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

---

RESPONDENT'S BRIEF IN OPPOSITION

JOHN W. SUTHERS
Attorney General

DANIEL D. DOMENICO
Solicitor General
MELANIE J. SNYDER*
Deputy Attorney General
GRANT T. SULLIVAN
Assistant Solicitor General
1300 Broadway, 8th Floor
Denver, Colorado 80203
(720) 508-6335
melanie.snyder@state.co.us
**Counsel of Record*

Counsel for Respondent

June 6, 2014

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

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), provides that "the federal 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." Because it found that Colorado's law was enacted to ensure compliance with and increase collection of the use tax and that the challenge by the Direct Marketing Association ("DMA") would restrain the State's collection of that tax, the Tenth Circuit Court of Appeals held the TIA divested the federal courts of jurisdiction. The Tenth Circuit also determined that principles of comity compelled dismissal in deference to the state adjudicative process.

The Tenth Circuit's ruling presents the following questions:

1. Does the TIA bar federal district courts from hearing suits that seek to enjoin a state's chosen method of collecting an undisputedly lawful tax when there exists a plain, speedy, and efficient state court remedy?

2. Do principles of comity compel dismissal of federal claims for relief that seek to have a state's chosen tax collection method enjoined and declared unconstitutional?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 8

REASONS FOR DENYING THE PETITION 9

I. The Tenth Circuit's decision is consistent with this Court's TIA precedent 9

A. The TIA's jurisdictional bar is not limited to suits brought by taxpayers challenging their own tax liability 10

B. The TIA bars federal court jurisdiction to enjoin or declare unconstitutional Colorado's method of collecting the use tax 13

II. The Tenth Circuit's decision is consistent with the weight of circuit authority 16

A. *Wells* and *UPS I* pre-date *Hibbs* and did not involve challenges to a state's chosen method of tax collection 16

B. The circuit courts consistently recognize the state revenue-protective moorings of the TIA 20

TABLE OF CONTENTS – Continued

Page

III. The doctrine of comity supports the Tenth Circuit's ruling that the DMA's claims should be dismissed in deference to the state adjudicative process 23

CONCLUSION.. 27

TABLE OF AUTHORITIES

Page

CASES

14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009)....6

Alcan Aluminum Ltd. v. Dep't of Revenue of the State of Or., 724 F.2d 1294 (7th Cir. 1984)....22

Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249 (11th Cir. 2003)....21

Ark. v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821 (1997)....10, 13, 15

Bd. of County Comm'rs v. Vail Assocs., Inc., 19 P.3d 1263 (Colo. 2001)....25

BellSouth Telecomms., Inc. v. Farris, 542 F.3d 499 (6th Cir. 2008)....19

Blangeres v. Burlington N., Inc., 872 F.2d 327 (9th Cir. 1989)....20

Brooks v. Nance, 801 F.2d 1237 (10th Cir. 1986)....22

California v. Grace Brethren Church, 457 U.S. 393 (1982)....10, 12, 15

Coors Brewing Co. v. Mendez-Torres, 562 F.3d 3 (1st Cir. 2009)....19

Czajkowski v. Illinois, 460 F. Supp. 1265 (N.D. Ill. 1977)....22

Direct Marketing Ass'n v. Colo. Dep't of Revenue, No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014)....8

Dows v. City of Chicago, 11 Wall. 108 (1871)....9

TABLE OF AUTHORITIES – Continued

Page

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 651 F.3d 722 (7th Cir. 2011) (en banc) 20

Gass v. County of Allegheny, 371 F.3d 134 (3d Cir. 2004), *cert. denied*, 543 U.S. 987 (2004)..........21

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963)...2

Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937)..2

Hibbs v. Winn, 542 U.S. 88 (2004) 11, 14, 16, 19

Huber Pontiac, Inc. v. Whitler, 585 F.2d 817 (7th Cir. 1978) 19

Jerron West, Inc. v. Cal. State Bd. of Equalization, 129 F.3d 1334 (9th Cir. 1997), *cert. denied*, 525 U.S. 819 (1998)............................21

Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014) 15

Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010)...11, 23, 24, 25

Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967)..3

Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012)...12, 14

Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582 (1995) 13

Ohio Bureau of Emp't Servs. v. Hodory, 431 U.S. 471 (1977)..23

TABLE OF AUTHORITIES – Continued

Page

Perez v. Ledesma, 401 U.S. 82 (1971) 25, 26

Pleasures of San Patricio, Inc. v. Mendez-Torres, 596 F.3d 1 (1st Cir. 2010)............................18

Quill Corp. v. N.D., 504 U.S. 298 (1992)................3, 24

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981)..11, 13

RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co., 169 F.3d 448 (7th Cir. 1999) 20

Schneider Transport, Inc. v. Cattanach, 657 F.2d 128 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982)...19

Sipe v. Amerada Hess Corp., 689 F.2d 396 (3d Cir. 1982)..18

Sonzinsky v. United States, 300 U.S. 506 (1937)........ 14

Stone v. Powell, 428 U.S. 465 (1976)..........................15

United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323 (1st Cir. 2003)..............................16, 17, 18

