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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 Tenth Circuit Court of Appeals

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

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

September 16, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. THE TAX INJUNCTION ACT IS INAPPLICABLE IN ACTIONS NOT CONTESTING TAX LIABILITY OR SEEKING TO INTERFERE WITH THE COLLECTION OF STATE TAXES	6
II. THE COMITY DOCTRINE IS NOT APPLICABLE TO THIS CASE	14
A. Comity Has Been Waived in This Case	15
B. Even if the Comity Doctrine Is Not Waived, It Is Inapplicable in This Case	17
III. APPLICATION OF THE TAX INJUNCTION ACT SHOULD BE LIMITED AND NOT EXPANSIVE	20
A. The TIA Does Not Apply to Fees, So it Would Be Incongruous for the TIA to Apply to Notice and Reporting Regulations	20
B. Federal Oversight Remains Important	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES Page(s)

America's Health Ins. Plans v. Hudgens,
742 F.3d 1319 (11th Cir. 2014)................ 20

Amos v. Glynn Cnty. Bd. of Tax Assessors,
347 F.3d 1249 (11th Cir. 2003)................ 13

Arkansas v. Farm Credit Servs. of Cent. Ark.,
520 U.S. 821 (1997).................................. 14

Bank of United States v. Deveaux,
9 U.S. 61 (1809)....................................... 27

BellSouth Telecommunications, Inc. v. Farris,
542 F.3d 499 (6th Cir. 2008)...................*passim*

Bidart Bros. v. California Apple Comm'n,
73 F.3d 925 (9th Cir.1996)....................... 20

Blangeres v. Burlington N., Inc.,
872 F.2d 327 (9th Cir. 1989).................... 13

Bond v. United States,
131 S. Ct. 2355 (2011).............................. 25, 26

California Chamber of Commerce v. California Air Resources Board,
No. 34-2012-8000313 (Cal. Super. Ct. Aug. 28, 2013) 21

Collins Holding Corp. v. Jasper County,
123 F.3d 797 (4th Cir. 1997).................... 21, 22

CSX Transportation, Inc. v. Georgia State Board of Equalization,
552 U.S. 9 (2007)...................................... 1

TABLE OF AUTHORITIES—Continued

Page(s)

Cumberland Farms, Inc. v. Tax Assessor,
116 F.3d 943 (1st Cir. 1997) 20

Direct Marketing Ass'n v. Brohl,
735 F.3d 904 (2013) 3, 14, 22, 24

Direct Marketing Ass'n v. Colorado Dep't of Revenue,
No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014) 3, 4

Direct Marketing Ass'n v. Huber,
Civil No. 10-cv-015460-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012) 3

Dows v. Chi.,
78 U.S. 108 (1871) 18

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.,
651 F.3d 722 (7th Cir. 2011) 13

Fair Assessment in Real Estate Ass'n v. McNary,
454 U.S. 100 (1981) 15, 16, 18, 19

Folio v. City of Clarksbrug,
134 F.3d 1211 (4th Cir. 1998) 14

Gass v. County of Allegheny,
371 F.3d 134 (3d Cir. 2004) 13

GenOn Mid-Atlantic, LLC v. Montgomery County,
650 F.3d 1021 (4th Cir. 2011) 26, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Great Lakes Dredge & Dock Co. v. Huffman,
319 U.S. 293 (1943).................................. 19

Hager v. City of W. Peoria,
84 F.3d 865 (7th Cir.1996)........................ 20

Hedgepeth v. Tennessee,
215 F.3d 608 (6th Cir. 2000)..................... 20

Hibbs v. Winn,
542 U.S. 88 (2004)...................................*passim*

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (2013) 23, 24

Kerr v. Hickenlooper,
880 F. Supp. 2d 1112 (D. Colo. 2012)....... 27

Levin v. Commerce Energy,
560 U.S. 413 (2010).................................*passim*

Madden v. Kentucky,
309 U.S. 83 (1940).................................... 5

MeadWestvaco Corp. v. Illinois Department of Revenue,
553 U.S. 16 (2008).................................... 1

Mobil Oil Corp. v. Tully,
639 F.2d 912 (1981) 22, 23

Ohio Bureau of Employment Servs. v. Hodory,
431 U.S. 471 (1977).................................. 16, 17

Perez v. Ledesma,
401 U.S. 82 (1971).................................... 18

TABLE OF AUTHORITIES—Continued

Page(s)

