No. 13-1032

IN THE
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.
BARBARA BROHL, IN HER CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NFIB SMALL BUSINESS LEGAL CENTER, ASSOCIATION OF NATIONAL ADVERTISERS, NETCHOICE, ELECTRONIC RETAILING ASSOCIATION, AND AMERICAN CATALOG MAILERS ASSOCIATION, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Tax Injunction Act, 28 U.S.C. § 1341, bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.

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INTERESTS OF THE *AMICI*[1]

A. The Common Interest of Each of the *Amici*. Each of the *Amici* has an interest in preserving the favorable economic and business-related benefits that flow from this Court's ruling in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). There, this Court held that the dormant commerce clause doctrine prohibited a state from pressing an out-of-state vendor into service as a revenue collector for the state's sales tax on goods sold by the vendor to in-state customers. As a result, businesses of all sizes (including small vendors) with geographically dispersed clientele have been able to compete and grow without the fixed (and uncompensated) cost of acting as an agent for 49 states in addition to the State in which each is present.

The practical consequences of *Quill Corp.* would be undermined by anything less than a

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party to this action authored any part of this brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Letters granting blanket consent to the filing of amicus briefs are on file with the Clerk of Court.

reversal and remand in this case. An affirmance would permit each State to avoid litigation in a lower federal court regarding the validity of the State's impressment of an out-of-state vendor into the State's service unless the out-of-state vendor relinquishes its rights under *Quill Corp.* As demonstrated below, each of the *Amici* has an interest in preventing the erosion of the practical consequences of *Quill Corp*. that could result from this Court's disposition of this case.

B. The Particular Interests of Each *Amicus*. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. The National Federation of Independent Business is the nation's leading small-business association; its mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 businesses nationwide.

The Association of National Advertisers (ANA) provides leadership that advances marketing excellence and shapes the future of the industry.

Founded in 1910, ANA's membership includes more than 600 companies with 10,000 brands that collectively spend over $250 billion in marketing and advertising to communicate with consumers and conduct business operations across state and national boundaries. ANA strives to communicate marketing best practices, lead industry initiatives and advance and protect the rights of marketers in the courts.

NetChoice is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of Internet business models. Members of NetChoice include online commerce platforms that bring together sellers and buyers from different states and nations. NetChoice has a critical interest in ensuring that businesses can bring claims against states in federal court, particularly where the Internet enables these businesses to engage in commerce across state borders.

Representing a more-than $300-billion market, the Electronic Retailing Association (ERA) is the trade association that represents the global leaders of the direct-to-consumer marketplace—

companies which use the power of direct response to sell goods and services on television, online and on radio. ERA works to protect the regulatory and legislative climate of direct response while ensuring a favorable landscape that enhances direct response marketers' ability to bring quality products and services to the consumer. In addition, the association strives to promote thought leadership and the sharing of knowledge to advance the direct response industry, as well as to facilitate relationships that help members to drive their businesses' growth and profitability. ERA represents more than 450 companies in 45 countries.

American Catalog Mailers Association, Inc. (ACMA) is organized as a nonprofit corporation under the laws of the District of Columbia, and has its principal place of business in Providence, Rhode Island. ACMA advocates in matters directly affecting the catalog business, including publishers, suppliers and vendors. Its membership is comprised of both large and small marketers across the country. Founded in 2007 in response to disastrous postal policy decisions, ACMA now focuses on any material

policy or regulatory issue specific to catalog marketing.

SUMMARY OF ARGUMENT

The Tax Injunction Act (TIA), 28 U.S.C. § 1341, does not deprive the District Court of jurisdiction to adjudicate Petitioner's claims in this action. Accordingly, the judgment below should be reversed, and the case should be remanded.

1. Petitioner brought this action challenging the validity of Colo. Rev. Stat. § 39-21-112(3.5) ("the Colorado Act") on federal constitutional grounds. The Colorado Act provides in relevant part for punitive fines on non-taxpayer out-of-state vendors unless they satisfy certain informational notice and reporting requirements that are wholly unrelated to any tax liability of their own.

