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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
United States Court Of Appeals
For The Tenth Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. RESPONDENT PROVIDES NO SUPPORT FROM THE TEXT OF THE TAX INJUNCTION ACT FOR THE TENTH CIRCUIT'S RULING.

A. The Respondent's Focus On The Colorado Act's Purported "Importance" Is Misplaced.

Rather than addressing the proper interpretation of the text of the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), the Respondent devotes her attention to arguing the merits of limitations on state taxing power under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), an issue not before the Court and which this Court has made clear Congress is best able to resolve. *Id.* at 318.

At the same time, the Respondent and her supporting amici insist, in exaggerated terms, upon the "integral" nature of the consumer notice and information reporting requirements of Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d) ("Colorado Act"), as though this unprecedented law was a fixture of every state tax system. The Respondent grossly inflates the importance of the Colorado Act's requirements to the Colorado sales and use tax regime.

Most tellingly, the Respondent has never, prior to her appearance before this Court, argued that the Colorado Act is an important component of the State's tax system. To the contrary, in her briefs to the Court of Appeals, the Respondent acknowledged the non-tax

nature of the Colorado Act's notice and reporting requirements:

> *By treating the information reporting requirements of Colorado's Law like a tax*, the district court may have *unnecessarily implicated the Tax Injunction Act* ("TIA"). 28 U.S.C. § 1341 (providing federal 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"). In any event, this Court may reverse the district court's injunction *without running afoul of the TIA or comity principles*.

Appellant's Brief at 31 n.3 (italics added). The Respondent never sought dismissal in the lower courts based on the TIA precisely because the notice and reporting requirements of the Colorado Act are *not* integral to Colorado's use tax system, or even "tax" requirements, at all. The Respondent's newly-adopted position regarding the centrality of the Act's requirements to Colorado's tax system rings hollow.

The Colorado Act should be placed in proper perspective. Enacted in 2010, it is the only state law of its kind. No other state requires out-of-state (or in-state) retailers to file reports of their customers' purchasing activity with the state tax agency. The South Carolina statute cited by the Respondent (Resp. Br. at 7), which she suggests imposes a consumer notification requirement "similar" to the Annual Purchase Summary, was adopted after the

Colorado Act and targets a "class of one" (*i.e.*, Amazon.com) for a limited period of time.[1] While four states have adopted consumer notice provisions akin to the Transactional Notice, each with its own particular features, *see* Okla. Stat. Ann., tit. 68, § 1406.1(A) (2010); S.D. Codified Laws § 10-63-2 (2011); Vt. Stat. Ann., tit. 32, § 9783 (2011); Ky. Rev. Stat. Ann. § 139.450(2)(a) (2013), none of these other states' laws contains a requirement that retailers send annual notices to consumers or report their customers' purchasing histories to the department of revenue. The Colorado Act stands alone.

Nor does the Colorado Act have the dramatic budget implications now accorded to it by the Respondent. Even the rosy projections contained in the fiscal note for the Colorado Act, revised after DMA filed suit, estimated initial annual revenue of only $12.5 million. J.A. 114.[2] This was less than two-tenths

[1] The South Carolina statute applies to a person who, between December 31, 2010 and January 1, 2013: (1) placed a distribution center in the state; (2) made a capital investment of at least $125 million in the state; and (3) created at least 2,000 full-time jobs in the state. S.C. Code Ann. § 12-36-2691(C) (2011). The statute expires on January 1, 2016. *Id.* § 12-36-2691(D).

[2] The revenue projections in the fiscal note, which are also relied upon by the Respondent and her supporting amici, are based on a 2009 study by William Fox. The estimates put forward by Professor Fox have been challenged as grossly inaccurate by a study authored by economists Jeffrey Eisenach and Robert Littan. *See* C.A. App. 850-909 (J.A. 6 (Dckt. 56-8)). The Fox study has not been updated to take account of developments since its issuance in 2009, including the continued growth

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of one percent (0.18%) of Colorado's total projected tax revenues. *See* J.A. 112 (revenue of $6.8 billion projected for fiscal year 2011).

In fact, the revenue to be realized from the Colorado Act had little to do with the law's enforcement. Instead, as admitted by the Department's Tax Policy Director, the anticipated consequence of the new legislation would be to force remote sellers to surrender their constitutional protections under *Quill* and collect state use taxes, rather than hand over sensitive customer information. *See* C.A. App. at 132, 146.

