107 (TIA's jurisdictional limitation must be read "harmoniously" with the requirement that state law must provide a plain, speedy and efficient remedy "tailormade for taxpayers"). The Colorado Act itself contains no provision setting forth a remedy for challenging either the notice and reporting obligations, or the imposition of a penalty for non-compliance. *See generally* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)&(d). The absence of such a specific administrative remedy for challenging the Act further indicates that the Colorado Act is not among the types of state laws that Congress dictated should be challenged only in state court. *Id.* at 104-05 ("in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority").

recovery of revenue would then be implicated. For example, a suit challenging, on Fourteenth Amendment grounds, the bid process by which the Department of Revenue acquired a new computer system might be said to "undermine state tax collection" (*see* Pet.App. at A-17) and thus be subject, under the Tenth Circuit's construction, to the TIA's jurisdictional bar, but it could not seriously be contended that the TIA extends to a suit of this nature.

B. The Notice And Reporting Obligations Of The Colorado Act Are Not The "Assessment, Levy Or Collection" Of Any Tax.

The Tenth Circuit's repeated reference to the Colorado Act's notice and reporting requirements as "collection methods" is a clear mischaracterization. None of the requirements of the Colorado Act constitute "the assessment, levy or collection" of a state tax within the meaning of the TIA.

1. "Assessment," "Levy" and "Collection" Describe Specific Taxing Functions Performed by State Tax Officials.

The TIA applies to three taxing functions: assessment, levy and collection. Congress focused on specific procedures regularly undertaken by states to record and recover taxes that are due from taxpayers. *See Hibbs,* 542 U.S. at 105 n.7 (contrasting TIA's reference to "those aspects of state tax regimes that are needed to produce revenue – *i.e.,* assessment, levy and collection" with the Johnson Act's broader prohibition against interference with "the operation of, or compliance with" public utility rate orders).

The words "assessment," "levy" and "collection" are also terms of art in the area of taxation, most readily defined with reference to another federal statute, the Internal Revenue Code. *See Hibbs*, 542 U.S. at 100 ("assessment" defined with reference to provisions of Title 63 of the IRC); *see also National Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2584 (2012) ("'Assessment' and 'Collection' are chapters of the Internal Revenue Code providing the Secretary authority to assess and collect taxes, and generally specifying the means by which he shall do so.").

a. "Assessment"

In *Hibbs*, there was broad agreement among members of the Court that "assessment" as used in the TIA refers to "the recording of a taxpayer's ultimate tax liability" upon the state's tax rolls. *See* 542 U.S. at 114-17 (Kennedy, J., dissenting) (noting agreement with the majority's discussion of the term, *see* 542 U.S. at 100-02). Such a reading is consistent not only with the term's meaning as used in the Internal Revenue Code, 26 U.S.C. § 6203 ("assessment shall be made by recording the liability of the taxpayer in the office of the Secretary"), but also with recent court decisions and tax treatises. *E.g., Seven-Sky v. Holder*, 661 F.3d 1, 11 (D.C. Cir. 2011) (*citing*

Hibbs), *abrogated on other grounds by National Fed'n of Indep. Bus.,* 132 S. Ct. 2566 (2012); Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01[1] (Rev. 2d ed. 2002) ("An 'assessment' is the formal recording of the taxpayer's liability, fixing the amount payable.").

b. "Levy"

The Tenth Circuit made no mention of the term "levy," but its meaning is readily ascertainable from the Code. Under § 6331(a), "levy" refers generally to the seizure of property "by any means." 26 U.S.C. § 6331(a), (b) (authority of Secretary to levy upon property).

c. "Collection"

Chapter 64 of the Internal Revenue Code is entitled "Collection." *See* 26 U.S.C. §§ 6301 *et seq*. Collection begins with notice that a taxpayer is liable for an unpaid amount and a demand that the taxpayer pay it. *See* 26 U.S.C. § 6303(a); *Seven-Sky*, 661 F.3d at 11. On the state level, similar measures would include the issuance of an assessment to a taxpayer. *See, e.g., Tully*, 429 U.S. at 69-70. If, after being notified, the taxpayer fails to pay, the taxing authorities "can employ various collection methods, including liens and levies on the taxpayer's property." *Seven-Sky*, 661 F.3d at 11 (*citing* 26 U.S.C. § 6303; § 6311 (means of payment); § 6321 (liens); § 6331 (levies)). Collection measures also include court proceedings and similar actions undertaken by state officials to enforce state taxes. *See, e.g., Central Distributing*, 306 U.S. at 534 (state court attachment proceedings); *Rosewell*, 450 U.S. at 510 (publication and notice of tax sale).

2. The Tenth Circuit's Ruling Would Expand the TIA's Jurisdictional Bar Farther than Any Other Court to Include Provisions Encouraging Voluntary Compliance by Taxpayers.

As is evident from the meaning of the terms "assessment, levy or collection," none of the Colorado Act's requirements – not the Transactional Notice, not the Annual Purchase Summary, not the Customer Information Report – constitute either a recording of a taxpayer's liability (assessment), the seizure of property (levy), or the recovery of amounts due (collection).

In reciting the objective for each of the requirements of the Colorado law, the Executive Director framed the requirement in terms of its hoped-for effect on voluntary self-reporting by Colorado taxpayers. Thus, the Transactional Notice purportedly "serves to educate consumers about their state use tax liability with *the aim of increasing voluntary compliance*." Pet.App. at A-6 (*citing* Appellant's Br. at 12) (italics added). The Annual Purchase Summary similarly "arms the consumer with accurate information *to facilitate reporting and paying the use tax*."

Id. at A-7 (*citing* Appellant's Br. at 13) (italics added). The Customer Information Report "is designed to *increase voluntary consumer compliance* with state tax laws because consumers know that a third party has reported taxable activity to the taxing authority." *Id.* at A-7 (*citing* Appellant's Br. at 13) (italics added). The Executive Director also contends that the Customer Information Report will permit the Department to take future action, if necessary, to "pursue audit and collection activities against taxpayers who fail to pay the tax." *Id.*

The Tenth Circuit thus directly equates measures to promote voluntary tax compliance with "tax collection." As the Court of Appeals states, "Colorado enacted the notice and reporting obligations to increase taxpayers' compliance with use tax laws *and thereby increase tax collection*." Pet.App. at A-18 (italics added). No court has extended the reach of the TIA's jurisdictional bar so far. To the contrary, courts have rejected the contention that similar measures intended to facilitate, encourage or promote the payment of taxes by taxpayers constitute the "collection" of a tax within the meaning of the TIA and similar jurisdiction-limiting statutes.

a. Federal Court Jurisdiction is Not Foreclosed Over a Suit that Challenges Neither the Validity of the Tax nor the Authority of State Officials to Collect It.