2. Petitioner's civil action arises under the Constitution of the United States. The District Court had original jurisdiction over the case under 28 U.S.C. § 1331, unless it belongs to a class of civil actions described in a federal statute that effectively creates an exception to the general rule in 28 U.S.C. § 1331. The Court of Appeals incorrectly ruled that

the TIA deprives the lower federal courts of jurisdiction over actions such as this one.

a. Petitioner's action is not one described in the text of the TIA. Moreover, an interpretation of the TIA that would divest the lower federal courts of jurisdiction over the action cannot be reconciled with the text of the TIA.

b. The judgment below depends on an erroneous interpretation of the term "restrain,"" as used in the TIA, that will result in the denial of timely access to a federal forum on a federal question under circumstances far beyond what the statutory text, the legislative history, and this Court's precedents will permit.

c. The judgment below rests on an interpretation of the word "collection" and the concept of the "collection of taxes" that accords interpretive significance – arguably decisive interpretive significance -- to definitions of those terms in state legislation. This approach allows each State to reduce the subject matter jurisdiction of the lower federal courts by adopting statutes defining "collection" of a tax to include compulsory activities by non-taxpayers specified in the legislation, even

though those activities do not fall within the ordinary sense of the word "collection" in the tax context. The TIA cannot be interpreted and applied in that manner, because the TIA was adopted pursuant to an enumerated power that is exclusively national. Thus, any interpretation of the phrase "collection" that permits its meaning to vary because of features of one state statute *versus* another is necessarily incorrect.

d. The Tenth Circuit's interpretation and application of the TIA in this case fails to take into account the interpretive significance of the TIA's exception in cases where a plaintiff is not afforded a "plain, speedy and efficient remedy." This omission led to the extraordinary holding that the TIA applies to an action by a person not subject to the relevant tax.

3. The Tenth Circuit's holding is in sharp conflict with this Court's Commerce Clause jurisprudence in that it will encourage state legislatures to enact legislation that imposes burdens selectively on out-of-state retailers based on their exercise of rights under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and saddles them with burdens

of tax administration and collection that should be borne by the states themselves.

ARGUMENT

I. The Interpretation of the TIA on Which the Judgment of the Court of Appeals Rests Conflicts with the TIA's Statutory Text and Legislative History

This case arises under the U.S. Constitution. Unless Congress specified an exception to its general grant of federal question jurisdiction to the district courts in 28 U.S.C. § 1331, the District Court had original jurisdiction over Petitioner's civil action. *See,* 28 U.S.C. § 1331. *Mims v. Arrow Financial Services, L.L.C.*, ___ U.S. ___, 132 S.Ct. 740, 743 (2012).

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The judgment of the Court of Appeals in this case dismissed Petitioner's complaint on the sole ground that under the TIA, the District Court lacked subject matter jurisdiction over Petitioner's claims.

The judgment below relies on the Tenth Circuit's interpretation of the TIA and the Tenth Circuit's application of its interpretation to the facts of this case. With respect, Amici submit that the Court of Appeals erred in this regard.

To begin with, the Tenth Circuit treated the word "restrain" as a non-technical term. Using definitions of that word from general-purpose dictionaries, the Tenth Circuit concluded that the relief Petitioners sought would "restrain" the "collection" of State taxes because it would "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." *Brohl* at 913.

This interpretation of the TIA misses the mark by such a broad margin that it transforms the statute's meaning and purpose. As shown below, the TIA deprives the lower federal courts of jurisdiction to grant specific remedies that would require a State temporarily or permanently to cease its own proceedings with respect to a plaintiff's own liability for the type of tax involved. The Colorado Act imposes a use tax on the amount paid by a Colorado resident for a good provided to the resident by an

out-of-state vendor that does not collect and remit the resident's Colorado sales tax. Colo. Rev. Stat. § 39-21-112(3.5) Thus, if the answer to the question presented is yes, the lower federal courts will have two new missions under the TIA: (1) to determine whether applying a state's law with respect to the affirmative duties of out-of-state parties who cannot be liable for a tax would increase the amount of revenue derived from the tax in question; and, if so, (2) to dismiss any action by the non-taxpayer, including a challenge to the constitutional validity of the state statute, thereby preventing or postponing review of the non-taxpayer's claims under federal law.

For the reasons stated below, the interpretation and application of the TIA adopted by the Court of Appeals on the facts of this case were erroneous.