Polar Tankers, Inc. v. City of Valdez,
557 U.S. 1 (2009)....................................... 1

Quill Corp. v. North Dakota,
504 U.S. 298 (1992)................................... 17

Robertson v. United States,
582 F.2d 1126 (7th Cir. 1978)................... 24

San Juan Cellular Tel. Co. v. Public Serv. Comm'n,
967 F.2d 683 (1st Cir.1992). 20

TABOR Foundation v. Colorado Bridge Enterprise,
No. 13CA1621, 2014 WL 3955600 (Colo. App. Aug. 14, 2014).................................. 21

Travelers Ins. Co. v. Cuomo,
14 F.3d 708 (2d Cir.1994) 20

United Parcel Service, Inc. v. Flores-Galarza,
318 F.3d 323 (1st Cir. 2003) ....*passim*

Unites States v. N.Y. Tel. Co.,
434 U.S. 159 (1977)................................... 15

Wells v. Malloy,
510 F.2d 74 (2d Cir. 1975) ....*passim*

Zwickler v. Koota,
389 U.S. 241 (1967)................................... 25

STATUTES

1 Colo. Code Regs. §§ 201-1:39-21-112.3.5 (3)(d) 21

Page(s)

1 Colo. Code Regs. §§ 201-1:39-21-112.3.5 (4)(f) 21

1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2)(f) 21

26 U.S.C. § 7421(a) 23

42 U.S.C § 1983 19

Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) 2

Colo. Rev. Stat. § 39-21-112(3.5)(c) & (d) 2

Tax Injunction Act, 28 U.S.C. § 1341 ....*passim*

U.S. Const., Art. III, § 1 16

OTHER AUTHORITIES

Pet. for a Writ. of Cert., *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014) 24

Petitioner's Brief. 3, 4

Respondent's Brief in Opposition 13, 15, 24

INTEREST OF *AMICUS CURIAE*[1]

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 nearly 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 only apply in cases brought by taxpayers relating to the assessment or collection of state taxes; it is inappropriate to judicially expand its application to cases not contesting a tax liability or not seeking to interfere with the collection of state taxes from the party that owes the tax. Access to the federal courts protects out-of-

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

state businesses from parochial favoritism. Statutes or regulations imposed by a state only having a remote connection with state taxes should not be subject to the TIA or the doctrine of comity.

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. State. § 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 who have no obligation to collect or remit 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 names of the purchasers shipping goods into the State along with those purchasers' billing addresses, shipping addresses, and the total amount sold to each purchaser. Finally, penalties can be 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 federal District Court for the District of Colorado

("District Court"). The thrust of DMA's complaint was Colorado's law and regulation violated the Commerce Clause. There was no objection to the remote sellers' collection or remittance responsibilities to the State.[2] 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 (2013) (hereinafter "10th Cir. Op."). DMA filed a request for rehearing *en banc*, which was denied on October 1, 2013. Proceeding to state court on November 5, 2013, DMA requested an injunction of Colorado's law and regulations from enforcement. On February 18, 2014, a state court granted DMA's request for a preliminary injunction. The state court found the law and regulation only fell on sellers located outside of Colorado and thereby facially discriminated against interstate commerce. *Direct Marketing Ass'n v. Colorado Dep't of*

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[2] The DMA also alleged constitutional issues under the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause, but those issues are outside the scope of this appeal. Pet'r's Br. 12.

Revenue, No. 13CV34855 (Denver Dist. Ct. Feb. 18, 2014). On July 10, 2014, the state court stayed further proceedings pending resolution of this appeal. Pet'r's Br. 15.

SUMMARY OF THE ARGUMENT

This case provides the Court with an opportunity to clarify the limits of the TIA's jurisdictional bar to federal courts in lawsuits not directly challenging state tax administration or state tax collection.

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." 28 U.S.C. § 1341. The sole issue in determining the applicability of the TIA in this case is whether the petitioner's challenge to novel, burdensome, and 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 under State law." *Id*.