United Parcel Serv., Inc. v. Flores-Galarza, 385 F.3d 9 (1st Cir. 2004)..17

United States v. N.Y. Tel. Co., 434 U.S. 159 (1977)...23

Washer & Refrigeration Supply Co., Inc. v. PRA Gov't Servs, LLC, No. 2:09-CV-1111-WKW (WO), 2010 U.S. Dist. LEXIS 93576 (M.D. Ala. 2010) 19

TABLE OF AUTHORITIES – Continued

Page

Wells v. Malloy, 510 F.2d 74 (2d Cir. 1975) 16, 17, 18, 19

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 15

STATUTES AND RULES

COLO. REV. STAT. § 24-35-102(2) (2013).....5

COLO. REV. STAT. § 39-21-112(3.5)(c)(I) (2013) 4

COLO. REV. STAT. § 39-21-112(3.5)(c)(II) (2013).....12

COLO. REV. STAT. § 39-21-112(3.5)(d)(I) (2013).....4

COLO. REV. STAT. § 39-21-112(3.5)(d)(II) (2013) 4, 12

COLO. REV. STAT. § 39-21-116.5 (2013) 13

COLO. REV. STAT. § 39-21-118(2) (2013).....2

COLO. REV. STAT. §§ 39-26-101 to -127 (2013).....2

COLO. REV. STAT. § 39-26-202 (2013) 1

26 U.S.C. § 6552 19

28 U.S.C. § 1341 .....7, 10

48 U.S.C. § 872 17

1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2) 4

1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3) 4

1 COLO. CODE REGS. § 201-1:39-21-112.3.5(4) 4

SUP. CT. R. 10(a) 16

SUP. CT. R. 14.1(a) 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (March 2010) 4

INTRODUCTION

This case presents a poor vehicle for the reexamination of the proper scope of the TIA and comity doctrine. As the DMA acknowledges, neither party fully briefed the issues presented by its petition in the courts below. Concurrent with its petition in this Court, the DMA filed nearly identical claims in a Colorado state court, and that court has preliminarily enjoined Colorado's law. This Court has long recognized both that state courts are equipped to hear constitutional challenges and that they are best suited to do so when a state's method of tax collection is challenged and state tax revenue is put in jeopardy.

The Tenth Circuit's decision is consistent with this Court's TIA precedent and there is no split of authority amongst the circuits requiring clarification from this Court. Because the DMA's claims strike at the heart of Colorado's tax collection authority, both the TIA and comity preclude the federal district court's jurisdiction where, as here, a plain, speedy, and efficient state court remedy exists.

STATEMENT OF THE CASE

1. **Colorado Sales and Use Tax.** Colorado enacted a sales tax in 1935 and a complementary use tax in 1937. Use tax has long been due on the storage, usage, or consumption of tangible property within Colorado when sales tax has not been paid. COLO. REV. STAT. § 39-26-202 (2013). The use tax aims to

capture lost sales tax revenue when sales are diverted outside the state or are accomplished remotely, as through catalog purchases or the Internet.

The purpose of a complementary sales and use tax scheme is to make all tangible property used or consumed in the state subject to a uniform tax burden, regardless of whether it is acquired within or without the state. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963). Although the use tax, viewed in isolation, is facially discriminatory, this Court long ago determined that when paired with a sales tax of the same rate, it does not run afoul of the dormant Commerce Clause. *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937).

Colorado requires retailers doing business in the state to collect sales tax from consumers at the time of the transaction. Those retailers are themselves liable for the sales tax even if they do not actually collect the tax from consumers, and must comply with a series of requirements: obtain a license, determine whether any exemptions apply to a particular sale, calculate the state and local sales tax due for each sale, collect the tax at the time of the transaction, file a return, remit the tax collected to the state, and maintain records. *See* COLO. REV. STAT. §§ 39-26-101 to -127 (2013). Collecting retailers may be subject to criminal penalties if they fail to collect and remit. COLO. REV. STAT. § 39-21-118(2) (2013).

However, as a result of two decisions from this Court, these burdens associated with state sales and

use tax *collection* may be required only of those retailers with a physical presence within the state. *Quill Corp. v. N.D.*, 504 U.S. 298 (1992); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). Thus, national retailers with locations in Colorado, like Home Depot or Target, must collect and remit sales tax on their online or other remote sales. Internet and mail-order companies with no physical presence in the state, like Amazon.com or L.L. Bean, are not required to do so. Instead, consumers who purchase from remote retailers are required to remit the owed use tax to the State at the time of their annual income tax return. However, as the Tenth Circuit noted, voluntary consumer compliance with the use tax is extremely weak. App. at A-5.