The fact that the Department's primary objective was to coerce out-of-state retailers to collect state taxes is further demonstrated by the failure of Colorado to adopt simple measures to increase taxpayer compliance adopted by many states. Most notably, unlike more than 25 other states, Colorado did not include a line on its individual income tax returns for the reporting of use tax on out-of-state purchases. In addition, Colorado is the only state not participating in the sales tax simplification efforts of the Streamlined Sales and Use Tax Agreement ("SSUTA"), *see* http://www.streamlinedsalestax.org/uploads/images/state%20map%202014_1_1.jpg, a multi-state compact whose limited sales/use tax-simplification measures

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of the SSUTA and the dramatic increase in tax collection by Internet behemoth Amazon.com, which now collects sales tax in 23 states.

became the basis for federal legislation passed in the United States Senate in May 2013. S. 743, 113th Congress (2013), https://www.congress.gov/bill/113th-congress/senate-bill/743. Nor has Colorado sought to increase use tax reporting through its electronic filing system for individual income tax, which over 80% of Colorado taxpayers use each year, nor has it adopted a default use tax calculation to simplify tax reporting by consumers.

B. The Respondent Neither Defends The Tenth Circuit's Interpretation Of The TIA's Text, Nor Provides A Well-Reasoned Alternative Interpretation.

More to the point, although the central issue on appeal is the proper interpretation of the TIA's text, the Respondent gives the task of statutory interpretation only cursory attention. Like the Tenth Circuit, the Respondent fails to recognize that the operative words in the TIA are terms of art, and must be construed in context and with reference to the Act's underlying purpose and history of enforcement. The Respondent complains that the DMA's careful reading of the TIA's text is "overly literal and technical" (Resp. Br. at 28), but demonstrates no weaknesses in the DMA's interpretive analysis.

With regard to the TIA's first operative clause ("enjoin, suspend or restrain"), which was the basis for the Tenth Circuit's opinion below, Pet.App. at A-16, the Respondent disavows the need for any

interpretation at all. In sharp contrast to the DMA's examination of the statutory text, the Respondent devotes a single sentence to describing the Tenth Circuit's reasoning, and then argues that because the DMA sought injunctive relief, the precise meanings of "enjoin," "suspend" and "restrain" are immaterial. Resp. Br. at 17-18. The Respondent's conclusion that no analysis of the TIA's terms is required misses the point.

It is self-evident that the DMA sought an injunction. Its claims are a straightforward challenge to the constitutionality of the notice and reporting requirements of the Colorado Act. On their face, however, the Transactional Notice, Annual Purchase Summary, and Customer Information Report are *not*, in the words of the TIA's second operative clause, the "assessment, levy or collection" of a tax. Presented with a state law whose requirements are not the types of taxing functions that Congress determined should only be challenged through available state procedures, the Tenth Circuit resorted to an expansive reading of the term "restrain." As the DMA demonstrated, the Tenth Circuit's reliance on modern dictionaries to define "restrain" ignores the aim of the TIA as a limitation on the grant of equity power to the district courts, fails to take account of the TIA's similarities, and its differences, with prior statutes of similar import, and fails to give independent meaning to each of the terms chosen by Congress. The Respondent presents no defense for the cornerstone of the Tenth Circuit's reasoning.

With regard to the TIA's second operative clause ("assessment, levy or collection") – terms the Tenth Circuit failed to define – the Respondent likewise provides no clear interpretive rationale for the statutory text. *See* Resp. Br. at 18-19. Apparently arguing that the word "assessment" in the TIA encompasses actions by parties other than the taxing authority (such as a taxpayer's "self-assessment" of income tax), the Respondent misconstrues this Court's discussion of the term "assessment" in *Hibbs v. Winn*, 542 U.S. 88, 100-02 and n.3 (2004). There, the Court commented that for income taxes, although a taxpayer may "self-assess" the tax in the first instance, the technical term "assessment" refers to the action *by the taxing authority*, not any action by the taxpayer. *Id.* at 100 n.3; *see also* 542 U.S. at 115 (Kennedy, J., dissenting) ("The recording of the liability on the Government's tax roll is itself an assessment" without regard to who performed the underlying calculation). As the Court recognized, the "assessment" of a tax has distinct legal significance. The assessment of a tax by revenue officials triggers the taxpayer's obligation to either pay the tax and/or contest it, starts the running of prescribed appeal periods and statutes of limitations, and is the basis for subsequent actions to collect the tax. *Id.* at 101-02; *see, e.g., United States v. Galletti*, 541 U.S. 114, 122-23 (2004) (assessment of tax against partnership extended statute of limitations against general partners).