The Tenth Circuit on its own accord, in an unprecedented, broad ruling, held the TIA bars federal court jurisdiction over a lawsuit by non-taxpayers to enjoin informational notice and reporting requirements of a state law that neither impose a tax nor require the collection of a tax. In so holding, the Tenth Circuit placed itself in direct conflict with *Hibbs v. Winn*, 542 U.S. 88 (2004), and multiple long-standing holdings in federal circuit courts, which limit the scope of the TIA to lawsuits brought by taxpayers relating to the assessment or collection of their own state taxes: 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 (2d Cir. 1975); and the Sixth Circuit in *BellSouth*

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

The goal of the TIA is to protect state revenues by preventing *taxpayers* from challenging state tax assessments or seeking state refunds outside the normal state administrative and judicial channels. The TIA was not designed to prohibit federal court jurisdiction over all aspects of state tax administration. *Hibbs* at 104-105. The Tenth Circuit's opinion provides no workable standard because it bars federal court jurisdiction in any state action that somehow affects state revenue. The more appropriate test to determine if the TIA applies is the two-part test set out in *Hibbs*: the TIA should *not* apply when a plaintiff: 1) does *not* contest its own tax liability, or 2) does *not* seek to interfere with a state's collection of tax revenues from the party that owes the tax.

The principles of comity, as espoused by this Court in *Levin*, also 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, in part, because the CDOR waived application of the comity doctrine by failing to raise it in lower courts. Further, *amicus* believes that even if comity is not deemed to be waived, comity is irrelevant in this case and should not be applied. Allowing federal court jurisdiction in this case does not implicate the concern of 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 application of the TIA has been limited to cases directly addressing state and local taxes. Other federal courts have correctly held it does not bar a person from challenging a state or local fee in federal court; therefore, it would be incongruous to hold it should apply to a state's regulation that does not derive any tax revenue from the person subject to the regulation. Neither situation restrains the collection of a state or local tax.

In today's world, nearly every aspect of economic life is related to some state tax; it is not hard to invent a colorable connection between an activity and its potential impact on a state government's *fisc*. However, testing the reach of the TIA by such imaginative extrapolation would bar the doors to the federal courts in ways the drafters of the TIA never intended. Interpreting the TIA to operate on speculation, as the Tenth Circuit has done here, turns ordinary federal court jurisdiction into the exception and not the rule.

The federal courts should be available to adjudicate federal constitutional challenges to regulations not directly related to a state imposing a tax on a person. The Tenth Circuit seriously erred by breaking away from TIA precedent—its decision should be reversed.

ARGUMENT

I. THE TAX INJUNCTION ACT IS INAPPLICABLE IN ACTIONS NOT CONTESTING TAX LIABILITY OR SEEKING TO INTERFERE WITH THE COLLECTION OF STATE TAXES.

Amicus believes this Court should follow the reasoning of its prior decision in *Hibbs v. Winn*, 542

U.S. 88 (2004), and in multiple holdings in federal circuit courts, to limit the scope of the TIA to lawsuits brought by taxpayers related to the assessment or collection of state taxes. It should not bar lawsuits that do not contest tax liability or seek to interfere with the collection of state taxes. *See United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003); *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975); and *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).

The Tenth Circuit in this case held that the TIA bars federal court jurisdiction over a lawsuit by non-taxpayers 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 directly conflicts with this Court's opinion in *Hibbs* and in the decisions in other circuits that take a more reasonable view of the jurisdictional bar created by the TIA. A review of the facts and legal analysis in *Hibbs* and in these circuit court decisions illuminates the great divide between the test set forth in these cases and the standard used by the Tenth Circuit in the instant case.

In *Hibbs*, this Court ruled the TIA did not bar federal court jurisdiction over a challenge brought by plaintiffs on Establishment Clause grounds against an Arizona law authorizing tax credits for contributions to organizations that award educational scholarships and tuition grants to children attending private schools. In making its decision in *Hibbs*, this Court focused on two key determinant factors also present in this case; the TIA does not apply if: 1) the plaintiff is not contesting its own tax liability and 2) the plaintiff does not seek to interfere with the state's collection of

tax revenues from the party that owes the tax. As this Court noted:

> The question presented is whether the Tax Injunction Act . . . which prohibits a lower federal court from restraining 'the assessment, levy or collection of any tax under State law, 'bars the suit. Plaintiffs-respondents do not contest their own tax liability. Nor do they seek to impede Arizona's receipt of tax revenues. Their suit, we hold, is not the kind § 1341 proscribes'.[3]

Id. at 93.

This Court's decision in *Hibbs* was rooted in its analysis of the legislative history of the TIA. The key goal of the TIA was to protect state revenues by preventing taxpayers from challenging state tax assessments or seeking state tax refunds outside the normal state administrative and judicial channels. In reviewing the legislative history of the TIA, this Court noted:

> [I]n 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

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[3] In *Hibbs*, this Court also noted another purpose of the TIA was to "eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally require taxpayers to pay first and litigate later." *Hibbs* at 104. However, this factor is not present in the instant case because Colorado's notice and reporting requirements are only imposed on out-of-state corporations with no filing responsibilities in Colorado.

> legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration.

Id. at 104-105 (internal quotations omitted).

To be sure, the *Hibbs* case dealt with a constitutional challenge to an Arizona tax credit provision, and this Court noted a decision in favor of the plaintiffs would actually *increase* tax revenues, not *decrease* tax revenues. Nonetheless, this Court's analysis in the case was not limited to situations involving tax credits as indicated by its favorable reference to Judge Friendly's decision in *Wells v. Malloy* (a case that did not involve tax benefits or credits). This Court quoted his analysis of the intent of the TIA: "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* . . ." *Hibbs* at 109, citing *Wells* at 77 (italics added).

Cases in three other circuits—two of which were decided before this Court handed down its decision in *Hibbs*—have all adopted similar approaches to delineate federal court jurisdiction in light of the TIA. In the *UPS* case, the First Circuit ruled 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 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 provision to the government of extensive daily documentation on shipments. *Id*. at 325.

The similarities between the *UPS* case and this case are striking. In both situations, the government endeavored to enhance the collection of taxes by imposing significant regulatory burdens on third parties that both parties agreed were not subject to 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 territorial and state tax schemes that imposed significant regulatory burdens on them with the threat of sanctions or penalties for not following the suspect law.

Unlike the Tenth Circuit in this case, 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 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 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* at 77.

The *Wells* case involved a challenge to a Vermont statute allowing the suspension of a person's driver's license if a motor vehicle excise tax was not paid. *Id*. In that case, the plaintiff did not dispute the tax was owed; rather, the plaintiff 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 is entirely tangential to the traditional mechanisms for state tax collection.

Unlike the Tenth Circuit's 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 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*.

Closely akin to this case, in *BellSouth*, the Sixth Circuit held 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. Similar to DMA challenging Colorado's notice and reporting regulation, the telecommunications providers in *BellSouth* challenged neither the gross receipts tax nor the state's ability to collect it; rather, they challenged the federal constitutionality of the State's regulatory authority to prohibit the providers from informing their customers their bills were going up to reflect the new tax.[4] *Id*. at 500.

The Sixth Circuit listed several reasons why the TIA did not apply, including the following reasons 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). Following 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, the Sixth Circuit expediently ruled on the First Amendment issue.

In the instant case, the State cites several federal circuit court decisions to support its argument that the

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[4] The telecommunication providers challenged the regulation's prohibition against notifying their customers of the tax under the Free Speech Clause of the First Amendment.

TIA should apply in this case because it bars "suits challenging a State's chosen method for collecting owed taxes." Resp't's Br. in Opp'n 20-22. However, all of the cases cited by the State were brought by taxpayers contesting their own taxes or seeking to interfere with collection from taxpayers who do owe tax. *Id.*, citing *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (taxpayer casinos sought constructive trust for their own assessments paid to support race-tracks under the Illinois Racing Acts); *Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989) (taxpayers sued to enjoin railroad from disclosing earning records and other tax-related information to state taxing authorities); *Gass v. County of Allegheny*, 371 F.3d 134 (3d Cir. 2004) (taxpayers argued due process violations in the appeals process of property taxation); *Amos v. Glynn Cnty. Bd. of Tax Assessors*, 347 F.3d 1249 (11th Cir. 2003) (taxpayer property owners sued to enjoin allegedly unconstitutional spot reappraisals of their *own* property). The CDOR's authorities stand for the unremarkable proposition that the TIA bars actions where taxpayers contest their *own* taxes. These authorities are: (1) irrelevant to the case at bar, and (2) do not conflict with *UPS*, *Malloy*, or *BellSouth*.

Because DMA is not contesting any of Colorado's taxes, the TIA does not apply under *Hibbs*, *UPS*, *Wells*, and *BellSouth*. Moreover, the TIA does not bar federal review here because nothing in this suit is stopping Colorado from auditing, assessing, and collecting its use tax directly from Colorado purchasers.