In *UPS*, a closely analogous case, the First Circuit rejected the contention that the Butler Act bars federal court jurisdiction over a challenge to a law that, like the Colorado Act, sought to compel a third party to comply with burdensome regulatory requirements related to excise taxes owed by local residents on the interstate shipment of goods. 318 F.3d at 330-32.

The Puerto Rico law challenged by UPS prohibited a commercial air carrier from delivering a package to a recipient in Puerto Rico unless the recipient provided the carrier with a certificate from the Puerto Rico Department of Treasury indicating that the excise tax due on the package's contents was paid. *Id.* at 326. Failure to obtain the certificate subjected the air carrier to fines and to payment of the tax on the package's contents. *Id.* As an alternative to obtaining the certificate, carriers could pre-pay the taxes due to the Department and seek to collect them from the recipient. *Id*.

Adopting a position strikingly similar to the reasoning of the Tenth Circuit in this case, the Puerto Rico Department of Treasury argued that the Butler Act barred federal court jurisdiction because the suit constituted a challenge to the statutory mechanism adopted to promote "collection" of the Puerto Rico excise tax. *Id.* at 330. The First Circuit disagreed. The Court noted that "[n]ot every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court." *Id.* at 331. In a passage that might have been written for this case, the First Circuit explained that UPS "did not challenge the amount or validity of the tax due from consumers, nor the authority of [revenue officials] to assess or collect it." 318 F.3d at 330-31 (brackets added). The Court held that the regulatory provisions adopted by Puerto Rico, which relied on "the threat of sanctions against private parties who do not even owe the tax at issue" to produce tax money indirectly, did not constitute "a system of tax collection" within the meaning of the Butler Act. *Id.* at 331.

In direct opposition to the First Circuit's decision in *UPS*, the Tenth Circuit determined that the TIA applies to any "procedure required by a state's taxing statutes that aims to enforce and increase tax collection." Pet.App. at A-19. The term "collection" could thus be understood to encompass similar informational notice and reporting obligations imposed on credit card issuers that provide statements to consumers (because credit cards are used to make taxable purchases), telecommunications carriers that provide cell phone service (because mobile devices are used to place orders for taxable goods), and social media networks (on which retailers maintain pages viewed by consumers). If any statutory or regulatory provision that may *encourage voluntary tax payment* is covered, the term "collection" loses any significance as a taxing function.

b. Not Every Measure Intended to Secure Tax Payment is Covered by the TIA.

The reasoning of the Tenth Circuit is also refuted by the Second Circuit's decision in *Wells.* Judge Friendly reviewed a challenge by a taxpayer to a statute that allowed the suspension of a motorist's driver's license for failure to pay the excise tax on his vehicle. 510 F.2d at 76. The plaintiff did not dispute that he owed the tax and had failed to pay it. *Id.* The plaintiff challenged the suspension of his driver's license on the ground that classifying motor vehicle operators based on their payment (or non-payment) of the excise tax violated the Equal Protection Clause. *Id.*

Just as the Tenth Circuit asserted in the decision below, the defendant in *Wells* argued that the plaintiff was seeking to "restrain collection" of the excise tax within the meaning of the TIA. *Id.* at 77. Judge Friendly noted that the term "collection" might be read "broadly to include anything that a state has determined to be a likely method of securing payment," but concluded that in enacting the TIA, Congress had not "intended to go so far." *Id.* Rather, the Court held that the term "collection" was meant to apply to state procedures "that would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Id.*

The Tenth Circuit purported to endorse Judge Friendly's conclusion that the TIA does not extend so far as to bar "any action challenging a state law that could possibly secure tax payment." Pet.App. at A-23. The Tenth Circuit's reasoning, however, is at odds with the principle it professes to approve. Earlier in the Tenth Circuit's opinion the Court of Appeals concludes that the DMA's claims are barred *precisely because* they purport to challenge Colorado's "chosen method to secure [use] taxes." *Id.* at A-18 (brackets added). *Wells* stands for the proposition that the TIA does not prevent a challenge to any and all state measures, however indirect, that are intended to increase taxpayer compliance, but that is precisely the manner in which the Tenth Circuit applied the TIA to the Colorado Act.[7]

The Tenth Circuit also strives to distinguish *Wells* on the grounds that it concerned a "punitive" measure imposed on a taxpayer that had refused to pay taxes, in contrast to the Colorado Act, which it describes as outlining measures that "attempt to secure tax compliance in the first instance." *Id.* at A-23. Judge Friendly, however, rejected a similar

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[7] The Second Circuit later reaffirmed its reading of the proper scope of the TIA in *Luessenhop v. Clinton County, N.Y.,* 466 F.3d 259, 265 (2d Cir. 2006), stating that "dismissing plaintiffs' causes of action because they pertain to state tax administration in the most general sense would be a patent misreading of the TIA."

invitation to parse between "collection" and "enforcement" measures based on the timing of their application, and instead construed the TIA's use of the term "collection" to mean direct revenue raising measures, rather than indirect means of contriving payment. 510 F.2d at 77. The Act and Regulations are, in any event, unquestionably punitive and coercive[8] as to out-of-state retailers, who face significant sanction for electing, consistent with *Quill*, not to collect Colorado use taxes.[9]

c. Reporting Obligations Are Not Within the Scope of the TIA Merely Because They May Improve Tax Compliance.

More recently, in *Florida Bankers*, the district court rejected the government's contention that the

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[8] The Department's Tax Policy Director expressed the opinion that affected out-of-state retailers would find the new notice and reporting obligations sufficiently "unpleasant" that they would simply choose to collect Colorado sales tax, rather than send notices to their customers regarding the purchasers' obligation to self-report use tax. *See* C.A. App. at 132, 146.

[9] Two different district court decisions recently adopted *Wells'* reasoning in rejecting the application to the TIA to statutes conditioning state licensure on the payment of state taxes. *See, e.g., Berjikian v. Franchise Tax Bd.*, 2014 WL 690211, at *2 (C.D. Cal. Feb. 20, 2014) (the TIA does not bar suit brought by taxpayer who does not challenge the validity of the tax but challenges the sanction of license revocation for non-payment of the tax); *Pickell v. Sands*, 2012 WL 6047286, at *5-*6 (E.D. Cal. Dec. 5, 2012) (same).

AIA foreclosed a challenge to a 2012 regulation that required financial institutions to report to the IRS the amount of interest earned by accountholders residing in foreign countries. 2014 WL 114519 at *1. According to the IRS, the new reporting requirement, was "aimed at detecting and deterring tax cheats at home and abroad" and was adopted to help close the growing "tax gap" between income taxes owed and taxes voluntarily reported by taxpayers. *Id.* By gathering information on foreign citizens with accounts in the United States, the Court explained, the IRS could share the information with foreign countries under reciprocity agreements and receive similar information regarding accounts maintained abroad by U.S. citizens. *Id.* at *2. The regulation was deemed by the IRS "essential to the U.S. Government's efforts to combat offshore tax evasion" (*id.* at 3 (citation omitted)) and a measure that would "directly enhance U.S. tax compliance by making it more difficult for U.S. taxpayers with U.S. deposits to falsely claim to be nonresidents in order to avoid U.S. taxation." *Id.* (citation omitted).