Indeed, the Respondent's citation to Colorado tax law illustrates the point. The Respondent suggests

that sales taxes are "assessed" by retailers at the point of sale (Resp. Br. at 19), but her proposition is contradicted by Colorado's tax code. The sales tax provision the Respondent cites, Colo. Rev. Stat. § 39-26-105, does not contain the term "assessment" or any variation thereof. Rather, Colorado's tax code makes clear – consistent with the meaning of the term as used in the TIA – that the "assessment" of the tax is the recording of a taxpayer's liability by the Department. *See* Colo. Rev. Stat. § 39-21-107(a) ("the amount of any tax . . . imposed pursuant to article [26, Sales & Use Taxes] . . . shall be assessed within three years after the return was filed . . . and no assessment shall be made . . . after the expiration of such period") (ellipses and brackets added); *see also* Colo. Rev. Stat. § 39-26-204(3) (indicating procedure for assessing use tax against retailers); Colo. Rev. Stat. § 39-26-210 (use tax not to be assessed more than three years after tax was payable). A taxpayer's actions prior to the recording of the liability by revenue officials are simply not the "assessment" of the tax.

The Respondent's approach to interpretation of the word "collection" is likewise abbreviated and misguided. The Respondent chooses between two partial definitions of a related word ("collect") contained in a recently-published dictionary (Webster's International Dictionary (3d ed. 2002)),[3] without

[3] The Tenth Circuit made a similar error with respect to its interpretation of "restrain." Pet'r Br. at 22-23 (*citing Hibbs*, 542 U.S. at 116 (Kennedy, J., dissenting)).

reference to any tax code, tax treatise, or case law, and offering no examples of the kinds of "collection" activities encompassed by the TIA. Resp. Br. at 19. The meaning thus ascribed to the term by the Respondent of any "effort to receive or extract tax payments" *(id.)* is both imprecise and overly-expansive, and would require overturning cases in which the Respondent accepts federal courts as having properly exercised jurisdiction, such as *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) and *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975). *See* Resp. Br. at 32-33, 36-37.

In the end, the Respondent's reading of the TIA provides no support for the Tenth Circuit's ruling below. The bulk of her argument is disconnected from the statutory text, and instead depends upon her contention that the TIA should apply based on the "importance" of the notice and reporting requirements to Colorado's tax system as its "chosen method" for pursuing payment of use tax by consumers. However, under the TIA, not every regulatory requirement that touches upon state taxes is shielded from review in federal court.

II. THE DMA'S CLAIMS FALL OUTSIDE OF THE TIA'S JURISDICTIONAL BAR.

As demonstrated by the DMA, the words "assessment, levy or collection" in the TIA are terms of art that signify specific actions undertaken by state revenue departments to record tax liability and

pursue its enforcement. Pet'r Br. at 36-39. When these words are read together with the TIA's limitation on federal equity jurisdiction, the TIA, on its face, precludes any equitable remedy that prevents a state from registering the amount of tax due the state or proceeding to recover such sums from a taxpayer.

As this Court has consistently explained since its first exposition of the TIA in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the principle of non-interference with state affairs by federal courts sitting in equity was made most manifest in the area of state taxes. Federal courts have historically refused to grant injunctive relief to taxpayers preventing the collection of state taxes, when the state itself provided an adequate remedy. *Id.* at 297-301. The core purpose of the TIA has always been to bar federal court jurisdiction over challenges to state tax liability brought by taxpayers seeking to circumvent established state administrative procedures (typically, a process requiring payment and filing a claim for refund). Pet'r Br. 18-21.

A. Suits By Taxpayers Challenging Their Liability Lie At The Secure Core Of The TIA.

Most suits challenging state tax laws that implicate the TIA present a familiar pattern: a taxpayer (or its proxy) files a suit disputing the amount or validity of state taxes imposed (or to be imposed) upon it, seeking a federal forum that will enable the

taxpayer to bypass the prescribed procedures for contesting taxes under state law. In that great majority of tax-related cases, the TIA's broad jurisdictional barrier forecloses federal court jurisdiction, regardless of the manner in which the plaintiff seeks to frame its suit.