II. THE COMITY DOCTRINE IS NOT APPLICABLE TO THIS CASE

Having addressed why the TIA is not a bar to federal jurisdiction in this case, we now turn to address why the comity doctrine also has no place in this case. The first part of this analysis focuses on a critical difference between the TIA and the comity doctrine—only the latter can be waived. As noted by the Tenth Circuit in this case, "[The TIA] serves as a broad jurisdictional barrier that limits drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *See* 10th Cir. Op. at 910, citing *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825-26 (1997) (internal quotations omitted). This jurisdictional bar applies even if the parties to the case do not dispute a federal district court's jurisdiction in a case. 10th Cir. Op. at 910, quoting from *Folio v. City of Clarksbrug*, 134 F.3d 1211, 1214 (4th Cir. 1998).[5]

While this Court crystalized in *Levin v. Commerce Energy*, 560 U.S. 413 (2010), that the comity doctrine still applies in certain situations as an exercise of judicial restraint "to abstain from deciding the remedial effects of [the state tax measure] holding," *id*. at 427-28, that doctrine is not applicable to this case. It is not applicable because it was: (1) waived by CDOR by its failure to raise the issue in the lower courts, and (2) even if was not waived, the use of the comity doctrine is not appropriate in this case.

[5] "This statutory provision is a jurisdictional bar that is not subject to waiver, and the federal courts are duty-bound to investigate the application of the [TIA] regardless of whether the parties raise it as an issue." *Id*. at 1214.

A. Comity Has Been Waived in This Case

The CDOR acknowledges it "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." *See* Resp't's Br. in Opp'n n.1. The CDOR, however, now suggests it can raise the comity doctrine as an issue to defend the Court of Appeals' decision that the TIA applied to this case. *See* Resp't's Br. in Opp'n, nn.1 and 7. To highlight this position, the CDOR cites *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977), for the proposition that this Court possesses discretion to consider comity "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *Id*. at 166, n.8.

N.Y. Tel. Co. is easily distinguishable from the case at hand. In that case, the underlying concern of whether certain legal arguments were considered by both the district court and the circuit court was determined not to be an issue. The *N.Y. Tel. Co*. Court noted the arguments were presented to the lower courts. *Id*. In contrast, the CDOR did not raise (or brief) a jurisdictional issue to the lower courts; the CDOR never raised the TIA or the comity doctrine as a jurisdictional bar to the federal District Court or the Tenth Circuit. By not properly raising the issue, the CDOR waived its ability to subsequently raise the comity doctrine in this case.

In a concurring opinion in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 119-122 (1981), Justice Brennan succinctly noted the comity doctrine should only be used in special circumstances:

> While the 'principle of comity' may be a source of judicial policy, it is emphatically no source of judicial *power* to renounce jurisdiction. The application of the comity principle has thus been limited to a relatively narrow class of cases: *Only where a federal court is asked to employ its historic powers as a court of equity, and is called upon to decide whether to exercise the broadest and potentially most intrusive form of judicial authority, does 'comity' have an established and substantial role in informing the exercise of the court's discretion*. . . . Surely no judicial power to fashion novel doctrine concerning the jurisdiction of the federal courts is to be found in the Constitution itself, which provides that the judicial power shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.

Id. at 119-122 (Brennan, J., concurring) (citing U.S. Const., Art. III, § 1) (italics added). And, importantly, this Court recently supported that notion in *Levin*. With *New York Tel. Co*. set aside, *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977), remains as the authority on when comity is waived. *Hodory* says that in a case like this one comity is waived. The State appears to concede as much by saying nothing about *Hodory* and, instead, focusing on *New York Tel. Co*., which as previously established, is inapposite.

The *Levin* Court also negated the Sixth Circuit's concern with the comity doctrine making the TIA "*effectively superfluous*." *Levin* at 433 (italics added). The Court noted that "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." *Levin* at 432, citing *Hodory* at 480. The CDOR, admitting it sought an "expedited ruling" and not challenging the federal District Court's jurisdiction, leaves no doubt it waived its ability to assert the comity doctrine. Based on this, the only analysis this Court needs to make is under the jurisdictional bar Congress has placed on the federal courts, the TIA, and not an equitable abstention doctrine—the comity doctrine.

B. Even if the Comity Doctrine Is Not Waived, It Is Inapplicable in This Case.

Even if the comity doctrine is not deemed to be waived, that doctrine is not applicable to this case. DMA did *not* in any way seek to restrain Colorado from collecting tax from any remote seller having a collection responsibility (*e.g.*, those with substantial nexus with the state under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Nor did DMA seek any tax relief, or tangentially challenge another person's exemption from Colorado's sales/use tax that would otherwise frustrate the collection of state taxes. Rather, DMA only seeks relief from the regulatory powers (or police 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. DMA simply asserts the Colorado notice and reporting regulation imposed on remote sellers violates the U.S. Constitution's Commerce Clause. It does not in any manner challenge Colorado's imposition of its sales/use tax on sellers located outside of the state (or on consumers located in the state). Colorado's tax system on remote sellers and in-state users remains

intact regardless of whether a federal court strikes down Colorado's notice and reporting scheme.