The regulations were challenged in federal court by trade associations representing financial institutions as having been adopted in violation of the Administrative Procedures Act and Regulatory Flexibility Act. The government moved to dismiss on various grounds, including that the court lacked jurisdiction over the suit under the AIA. *Id.* at *6. The government argued that non-compliance with the regulation triggered a penalty against the financial institutions, which would then be treated as a "tax" for purposes of the Internal Revenue Code. *Id.*

The court rejected the IRS's argument. The AIA, the court found, is "not so broad as to cover the reporting requirements challenged here." *Id.* The Court further found that the penalty provision was also more like a regulatory penalty than a tax, further weighing against the application of the TIA. *Id.* at *7.

Like the trade associations in *Florida Bankers*, the DMA does not challenge the imposition of any tax, but instead challenges notice and reporting provisions. The regulations in question are only secondary aspects of tax administration, not the primary taxing functions that tax officials perform to record and collect taxes from the persons responsible for them. Perhaps most tellingly, the government in *Florida Bankers* did not even argue that the reporting requirements themselves constituted the "collection" of a tax for purposes of the AIA.

Likewise, in this case, the Executive Director never moved to dismiss the DMA's claims on TIA grounds, and instead informed the Tenth Circuit that the TIA was no bar to its jurisdiction to hear the appeal. In her opposition to the DMA's petition for certiorari, the Executive Director suggested that she chose not to raise the TIA in order to obtain an expedited ruling on the constitutionality of the Colorado Act. Opposition to Petition for a Writ of Certiorari at 5-6 n.1. Clearly, in making this decision, the

Executive Director believed that the district court had jurisdiction to adjudicate the DMA's claims.

d. Distinguishable Cases Dismissing Taxpayer Challenges to Information Gathering By Taxing Authorities are Not Applicable.

In certain cases, the TIA has been applied to exclude from federal court suits brought by taxpayers to prevent the gathering of information necessary to determine the taxpayers' liability for state taxes. For example, in *Blangeres v. Burlington Northern, Inc.,* 872 F.2d 327 (9th Cir. 1989), the court held that the TIA barred jurisdiction over a suit by railroad workers seeking an injunction forbidding their employer to provide earnings information to two states in which the employees had potential income tax liability. The Court found that the TIA applied because precluding the states from obtaining the information would prevent the state from imposing income taxes on the workers. 872 F.2d at 328. The Court noted that the Third Circuit reached a similar result in *Sipe v. Ameranda Hess Corp.*, 698 F.2d 396, 404 (3d Cir. 1982), in dismissing a suit by seamen challenging the withholding of New Jersey unemployment and disability taxes from their wages.

The holdings in these cases are unremarkable, and neither support the Tenth Circuit's boundless interpretation of the TIA, nor dictate dismissal of the DMA's claims. The central purpose of the TIA, like the AIA before it, was to foreclose jurisdiction over pre-enforcement challenges by taxpayers to the imposition of state taxes as a means of circumventing standard administrative procedures for determining such taxes. Taxpayers (or their proxies) who challenge the process for obtaining information regarding their tax liability necessarily challenge the assessment of taxes against them.

Such a suit is fundamentally different from a challenge, like the DMA's, brought by outsiders to the tax system, as to whom the functions of assessment, levy and collection are irrelevant. *See Levin*, 560 U.S. at 430 (explaining that the TIA did not apply in *Hibbs* because the plaintiffs were "outsiders . . . whose own tax liability was not a relevant factor" to the claims asserted). Plaintiffs who do not contest the validity of a tax, who bear no responsibility whatsoever for the taxes in question, and who pursue no tax relief on behalf of the taxpayers themselves, by definition are not invoking the jurisdiction of the federal court to prevent the assessment of a state tax. Indeed, as it relates to the tax liability of the parties subject to the tax, it is doubtful, at best, that an outsider has standing to bring such a challenge in federal court in the first place. *See United States v. Starke*, 2005 WL 3278116, at *2 (M.D. Fla. 2005) ("It is well established that a third party lacks standing to contest the tax assessment of another."). Where no jurisdiction over such a suit exists (due to lack of standing), Congress cannot be said to have withdrawn such jurisdiction by enacting the TIA.

Unlike pre-enforcement suits brought by taxpayers challenging state tax procedures, this is not "a run of the mine tax case" barred by the TIA. *See Levin*, 560 U.S. at 430 (discussing *Hibbs*). To the contrary, the DMA's suit is a challenge by a group of non-taxpayers, located outside the state, who are not obligated to collect or report a tax, and who contest neither the amount, nor the validity of the tax imposed on their Colorado purchasers. More so even than in *Hibbs*, the affected out-of-state retailers are "outsiders," whose "own tax liability is not a relevant factor" at all in the suit. *Id.*

The Tenth Circuit's analysis of non-taxpayer suits mischaracterizes the DMA's contentions. Pet.App. at A-16 (incorrectly asserting that the DMA sought to "avoid the TIA merely because it is not a taxpayer challenging tax payment"). The DMA has never argued, and does not contend, that a federal court has jurisdiction "to enjoin, suspend or restrain the assessment, levy or collection" of a state tax, *solely* because the suit is filed by a third party. Indeed, in *Hibbs*, the Court held that the TIA was inapplicable, not to all third-party suits, but to a specific type of third-party suit brought by plaintiffs who were "outsiders" to the tax credits in question. *See id*.

Far from insisting the TIA is inapplicable merely because the DMA's members are third parties, the DMA contends that its claims do not implicate the TIA based on the language and underlying purpose of the Act. The status of its affected members as non-taxpayers is significant, but not "merely" because they are non-taxpayers. Rather, their status as outsiders, who neither object to their own tax liability, nor to the liability of Colorado purchasers who owe use tax, and who are not seeking to circumvent state administrative procedures, places their suit squarely outside the scope of the TIA.[10]

[10] The Tenth Circuit concluded that the sole distinction as to the applicability of the TIA is between suits that would have the effect of increasing state tax revenues (like the challenge to state tax credits in *Hibbs*), over which jurisdiction is not prohibited, and suits that would "reduce the flow of revenues to the state," which trigger the TIA. *Id*. at A-21 (*citing Hibbs*, 542 U.S. at 106). The application of the TIA, by its express terms, is not determined *merely* by the potential revenue impact of the challenged provision. Most obviously, penalties may contribute to state revenues, but suits seeking to suspend them are not blocked by the TIA. *See, e.g., Edmondson v. Chamber of Commerce*, 594 F.3d 742, 762 (10th Cir. 2010). Furthermore, a suit challenging a tax exemption as unlawfully discriminatory might be characterized in the alternative as a suit that would raise, or lower, tax revenues, depending upon whether the suit seeks to strike down, or expand, the relevant tax exemption, so the purported revenue impact alone cannot dictate whether the TIA applies. S*ee Levin*, 560 U.S. at 435 (Thomas, J., concurring in the judgment); *see also Mobil Oil,* 639 F.2d at 917-18 (holding that TIA did not require dismissal of suit against anti-pass through provision of a state tax law, even where invalidating the challenged provision resulted in voiding the entire law, including the tax itself).