Indeed, in each purportedly instructive lower court decision cited by the Respondent concerning the TIA or the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), the plaintiff was the taxpayer (or a successor to the taxpayer), and not a third party. *See* Resp. Br. at 20, 24, 28 (citing cases in which TIA or AIA precluded jurisdiction, *e.g., Blangeres v. Burlington N., Inc.,* 872 F.2d 327 (9th Cir. 1989) (TIA) (taxpayer employees sought to enjoin reporting of wage information by employer); *Gass v. County of Allegheny*, 371 F.3d 134, 135-36 (3d Cir.) (TIA) (taxpayers challenged appellate board's practice of using *ex parte* evidence to assess property value), *cert. denied*, 543 U.S. 987 (2004); *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1253 (11th Cir. 2003) (TIA) (taxpayers contested assessment method alleged to result in disproportionate tax burden); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 453-54 (7th Cir. 1999) (TIA) (successor to mortgagee challenged validity of tax lien on mortgaged property); *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (TIA) (taxpayers contested seizure of cigarettes on which plaintiffs had not paid tax); *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 408 (4th Cir.) (AIA) (nonprofit organization sought to

prevent audit of its qualification for tax exempt status), *cert. denied*, 540 U.S. 825 (2003); *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (AIA) (taxpayer sought to prevent use of evidence gathered in criminal investigation as basis for tax assessment); *Kemlon Products & Dev. Co. v. United States*, 638 F.2d 1315, 1318 (5th Cir.) (AIA) (taxpayer contested IRS effort to obtain information pertinent to plaintiff's tax liability from customer of plaintiff), *cert. denied*, 454 U.S. 863 (1981); *United States v. Dema*, 544 F.2d 1373, 1377 (7th Cir. 1976) (AIA) (taxpayer moved for order restraining IRS from issuing or enforcing summons for records of taxpayer), *cert. denied*, 429 U.S. 1093 (1977); *Neilson v. United States*, 674 F.Supp.2d 248, 251 (D.D.C. 2009) (AIA) (taxpayer sought to enjoin IRS from using information regarding taxpayer gathered from financial institutions)).

The DMA's claims are unlike such suits. DMA's members are not Colorado taxpayers challenging the tax liability of any person, nor does DMA seek review in federal court to bypass an administrative remedy established by the State.[4] Moreover, the Colorado

[4] The Colorado Act includes no procedures for appeal by affected retailers. The Tenth Circuit incorrectly concluded that Colorado provides an administrative appeal under the tax or penalty refund provisions of the Colorado tax code, as the DMA demonstrated in its Petition for Rehearing En Banc. *See* J.A. 23. Neither of the administrative remedies hypothesized by the Tenth Circuit is applicable. *See id.* DMA has not, however, contested the availability of a "plain, speedy and efficient

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Act's requirements do not constitute the "assessment, levy or collection" of a state tax. The DMA's challenge to these regulatory requirements is straightforward and does not obscure an alternative, tax-motivated objective.

B. The TIA's Language And Purpose Provide The Framework For Determining Those Cases In Which Federal Jurisdiction Is Barred.

In evaluating whether a federal court may exercise jurisdiction over a suit that touches upon state taxes, the language of the Act, along with its well-established purpose and long history of enforcement, must provide the proper framework:

- First, does the lawsuit fit within that category of cases which comprise the broad core of the TIA, *i.e.*, a suit by a taxpayer (or someone suing on the taxpayer's behalf) challenging either his tax liability or a state's effort to recover tax amounts due the state, by a means other than the established state procedure for challenging state taxes?
    - If the answer is "Yes," then the TIA applies to bar federal court jurisdiction. *See, e.g., Tully v. Griffin*, 429

remedy" under Colorado's declaratory judgment statute, Colo. Rev. Stat. § 13-51-101 *et seq.*

U.S. 68 (1976); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

- If the answer is "No," *i.e.*, the suit is either filed by a non-taxpayer or by a taxpayer who does not directly contest his state tax liability, then the TIA may still preclude federal court jurisdiction, in the following circumstances:

    - If a non-taxpayer plaintiff is suing to oppose another person's state tax liability, then the TIA will bar federal court jurisdiction. *See, e.g., Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007) (direct challenge to license plate tax paid by motorists other than plaintiffs).