2. **Colorado's Law.** Modeled after third party information returns like I.R.S. Form 1099, which promote voluntary compliance with income tax requirements, Colorado enacted legislation in 2010 to address the dual problem of weak consumer use tax compliance and the ballooning tax gap caused by the explosion of E-commerce and remote retail sales. C.A. App. 1757-90. The law provides non-collecting retailers (typically remote, out-of-state retailers) the choice between collecting the sales or use tax, just like in-state retailers and national retailers with a physical presence, or, complying with three information reporting requirements (collectively, "Colorado's law"). App. at E-1 – E-4.

First, non-collecting retailers must notify Colorado purchasers that, although the retailer is not

collecting sales tax, the purchase may be subject to Colorado's use tax (the "Transactional Notice"). COLO. REV. STAT. § 39-21-112(3.5)(c)(I) (2013); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2). The Transactional Notice serves to educate consumers about their state use tax liability with the aim of increasing voluntary compliance.

Second, non-collecting retailers must send Colorado customers who purchase more than $500 from the retailer in a year an annual summary listing the dates, general categories, and amounts of their purchases and reminding them of their use tax obligation (the "Annual Purchase Summary"). COLO. REV. STAT. § 39-21-112(3.5)(d)(I) (2013); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3). The Annual Purchase Summary arms the consumer with accurate information to facilitate reporting and paying the use tax.

Third, non-collecting retailers must send an annual report to the Colorado Department of Revenue ("the Department") listing only customer names, addresses, and total amounts spent (the "Customer Information Report"). COLO. REV. STAT. § 39-21-112(3.5)(d)(II) (2013); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(4). The Customer Information Report both allows the Department to pursue audit and collection actions against taxpayers who fail to pay the tax and increases voluntary consumer compliance with state tax laws because consumers know that a third party has reported their taxable activity to the taxing authority. *See generally* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is*

Information Reporting Warranted?, 78 FORDHAM L. REV. 1733, 1738-39 (March 2010) (comparing third party information reporting to red light cameras "spurring compliance in the first instance").

The estimated annual revenue associated with Colorado's law as adopted is high – initially estimated to be $12.5 million for fiscal year 2011-12 and expected to increase over time as awareness of Colorado's law and enforcement increase. C.A. App. 2084, 2116-19.

3. **The DMA's Challenge.** Shortly after the passage of Colorado's law in 2010, the DMA filed suit in the United States District Court for the District of Colorado against the Executive Director of the Department, the state's chief authority for collecting taxes and enforcing the state's tax laws. *See* COLO. REV. STAT. § 24-35-102(2) (2013). The DMA asserted eight counts against the Department, including two counts under the Commerce Clause, seeking injunctive and declaratory relief to permanently enjoin enforcement of Colorado's law. C.A. App. 11-43, 46-83. The Department moved to dismiss all counts except those under the Commerce Clause.[1] C.A. App. 3204-39.

[1] Recognizing Colorado's law was the first of its kind in the country and that many states were contemplating similar legislation, the Department did not challenge the federal district court's jurisdiction on TIA grounds and, instead, agreed to seek an expedited ruling on the merits of the Commerce Clause challenge. As the Tenth Circuit acknowledged, the DMA's claims differ from the prototypical TIA lawsuit. App. at A-18. At this juncture, however, the Department opposes continuing federal

(Continued on following page)

The DMA moved for a preliminary injunction solely on the Commerce Clause counts. C.A. App. 84-114. The parties agreed to engage in limited factual discovery, including expert discovery, related to the Commerce Clause counts, and to defer discovery on the remaining counts. The district court found the DMA had a likelihood of success on the merits under the Commerce Clause and granted its motion for a preliminary injunction. App. at C-1 – C-17.

At the parties' joint request, the district court approved a briefing schedule for cross-motions for summary judgment on the Commerce Clause counts and stayed all proceedings on the remaining counts. C.A. App. 1669-74, 1677-79. Given this stipulated briefing schedule, the district court denied without prejudice the Department's motion to dismiss as to the non-Commerce Clause counts and authorized the Department to renew its motion after full resolution of the Commerce Clause counts. C.A. App. 3295.

The district court ultimately granted the DMA's motion for summary judgment, denied the Department's summary judgment motion, and permanently

---

court jurisdiction. As detailed *infra*, the DMA has filed the same claims in Colorado state court and is actively availing itself of its state court remedies. The lack of full briefing on the TIA in the lower courts also counsels against review by this Court. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (declining to address issue not fully briefed in lower courts). Further federal court jurisdiction is not warranted.

enjoined the Department from enforcing Colorado's law. App. at B-1 – B-25.

On appeal, the Department urged reversal on the merits but nonetheless pointed out the potential jurisdictional impact of the TIA. Appellant's Op. Br. at 31 n.3. The Tenth Circuit vacated the district court's judgment but refrained from addressing the merits of the district court's Commerce Clause analysis. Rather, it concluded the TIA divested the federal courts of jurisdiction over the DMA's suit. App. at A-10 – A-32. Central to the appellate court's reasoning was that the DMA's requested relief, if granted, would "restrain" Colorado's collection of state tax. App. at A-16 (quoting TIA, 28 U.S.C. § 1341). The Tenth Circuit also determined that principles of comity compelled dismissal in deference to the state adjudicative process. A-33 n.11.