3. The Tenth Circuit's Ruling Would Shield Any State Law Nominally Related to Tax Payment from Challenge in Federal Court.

By expanding the concept of "collection" of a tax to include all "state laws *enacted to ensure compliance*" with state taxes (Pet.App. at A-17) and "any procedure required by the state's tax statutes and regulations that *aims to enforce and increase* use tax collection," (*id.* at A-19), the Tenth Circuit insulates from federal court review any law that a state may deem to have some bearing on the payment of a tax, no matter how tenuous the relationship. If the litmus test of federal jurisdiction will be the claimed objective of the challenged state statute, one can readily imagine how state tax codes will become attractive vehicles for regulatory measures serving a variety of purposes, and how optimistic predictions of increased state tax compliance will become commonplace in statements of legislative purpose. Congress, and the federal courts interpreting its enactments, must determine the scope of federal court jurisdiction, not state legislatures interested in precluding review of state laws in federal courts.

A simple hypothetical serves to prove the point. Suppose a state legislature adopts a steep excise tax on the possession of cocaine. *See, e.g.,* Mass. Gen. Laws, ch. 64K, § 8(2) (controlled substances tax); Ga. Code. § 48-15-3 (same). To promote its collection of the tax, state law requires common carriers to unseal, for inspection by revenue officials at the point of entry into the state, all packages destined for delivery to residential addresses.

The ostensible reason for the inspection law is to enable revenue department officials to identify goods (cocaine) on which the tax is due. The actual reason for the law is to: (1) deter shipments of cocaine into the state; and (2) locate and refer recipients of cocaine shipments to the state police. The obligations of the law fall entirely on the carriers, who do not owe the tax and are under no obligation to collect the tax. The unsealing of all packages entering the state is a tremendous burden on the carriers in terms of expense, delay, and loss of customer goodwill. The carriers believe that the state law violates the Commerce Clause, as well as the Fourth, and Fourteenth Amendments.

Under the Tenth Circuit's interpretation of the TIA, a challenge brought by the carriers in federal court to the package inspection requirements must be dismissed. Consistent with the Tenth Circuit's reasoning, because the requirements were enacted with the stated "aim" of increasing tax compliance, and comprise part of the state's "chosen method" for collecting the excise tax due from certain package recipients, the law is immune from challenge in federal court. That the requirements imposed upon the common carriers do not represent the assessment, levy or collection of any tax, and in fact have an ulterior purpose, is irrelevant under the Tenth Circuit's interpretation of the statute. The law's ostensible connection, however remote, to the generation of tax revenue, brings it within the umbrella of the TIA.

III. THE IMPORTANCE OF ACCESS TO FEDERAL COURTS.

The already broad scope of the TIA should not lightly be expanded. The significant value of access to federal courts is an appropriate consideration in interpreting the scope of a statute that limits the jurisdiction of federal courts. Colorado has enacted a law targeted exclusively at companies that are not located in the state, are not Colorado taxpayers, and have no obligation to collect or report any state tax. In the face of such a statute, it is not surprising that an out-of-state company may have concerns about the neutrality and fairness of the forum in which its federal constitutional rights are to be determined.

The issue is not whether state courts are fully capable of addressing federal constitutional questions. Indeed, they are, and the DMA has never argued to the contrary.[11] In our system of justice, however, the confidence of both citizens and commercial interests in the neutrality and fairness of the courts adjudicating their claims is critical. No matter how competent and objective a state court may be,

[11] In fact, in the wake of the Tenth Circuit's ruling, the DMA pursued its claims in state court, securing a preliminary injunction against the law, while also seeking review of the Tenth Circuit's ruling concerning the scope of the TIA.

the concern of a non-resident party that it will be disadvantaged because of its foreign status in a state court is a real factor in how our system of justice is viewed by those persons and entities whose fate and affairs will be decided in a court of law.

Joseph Story, in his famous Commentaries on the Constitution of the United States, § 1685 (1833), recognized the significance of the perception of fairness in our courts, separate from any issue regarding equal treatment of domestic and out-of-state parties:

> It would require an uncommon exercise of candour or credulity to affirm, that in cases of this sort all the state tribunals would be wholly without state prejudice, or state feelings; or, that they would be as earnest in resisting the encroachments of state authority upon the just rights, and interests of the citizens of other states, as a tribunal differently constituted, and wholly independent of state authority. And if justice should be as fairly and as firmly administered in the former, as in the latter, still the mischiefs would be most serious, if the public opinion did not indulge such a belief. Justice, in cases of this sort, should not only be above all reproach, but above all suspicion.

This Court, from its earliest days, has expressed similar concern over the potential "fears and apprehensions" of out-of-state parties who seek justice in state courts. In *Bank of the United States v. Devaux*, 9 U.S. (5 Cranch) 61, 87 (1809), Chief Justice Marshall wrote:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

There is a necessary balancing of competing interests when Congress acts to restrict access to federal courts over certain categories of cases. Such considerations were clearly involved in enactment of the TIA:

> In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent "federal-court interference with all aspects of state tax administration."

Hibbs, 542 U.S. at 104-05 (citation omitted).

Petitioner's federal court action neither questions nor disturbs the TIA's primary objective – preventing taxpayers from bypassing state procedures for protesting tax assessments or seeking refunds of taxes paid. The DMA's members are not taxpayers and they are not protesting any tax liability. They do, however, fall precisely within that category of out-of-state parties who might reasonably lack confidence in the impartiality of a state tribunal, even if that apprehension is not warranted.

Whether the grant of federal jurisdiction is based on diversity or federal question, the avoidance of any appearance of discrimination against out-of-state parties is of critical importance. This was stated well by former Acting Solicitor General Walter Dellinger:

> Diversity jurisdiction was designed not only to diminish the risk of uneven justice, but also to protect the reputation of our courts – "to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents."