    - If the plaintiff is a taxpayer, who, rather than directly challenging the recording or enforcement of his tax liability, instead brings an action that anticipates the assessment, levy or collection of his taxes, or employs clever pleading in an effort to avoid the application of the TIA, then the TIA will also preclude federal court jurisdiction. *See, e.g., Blangeres v. Burlington N., Inc.*, 872 F.2d 327 (9th Cir. 1989) (employees' suit to bar reporting of earnings information

> in order to preclude income tax assessment); *Czajkowski v. Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977) (action to prevent collection of cigarette tax by depriving state officials of funds and authority to enforce the tax).

The above framework makes clear that the TIA is not a bar to federal court jurisdiction where all of the following elements are present:

1. The plaintiff is not a taxpayer;
2. The plaintiff is not opposing his own or any other person's tax liability (*i.e.*, the plaintiff is an "outsider"); and
3. The plaintiff is challenging a regulatory burden that is not itself the "assessment, levy or collection" of a tax.

The fact that a regulation may be collateral to a state's tax regime, or intended to aid in the administration of a state's tax system, does not convert that regulation into "the assessment, levy or collection" of a state tax. The TIA sets a boundary line for federal court jurisdiction. State laws directed at non-taxpayers, along with the obligations that arise under them, that may be "related to" or "preliminary to" or "complementary of" state tax laws are not the same as the exercise of a state's authority to assess, levy or collect taxes. While such third-party obligations may be viewed as supportive of state tax laws, they

nonetheless fall outside the jurisdictional barrier established by the TIA.

C. Suits By Outsiders Are Unlikely To Trigger The TIA's Jurisdictional Bar.

As the Court recognized in *Hibbs* and explained in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 430 (2010), suits by "outsiders" to a state tax, whose liability is not a relevant factor in the case, are a "poor fit" for the TIA. The Respondent agrees that a plaintiff's status as an outsider is relevant to the applicability of the TIA, but disputes that the DMA qualifies as an outsider to the Colorado use tax, on the grounds that its members have relevant information regarding taxable transactions. Resp. Br. at 32. The Court in *Levin* made clear, however, that the plaintiffs in that case were not "outsiders," because their suit expressly contested the measure of their tax liability in comparison to their competitors' liability. *Id.* at 430. DMA and its members, however, do not contest their own tax liability or the liability of their competitors or customers.

The Respondent's proposed "possesses relevant information" or "party to the transaction" standard fails to provide a clear rule and would lead to uncertainty in the application of the TIA by district courts. The Respondent's proposed test fails to provide a basis for differentiating between retailers and credit card companies or payment processors with respect to the use tax. A credit card issuer is not a party to a

sales transaction for which it provides the medium of payment, but it possesses all, or nearly all, of the same information a retailer maintains concerning a consumer transaction (identity and address of purchaser, amount of transaction, and in some cases products purchased). Furthermore, if having relevant information were the test, it is unclear what type or amount of information the third party must possess before its claims are barred from review by a federal court. The Respondent argues that the First Circuit's decision in *UPS* is compatible with her proposed rule, because the common carrier in that case was not a party to the underlying sales transaction. Resp. Br. at 32-33. But a common carrier will always have information reflecting the identity of the purchaser receiving the product, the lack of which is the primary impediment claimed by the State in being able to enforce its use tax. Respondent also agrees that *Florida Bankers Ass'n v. U.S. Dep't of Treasury*, 2014 WL 114519 (D.D.C. Jan. 13, 2014) was correctly decided, even though the information sought by the IRS for exchange with foreign governments directly promoted U.S. tax compliance by identifying false claims of non-residency made by taxpayers "in order to avoid U.S. taxation." *Id.* at *3. A standard associated with the amount of information possessed by a non-taxpayer is not workable as a jurisdictional rule.

Contrary to the Respondent's assertion, this Court has never held that the TIA applies "regardless of the identity of the plaintiffs." Resp. Br. at 27. *Franchise Tax Board of California v. Alcan Aluminum,*

Ltd., 493 U.S. 331 (1990), does not stand for the proposition that the status of the plaintiff is irrelevant, but rather for the core principle that the TIA bars suits by taxpayers and their proxies that seek to contest tax liability and have an available state remedy. The indirect sole shareholder in *Alcan* was plainly not an "outsider" because it had complete control over the taxpayer. *Id.* at 338-39. The DMA's members, by contrast, have no control over their customers. The DMA, moreover, does not contest the use tax liability of its members' Colorado customers or the validity of the use tax – it challenges the regulatory obligations imposed by the Colorado Act directly upon out-of-state retailers. Like *Hibbs*, the DMA's suit is a poor fit for the TIA.