The Tenth Circuit denied the DMA's petition for rehearing en banc on October 1, 2013. App. at D-1 – D-2. On December 10, 2013, the district court issued an order dissolving the permanent injunction and dismissing the DMA's Commerce Clause claims. The DMA filed its petition for writ of certiorari in this Court on February 25, 2014.

Meanwhile, on November 5, 2013, months before filing its petition with this Court, the DMA filed a Colorado state court case against the Department, asserting nearly identical claims for relief that were brought in federal court. On February 18, 2014, the Colorado state district court entered a preliminary

injunction barring enforcement of Colorado's law. *See Direct Marketing Ass'n v. Colo. Dep't of Revenue*, No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014). Significantly, the Colorado state district court declined to stay the state case while the DMA's petition for writ of certiorari is pending in this Court. As a result, several years after first litigating the constitutionality of Colorado's law, the parties are again preparing discovery on the same issues in the state court proceedings. Discovery, as well as briefing, on cross motions for summary judgment on the DMA's discrimination claim under the Commerce Clause, should be completed in July 2014.

SUMMARY OF THE ARGUMENT

The DMA's petition for writ of certiorari should be denied. Consistent with this Court's longstanding admonition that federal district courts should not interfere with the modes adopted by the states to enforce and collect state taxes, the Tenth Circuit determined that the DMA's claims for injunctive and declaratory relief were barred by the TIA. The Tenth Circuit properly held the TIA precludes the federal district court's jurisdiction to hear the DMA's challenge to Colorado's law, which, if successful, would restrain the State's collection of use tax revenue undisputedly owed to the State. Because the jurisdictional bar of the TIA is not limited to suits brought by taxpayers challenging their own tax liability, but rather precludes any claim that would restrain a

State's collection of tax revenue, the Tenth Circuit correctly ordered the remand of the case for dismissal by the federal district court. The Tenth Circuit properly distinguished and declined to follow two outdated cases cited by the DMA in an attempt to identify a circuit split. Contrary to the DMA's suggestion, the Tenth Circuit's TIA analysis is consistent with the weight of circuit court authority and no split of authority exists requiring clarification from this Court. Likewise, principles of comity, as recognized by the Tenth Circuit, compel federal deference to the state adjudication of the DMA's challenge. There is no question that the DMA has an adequate state court remedy available and, indeed, has since availed itself of that remedy by obtaining a preliminary injunction of Colorado's law from the state court. Review by this Court is thus unwarranted.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's decision is consistent with this Court's TIA precedent.

This Court has long recognized the danger of interfering with the administration of state tax systems. *See*, *e.g.*, *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the *modes adopted to enforce the taxes levied* should be interfered with as

little as possible." (emphasis added)). The TIA was enacted to prevent interference by the lower federal courts with the assessment and collection of state taxes. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982). Exceptions to this general rule are made only when a state court remedy is lacking. *Ark. v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 823 (1997); 28 U.S.C. § 1341 (requiring a "plain, speedy and efficient" state court remedy). The DMA does not contest the availability or adequacy of Colorado's remedies.[2]

Consistent with this Court's precedent, the Tenth Circuit properly held the DMA's claims were barred by the TIA because, although the association itself is not a taxpayer, the relief it requested would restrain the State's collection of the use tax.

A. The TIA's jurisdictional bar is not limited to suits brought by taxpayers challenging their own tax liability.

The TIA bars federal suits requesting relief that would have the effect of diminishing state tax

---

[2] The Tenth Circuit identified three adequate state remedies available to challenge Colorado's law and the DMA has not challenged that finding here. App. at A-26 – A-32; SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Indeed, the DMA has availed itself of its proper remedy and, as indicated, the Colorado state district court has preliminarily enjoined the challenged provisions of the law.

revenue. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 428 (2010). The TIA is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). Contrary to the DMA's suggestion, *Hibbs v. Winn*, 542 U.S. 88 (2004) does not limit the application of this jurisdictional bar to suits brought by taxpayers seeking to avoid their own state tax liability.

Hibbs involved an Establishment Clause challenge to an Arizona tax credit allowed for contributions toward private religious schools. *Id.* at 95-96. The Court held the TIA did not preclude the federal district court's jurisdiction because the plaintiffs did not seek to impede the State's receipt of tax revenues. *Id.* at 93. The Court emphasized the "state-revenue-protective moorings" of the TIA. *Id.* at 106. Consequently, it distinguished taxpayer claims contesting state tax liability that would *reduce* state revenues if successful from third-party constitutional challenges to the award of tax benefits that would have the effect of *enlarging* state receipts. *Id.* at 108. Ultimately, the Court held the Establishment Clause challenge to Arizona's tax credit would have "no negative impact on tax collection" and thus did not implicate any of the TIA's underlying purposes. *Id*. at 94.