Walter Dellinger, "The Class Action Fairness Act: Curbing Unfairness and Restoring Faith in our Judicial System," at 4, *Public Policy Institute* (Policy Report March 2003) (citation omitted) (available at www.dlc.org/documents/Class_Action_0303.pdf).

An enlarged reading of the TIA would, instead, produce the very "fears and apprehensions" on the part of non-residents that Chief Justice Marshall warned against.

IV. THE DOCTRINE OF COMITY DOES NOT APPLY.

Analysis of federal court jurisdiction under the TIA is sometimes supplanted through reference to the "more embracive" doctrine of comity, discussed by the Court in *Levin.* 560 U.S. at 424. That is not the case here. The Tenth Circuit alluded to comity, in a footnote, as an additional factor that "militates in favor of dismissal" of the DMA's claims (Pet.App. at A-33 n.11), but the doctrine of comity does not apply. Neither the purpose of the comity doctrine, nor its application in *Levin*, dictate the dismissal of the DMA's suit.

A. The Executive Director Did Not Raise Comity Below.

Comity is a prudential doctrine. *Id*. at 432. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the state system." *Id.* (*citing Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 (1977)). The Executive Director did not seek dismissal of the DMA's Commerce Clause claims in either the district or appellate court on jurisdictional or comity grounds. In her opposition to the DMA's petition for certiorari, the Executive Director explained that she "agreed to seek an expedited ruling on the merits of the Commerce Clause challenge" because she was advised other states were considering similar legislation. Opp. to Pet. for Cert. at 5-6 n.1. The Executive Director thus either believed that comity was not a bar to the district court ruling on the merits, or she elected to proceed in the federal forum to avoid the delays associated with refiling the action in state court. In either case, the Court need not address the comity issue now. *See Hodory*, 431 U.S. at 480 (court not required to decline jurisdiction where the state either agreed that abstention was not required, or chose to proceed in federal court in order to avoid protracted state proceedings).

B. The DMA's Claims Present None Of The Concerns Relevant To Comity In State Tax Cases.

Comity is not a bar to the DMA's claims in any case. The principle of comity from which the TIA derives is "a reluctance to interfere by prevention with the fiscal operations of state governments." *Fair Assessment,* 454 U.S. at 108 (*quoting Boise Artesian Water Co. v. Boise City*, 213 U.S. 276, 282 (1909)). This principle applies with "particular force" in the area of state taxation, for the reasons described cogently in *Great Lakes* and serves the same purpose, *i.e.*, to preclude jurisdiction over challenges to state taxes that deviate from established procedures for determining and collecting state tax liability. 319 U.S. at 301. But in a case challenging non-tax matters, whose stated aim is to encourage a hoped-for increase in voluntary tax reporting, the interests served by comity are not at stake.

The significance of comity in state tax matters was articulated by Justice Brennan in *Perez v. Ledesma*:

> [I]f federal [equitable relief] were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

401 U.S. 82, 127 n.17 (concurring in part and dissenting in part). None of the concerns expressed by the Court as resting at the core of the comity principle are presented by this case. The DMA's suit does not seek to "test [a] state tax assessment," nor can its affected, out-of-state members be subject to Colorado use tax assessments. There are no "ordinary procedural requirements" akin to state tax appeal procedures for contesting the notice and reporting provisions, and thus the DMA's membership "escapes" none of them. The Colorado statute does not impose a collection obligation upon non-collecting retailers, and the notice and reporting obligations in no way constitute "the collection of revenue" by the Department. The DMA's suit will no more obstruct these non-tax, regulatory measures than would a declaratory judgment action in state court (as the DMA's pending state action shows). There is no more

danger of damage to the State's budget, and no more increased risk of taxpayer insolvency, that arises from the DMA seeking redress in federal court. Nor are there any disputed questions of state tax which are better reserved to the state courts to answer. The DMA challenges the Colorado Act on its face. In sum, even if one accepts that the Colorado Act implicates state tax collection concerns, the DMA's suit causes no unusual "disarray" in the administration of the State's taxes. Just as this case is "a poor fit under the TIA, so it [is] a poor fit for comity." *Levin*, 560 U.S. at 430 (brackets added).

C. The *Levin* Factors Are Absent Here.

The Court's recent decision in *Levin* illustrates further the inapplicability of the doctrine here. *Levin*, found that a "confluence of factors," taken together, dictated dismissal, on comity grounds, of a suit alleging discriminatory treatment of a group of "independent marketers" under Ohio's system for the taxation of natural gas. *Id*. at 431. *First*, the Court noted that there was no fundamental Constitutional right or classification subject to heightened scrutiny involved in the taxpayers' challenge. *Id. Second*, by complaining about their relative tax burden in comparison to their competitors, the plaintiffs were seeking to enlist the federal courts to improve their competitive position in the Ohio market. *Id. Third*, Ohio courts were "better positioned than their federal counterparts" to correct any unconstitutional discrimination resulting under state law, and were not limited by the TIA, as a federal district court would be, in the remedy it could prescribe. *Id.* at 431-32. The Court concluded that "[i]ndividually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process." *Id.* at 432.

The Court placed particular emphasis on the third factor as central to the comity analysis, *i.e.*, the existence of alternative possible remedies to achieve equal treatment under the law, pending correction by the state legislature. *Id.* at 427-28. The Court explained that it has traditionally left to state courts upon remand the determination of what form of relief is preferable to remedy unlawful discrimination resulting from unconstitutional state statutes. *Id*. Lower federal courts, however, lack the power to send cases to state courts for decision on the proper remedy, and thus comity principles suggest that federal district courts must refrain from exercising jurisdiction in the first place, where a state court forum is available to plaintiffs. *Id*. at 428.

The principles enunciated by the Court in *Levin* do not lead to the conclusion that the district court in the present case was required to refrain from exercising its jurisdiction over the DMA's suit as a matter of comity. Most significantly, there is no remedy other than enjoining enforcement of the Colorado Act's notice and reporting requirements available in response to the DMA's claims. Extending such obligations to in-state, Colorado retailers would be nonsensical, since sales tax collection at the point-of-sale renders use tax reporting by the consumer unnecessary. Nor would such an illogical approach cure the violation alleged by the DMA in Count II, *i.e.,* that the State lacks the power under the Commerce Clause to impose the notice and reporting obligations on out-of-state retailers with no physical presence in the state. *See* C.A. App. at 65-67. In short, "[b]ecause state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting" the DMA's claims to be litigated in federal court. *Levin*, 560 U.S. at 431.