The factors that would otherwise justify the application of comity are not present here. Comity is not appropriate because this case does not implicate the concern that federal jurisdiction would disrupt operations of the state by impeding the administration of state taxation. *See Perez v. Ledesma*, 401 U.S. 82, 127-28 n.17 (1971) (the "comity doctrine . . . restrains federal courts from entertaining claims for relief that risk disrupting state tax administration"). Nothing about this case will prohibit Colorado from auditing, assessing, or collecting any tax from anyone. To boot, nothing about this case will "derange the operations of government." *Dows v. Chi.*, 78 U.S. 108, 110 (1871). Certainly, this case does not threaten any pre-existing state revenue by asking for its return.

Futhermore, this case does *not* have the "remedy" issue frequently cited to justify the application of the comity doctrine. *Levin* at 427. As noted by this Court in *Levin*, one reason for restricting access to the federal courts in state cases is the remedy a state may need to provide to correct constitutional infirmities is something the state will still ultimately need to address. *Id*. at 431. In *Levin*, while the petitioner was not asking to lower its own tax burden, it was asking for its competitor's tax burdens to increase—affecting state tax administration. The Court applied the principles of comity because it believed the remedy for this sort of request was best left to Ohio's courts and legislature. However, this case does not present that concern because the remedy here is within the power of the federal courts to grant.

This case also differs from *Fair Assessment*, where this Court applied the comity doctrine to prevent a

42 U.S.C § 1983 action seeking damages for the alleged unconstitutional administration of Missouri's property tax. 454 U.S. at 102. Unlike *Fair Assessment*, DMA is not asserting any damages against Colorado for its regulation that violates DMA members' constitutional rights. DMA is also not asserting the state tax laws in Colorado, specifically Colorado's sales/use taxes, are unconstitutional as the Petitioner was attempting to do in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

Of note, the challenge to an income tax credit this Court allowed to proceed in a federal district court in the *Hibbs* decision had a greater potential to impact Arizona's administration of its income tax than the action against Colorado's notice and reporting requirements in this case. In *Hibbs*, if the tax credit was declared to violate the Establishment Clause, the State would have had to provide a remedy to redress an unconstitutional tax credit that aided parochial schools. *Hibbs* at 99. However, none of those concerns exists in this case—if DMA is successful, the CDOR is only prohibited from requiring sellers not subject to Colorado's taxing authority to comply with discriminatory notice and reporting regulations. In harmonizing *Hibbs* and *Levin*, this Court should use the following test to limit the applicability of the comity doctrine: it only applies to situations where a taxpayer is not directly challenging its own tax, but is challenging a competitor's exemption to the tax. In *Hibbs*, the plaintiffs were not seeking a competitive tax advantage over another person in raising an Establishment Clause issue. In contrast, in *Levin*, the plaintiff was attacking a tax exemption its competitors enjoyed from Ohio's sales/use tax. This situation does not exist in this case.

This particular case raises a question of interstate commerce, a federal concern properly within the orbit of the federal courts. Based on the above, this Court should refuse to allow the CDOR to assert, in any manner, that the comity doctrine applies to this case.

III. APPLICATION OF THE TAX INJUNCTION ACT SHOULD BE LIMITED AND NOT EXPANSIVE.

A. The TIA Does Not Apply to Fees, So it Would Be Incongruous for the TIA to Apply to Notice and Reporting Regulations

It is long-standing practice the TIA does not bar a person from challenging a state fee in a federal district court. *See i.e.*, *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319 (11th Cir. 2014); *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 930 (9th Cir.1996), *Hager v. City of W. Peoria*, 84 F.3d 865, 870 (7th Cir.1996); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir.1994); and *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683 (1st Cir.1992). "The question is whether, for purposes of the TIA, [the] surcharge is a tax (which would defeat the exercise of federal jurisdiction) or a fee (which would allow the exercise of federal jurisdiction)." *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 946 (1st Cir. 1997) (parentheses in original). Thus, it is incongruous for the TIA to bar suits seeking to enjoin notice and reporting requirements while not barring suits seeking to enjoin regulatory fees—both situations akin to each other—as neither situation restrains the assessment or collection of a state tax.