A. The Judgment of the Court of Appeals Rests on a Misinterpretation of the Term "Restrain" As It Is Used In the TIA

The Tenth Circuit's interpretation of the TIA is incorrect because it misconstrues the term "restrain," giving it an insupportably broad meaning and effect. In the TIA, the term "restrain" refers only to a form of judicial relief, and only to the extent that the form of relief would keep a state from carrying out processes that constitute "the assessment, levy or collection" of any state tax.

Petitioner's Complaint clearly did not seek a stay or injunction restraining Colorado from proceeding with any "assessment, levy or collection" of its use tax. The Tenth Circuit interpreted the TIA's prohibition of an action to "restrain . . . [the] collection of a State tax" to authorize and require an exception to federal question jurisdiction in actions by non-taxpayers merely because the requested relief might have adverse downstream effects on the amount of revenues the state realizes from a particular tax. Other Courts of Appeals have rejected such an interpretation. *See*, *BellSouth*

Telecomms., Inc. v. Farris, 542 F.3d 499, 503-504 (6th Cir. 2008) ("The [TIA] does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have some negative impact on local revenues; it strips jurisdiction over claims seeking to enjoin the collection of State 'tax revenue.'"); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1383 (8th Cir. 1997) ("the plaintiffs do not question the County's authority to levy taxes. . . . While the relief they seek may well affect the revenue that the County raises . . . , this secondary economic effect would not require the court to enjoin, suspend, or restrain any tax collection.")

The consequence of a ruling by the District Court in Petitioner's favor would merely have prohibited the state from conscripting an out-of-state vendor to perform actions specified in the Colorado Act (at the vendor's expense) that Respondent believes would have an effect on Colorado residents' compliance with Colorado's use tax regime. The actions specified in the Colorado Act amount to efforts by the vendor to urge Colorado residents to obey Colorado law by self-reporting Colorado use tax

on purchases from out-of-state vendors in which no sales tax was paid on behalf of the Colorado resident.

The Colorado Act's educational/hortatory goals themselves were not the gravamen of Petitioner's Complaint in this case. Petitioner merely sought to enforce its rights not to be forced to participate in pursuing those goals. Thus, the District Court did not enjoin the state from engaging in those functions. Colorado would not have been permitted to force these functions on out-of-state vendors exercising their *Quill Corp*. rights, but Colorado would remain free to send its own communications to its residents to stimulate greater voluntary compliance with its use tax. No one suggests that a statement from the government of Colorado regarding the duty to pay use taxes is necessarily less persuasive than (for example) the same statement made by a vendor of hobbyist supplies located in a different state. Thus, the relief requested by the Petitioner in the District Court would not have "restrained" the collection of state use taxes, either in the sense covered by the terms of the TIA or even in the sense that concerned the Court of Appeals.

B. The Judgment of the Court of Appeals Erroneously Rests on an Interpretation of the Term "Collection" In the TIA That Effectively Gives a State the Authority to Alter the Scope of the TIA Through State Legislation.

1. The Tenth Circuit Failed to Recognize that the TIA's Terms Such as "Collection" Must Be Interpreted Without Regard to State Statutory Law.

Because the source of Congress's authority to adopt the TIA is an exclusively national power, the TIA's terms must be interpreted and applied according to a single rule or set of rules drawn exclusively from federal law, to the exclusion of state legislation. Congress's only legislative authority for adopting the TIA is its exclusive power to create the lower federal courts. The States may not legislate with respect to the subject matter of an exclusively national power. *See, e.g., U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995). "'[T]he States can exercise no powers whatsoever, which exclusively spring out of the national government, which the constitution did not delegate to them.'" *Cook v.*

Gralike, 531 U.S. 510, 519 (2001), *citing and quoting* 1 Story's Commentaries on the Constitution of the United States § 627 (3d ed. 1858). Because the People delegated only to the national government the power to create the lower federal courts, an interpretation of the TIA that permitted its scope to expand because of a feature of state legislation would be inconsistent with the allocation of governmental powers ordained by the Constitution. *Cf., County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 240 (1985) (in an action by an Indian tribe for possession of tribal lands, previously held to arise exclusively under federal common law because of the national government's exclusive powers to treat with Indian tribes, *held* that it would be inappropriate to borrowing a state statute of limitations).

