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

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BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

KARL FRIEDEN
Counsel of Record
FREDRICK NICELY
DOUGLAS LINDHOLM
WM. GREGORY TURNER
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222
kfrieden@cost.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Council On State Taxation ("COST") is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents over 600 multistate businesses in the United States, including companies in numerous industries. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including: *Levin v. Commerce Energy*, 560 U.S. 413 (2010), *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009), *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), and *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007).

COST's membership has a vital interest in ensuring that states do not impede the rights of all businesses to engage in commerce in the national market. To that end, it is important to COST members that the federal courts remain available to resolve constitutional challenges to state laws. The federal Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, should not impede a person or business from resolving an issue before a federal district court when a state's taxing authority is not being challenged. Access to the federal courts protects out-of-state businesses from parochial favoritism. Statutes or regulations imposed by the state that only have a remote connection with state taxes should not be subject to the TIA, or the doctrine of comity.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file

STATEMENT OF THE CASE

In February 2010, the Colorado legislature enacted notice and reporting obligations on remote sellers who are not collecting Colorado's sales or use tax, *see* Colo. Rev. Stat. § 39-21-112(3.5)(c) & (d). The Colorado Department of Revenue ("CDOR") promulgated a regulation in June 2010 to fill in some gaps in the law, *see* Colo. Code Regs. § 201-1:39-21-112.3.5 (2010). The law and the regulation require sellers <u>not</u> collecting and remitting Colorado's sales tax or use tax to: (1) provide a notice to the purchaser at the time of sale that the seller does not collect Colorado's tax and that the purchase is not exempt merely because it is purchased over the Internet or by other remote means (including a prohibition of the seller implying no tax is due); (2) annually send to purchasers, via first class mail, detailed information on their purchases shipped to a location in Colorado; and (3) annually provide the CDOR with a seller's report that lists the name of the purchasers having goods shipped into the State along with those purchasers' billing addresses, shipping addresses, and the total amount sold to each purchaser. Finally, substantial penalties are imposed on remote sellers who fail to comply with the notice and reporting rules. § 201-1:39-21-112.3.5-3-a(iv) (2010).

The Petitioner, Direct Marketing Association ("DMA"), a trade organization supporting remote sellers with a multitude of marketing channels (*e.g.,* catalog, advertisements, and the Internet), filed suit against Colorado's law and regulation in June 2010 in the U.S. District Court for the District of Colorado

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this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

(District Court). The thrust of the DMA's complaint was that Colorado's law and regulation violated the Commerce Clause. In January 2011, the District Court granted a preliminary injunction, enjoining the CDOR from enforcing the law and regulation, made permanent in the District Court's March 30, 2012 decision. *Direct Marketing Association v. Huber*, Civil No. 10-cv-015460-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012) (hereinafter "D. Colo. Op.").

The CDOR subsequently appealed that decision to the United States Court of Appeals, Tenth Circuit ("Tenth Circuit"). While DMA and the CDOR never raised the TIA to have the case dismissed on jurisdictional grounds before the District Court or the Tenth Circuit, on August 23, 2013 the Tenth Circuit held the TIA divested the District Court of its jurisdiction and remanded the case back to the District Court to dismiss the case for lack of jurisdiction. *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013) (hereinafter "10th Cir. Op."). DMA filed a request for rehearing *en banc*, but was denied on October 1, 2013. Proceeding back to state court, the DMA filed a request on November 5, 2013 to again enjoin Colorado's law and regulations from enforcement. On February 18, 2014, a state district court granted DMA's request for a preliminary injunction, again enjoining CDOR's enforcement based on the law being facially discriminatory against interstate commerce. The state district court held that the law and regulation only fell on sellers located outside of Colorado. *Direct Marketing Ass'n v. Colorado Dep't of Revenue*, No. 13CV34855 (D. Colo. Feb. 18, 2014).

SUMMARY OF THE ARGUMENT

This case provides the Court with an opportunity to clarify the limits of the TIA's jurisdictional bar to

lawsuits in federal court challenging state tax administration rather than state tax collection.

The sole issue in determining the applicability of the TIA is whether the petitioner's challenge to novel, burdensome and arguably discriminatory information reporting rules that do not themselves impose a tax or the obligation to collect a tax can somehow be construed as "restrain[ing] the… collection of any tax." 28 U.S.C. §1341.