Here, the TIA precludes the federal district court's jurisdiction because the relief requested by the DMA would impede and diminish Colorado's collection of tax revenues. The Tenth Circuit recognized

that collection of the use tax is "elusive" and that Colorado was estimated to lose $172.7 million in 2012 as a result of residents' failure to pay tax on remote E-commerce purchases. App. at A-5. The Colorado General Assembly adopted the notice and reporting requirements to increase taxpayers' compliance with Colorado's use tax and thereby increase use tax collection. App. at A-18.

Although the DMA does not challenge the imposition of the tax itself, it seeks to enjoin Colorado's chosen method of collecting the tax. Suits that would disrupt the collection of state tax revenue, however, cannot avoid the TIA's jurisdictional bar. *See*, *e.g.*, *Grace Brethren Church*, 457 U.S. at 417 (Congress did not intend federal district courts to have authority to issue declaratory or injunctive judgments to disrupt state tax administration).

Because the DMA's claims ask the federal court to interfere with the collection of state taxes and would negatively impact the collection of state tax revenue, they are barred by the TIA.[3]

---

[3] This Court's holding in *Nat'l Fed. of Indep. Bus. v. Sebelius*, does not support the DMA's contention that its challenge to the penalty provisions of Colorado's law is beyond the scope of the TIA's jurisdictional bar. *See* 132 S.Ct. 2566, 2583-84 (2012) (finding that while Congress could have chosen to call the penalty a tax subjecting it to the Anti-Injunction Act, it did not). As is common in the tax context, Colorado's law imposes penalties upon retailers for failure to comply with the laws. *See*, *e.g.*, COLO. REV. STAT. § 39-21-112(3.5)(c)(II) & (d)(II) (2013) (penalties for

(Continued on following page)

B. The TIA bars federal court jurisdiction to enjoin or declare unconstitutional Colorado's method of collecting the use tax.

The DMA's claims strike at the heart of the State's tax collection authority and the federal district court's jurisdiction is thus barred by the TIA. The TIA is a "broad jurisdictional barrier." *Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 825-26. This Court has recognized that "the States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," and "federal courts must guard against interpretations of the [TIA] which might defeat its purpose and text." *Id*. at 826-27. The TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer is own fiscal operations." *LaSalle Nat'l Bank*, 450 U.S. at 522. Thus, the TIA prohibits federal courts from issuing declaratory or injunctive relief in state tax cases when an adequate state court remedy exists. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588 (1995).

In this case, the Tenth Circuit recognized the TIA bars not just suits that enjoin tax collection but also suits that would "*restrain* the . . . collection" of a state

---

retailers selling to Colorado customers who fail to comply with notice and reporting requirements); COLO. REV. STAT. § 39-21-116.5 (2013) (penalties for willful attempts to evade payment of a tax). These penalties are an integral part of the State's tax code and challenges to these penalties are likewise barred by the TIA.

tax. App. at A-16 (emphasis in original). Modeled after third party information reporting requirements in the income tax context, which have proven quite effective, the challenged notice and reporting requirements were adopted to improve voluntary tax compliance and increase the collection of revenue owed the state. C.A. App. 1797. The DMA challenges the State's chosen method to collect the use tax and not merely a "secondary aspect" of tax administration as the DMA suggests. Utilizing the common dictionary meaning of the word "restrain," the Tenth Circuit determined the DMA's claims, if successful, would limit, restrict, or hold back the State's ability to collect tax revenue. App. at A-17. The Tenth Circuit acknowledged that in *Hibbs* this Court rejected the argument that the TIA "immunizes" from federal court review "all aspects of state tax administration," 542 U.S. at 105. App. at A-21. But the Tenth Circuit appropriately distinguished the DMA's claims, which, if successful, would reduce the flow of state tax revenue, from those of the plaintiffs in *Hibbs*, which, if successful, would have increased state revenue.

The DMA's characterization of the notice and reporting requirements as coercive regulatory measures designed to indirectly increase the payment of taxes does not put its claims outside the reach of the TIA. "'[E]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.'" *Nat'l Fed. of Indep. Bus.*, 132 S.Ct. at 2596 (quoting *Sonzinsky v. United States*, 300 U.S. 506,

513 (1937)). Sales and use tax revenue typically represents one third of Colorado's annual general fund budget. C.A. App. 1930. Collection of this revenue is thus critical to the State. *See*, *e.g.*, *Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 826 ("The power to tax is basic to the power of the State to exist.") (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

The Tenth Circuit correctly concluded that allowing the DMA's claims to proceed in federal court would defeat the purpose and text of the TIA when there are adequate state court remedies available to challenge the constitutionality of Colorado's law.[4]

[4] This Court has consistently rejected the argument by amicus Council On State Taxation ("COST") that state courts are somehow less equipped to hear constitutional challenges. *See*, *e.g.*, *Grace Brethren Church*, 457 U.S. at 418 n.37 ("[We] are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the . . . courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.") (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)). Further, the citation by COST to the Tenth Circuit's decision in *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), is inapposite. There, the plaintiffs, a group of state legislators, did not seek to enjoin or impede the State's collection of tax revenue; rather, the *Kerr* plaintiffs filed suit against the Governor challenging the State constitution's Taxpayer's Bill of Rights as a violation of the requirement that the states have a republican form of government. *Id.* at 1161.