To be sure, an Act of Congress might entail the exercise of more than one delegated power. For example, the act prohibiting the U.S. District Court for the District of Puerto Rico from enjoining the collection of any tax under Puerto Rican law fits comfortably within both Article I, Sec. 8, cl. 9 and within the Property Clause's grant of Congressional authority to make needful rules and regulations

respecting the Territories of the United States. In some cases, one of the powers might not be exclusively federal. For example, the Anti-Injunction Act could be treated as necessary and proper to the exercise of the national government's power to collect taxes; to spend for the public welfare; and as an exercise of Article I, Sec. 8, cl. 9.

By contrast, when it comes to identifying the Congressional power exercised in adopting the TIA, there is only one plausible candidate: Congress's implied power to limit the jurisdiction of the lower federal courts it may choose to create.

The power to define the jurisdiction of the lower federal courts has been deduced from only two provisions of the Constitution, namely Art. I, Sec. 8, cl. 9 and/or Article III. At least as early as 1845, this Court treated the Congressional power to constitute the lower federal courts as including an implied power to limit their jurisdiction. *See Cary v. Curtis*, 44 U.S. 236, 245 (1845). Subsequent decisions confirm this reading of U.S. Const. Art. I, Sec. 8, cl. 9. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 697 (1992), *citing and quoting Palmore v. United States*, 411 U.S. 389, 401 (1973). *Cf., also, Glidden*

Co. v. Zdanok, 370 U.S. 530, 551-52 (1962) (plurality opinion) (collecting cases). In some instances, this Court has held that the Congressional power to limit the jurisdiction of the lower federal courts is implied by Article III together with Art. I, sec. 8, cl. 9. *See, e.g., Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 474 (1959).

Article III and Art. I, Sec. 8, cl. 9 create exclusively national powers. Thus, the implied power to limit the jurisdiction of the lower federal courts stems from an authority delegated by the People *exclusively* to the national government. The state governments never had the power to create a lower federal court under Article III, or to circumscribe its jurisdiction as specified by the national legislature, because no power to create a federal court yet existed. Thus, before the Constitution, there could not have been a state power to control the jurisdiction of the lower federal courts. *Gralike, supra,* 531 U.S. at 522-23. This Court never has suggested that a state can exercise a legislative authority delegated by the Constitution to create an inferior Article III court. Without that power, a state lacks any basis for an implied power to

shrink the jurisdiction conferred by Congress on a lower federal court by 28 U.S.C. 1331. *Id.*; *cf. Harbison v. Bell,* 556 U.S. 180, 186-87 (2009) (holding that the statutory phrase "proceedings for executive or other clemency" in 28 U.S.C. § 3599(e) reveals that Congress intended to include state clemency proceedings within the statute's reach, since federal clemency is exclusively executive, because "only the president has the power to grant clemency for offenses under federal law." U.S. Const., Art. II, § 2, cl. 1.")

When Congress exercises an exclusively national power to legislate, individual States cannot legislate on the subject matter of the federal statute. *See Houston v. Moore*, 18 U.S. 1, 7 (1820) (dictum) ("[I]t is conceded that, after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia, the State governments never had, or could have, jurisdiction.") This principle has been a persistent theme since then. *See, e.g., Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 381 (2000);

Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 455-58 (1995); *Perpich v. Dep't of Defense*, 496 U.S. 334, 353-54 (1990); *Oneida Indian Nation v. County of Oneida.,* 414 U.S. 661, 667 (1974) (holding that a claim for possession of tribal lands raises a federal question because "once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law."); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (Twenty-First amendment does not give states the power to regulate the use of alcohol within a national park over which the national government has exclusive jurisdiction). Thus, an interpretation of the TIA that permitted its scope to expand because of state law necessarily would be incorrect.

Interpreting the TIA's terms so that state legislation can vary its scope to the degree seen in this case is substantively no different from applying that state legislation directly. Other Courts of Appeals have concluded that the lower federal courts should not defer to state law or practice in defining terms in the text of the TIA. *Robinson Protective Alarm Co. v. Philadelphia*, 581 F.2d 371, 375 (3d Cir.

1978) ("Congress' power to implement or limit federal courts' jurisdiction is so fundamental that we decline to infer a congressional intent to leave a jurisdictional provision dependent on state law absent an unambiguous and express incorporation by statute."); *Tramel v. Schrader*, 505 F.2d 1310, 1315, n. 7 (5th Cir. 1975) (in interpreting the statutory text of the TIA, "[t]he proper question is not what the Texas courts have said the Texas legislature meant when it used the term but what Congress meant when it used the term").