The Tenth Circuit, in an unprecedented, broad ruling, held that the TIA barred the petitioner from access to the District Court because the law in question could, somehow speculatively, indirectly, and/or tangentially affect the collection of state taxes. In so holding, the Tenth Circuit placed itself in direct conflict with long-standing Court of Appeals decisions in at least three other Circuits that took a much narrower view of the jurisdictional bar created by the TIA: the First Circuit in *United Parcel Service, Inc. v. Flores-Galarza,* 318 F. 3d 323 (1st Cir. 2003); the Second Circuit in *Wells v. Malloy*, 510 F. 2d 74 (2nd Cir. 1975); and the Sixth Circuit in *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).

Apart from the direct conflict with the other Circuits, the chief problem with the Tenth Circuit's opinion is that it presents no workable standard. According to the Tenth Circuit, any state action that somehow affects state revenue, no matter how tangential and no matter how much it stretches the imagination, invokes the bar to federal court jurisdiction. This cannot be so. As the Ninth Circuit has observed, "Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow." *Hexom v.*

Oregon Dep't of Tax., 177 F.3d 1134, 1136 (9th Cir. 1999).

The principles of comity, as espoused by this Court in *Levin*, do not apply here. The comity doctrine in the tax context stems from the deference shown to states in matters of tax policy. *Levin*, 560 U.S. at 414 ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (*quoting Madden v. Kentucky*, 309 U.S. 83, 88 (1940))). Such deference is not warranted here because the concern before the federal courts is not the propriety or policy behind Colorado's use tax but rather Colorado's unconstitutional requirement to force out-of-state sellers to submit to Colorado's informational reporting requirements. Moreover, this case does not implicate the concern that federal jurisdiction in a state tax case would cause potential for disruption with the operations of the state by impeding the administration of state taxation. *See id.* at 417 (the "comity doctrine … restrains federal courts from entertaining claims for relief that risk disrupting state tax administration").

The lack of connection between the petitioner's lawsuit and the "collection" of any tax obviates the application of the comity doctrine. There is no dispute in this case—or challenge to—the tax owed. All parties agree that a "use tax" is owed by the purchaser on purchases made by Colorado residents from remote sellers (at least to the extent the items are part of the taxable sales and use tax base in the State). Nor is there any contention about the remote sellers' obligation to collect the "use tax"—they have none—as long as they lack a "physical presence" within Colorado. The remedy here would not require the State to make any change to its collection and remit-

tance laws relating to sales and use tax; it would only remove the constitutionally impermissible notice and reporting requirements on remote sellers. Finally, and most importantly, even if the principles of comity were applicable, comity does not apply here because it was never raised below, and, as such, the point has been waived.

There is a compelling need for this Court to clear up the confusion created by conflicting decisions in the federal Circuit Courts and spell out the limits of the TIA's jurisdictional bar regarding suits that do not directly challenge state tax collections. In other words, *amicus* is very concerned that this case could have a chilling effect on individuals and businesses trying to have their other non-tax cases reviewed by a federal court, despite some abstract connection to a state's tax scheme.

The certainty and predictability that are the cornerstones of fair and efficient state tax administration require resolution of this important question on the relative availability of federal and state courts to adjudicate constitutional challenges to rules related to state tax administration. This warrants this Court's review of the Tenth Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. THIS COURT NEEDS TO RESOLVE A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS ON THE APPROPRIATE SCOPE OF THE TAX INJUNCTION ACT.

Amicus believes the Court should grant review of this case to clarify the appropriate scope of federal court jurisdiction under the TIA in lawsuits relating to state tax administration and not to the collection of state taxes. The current division among federal circuit

courts on this topic is sowing confusion among both the states and taxpayers about the intent and reach of the TIA that can only be resolved by this Court.

The Tenth Circuit's decision held that the TIA bars federal court jurisdiction over a lawsuit to enjoin informational notice and reporting requirements of a state law that neither imposes a tax nor requires the collection of a tax. This decision is in conflict with long-standing Court of Appeals decisions in other Circuits that take a narrower view of the jurisdictional bar created by the TIA: the First Circuit in *United Parcel Service, Inc. v. Flores-Galarza,* 318 F. 3d 323 (1st Cir. 2003); the Second Circuit in *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975), and the Sixth Circuit in *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008). A review of the facts and legal issues in these three cases illuminates the great divide between the decisions in the First, Second, and Sixth Circuits and the decision of the Tenth Circuit in this case.