II. The Tenth Circuit's decision is consistent with the weight of circuit authority.

The Tenth Circuit properly distinguished and declined to follow two outdated cases the DMA cites in an attempt to identify a circuit split: *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), and *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("*UPS I*"). The Tenth Circuit's decision is consistent with TIA precedent of the circuit courts.

A. *Wells* and *UPS I* pre-date *Hibbs* and did not involve challenges to a state's chosen method of tax collection.

In *Hibbs*, this Court confirmed the TIA is principally concerned with "state-revenue-protective objectives." 542 U.S. at 104. Little benefit is gained by granting certiorari to review the continuing vitality of two cases that preceded *Hibbs*. *Cf.* SUP. CT. R. 10(a).

Wells, dating from 1975, held that a challenge to Vermont's law requiring suspension of a taxpayer's driver's license for nonpayment of a vehicle tax was not barred by the TIA. 510 F.2d 74. The Second Circuit noted that Congress, in enacting the TIA, sought to remove federal jurisdiction over challenges to laws that "would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Id.* at 77. Thus, the Second Circuit concluded, the TIA was no bar to the "unusual sanction" of a driver's license suspension. *Id.* Importantly, *Wells* itself recognized the critical revenue-raising

objectives underlying the TIA, *see id.* at 77 n.5 (quoting Senate Report stating that federal taxpayer suits "seriously disrupt State and county finances"), but ultimately concluded those objectives were not hindered by exercising federal jurisdiction over the challenge to Vermont's licensing scheme.

Similarly, in *UPS I*, the plaintiffs did not challenge the tax or the authority of the Treasury Secretary to collect the tax. *UPS I* concerned Puerto Rico's analog to the TIA, the Butler Act, not the TIA itself. 318 F.3d at 330 (citing 48 U.S.C. § 872). But even if the two laws are comparable, Puerto Rico's law banning delivery of packages by third party interstate carriers absent certain conditions did "not seek to restrain a system that 'produces money or other property directly.'" *Id.* at 331 (quoting *Wells*, 510 F.2d at 77). Rather, like the Vermont law in *Wells*, Puerto Rico's law produced "tax money indirectly through a more general use of coercive power." *Id.* (internal quotation marks omitted). No "system of tax collection" within the meaning of the Butler Act was at issue. *Id.* The First Circuit distinguished the package delivery restrictions from cases where attacks on the State's method of tax collection were barred by the TIA. *Id.* at 331 n.12. Notably, the First Circuit later held that one discrete part of Puerto Rico's scheme (a licensing fee applicable to air carriers) was in fact a tax subject to the Butler Act and thus beyond the federal courts' jurisdiction. *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14-15 (1st Cir. 2004) ("*UPS II*").

Here, the Tenth Circuit properly distinguished and declined to follow both *Wells* and *UPS I*. The court reasoned that Colorado's laws "are not a reactive and punitive 'general use of coercive power'" as was the case in *Wells* and *UPS I*. App. at A-23. Instead, Colorado's laws "attempt to ensure tax compliance in the first instance" by notifying consumers of their duty to pay use tax and garnering information on consumer purchasers to assist in later audits. *Id.* Such notice and reporting obligations, the Tenth Circuit held, have "revenue-generating" purposes because they constitute "the state's chosen means of enforcing use tax collection in the first instance." App. at A-25. Colorado's laws thus fit "squarely" within the TIA's ambit. App. at A-26.

Other circuits likewise recognize the revenue generating objectives of the TIA and, consequently, criticize *Wells* and *UPS I* as outdated. *See*, *e.g.*, *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 403 (3d Cir. 1982) (questioning whether *Wells* "survives the reasoning in more recent Supreme Court cases" and stating the "essential administrative mechanism" of unemployment tax withholding furthers TIA's policy of noninterference with state revenue collection). Even the more recent of the cases cited by the DMA, *UPS I*, has been superseded by later First Circuit precedent holding the TIA and Butler Act block suits that reduce the flow of state tax revenue. *Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1, 6-7 (1st

Cir. 2010) (citing *Hibbs*); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 13-14 (1st Cir. 2009) (same).[5]

Accordingly, review by this Court to reconcile a split of authority is not warranted.[6]

---

[5] Still other cases limit *Wells* and its progeny to instances where the penalty for nonpayment is "an unusual sanction." *See Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 134 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); *Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817, 819 (7th Cir. 1978). Colorado's law imposes monetary penalties for failure to comply with the notice and reporting requirements – hardly an unusual sanction in the tax context. *See*, *e.g.*, 26 U.S.C. § 6552 (imposing various monetary penalties for failure to file certain information returns with I.R.S.).