Similarly, the TIA should not be applied based on a concept of the "collection of taxes" that might cause "collection" to mean one thing in Colorado and another in Texas. While states may choose different constitutionally-permissible methods of maximizing tax revenues and creating incentives for greater taxpayer compliance, they cannot expand the statutory definition of "collection" in the TIA when doing so. *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (refusing to apply TIA to taxpayer challenge to state's refusal to issue him a driver's license until tax debt was paid and rejecting the contention that "collection" "could be read broadly to include

anything that a state has determined to be a likely method of securing payment"). Every effort by a state to tighten the screws on its taxpayers does not qualify as "collection" under the TIA merely because the state's aim is to generate more revenue.

Contrary to these principles, the Tenth Circuit focused on the fact that Colorado intended the challenged enactments to be part of its overall scheme for maximizing use tax collections. For example, the Tenth Circuit found the TIA applicable in part because this litigation would "hold back the state's chosen method of enforcing its tax laws and generating revenue," and the "state-chosen method to secure . . . taxes would be compromised." *Direct Marketing Assoc. v. Brohl*, 735 F.3d 904, 913 (10th Cir. 2013). Likewise, the Tenth Circuit found it significant that the title of the notice and reporting legislation was "An Act Concerning the *Collection of Sales and Use Taxes* on Sales Made by Out-of-State Retailers." *Brohl* at 914 (emphasis added by the Tenth Circuit).

Thus, the Tenth Circuit looked to the labels that the Colorado Act attaches to the activities required of out-of-state retailers in order to

determine the statutory significance of those activities under the TIA. This led to misapplication of the TIA to the facts in this case.

2. "Collection" Under the TIA Does Not Include the Requirements Imposed on Petitioner by the Colorado Act.

The requirements imposed on out-of-state retailers by the Colorado Act cannot reasonably be considered collection measures. In tax parlance as well as everyday speech, "collection" is undertaken only after a liquidated amount has been assessed and payment of that amount is due. *See, e.g.,* The IRS Collection Process, IRS Publication 594 (Rev. 4-2012) ("The collection process is a series of actions that the IRS can take against you if you don't voluntarily pay them. The collection process will begin if you don't make your required payments in full and on time, after receiving your bill.") *Cf. Jones v. Liberty Glass Co.,* 332 U.S. 524, 531 (1947) (presumption that words used in federal tax legislation have their ordinary meaning).

In federal tax parlance, "collection" refers to activities of a government official with respect to

taxes imposed under federal tax law. *See, e.g.,* Ch. 64, Subchapters A through D of the Internal Revenue Code of 1986, as amended ("Code"), 26 U.S.C. §§ 6301-6344. Under Chapter 64, Subchapter B, a taxpayer may make voluntary payments of taxes to the federal taxing authority, including payments of estimated taxes, *see, e.g.*, Code § 6315, for which the taxpayer would be entitled to a receipt from the federal tax official upon demand, *see* Code § 6314(a). But this sense of the word "collection" is not germane to the question presented in this case, for at least three reasons. *First*, a vendor that is not present in a State is not a tax official of that State. *Second*, since a person disinclined or unable to pay a tax voluntarily does not require an injunction issued by a lower federal court to prevent voluntary payment, the "voluntary payment" aspect of "collection" simply is not relevant to the meaning of that term as used in the TIA. *Third*, because the Colorado Act does not impose a duty to receive (or even authorize the receipt of) payments of Colorado sales tax by an out-of-state vendor exercising its *Quill Corp*. rights, this Subchapter B aspect of the term "collection" is not relevant to the application of the TIA in this case.

What is relevant in this case is the meaning of the term "collection" when it refers to steps a federal official may take *against an unwilling or otherwise non-compliant taxpayer* to secure payment or receive payment of a tax that already is due and owing. These include a statutory lien, Code § 6320; filing a notice of the lien, Code § 6321; a levy on the property of the person owing the unpaid tax (a concept that includes the seizure of the taxpayer's property), Code § 6331; and the sale of the taxpayer's seized property, Code § 6335. The Colorado Act does not require out-of-state vendors to take any of these steps. Indeed, given this Court's holding in *Quill Corp.*, Colorado could not lawfully require out-of-state vendors to take these steps. Thus, the Petitioner's action could not have been an action to restrain the "collection" of Colorado's use tax.