The state courts in Colorado and California, both with restrictions on the imposition of taxes and not fees, have also come to similar conclusions on what constitutes a tax versus a fee. *See TABOR Foundation v. Colorado Bridge Enterprise*, No. 13CA1621, 2014 WL 3955600 (Colo. App. Aug. 14, 2014) (registration fee was not a tax levy prohibited by Colorado's Taxpayer Bill of Rights (TABOR)); and *California Chamber of Commerce v. California Air Resources Board*, No. 34-2012-8000313 (Cal. Super. Ct. Aug. 28, 2013) (regulatory fees are not taxes subject to a super-majority vote of California's legislature), http://elr.info/store/download/81919/8079.

The function of Colorado's notice and reporting obligations is not to impose a general tax, but is more similar to a state fee. Colorado is only attempting to impose its regulatory powers on remote sellers not required to collect and remit Colorado's sales/use tax (albeit in a discriminatory manner). There is no tax imposed, and the penalty is an enforcement tool to encourage non-collecting remote retailers to comply with the State's notice and reporting obligations.[6] There is insufficient revenue to constitute a tax under the *Collins Holding Corp*. test.[7] Clearly, the notice

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[6] 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 the Transactional Notice is not given, subject to $50,000 first year cap), (3)(d) ($10 penalty per Annual Summary not mailed, subject to $100,000 first-year cap), (4)(f) ($10 penalty per name not included on a Customer Information Report, subject to a $100,000 first-year cap).

[7] To determine when the TIA applies to a case concerning a tax as opposed to when it does not apply to a case concerning a fee, the courts focus on the "general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory

and reporting requirements directly generate no revenue flow; if the non-collecting remote retailers submit the information to the CDOR, the CDOR receives no more and no less tax revenue from such sellers. The Tenth Circuit recognized this when it stated "Even if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." 10th Cir. Op. at 918. The requirements simply serve to "aid the [CDOR]'s auditing of [other persons]," defraying the costs of CDOR's cost of regulation. *Id*. Colorado's notice and reporting requirements are only imposed on a narrow group of sellers not physically present in Colorado. It does not apply to the general public, and thus, similar to a fee, the TIA should not bar federal jurisdiction in this case.[8]

DMA does not contest Colorado's right to require retailers to collect sales and use tax, or ultimate consumers to pay it, and the requirements do nothing to raise revenue from remote sellers not legally obligated to collect Colorado's sales or use taxes. The

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scheme." *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997).

[8] "The mere fact that the . . . section is contained in a tax law of the State should not lead to automatic sanctuary under [the TIA]." *Mobil Oil Corp. v. Tully*, 639 F.2d 912, 918 (1981). In *Mobil Oil*, plaintiff oil companies challenged the constitutionality of an anti-passthrough provision of a 2% gross receipts tax for oil companies doing business in New York. *Id.* at 913. The state moved to dismiss the case under the TIA. *Id.* at 914. In finding the TIA did not preclude federal jurisdiction, the Second Circuit stated, "No one questions the right of the State of New York to place the legal incidence of the tax upon oil companies but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product." *Id.* at 918.

requirements fall outside the state's taxing power, and as Colorado is asserting its police power as opposed to its taxing power, the TIA should not stop DMA from obtaining federal court jurisdiction. *Mobil Oil* at 918 ("We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs . . . the State has gone beyond its taxing powers and has employed its police powers").

In finding the TIA applies to this challenge of the notice and reporting requirements, the Tenth Circuit tries to distinguish the case at bar from *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (2013). In *Hobby Lobby*, the Tenth Circuit analyzed the application of the Anti-Injunction Act ("AIA") to a case challenging the federal government's authority to impose a penalty on any employer that did not provide contraceptive coverage as required by the Patient Protection and Affordable Care Act. *Id*. at 1126-28. The AIA is the federal counterpart of the TIA and states "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax is assessed." 26 U.S.C. § 7421(a). The Tenth Circuit found the AIA did not apply when plaintiffs "are not seeking to enjoin the collection of taxes," but "are seeking to enjoin the enforcement, by whatever method" of a regulation. *Hobby Lobby* at 1127.