In the *UPS* case, the First Circuit ruled that the Butler Act, the Puerto Rico law analogous to the federal TIA, did not bar federal court jurisdiction over a challenge to a tax administration statute that imposed burdensome regulatory requirements on third parties. *UPS* at 330-32. The *UPS* case involved a Puerto Rico excise tax on items that were imported into Puerto Rico. *Id.* at 326. While the incidence of the excise tax in Puerto Rico fell on the recipients/ consumers of the imported goods—as does the "use" tax in Colorado—the Commonwealth's statutory scheme prohibited interstate carriers from making deliveries into Puerto Rico unless the carrier: (1) obtained up front proof of the recipient's payment of the territorial excise tax or (2) complied with complex

rules that called for a prepayment of the tax along with providing the government extensive daily documentation on shipments. *Id.* at 325.

The similarities between the *UPS* case and the *DMA* case are striking. In both situations, the government endeavored to enhance the collection of taxes by imposing significant regulatory burdens on third parties that all sides agreed did not owe the tax at issue. In both cases, the third parties did not contest the underlying tax liability of the consumers or the authority of the government to collect it. Rather, the third parties protested that the territorial and state tax schemes that imposed on them significant regulatory burdens and the threat of sanctions/penalties violated federal statutory and constitutional law.

However, unlike the Tenth Circuit in *DMA*, the First Circuit in *UPS* held that not all State measures to collect a tax, however tangential, were immune from federal jurisdiction. *Id.* at 331. In holding that the Butler Act did not bar federal jurisdiction over UPS's constitutional challenge to Puerto Rico's statutory scheme, the First Circuit stated, "Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar . . . . Such an interpretation extends the concept of tax collection and therefore the breadth of the Butler Act, too far." *Id.*

In the *Wells* case, the Second Circuit similarly held that the TIA did not bar federal court jurisdiction over a taxpayer challenge to a law with no direct impact on a state's tax collection efforts, but rather an indirect deployment of its coercive powers to achieve its goals. *Wells*, 510 F.2d at 77.

The *Wells* case involved a challenge to a Vermont statute that allowed the suspension of a person's driver's license for failure to pay the excise tax on his vehicle. *Id.* In that case, the plaintiff did not dispute that he owed the tax, but rather argued that the State's coercive method of penalizing someone who failed to pay the tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 76.

The *Wells* case, unlike the *UPS* case and the instant case, did not involve regulatory requirements placed on a third party. In *Wells*, the federal lawsuit challenged the penalty imposed on the taxpayer for non-compliance. However, it did share in common with the First and Tenth Circuit cases a challenge to a state law that was entirely tangential to the traditional mechanisms for collection of a state tax.

Unlike the Tenth Circuit decision in this case, the Second Circuit in *Wells* drew a distinction between lawsuits in which a taxpayer sought directly to "restrain" the collection of a tax, and those where the taxpayer challenged some other aspect of state tax administration. *Id*. at 77. The Second Circuit held that the focus of the TIA was on barring lawsuits in federal court that directly interfered with the collection of state monies, "…rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them . . . ." *Id.*

In *BellSouth*, the Sixth Circuit held that the TIA did not bar a lawsuit by telecommunications providers challenging Kentucky's statute that prohibited the providers from separately stating a gross receipts tax on invoices provided to their customers. *Bellsouth*, 542

F.3d at 501-04. The providers did not challenge the gross receipts tax; rather, they challenged the State's authority to prohibit the providers from informing their customers that their bills were going up to reflect the new tax. *Id.* at 500.

The Sixth Circuit listed several reasons why the TIA did not apply, including the following pertinent to the present case: 1) the taxpayers were not trying to avoid paying the tax and 2) the relief sought "would not interfere with the relationship between the body that imposed the tax (the Commonwealth) and the bodies that owe the tax (the providers)." *Id.* at 502. The court rejected the argument by the State that the providers sought to interfere with the collection of taxes: "A ban on enjoining a *State's* tax-collection efforts do not apply." *Id.* (Italics in original). Thus, in *BellSouth* the Sixth Circuit followed the lead of the First and Second Circuits in distinguishing the application of the TIA to a tax agency's administrative functions versus a tax agency's tax collection functions.