Here, Colorado seeks to delegate to out-of-state retailers the task of convincing Colorado residents to pay use taxes that are by definition imposed on them alone. But the Colorado Act does not require an out-of-state vendor to *collect* use taxes. For example, it does not require an out-of-state vendor to seize a taxpayer's assets or seek to

garner a Colorado resident's wages. Under the Colorado Act, the Colorado Department of Revenue's authority to collect use taxes due and payable is not shared with anyone else.

Instead, out-of-state retailers' purported role under the Colorado Act is to advocate for voluntary compliance by Colorado residents with Colorado's use tax system. The retailer's role is to issue warnings and "important sales tax information" notices, in forms specified by Colorado, at the retailer's own expense. The out-of-state retailers do not actually receive or collect anything. Colorado's scheme of foisting upon out-of-state retailers the burden of educating taxpayers about the use tax may be a cost-effective and politically expedient means of educating taxpayers, but it is not "collection," or even a "collection method."

Even the Tenth Circuit appears to agree that the TIA cannot reasonably be applied to <u>any</u> challenge to what the state might deem a collection method, but it makes a peculiar distinction to bring this case within the statute's scope:

> we do not interpret the TIA as applying to any action challenging a state law

> that could possibly secure tax payment. But here DMA challenges laws enacted to notify consumers of their duty to pay use tax and to garner information on consumer purchases to ensure tax compliance through audits. Its lawsuit targets measures that attempt to ensure tax compliance in the first instance, not sanctions imposed after a taxpayer has admittedly refused to pay taxes.

Brohl, 916. The temporal distinction on which the foregoing passage relies is utterly without support in the statutory text. If anything, the term "collection" is a better fit with post-assessment efforts than activities designed to help ascertain individual consumers' liability and convince them to be proactive about filling the state's coffers.

The purpose of the legislation and regulations at issue here is to emphasize to consumers that they may be liable for taxes, in the hope that they will be more motivated to pay them. See, *Brohl* at 908 (citing Colorado's brief in the Tenth Circuit for the proposition that transactional notice "serves to educate consumers about their use tax liability with the aim of increasing voluntary compliance," the annual notice "arms the consumer with accurate

information to facilitate reporting and paying the use tax," and the report to the Department of Revenue "is designed to increase voluntary consumer compliance with the state tax laws because consumers know that a third party has reported their taxable activity to the taxing authority"). These functions might be characterized as educating, persuading, coercing, or threatening. They cannot reasonably be called "collection."

C. The Tenth Circuit's Interpretation of the TIA Fails to Take Into Account the Significance Of the "Plain, Speedy and Efficient Remedy" Qualifier

In addition to its mistaken interpretation of "restrain" and "collection," the Tenth Circuit erred in failing to appreciate the importance of the qualifier "where a plain, speedy and efficient remedy may be had in the courts of such State" to the interpretation and application of the TIA. 28 U.S.C. § 1341. The clause would have been superfluous if the statute had been meant to apply to a non-taxpayer litigating to avoid compliance costs. Non-taxpayers do not need special remedies, as the relief they would seek does not include recovery of taxes paid under protest.

The fact that Congress specifically called for federal courts to evaluate the efficiency and adequacy of state law remedies strongly suggests that the statute is meant to apply only to taxpayers in particular. This Court expressly recognized this in *Hibbs v. Winn*, 542 U.S. 88 (2004):

> this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes. We have read harmoniously the § 1341 instruction conditioning the jurisdictional bar on the availability of "a plain, speedy and efficient remedy" in state court. The remedy inspected in our decisions was not one designed for the universe of plaintiffs who sue the State. Rather, it was a remedy tailormade for taxpayers.

Hibbs, supra, 542 U.S. at 107 (citations omitted).