[6] The Sixth Circuit decision in *BellSouth*, cited by amicus COST, does not conflict with the Tenth Circuit's decision. *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008). *BellSouth* concerned a Kentucky law that prohibited telecommunications service providers from separately stating a new tax on consumer invoices. *Id.* at 501. The Sixth Circuit held that a First Amendment challenge by providers was not barred by the TIA since the providers were not seeking relief from the legal responsibility to pay the tax, there was no hindrance of the state's interest in collecting the tax, and an injunction, if granted, would not interfere with the relationship between the state and those who owed the tax. *Id.* at 501-02. But here, as the Tenth Circuit observed, the DMA's requested relief would "limit, restrict, or hold back the state's chosen method of enforcing its tax laws *and generating revenue*." App. at A-17 (emphasis added). *See also Washer & Refrigeration Supply Co., Inc. v. PRA Gov't Servs, LLC*, No. 2:09-CV-1111-WKW (WO), 2010 U.S. Dist. LEXIS 93576, *15-16 (M.D. Ala. 2010) (similarly distinguishing *BellSouth*). Because it did not address revenue-generating measures, *BellSouth* is not instructive.

B. The circuit courts consistently recognize the state revenue-protective moorings of the TIA.

The DMA's overarching premise – that the TIA is no bar to suits challenging a State's chosen method for collecting owed taxes – has been rejected by the circuit courts.

In *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (en banc), the Seventh Circuit held the TIA barred the taxpayer casinos' claims seeking a constructive trust of taxes they paid because such relief would impede the State's collection of tax revenue. The court noted that although the State was not a party, the relief sought by the plaintiffs would "thwart the tax as surely as an injunction against its collection." *Id*. at 726.

In *Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989), the Ninth Circuit concluded the TIA barred an employee suit brought against the employer seeking to enjoin the employer from producing earnings records to the Idaho and Montana taxing authorities. In applying the TIA the court explained the requested relief, if granted, would render the states "unable to obtain the information necessary for [tax] assessment." *Id.* at 328. It was of no consequence that the employees' requested injunction would restrain assessment "indirectly rather than directly." *Id.*; *accord RTC Commercial Assets Trust 1995-NP3-1*

v. Phoenix Bond & Indem. Co., 169 F.3d 448, 454 (7th Cir. 1999).

The Ninth Circuit reached the same conclusion in *Jerron West, Inc. v. Cal. State Bd. of Equalization*, 129 F.3d 1334 (9th Cir. 1997), *cert. denied*, 525 U.S. 819 (1998). There, the taxpayers sought a federal court injunction to stay certain administrative tax proceedings pending before California's State Board of Equalization while ongoing criminal proceedings were also taking place. *Id.* at 1335-36. The court held the TIA precluded federal jurisdiction because the administrative tax proceedings "are an integral part of California's sales tax assessment and collection scheme." *Id.* at 1337.

The same is true in the Third Circuit. *See Gass v. County of Allegheny*, 371 F.3d 134 (3d Cir. 2004), *cert. denied*, 543 U.S. 987 (2004). In *Gass*, the court rejected the taxpayers' attempt to distinguish between the actual property tax (which they did not challenge) and the post-collection appeals process that they alleged denied them due process. *Id.* at 136-37. The court reasoned that "[t]he appeal process is directed to the Board's ultimate goal and responsibility of determining the proper amount of tax to assess – a power of 'assessment' that explicitly falls within the ambit of the Tax Injunction Act." *Id.*

Likewise, in *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1255 (11th Cir. 2003), the Eleventh Circuit stated it was "undisputed" that a challenge to a county tax assessor's method of

selectively re-evaluating certain upscale properties each year constituted a restraint on the state's tax assessment scheme, thus triggering the TIA. *See also Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (holding TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself."); *Czajkowski v. Illinois*, 460 F. Supp. 1265, 1272 (N.D. Ill. 1977) (rejecting taxpayers' distinction between tax itself and the enforcement, administration, and implementation of the taxing scheme).

Thus, the weight of circuit court authority is inconsistent with the DMA's suggested narrow application of the TIA. Were it otherwise, *any* mechanism employed by the states to advance their important tax collection efforts (other than direct levy) would be thwarted by federal challenges. *Cf. Alcan Aluminum Ltd. v. Dep't of Revenue of the State of Or.*, 724 F.2d 1294, 1297 (7th Cir. 1984) (indicating importance of adhering to policies underlying the TIA and need to avoid a hypertechnical approach to the law). This Court should reject the DMA's artificial distinction between the use tax and Colorado's chosen method for enforcing and collecting the tax.

III. The doctrine of comity supports the Tenth Circuit's ruling that the DMA's claims should be dismissed in deference to the state adjudicative process.