To settle this conflict between the Tenth Circuit and the First, Second, and Sixth Circuit Courts, this Court needs to review this case.

II. THE FEDERAL TAX INJUNCTION ACT AND THE COMITY DOCTRINE ARE NOT RELEVANT IN THIS CASE.

The TIA should not apply in this case because its bar to federal jurisdiction is limited to taxpayer lawsuits to 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, *see Levin*, 560 U.S. 413, 417 (2010). As noted by this Court in *Hibbs v. Winn*, 542 U.S. 88

(2004), in passing 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." *Id.* at 105 (internal quotations omitted).

In this case, the DMA does not seek to restrain Colorado from collecting tax from any remote seller that may have a collection responsibility (*e.g.,* those with nexus with the state). Nor does the DMA seek any tax relief, or tangentially challenge another person's exemption from Colorado's sales/use tax. Rather, the DMA seeks relief only from the regulatory powers the Colorado Legislature granted the CDOR to impose onerous notification and reporting requirements on remote sellers that have no tax liability or collection responsibility in Colorado. Colorado's regulatory scheme violates the Commerce Clause.[2]

If the DMA were challenging Colorado's imposition of its sales/use tax, *amicus* agrees that the TIA would serve as a jurisdictional barrier and it would have been appropriate for the Tenth Circuit to dismiss this case. That is clearly not the case; the DMA only

[2] Besides the Commerce Clause, DMA also asserted Colorado's regulation violated the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause. Pet. for Writ. Of Cert. and App. 6. *Amicus's* focus in this brief is on the Commerce Clause. This case is really not distinguishable from this Court's other Commerce Clause cases bearing on state regulatory requirements that unconstitutionally obligate out-of-state persons to report commercial activities in the manner dictated by the offending state. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333 (1977).

asserts that Colorado's notice and reporting regulation imposed on remote sellers violates the Commerce Clause. Colorado's sales/use tax system on remote sellers remains intact regardless of whether a federal court strikes down Colorado's notice and reporting regulation.

That leaves open the question of whether the comity doctrine applies in this case after this Court's clarification of it in *Levin.* There was some confusion after this Court's decision in *Hibbs v. Winn,* 542 U.S. 88 (2004), on whether *Hibbs* nullified the comity doctrine. This confusion was based on the Court allowing third parties in *Hibbs* to pursue a constitutional challenge under the Establishment Clause in a federal forum. In *Hibbs*, an Arizona citizen challenged a tax credit Arizona provided to its taxpayers. *Levin* at 425.

It is important to reiterate that the State of Colorado, specifically the CDOR, did <u>not</u> move for this case to be dismissed based on the TIA or the comity doctrine. The comity doctrine is the exercise of restraint "to abstain from deciding the remedial effects of [the state tax measure] holding." *Levin* at 427-28, *citing American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 176 (1990). It can, however, be waived.

This Court has previously held that a state can waive the application of the comity doctrine. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977). Addressing an unemployment compensation benefit conflict dispute, this Court held, "If a 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's own system." *Id.* at 480. This Court in *Levin* recently cited this as being a "prudential doctrine." *Levin* at 432. Unlike the *Levin* case, where the State of Ohio never waived

its demand for the case to remain under the State's jurisdiction, the CDOR here proffered no resistance and acquiesced to the jurisdiction of the federal courts. D. Colo. Op. at 2 ("I have jurisdiction over this case under 28 U.S.C. §1331 (federal question) . . . the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause.")

This case also does not have the "remedy" issue that is frequently cited to justify the application of the comity doctrine.[3] As noted by this Court in *Levin*, one reason for restricting access to the federal courts in state cases is that the remedy a state may need to provide to correct constitutional infirmities is something that will still ultimately need to be addressed by the state. *Levin* at 431. In *Levin*, the petitioner was not asking that his own tax burden be lowered but rather that the burden of his competitors be raised. The remedy for this sort of request was naturally best left to Ohio's courts and to the Ohio Legislature under principles of comity. However, this case does not present that concern because the remedy here is within the power of the federal courts to grant without more.[4] The remedy DMA seeks will not

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[3] See *Levin* at 427.