The Tenth Circuit did not address directly the language in *Hibbs* suggesting that the "plain, speedy and efficient" language reflected Congressional intent to limit application of the statute to taxpayer actions. Instead, the Tenth Circuit concluded that out-of-state retailers could back their way into a "plain, speedy and efficient" remedy by relinquishing

their *Quill* rights and collecting sales tax. *Brohl* at 919-20. In that case, provided they paid sales tax out of their own pockets rather than passing them to consumers as retailers generally do, they could seek a refund on the theory that their payment of the sales tax was the product of coercion due to the unconstitutional notice and reporting obligations. *Id.* Setting aside the other problems with this "remedy,"[2] it is further proof of the inapplicability of the TIA to non-taxpayers. Even the Tenth Circuit appears to recognize that the only way the statute really fits this scenario is if out-of-state retailers surrender their *Quill* rights and become taxpayers.

D. The Tenth Circuit's Interpretation of the TIA Conflicts With the Legislative History of the TIA

This Court has recognized that the TIA derived from the Anti-Injunction Act (AIA), which

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[2] If an out-of-state retailer exercising its *Quill Corp.* rights discharges the sales and use tax liability of a Colorado customer by paying the State out of its own pocket, the amount paid on behalf of the Colorado customer ordinarily would be includible in the customer's gross income for purposes of the individual federal income tax. *See, e.g., Old Colony Trust Co. v. Commissioner of Internal Revenue,* 279 U.S. 716 (1929) (amount of employer's payment of employee's federal income tax liability held to be includible in employee's gross income).

places a similar limit on challenges to federal tax enforcement and collection. *Jefferson County v. Acker*, 527 U.S. 423, 434-435 (1999). As this Court explained in *Hibbs*, "[i]n both [the AIA] and [the TIA], Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* . . . were outside Congress' purview." *Hibbs* at 104 (emphasis in original; internal citations omitted). This Court summarized the legislative history of the TIA as follows:

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

Id. at 104-05 (internal quotation and citation omitted).

Notwithstanding this language, the Tenth Circuit cited *Hibbs* for the proposition that the

legislative history of the TIA suggested it was enacted to meet "state-revenue-protective objectives." *Brohl* at 911 (citing *Hibbs*, 104.). However, the two "state-revenue-protective objectives" articulated in *Hibbs* were preventing out-of-state firms from gaining an advantage over in-state competitors by litigating in federal court and preventing taxpayers from "withholding large sums, thereby disrupting state government finances." *Hibbs* at 104. Neither objective is served by applying the TIA in this case. In-state retailers are not subject to the challenged requirements and neither the DMA nor its members are taxpayers. While the legislative history of the TIA supports the view that Congress passed the statute to prevent taxpayers from evading collection efforts by invoking federal jurisdiction, there is no evidence that Congress was worried about non-taxpayers asserting their rights in federal court in response to a state forcing them to help collect other people's taxes.

II. The Tenth Circuit's Holding Is In Conflict With This Court's Dormant Commerce Clause Jurisprudence and Would Result in an Erosion of the Rights Articulated in *Quill Corp*.

If states are entitled to evade federal review of use tax schemes that outsource administration and collection to unwilling out-of-state retailers, there is likely to be a drift toward piling ever more significant burdens on out-of-state retailers. Two troubling aspects of the Tenth Circuit's opinion suggest such an outcome: (1) the deference to state law and practice to define key terms of the TIA, such as what is a "tax" and what is "collection;" and (2) the conclusion that the absence of a plain, speedy and efficient remedy is no impediment to TIA coverage as long as the state leaves out-of-state retailers the option to forfeit their *Quill* rights.

A. Undue Deference to State Law Interpretation of the Text of a Jurisdiction Stripping Statute Will Create Incentives for States to Discriminate Against Interstate Commerce

As explained above, the TIA limits the jurisdiction of federal courts. As such, it must be

interpreted as a matter of federal law, with consistent federal law definitions of each statutory term. If the Tenth Circuit's deference to state interpretation were permissible, it is likely that the rights of out-of-state retailers recognized in *Quill Corp.* would be compromised. States would have an incentive to saddle out-of-state retailers with ever-more-burdensome obligations, secure in the knowledge that federal courts are unavailable as a forum for raising Commerce Clause objections. The political expediency of retaliating against out-of-state firms for exercising their *Quill Corp.* rights, to the benefit of in-state competitors, may lead states to engage in precisely the discrimination against interstate commerce that the Commerce Clause was designed to eliminate.