The distinction the Tenth Circuit tries to make between *Hobby Lobby* and this case cannot stand. In both cases, the plaintiffs did not challenge the taxing authority or taxes imposed by the tax agency; in *Hobby Lobby*, the challenge was against contraceptive

requirements. "Here, DMA challenges notice and reporting requirements in Colorado's sales and use tax statutory scheme." 10th Cir. Op. at 917. In both cases, the plaintiffs faced penalties if they did not comply with regulations they believed unconstitutional. In both cases, the regulations did not serve any revenue-raising function. If the AIA did not apply in *Hobby Lobby* because "the AIA does not apply to 'the exaction of a purely regulatory tax,'" then it should not apply in this case involving a regulation.[9] *Hobby Lobby* at 1128, citing *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978).

B. Federal Oversight Remains Important

The CDOR's admonition of *amicus* for its views regarding the propriety of federal court jurisdiction in a case like this illustrates precisely why this Court should narrowly interpret the TIA and comity. The CDOR states "This Court has consistently rejected the argument by amicus [COST] that state courts are somehow less equipped to hear constitutional challenges." Resp't's Br. in Opp'n n. 4. Although, *amicus* does not say, or even imply, such a thing anywhere in its previous briefing before the Court, it is revealing the CDOR interprets *amicus*'s view on the propriety of federal court jurisdiction this way.

The CDOR's admonition dismisses *amicus*'s concerns about the TIA and comity by reframing those concerns as a question of whether state courts are

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[9] When *Hobby Lobby* reached the U.S. Supreme Court, this Court did not address the application of the AIA because the parties agreed the AIA should not bar Art. III standing. Pet. for a Writ. of Cert. 18a, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

equipped to handle constitutional challenges. Therefore, it follows, that if state courts are capable of hearing constitutional challenges, *amicus*'s concerns should end there.

When *amicus* contends federal courts should protect federal interests, *amicus* is not casting aspersions on the powers or roles of state courts. All *amicus* is saying is questions of federal law should be entertained by federal courts whenever and to the fullest extent possible because that is why we have federal courts. The CDOR's defensive response to the prospect of answering to a federal court for the State's transgressions of federal constitutional law fails to acknowledge the federal courts were created to protect federal rights. This is so regardless of whether a state court may offer relief:

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. *Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . '*

Zwickler v. Koota, 389 U.S. 241, 248 (1967) (internal citations omitted) (emphasis added).

Apparently, the CDOR believes federalism and comity are protections meant for the State alone. However, this Court has plainly stated otherwise:

> The limitations that federalism entails are not therefore a matter of rights belonging

> only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

This case is a good example of why the federal courts should be circumspect in applying the TIA and comity. Here, there is a grave concern Colorado is exceeding federal restraints on its power by conscripting out-of-state entities to do the State's bidding under the color of raising state revenue. Such targeted financial strikes profoundly troubled the Fourth Circuit in another TIA case:

> 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).[10]

Amicus's concurrence with the views expressed by both the Fourth Circuit in *GenOn* and the Tenth Circuit in *Kerr* only reflects *amicus*'s concern the TIA and the comity doctrine will increasingly be used to keep cases best suited to federal courts away from them. The Tenth Circuit's decision in this case, if left as expansive, unmoored, and unworkable as it currently stands, would convert the TIA and the comity doctrine into a blindfold keeping cases that should be in federal courts away from them.

Since nearly the time of the founding of our nation, this Court has been mindful of the proposition:

> 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.

Bank of United States v. Deveaux, 9 U.S. 61, 87 (1809).

In reversing the Tenth Circuit's decision, this Court will recognize the proper role of the federal courts and

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[10] The Fourth Circuit is not alone in this view. Ironically, the 10th Circuit followed this line of reasoning in its decision *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112 (D. Colo. 2012), *aff'd* 744 F.3d 1156 (10th Cir. 2014), *reh'g en banc den.* 2014 U.S. App. LEXIS 14170 (10th Cir. July 22, 2014).

place meaningful limits on the TIA and the doctrine of comity.

CONCLUSION

In the years since its passage, the TIA has become unmoored from its original purposes and now threatens to turn federal court jurisdiction on its head. The Tenth Circuit's decision in this case, if left to stand, allows any state action conflicting with federal prohibitions that can imaginably have an effect on state revenues to escape the watchful eye of the federal courts.

The TIA is not a blindfold for the states to use to hide unconstitutional acts made in the name of state taxes from the federal courts. This Court should return the TIA and comity to their original, limited purposes.

For the reasons set forth above, COST urges this Court to follow long-standing TIA precedent by reversing the decision of the Tenth Circuit.

Respectfully submitted,

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

September 16, 2014