[4] *See* 28 U.S.C. § 2201 (giving the federal courts the power to grant declaratory judgments to invalidate unconstitutional acts). This case is also different from *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). In that case this Court applied the principle of the comity doctrine to prevent a 42 U.S.C § 1983 action to obtain damages for the alleged unconstitutional administration of the State of Missouri's property tax. Unlike *Fair Assessment*, the DMA is not asserting any damages against Colorado for its regulation that violates the DMA members' constitutional rights. DMA is also not asserting the state tax laws in Colorado, specifically Colorado's sales/use taxes, are

impact the State's tax collection system, but focuses solely on its notice and reporting requirements. If the Colorado law is declared unconstitutional by a federal court, no further remedy will be required that could interfere with the CDOR's collection and enforcement mechanisms relating to the sales and use tax.

In contrast, this Court's decision in *Hibbs* had a greater potential to impact Arizona's administration of its income tax because the State would have had to provide a remedy to redress an unconstitutional tax credit that aided parochial schools. *Hibbs* at 99. That concern does not exist in this case.

This Court should grant DMA's request for review of the Tenth Circuit's decision to avoid the illogical outcome whereby an aggrieved party's access to federal district courts can be stymied simply by a state's assertion of a remote connection of the case to the state's tax collection powers.

III. ACCESS TO FEDERAL COURTS IS IMPORTANT TO INDIVIDUALS AND BUSINESSES ENGAGED IN INTERSTATE COMMERCE.

In matters of state taxation, the TIA, 28 U.S.C. § 1331, and Art. III of the U.S. Constitution proscribe federal jurisdiction in certain situations. *See* 28 U.S.C. §1341 and *Ex parte Young*, 209 U.S. 123 (1908). On the other hand, diversity jurisdiction under Article III includes controversies "between Citizens of different States" within the judicial power of the federal government. U.S. Const. art. III, §2. It was codified by the Judiciary Acts of 1789 and 1888-89,

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unconstitutional as the Petitioner was attempting to do in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

which provide that for any cases with a certain amount in dispute (now $75,000 under 28 U.S.C. 1331) and a federal question at issue, the federal courts should have jurisdiction. Since this case involves 1) parties outside Colorado suing a Colorado party (the State) and 2) a question regarding the constitutionality of Colorado's notice and reporting obligations of remote sellers, federal jurisdiction is appropriate.

In *Ex parte Young,* this Court upheld a contempt order against the Minnesota Attorney General for violating an injunction prohibiting him from enforcing a statute that reduced railroad rates. *Ex parte Young,* at 192-93. The Court found that his actions as a state officer were not official in character because of the unconstitutionality of the law he was trying to enforce. *Id.* at 155-57. The case provided for federal jurisdiction to plaintiffs seeking injunctive relief for the unconstitutional actions of state officials.[5] This opened the federal courts to a flood of cases. To contain the flood, Congress enacted the TIA in 1937, to limit the tax cases allowed in federal courts, barring access to federal district courts if a taxpayer sought to suspend or restrain "the assessment, levy or collection" of any *tax* if there is "a plain speedy and efficient remedy" in state courts. 28 U.S.C. §1341.[6] Absent

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[5] Frederick C. Lowinger, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 740 (1979).

[6] Subsequent to enactment of the TIA, Congress inserted exceptions to allow certain state tax issues to be litigated in the federal courts. *See e.g.,* The Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11501, hereafter the "4-R Act") and the Prevent Discriminatory Taxes Against Motor Carrier Transportation Property Act (49 U.S.C. § 14502). Congress has articulated that access to the federal courts was needed in these acts due to "unlawful, unreasonable and unjust

assessment, levy or collection of taxes, the *Ex parte Young* doctrine still applies. *Amicus* argues that only the informational requirements are at issue in this case, not an assessment, levy or collection of a tax. Therefore, it was not appropriate for the Tenth Circuit to remand the case back to the federal district court for its dismissal; it should have remained in federal court.