Moreover, the other factors identified by the Court in *Levin* are not present here. The DMA is not seeking to enlist the federal courts to "increase a competitor's tax burden." *Id.* at 426. The DMA's affected members are true "outsiders" to the tax. *Id.* at 430. The DMA's suit will not, in any respect, alter the tax collection obligations of other retailers, in-state and out-of-state alike, that are required to collect Colorado sales and use taxes. Rather, the DMA's suit seeks to protect its members from discriminatory regulatory obligations. Finally, although Commerce Clause rights are not typically considered to be among those classified as "fundamental," discrimination against interstate commerce triggers a form of heightened scrutiny so strict as to result in a virtual *per se* rule of unconstitutionality. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Such heightened scrutiny militates against declining jurisdiction on comity grounds. *See Levin*, 560 U.S. at 426 (commenting that comity requires deference to states with regard to economic legislation that "does not employ classifications subjected to heightened scrutiny or impinge on fundamental rights"). In short, comity is not a bar to the DMA's suit.

CONCLUSION

The decision of the Tenth Circuit Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CONGRESSIONAL RECORD – SENATE

February 19, 1937

COLLECTION OF STATE TAXES – JURISDICTION OF FEDERAL DISTRICT COURTS

Mr. BONE. Mr. President, on the 17th of the present month I introduced a very short bill, to amend section 24 of the Judicial Code. The proposed amendment would affect the jurisdiction of district courts of the United States over suits relating to the collection of State taxes.

In view of the fact that the jurisdiction of the lower Federal courts has been under discussion during the last few days, I think this is a proper time to bring the bill forward, and I hope that the Committee on the Judiciary of the Senate will give it the attention I think it merits.

I introduced the bill primarily because it affects my own State, but I dare say that almost to the degree it would affect my State, it would affect the States of other Senators. The purpose of the bill is to take away the jurisdiction of Federal district courts to enjoin, suspend, or restrain the assessment or collection of any tax imposed by or pursuant to the laws of any State. Provision is made that the bill is not to affect suits pending at the time of its enactment.

I digress to call attention to the fact that even if this bill shall be enacted it will not affect the litigation now under way in the courts in my State, or in the courts in any other State.

At this point I ask unanimous consent that the bill to which I refer, Senate bill 1551, be inserted in my remarks, so that those who read them may know the nature of the bill.

The PRESIDING OFFICER. Is there objection?

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

> A bill to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.
>
> *Be it enacted, etc.*, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."
>
> SEC. 2. The provision of this act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the

> same effect as if this act had not been passed.

EXAMPLES OF SIMILAR LEGISLATION

Mr. BONE. Mr. President, the proposed legislation is not novel in character.

Section 3224 of the Revised Statutes provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This provision applies only to taxes levied by the Federal Government. State Railroad Tax Cases, 92 U.S. 575.

An act of March 4, 1927, provides that "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the district court of the United States for Puerto Rico."

The Johnson Act of May 14, 1934, after which this bill is modeled provides that –

> no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or in the repugnance of such order to the Constitution of the United States,

> where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.

Most of the arguments which were used in support of the Johnson Act and brought about its enactment apply in like manner to the legislation now proposed.

NECESSITY FOR THE LEGISLATION

The existing practice of the Federal courts to entertain tax-injunction suits make it possible for foreign corporations to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay.

While this situation exists in many of the States, the detailed information presented herewith relates only to the State of Washington.

Mr. President, at this point I desire to read brief excerpts from a letter to me from an assistant attorney general of the State of Washington dealing with the particular matter and referring to a very important piece of litigation in my own State at this time. The writer of this letter is Mr. R. G. Sharpe, assistant attorney general of my State, who says:

> (1) The statutes of Washington (ch. 61, Laws of 1931), takes away from the State courts the right to enjoin the collection of State and county taxes, unless the tax law is invalid or the property is exempt from taxation, and provides that taxpayers can contest their taxes only in refund actions after payment under protest. This law makes it possible for the State and its various agencies to survive while long drawn out tax litigation is in progress. But if those to whom the Federal courts are open may secure injunctive relief against offensive taxes, we have presented the highly unfair situation of the ordinary citizen being required to pay first and then litigate, while those privileged to sue in the Federal courts need pay only what they choose and withhold the balance during years of litigation.
>
> Pending and past tax injunction suits maintained in the Federal courts of this State serve to emphasize the point last urged. Thus, in December 1936 the Northern Pacific Railway Co. instituted in the Federal District Court at Spokane a suit to restrain a portion of the taxes levied upon that company's operating property located in 23 counties of this State for the years 1935 and 1936. The tax for 1935 is $1,401,549, of which the company has refused to pay and seeks to restrain the collection of $618,087. The tax for 1936 is $1,343,460, of which the company

has refused to pay and seeks to restrain the collection of $856,495. Thus, for these 2 years the company is seeking to enjoin the collection of $1,474,582, or more than half of its taxes. From the history of past similar litigation it is quite apparent that the company will refuse to pay any of these unpaid taxes until the end of the litigation several years hence, and will likewise prosecute similar actions against the counties for the taxes for future years and will likewise withhold large proportions of its taxes for these later years. And it is likewise more than likely that other roads will institute similar suits and follow the same practice.

In this, history will but repeat itself, as shown by the records of the same Federal district court in similar suits begun 10 years ago. In the fall of 1925 and the beginning of 1927 the Northern Pacific and the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Milwaukee") instituted suits in the Federal court at Spokane to restrain the collection of their taxes, the N. P. for its 1925 and 1926 taxes, and the Milwaukee for its 1926 and 1927 taxes. Each year thereafter similar suits were instituted by the two companies, so that by the time decrees in the original suits were entered by the district court in September 1932 suits involving the N. P. taxes for 1926 to 1931 were pending, and suits involving the Milwaukee taxes for 1926 to 1931 were likewise pending. Later suits involving the 1932 N. P. taxes and the 1932 and 1933 Milwaukee taxes were instituted.

The 1925 and 1926 N.P. suit and the 1926 and 1927 Milwaukee suit took a year and a half to try, the trial being had before a special master, and, although every effort was made by the county defendants to press the suits to judgment, decrees were not entered in those suits, as I have said, until September 1932. By this time the counties were so hard-pressed for money by reason of these railroads withholding such a large proportion of their taxes, that the railroads, the N. P. and the S. P. & S. (another litigating road), were in a position to dictate the terms of settlement, and as a result the counties threw up their hands and by agreed decrees entered February 20, 1933, consented to a settlement of the N. P. suits, which settlements resulted in the counties receiving substantially $1,500,000 less in taxes for the years 1927 to 1932 than they would have received under the formula of valuation announced by Judge Webster in his decision of the 1925 and 1926 case. (See *N. P. Ry. v. Adams County*, 1 Fed. Supp. 163).