The Tenth Circuit properly determined that, in addition to the TIA, the doctrine of comity militated in favor of dismissal of the DMA's claims. App. at A-33 n.11. Analyzing this Court's recent holding in *Levin*, the Tenth Circuit concluded comity "'compel[led] forbearance'" by the federal district court, noting the doctrine is more "embracive" than the TIA. App. at A-33 n.11 (alteration in original) (quoting *Levin*, 560 U.S. at 424). The Tenth Circuit determined all three factors discussed in *Levin* – the State's freedom over tax classifications versus more suspect classifications, the plaintiff's goal of improving their competitive position, and the state court's relative flexibility in correcting any violation – applied with similar force to the DMA's case. *Id.* The Tenth Circuit's conclusion is manifestly correct and should not be disturbed by this Court.[7]

As to the first *Levin* factor, no suspect classification or fundamental right is implicated. Like the

---

[7] Citing *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 480 (1977), amicus COST suggests the Department has waived its argument under the comity doctrine. Unlike the State of Ohio in *Hodory*, however, the Department here is the respondent and the prevailing party below. It thus may defend the lower court's judgment on any ground which the law and record permits. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

Levin plaintiffs, the DMA asserts violations of the Commerce Clause. 560 U.S. at 430-31. But those assertions, as the *Levin* Court held, are insufficient to overcome the "demand[ed] deference" owed to the state courts. *Id.* at 432.

As to the second *Levin* factor, the DMA through its requested relief – permanent enjoinment of Colorado's law – seeks to maintain its members' perceived competitive advantage over Colorado's brick-and-mortar retailers. As the DMA acknowledges, its remote members are not required to collect Colorado use tax on retail sales to Colorado consumers at the point of sale. Pet. for Writ of Cert. at 4 (citing *Quill Corp.*, 504 U.S. 298). And because "[m]ost Colorado residents do not report or remit use tax despite the legal obligation to do so," the DMA's members enjoy a perceived price advantage over their brick-and-mortar counterparts within Colorado who are required to collect and remit. App. at A-5. That perceived price advantage amounted to an astounding $172.7 million in 2012 in Colorado alone. *Id.* Accordingly, the DMA is "seeking federal-court aid in an endeavor to improve [its members'] competitive position." *Levin*, 560 U.S. at 431.

The final *Levin* factor – the state court's relative flexibility in correcting any violation – also supports the Tenth Circuit's decision. Contrary to the DMA's assertion, wholesale invalidation of Colorado's entire notice and reporting scheme is not the *only* possible remedy in the event a constitutional infirmity is proven by the DMA. Colorado's state courts,

unconstrained in their remedial options by the TIA, may sever any discrete portion of Colorado's law that is held constitutionally infirm. *See*, *e.g.*, *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1280 (Colo. 2001). It remains to be seen whether the DMA will carry its burden in demonstrating unconstitutionality as to the entire statutory scheme, a single discrete subpart, or none at all. In any event, being "more familiar with state legislative preferences," *Levin*, 560 U.S. at 431-32, Colorado's state courts may attempt "to implement what the legislature would have willed had it been apprised of the constitutional infirmity."[8] *Id.* at 415.

Beyond these three *Levin* factors, other "'special reasons'" rooted in comity justify the policy of federal noninterference. *Levin*, 560 U.S. at 422 n.2 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). Justice Brennan more than 40 years ago cautioned that concern for state solvency and orderly tax administration counsel in favor of state courts exercising jurisdiction in the first instance:

> The procedures for mass assessment and collection of state taxes and for administration

---

[8] Although currently impossible to predict with certainty because the DMA has yet to prove *any* constitutional infirmity, an example of a remedial option available to the Colorado state court may include the severing of the first class U.S. mail requirement for the Annual Purchase Summary if it is found to be unduly burdensome. *See* App. at E-3.

> . . . are generally complex, and necessarily designed to operate according to established rules. . . . If federal declaratory 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.

Perez, 401 U.S. at 128 n.17 (Brennan, J., concurring in part and dissenting in part).

Justice Brennan's admonition applies with particular force here. The DMA is not challenging a mere incidental licensing fee or insignificant service charge. It is challenging the enforcement mechanism that Colorado employs to enable collection of the use tax applicable to all remote transactions.

Concerns for comity are particularly acute at this stage of the case. Nearly four years after the initiation of the federal action, the parties are actively relitigating the very same Commerce Clause claims in Colorado state court. In the interests of comity and achieving finality of the litigation, this Court should deny the petition for writ of certiorari.

The Tenth Circuit's alternative holding under the doctrine of comity equally and independently supports its decision. Further review by this Court is not merited.

CONCLUSION

Given the lack of development of the TIA and comity issues in the courts below and the ongoing state court adjudication of the DMA's challenge, this case presents a poor vehicle to reexamine the proper scope of the TIA and comity. The Tenth Circuit's decision is consistent with this Court's precedent and no split of authority exists amongst the circuits that merits this Court's review. The DMA's petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General

DANIEL D. DOMENICO
Solicitor General
MELANIE J. SNYDER*
Deputy Attorney General
GRANT T. SULLIVAN
Assistant Solicitor General
1300 Broadway, 8th Floor
Denver, Colorado 80203
(720) 508-6335
melanie.snyder@state.co.us
**Counsel of Record*

Counsel for Respondent