The Tenth Circuit reiterated its adherence to the *Ex parte Young* doctrine in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007). In *Hill v. Kemp*, motorists brought a First Amendment challenge to the state's statutory scheme for specialty license plates. *Id.* at 1236. The Tenth Circuit found that the charges for the specialty license plates were taxes under State law and thus precluded from federal jurisdiction by the TIA; however, "the [injunctive] relief sought in this case falls within the scope of *Ex parte Young*." *Id.* at 1262. Similar to the plaintiffs in *Hill v. Kemp*, who requested an injunction to stop the state tax commission from enforcing certain parts of the state's license plate scheme, DMA is requesting a permanent injunction enjoining the CDOR from enforcing Colorado's onerous notice and reporting obligations imposed on remote sellers. *See* D. Colo. Op. at 3. The DMA seeks injunctive relief from a state officer; thus the *Ex parte Young* doctrine explicitly allows federal court jurisdiction, and the Tenth Circuit provided no reasoning as to why it overturned its own precedent set only seven years ago.

The TIA and comity best serve their purposes when they close federal court doors to tax cases that bear on

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discrimination against and undue burden upon interstate commerce …" S. Rep. No. 91-630, 91st Cong. 1st Sess. 3 (1969).

state and local issues. In cases where the controversy related to state and local tax matters can be resolved solely by reference to state law, the policy considerations for involving the federal courts are perhaps attenuated. However, this case in particular raises peculiar concerns for this Court because it involves a question of interstate commerce, a federal concern that should properly be within the orbit of federal courts. In declining to raise either the TIA or comity as a bar to jurisdiction in a non-tax case, the Fourth Circuit was alarmed by the notion of leaving matters of national importance without federal oversight:

> We cannot overlook the fact that the absence of federal jurisdiction in this case would turn what are truly interstate issues over to local authorities. Applying the Tax Injunction Act might encourage punitive financial strikes against single entities with national connections, for the federal courts would be unavailable to protect companies against local discrimination, preempted state laws, and other federal constitutional violations. The implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound, and we decline to foreclose these federal claims with a jurisdictional bar.

GenOn Mid-Atlantic, LLC v. Montgomery County, 650 F.3d 1021, 1026 (4th Cir. 2011).

Colorado's controversial reporting requirement here is no less a "financial strike" against out-of-state concerns than was the "tax" at issue in *GenOn*. Out-of-state companies will have to spend time and money complying with Colorado's controversial reporting

requirements. *Amicus* does not believe that a federal challenge should categorically exempt a matter from the TIA but that federal challenges should enjoy heightened scrutiny in the application of the TIA.

This Court needs to provide guidance and apply a balancing approach to the denial of access to the federal courts when a case has only remote connections to a state's taxing authority, especially in cases like this one where federal interest (for which the federal courts were designed to protect) are at stake. Of note, the Tenth Circuit addressed a case in Colorado that deals with Article X, § 20 of Colorado's Constitution, the State's Taxpayer's Bill of Rights ("TABOR"). *Kerr v. Hickenlooper*, No. 12-01445, 2014 WL 889445 (10th Cir. Mar. 7, 2014). In that case, plaintiffs filed suit alleging that TABOR's revenue-raising limitations prevented the State from having a republican form of government, as required by Article IV, §4 of the Constitution of the United States. *Id.* at *2. In *Ker*r, the Tenth Circuit addressed the issue of standing, but unlike the DMA case at hand, the Tenth Circuit never sought to invoke the TIA or the comity doctrine to bar the federal district court from jurisdiction to hear the case.

To retry a case in a state court after a federal court proceeding does not promote judicial efficiency. On the other hand, to allow access to federal courts in cases involving constitutional challenges to state tax administration where there is only a remote connection to a state's tax collections, addresses the perception of unfairness many taxpayers feel over resolving issues in state courts.[7]

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[7] *See* Arthur R. Rosen & Julie M Skelton, *Desperately Seeking State Tax Fairness: The Need for Federal Adjudication*, 61

CONCLUSION

Amicus respectfully requests that this court grant DMA's petition for a *writ of certiorari*.

Respectfully submitted,

KARL FRIEDEN
Counsel of Record
FREDRICK NICELY
DOUGLAS LINDHOLM
WM. GREGORY TURNER
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222
kfrieden@cost.org

Counsel for Amicus Curiae

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STATE TAX NOTES 357 (Aug. 8, 2011), *available at* http://services.taxanalysts.com/taxbase/archive/stn2011.nsf/dockey/0F0DFA16E883F9C785257A0300345A96?OpenDocument&highlight=0,desperately+seeking+state+tax+fairness.