The Milwaukee's offer of settlement was too ridiculous to be stomached by the counties, even in their distressed financial condition, and an appeal was taken to the Circuit Court of Appeals, resulting in a reversal of the 1926 and 1927 Milwaukee tax decree, in July 1934. (See *C. M. St. P. & P. R. Co. v. Adams Co.*, 72 Fed. (2d) 816.) The tax commission thereupon made assessments of the Milwaukee property for the years 1926 to 1932, and on November 30, 1934, the Milwaukee elected to pay the taxes as so reassessed, on the 10-year installment plan. In neither the N. P. nor the Milwaukee settlement was any interest allowed on the taxes wrongfully withheld for all these years.

I am enclosing herewith a few rather startling figures with respect to these suits. In so doing, however, I have ignored the N. P. suit relating to the 1925 and 1926 taxes for the reason that the N. P. in March 1927, paid substantially all of its taxes for those 2 years, pursuant to stipulation that a judgment of refund might be entered for the excess taxes found, if any.

May I here restate a few of the figures shown by this statement:

Total taxes assessed, against N.P. 1927 to 1931, and against Milwaukee, 1926 to 1932		$22,349,469
Total of said taxes paid by said companies prior to suit		12,893,713
Total of said taxes canceled as result of Milwaukee reassessment and settlements to which counties were forced to accede	$3,576,242	
Total of said taxes wrongfully withheld and paid to counties (without interest) by N. P. on Feb. 20, 1933, and by Milwaukee on Nov. 30, 1934	5,879,514	9,455,756

Interest to which counties would have been entitled at legal rate of 6 percent on said taxes wrongfully withheld for varying periods, some as long as 7½ years	1,120,774
Interest to which counties would have been entitled on said taxes wrongfully withheld as penalty for nonpayment of delinquent taxes	1,867,956

The suit of the Northern Pacific Railway Co. now pending in Washington serves to indicate the methods used by these powerful corporations to harass the State and local governments. The attorneys for the plaintiff very astutely did not make the State or the State tax commission parties to the action, but sued the 23 counties of the State in which the railway has property collectively, the purpose being to compel the defense of the action to be handled by 23 local prosecuting attorneys who may not be familiar with the processes by which utilities are valued and assessed by the State tax commission, and who may not be experts in the field of Federal court practice.

Perhaps it should be emphasized at this point that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court. Specific provision is made that the suit will be taken out of the jurisdiction of the Federal court only if a plain, speedy, and efficient remedy may be had at law or in equity in the courts of the State. Thus a full hearing and judicial determination of the controversy is assured.

At present the foreign corporation has a choice of going into two tribunals. The advantage thus given is illustrated by the following quotation from the report of the Committee on the Judiciary on the Johnson Act:

> Indeed, the utility company may pursue these two remedies concurrently. The Supreme Court of the United States has held that State and Federal courts have concurrent jurisdiction in such cases and a utility company can proceed in both State and Federal courts until a final judgment is rendered in one of the two proceedings. This gives the utility an opportunity, as the case progresses, to ascertain the views of the State authorities and the Federal authorities and, when it once ascertains these views, and finds it will probably be defeated in one of the proceedings, it can dismiss the case in that proceeding and rely upon the other. It seems quite plain that to give the utility this advantage is unreasonable and unfair. It is likewise exceedingly expensive and always means long delay. All the expenses in the end must be borne by the people who pay the rates to the public utility company. It all comes out of the ultimate consumer.

The following quotations from the same report are also thought to be applicable to this bill in the same manner that they were applicable to the Johnson bill:

> LITIGATION IN FEDERAL COURTS MORE EXPENSIVE THAN IN STATE COURTS
>
> It is much more expensive to litigate in Federal courts than in State courts. Attorney fees are usually higher, and the other expenses connected with the litigation are, as a rule, many times higher in Federal court than in the State court. The wealthy individual or corporation is thus often enabled to wear out his opponent and compel him to settle or submit to an unjust judgment for the very reason that his opponent is not financially able to follow him through the tortuous and expensive route through the Federal court to the Supreme Court of the United States at Washington. And all the time in this dispute there is no Federal question involved. There is a dispute arising under a State statute or law of other origin and nothing more. There are many places in the United States where litigants must travel several hundred miles to attend the place of trial if they are sued in Federal court.
>
> It is not argued that the Federal court will be unjust. For the purpose of our illustration we can assume that the Federal court will be just as fair and as just as the State court. But when sued in a Federal court, the defendant will be required to take his attorneys and his witnesses long distances where

the Federal court sits. If the case is continued, they must come again. And when the case is finally decided, the poor defendant may be successful, but his opponent, because he is a nonresident, has taken him into Federal court and he appeals the case to the Federal court of appeals. Then he must send his attorneys several hundred miles to the place where the Federal court of appeals sits. This means again a very much increased expense and, in almost every case, a much larger attorney fee. He may win his case in the court of appeals, but, if so, his opponent may possibly take the case to the Supreme Court of the United States and he will have to send his attorneys perhaps a thousand or 2,000 miles, paying the expenses and again a much larger attorney fee than he would pay in the State courts.

It means, therefore, that a person taken against his will into the Federal court for the purpose of settling a State question is worn out before he reaches the end. Therefore, at the beginning, he perhaps submits to an injustice because he knows it means financial ruin to pursue the case to its final determination.

It is easy to be seen, therefore, that while perhaps there was some basis for this kind of a law when our Constitution was adopted, the purpose for which this provision of law is now used was never dreamed of by our forefathers when they adopted the Constitution. The effect of this provision of law is now entirely different from what it was then. First adopted to bring about justice, it has, as a matter of practice, very largely resulted in injustice and discrimination. Originally intended for the protection of the nonresident, it has become a weapon of destruction and injustice in his hands.

Those who favor the continuance of this unjust discrimination base their reason upon the original claim of jealousies existing between citizens of different States. But the real reason is that they want to protect the "privilege" which the law gives them. They desire to have the right in their litigation to choose between two tribunals. What was originally intended to protect them in a right has become a "privilege" which they use to give them an advantage over their adversaries.

RELIEF OF FEDERAL COURTS FROM CONGESTION

The congestion in our Federal district courts is acknowledged by all. That of itself is often a denial of justice. All classes of our citizens have recently become interested in various proposals for the relief of the congestion in our Federal district courts. The President of the United States has sent official messages to Congress on the subject. He has appointed a commission composed of eminent jurists and other able, patriotic scholars. The question has received the

> attention of the leading members of the bar throughout the entire country. Federal judges from the Supreme Court down have lent their assistance in trying to devise some plan by which the Federal courts can be relieved from a large amount of the work now upon Federal judicial dockets.
>
> Why not do this by letting State courts settle State controversies and confine Federal courts to the settlement of Federal questions? When a State question arises under a State statute, why not let the courts of that State settle that controversy, whether the controversy is between citizens of one State or citizens of two different States? Why not be logical and let the State courts try controversies arising under State laws within their borders instead of permitting a few privileged persons who do business in a State to take their controversies into Federal courts and thus burden Federal judges with the settlement of State questions and control of lawsuits arising entirely and solely out of controversies under State laws?