Making federal courts available to out-of-state retailers challenging state action as non-taxpayers serves much the same purpose as diversity jurisdiction. Diversity jurisdiction serves as a safeguard against "local attachments" by providing an impartial federal tribunal for resolving disputes between citizens of different states. Federalist No. 80. *See also, Bank of the United States v. Deveaux*, 9

U.S. (5 Cranch) 61 (1809). The need for a federal forum in cases of disputed state action against foreign non-taxpayers is even greater.

Without a presence in the state, and being non-taxpayers pursuant to *Quill Corp.*, out-of-state retailers are particularly vulnerable to exploitation. If the Tenth Circuit's opinion stands, state governments will be permitted to impose regulatory burdens exclusively on out-of-state retailers and also to characterize such burdens as part of a taxation scheme and thus immune from federal challenge. While state courts are fully capable of adjudicating constitutional claims, if states are empowered to manipulate the availability of a federal forum, discrimination against and exploitation of out-of-state retailers is likely. Just as diversity jurisdiction provides a safeguard against local bias, interpretation of the TIA pursuant to uniform federal standards that recognize the right to a federal tribunal in cases not involving taxpayer disputes is an essential safeguard against violation of the Commerce Clause rights of foreign firms.

B. The Tenth Circuit's Conclusion That Out-of-State Retailers Can Avail Themselves of a Plain, Speedy and Efficient Remedy By Waiving Their Rights Under *Quill Corp.* and Collecting Sales Tax Undermines This Court's Commerce Clause Jurisprudence

Perhaps foreshadowing the Hobson's Choice that would confront out-of-state retailers as a result of its expansion of the TIA, the Tenth Circuit suggested an out-of-state retailer could simply pay sales tax and seek a refund. *Brohl* at 919. It acknowledged a major caveat: if the out-of-state retailer wishes to seek relief on its own behalf, it cannot collect tax from consumers. *Brohl* at 919, n. 9.[3] In other words, to avail itself of the benefits of

[3] The statutory section cited by the Tenth Circuit, Colo. Rev. Stat. Section 39-26-703, applies to claimed "exemptions." Colorado law provides that "[t]here is a strong presumption that taxation is the rule and exemption the rare exception." *S.W. Catholic Credit Union v. Charnes*, 665 P.2d 626 (Colo. App. 1982). It is therefore not clear whether a Commerce Clause claim could be brought pursuant to Section 39-26-703 at all, and it appears that even if so, a "strong presumption" would stack the deck against the party seeking to vindicate its Commerce Clause rights.

this method, out-of-state retailers would have to pay all sales tax out of their own pockets.[4]

Assuming for the sake of argument that waiving their rights under *Quill Corp.* and the dormant Commerce Clause is a viable means by which out-of-state retailers may manufacture a "plain, speedy and efficient remedy" under state law, such a scheme highlights the flaw in the Tenth Circuit's theory. This Court's Commerce Clause jurisprudence, reflected in *Quill Corp.*, is a constitutional safeguard against state government interference with interstate commerce. Interpreting the TIA so as to encourage and perhaps even require out-of-state retailers to give up rights secured by the Commerce Clause turns federalism on its head. If federal jurisdiction under the TIA is malleable, subject to expansion at the will of the states, interstate commerce will be subject to exactly the

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[4] Alternatively, the Tenth Circuit proposed that out-of-state retailers refuse to comply with their notice and reporting obligations and challenge the penalties imposed. *Brohl* at 920. However, the statutory language cited by the Tenth Circuit is premised on the filing of a tax return and applies only to a "taxpayer." Colo. Rev. Stat. § 39-21-103. It does not appear that Colorado has any provisions ensuring a "plain, speedy and efficient" remedy for a non-taxpayer who refuses to pay penalties.

local disruption that the dormant Commerce Clause was designed to eliminate.

While the TIA remains an important protection for state autonomy in the area of tax administration and collection, its scope is ultimately a matter left to federal control. This does not leave the states at the mercy of federal encroachment. As this Court has observed, "the Framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). An interpretation of the TIA that is destined to result in a steady chipping away at the rights secured by this Court's Commerce Clause precedents must be avoided.

CONCLUSION

The TIA does not limit federal jurisdiction over a federal law challenge to Colorado's attempt to force non-taxpayers to participate in the state's efforts to increase use tax revenues. The judgment below should be reversed and the matter remanded.

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