CONSTITUTIONALITY OF PROPOSED LEGISLATION

While there are many other parts of the committee's report on the Johnson Act which are well worth rereading in connection with the consideration of the proposed legislation, there is presented here only one additional quotation, which deals with the constitutional power of the Congress to enact legislation of this type:

> The object of the legislation, as it has been distinctly stated, is to take away jurisdiction from the district courts of the United States. It is not intended to take away and does not take away any jurisdiction of the Supreme Court of the United States. The Supreme Court is the only court where jurisdiction is conferred by the Constitution. All the inferior courts – which means all the courts of the United States except the Supreme Court – obtain their jurisdiction from statute. It would be perfectly constitutional for Congress to pass an act which would abolish every Federal court in existence except the Supreme Court. All the jurisdiction which such inferior courts have has been conferred upon them by statute, and the Supreme Court of the United States has repeatedly held that it is within the power of Congress to add to that jurisdiction within the limits of the Constitution, and to take away any part or all of it.
>
> In the case of *Kline v. Burke Construction Co.* (260 U.S. 226 (1922)) the Supreme Court said:
>
> "The right of a litigant to maintain an action in the Federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right

granted by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in article III. Section 1 of that article provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' By section 2 of the same article it is provided that the judicial power shall extend to certain designated cases and controversies, and, among them 'to controversies * * * between citizens of different States * * * .' The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies, but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

This question was passed upon directly by the Supreme Court in an early day. In *Turner v. Bank of America* (4 Dall. 6, 10 (U. S. 1799)) the Supreme Court, speaking through Mr. Justice Chase, said:

"The notion has frequently been entertained that the Federal courts derived their judicial power immediately from the

> Constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the Federal courts to every subject, in every form, which the Constitution might warrant."
>
> It is perfectly clear that this bill cannot be successfully attacked on constitutional grounds. Congress in legislating on that subject, has always acted on that theory.

Since the John Act was passed, its constitutionality has been upheld in an opinion by a United States district court in Mississippi, which reviewed at length the constitutional basis for such legislation in the case of *Mississippi Power & Light Co. v. City of Jackson* (9 Fed. Supp. 564).

Mr. President, in conclusion I desire to ask of my brethren a careful consideration of this particular bill, not because it affects my State only, but because the problem raised by reason of the holding that litigants have a right to go into the Federal court and seek relief against the imposition of taxes, as in the State of Washington, is one that confronts every State in the Union. It is a problem which is challenging to every State in the Union which has tax problems confronting it.

I sincerely hope that the Committee on the Judiciary of the Senate will see fit to report this bill promptly. I think my friend the Senator from Nebraska [Mr. NORRIS] wrote a portion of the committee's report from which I have quoted.

75th Congress } **SENATE** { **Report**
1st Session } { **No. 1035**

AMENDING THE JUDICIAL CODE

July 22 (calendar day, Aug. 2), 1937. – Ordered to be printed.

Mr. CONNALLY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1551]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, after consideration thereof, report the bill favorably to the Senate with the recommendation that it do pass.

S. 1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes. The bill reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph,

> no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."
>
> SEC. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed.

This legislation does not introduce a new principle, since the Congress has passed statutes of similar import. It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

The attorney general of each of the following States has seen fit to urge passage of this bill: Alabama, California, Florida, Idaho, Illinois, Louisiana, Minnesota, Missouri, Montana, New Jersey, Oklahoma, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming.

It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State. A full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases.

The propriety of this kind of legislation was fully discussed by the Senate Judiciary Committee when the so-called Johnson Act of May 14, 1934, S. 752, Public, No. 222, was favorably reported and subsequently passed by the Congress.

The report on the Johnson bill pointed out that the continuance of the unjust discrimination between citizens of the State and foreign corporations doing business in such State has been the cause of much controversy. The controversies arising out of the use of the injunctive process in State tax cases would be eliminated by the passage of this bill.

The question of the constitutionality of this type of legislation was also discussed in the report on the Johnson bill, which pointed out decisions of the Supreme Court which removed any question of the right of Congress to limit jurisdiction of Federal district courts in matters of this kind. There being no question of the constitutional right of the Congress to enact such legislation, the only remaining question is that of the propriety and wisdom of such legislation. The district courts of the United States derive their jurisdiction wholly from the authority of Congress, as was clearly pointed out in *Kline v. Burke Construction Company* (260 U.S. 226 (1922)). In that case the Supreme Court held that Congress might give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. As far back as 1799 the case of *Turner v. Bank of America*, Mr. Justice Chase, speaking for the Supreme Court, laid at rest any question of the right of Congress to enact this sort of legislation.

Since the Johnson Act was passed its constitutionality has been upheld in an opinion in the United States District Court of Mississippi, which reviewed at length, the constitutional basis for such legislation in the case of *Mississippi Power & Light Company v. City of Jackson* (9 Fed. Supp. 564).

A contemplation of the wisdom and desirability of this sort of legislation rising out of the compelling needs of many States for a more prompt disposition of tax controversies of the character referred to, impels us to recommend the prompt passage of S. 1551.

75th Congress } **HOUSE OF** { **Report**
1st Session } **REPRESENTATIVES** { **No. 1503**

SUITS RELATING TO COLLECTION OF STATE TAXES

August 11, 1937. – Referred to the House Calendar and ordered to be printed.

Mr. HILL of Oklahoma, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1551]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes, after consideration, report the same favorably to the House with the recommendation that the bill do pass.

The effect of this proposed legislation is to deny jurisdiction to United States district courts to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by, or pursuant to, the laws of any State where a plain, speedy, and efficient remedy may be had in the State courts of the State levying the tax.

The committee attach hereto and make a part of this report the report of the Senate Judiciary Committee on the bill.

[S. Rept. No 1035, 75th Cong., 1st sess.]

The Committee on the Judiciary, to whom was referred the bill (S. 1551) to amend section 24 of the Judicial Code, after consideration thereof, report the bill favorably to the Senate with the recommendation that it do pass.

S. 1551 amends section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes. The bill reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: 'Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State'
>
> "SEC. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior

> to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed."

In this connection the following is quoted from *Matthews v. Rodgers* (284 U.S. 521, 525-526):

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a State or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the State courts, from which the cause may be brought to this Court for review if any Federal question be involved (Judicial Code, sec. 237, U.S. C., title 28, sec. 344), or to his suit at law in the Federal courts if the essential elements of Federal jurisdiction are present" (citing numerous authorities).

In compliance with clause 2a of rule XIII, existing law is printed below in roman with new matter proposed to be added printed in italic:

> Judicial Code, section 24, amended, paragraph 1 (U.S. C., title 28, sec. 41). The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof

authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. *Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.*