III. CASES INTERPRETING THE AIA DO NOT DICTATE DISMISSAL OF THE DMA'S SUIT.

The Respondent's reliance upon cases interpreting the AIA is misplaced. The AIA, while sharing a similar purpose with the TIA of requiring plaintiffs to pursue available administrative remedies for challenging their tax liability, is broader and more restrictive than the TIA. The AIA's application to certain suits challenging IRS actions that would "culminate in the assessment" of taxes (Resp. Br. at 23-24) does not warrant dismissal of DMA's claims.

Legislating against the backdrop of the AIA, Butler Act, and Johnson Act, Congress chose different

words in the TIA, appropriate to its particular purpose of limiting federal court jurisdiction over suits by taxpayers challenging their state tax liability. The phrase "for the purpose of restraining" in the AIA was adopted by Congress in the Butler Act in 1927, only ten years prior to passage of the TIA. Rather than employing that phrase again in the TIA, however, Congress selected the more precise terms of equity jurisdiction, "enjoin, suspend or restrain," which it had used in the Johnson Act in 1934. At the same time, Congress did not choose to include words to expand the second operative clause of the TIA in the same manner it did in the Johnson Act with respect to orders of state utility commissions. *See Hibbs*, 542 U.S. at 105 n.7 (noting that the Johnson Act's use of "the operation of, or compliance with"). Had Congress intended the broader meaning advanced by the Respondent, it could have included (or could now, in revising the TIA, readily add) words to that effect, *e.g.,* "The district courts shall not enjoin, suspend or restrain *any provision related to* the assessment, levy or collection of any tax under state law."

The AIA's limitation on access to any court "for the purpose of restraining" the assessment or collection of any federal tax gives the AIA a more expansive reach with respect to suits by taxpayers and non-taxpayers alike. Pet'r Br. at 32-34. In *Bob Jones University v. Simon*, 416 U.S. 725, 739 (1974) and *Alexander v. 'Americans United,' Inc.*, 416 U.S. 752, 760-61 (1974), the Court found that the institutions in each case brought suit in order to reduce (*i.e.,* "for

the purpose of restraining") the tax liability of interested third parties (the plaintiffs' contributors), and held that their suits were barred under the AIA's plain language.

In contrast, the Court's TIA jurisprudence has recognized that a suit brought by plaintiffs who do not challenge their own tax liability are not outside of the district courts' jurisdiction when the suit implicates neither the TIA's plain terms, nor its underlying purposes. *Hibbs*, 542 U.S. at 104-08; *Levin*, 560 U.S. at 430 (discussing *Hibbs*). In this case, the DMA challenges *no one's* tax liability, so even apart from the differences in language between the AIA and TIA, *Bob Jones* and '*Americans United*' do not support extending the TIA's reach to a case where neither the Act's language nor its purpose preclude federal court jurisdiction.

The differences in scope between the AIA and TIA are consistent with the underlying objective of Congress associated with each statute. The AIA was adopted pursuant to Congress's taxing power as part of the internal revenue code. Its purpose was to eliminate court challenges altogether, in both state and federal courts, in all but those cases expressly exempted by Congress. As the Court has emphasized, the necessity of a "complete system" of taxation requires that the manner in which taxes may be challenged must be determined exclusively by Congress. *Taylor v. Secor*, 92 U.S. 575, 613 (1875). In enacting the TIA, Congress was exercising its power to determine the jurisdiction of the lower federal

courts, but was not purporting to craft a closed system of state taxation. The TIA contemplates both that equitable actions (in state court) may be an available remedy, if the state system so provides, and that suits in federal court may be required, where the state does not afford a "plain, speedy and efficient remedy." The AIA is, by its very nature, a more sweeping prohibition against challenges to federal taxes than is the TIA with respect to state taxes.

IV. THE RESPONDENT FAILS TO DISTINGUISH CONFLICTING CIRCUIT COURT AUTHORITY.

The Tenth Circuit's decision below is at odds with the First Circuit's decision in *UPS* and the Second Circuit's decision in *Wells*. The Respondent, however, does not argue that either case was wrongly decided. *See* Resp. Br. at 36-37. Thus, with respect to the two leading circuit court decisions that define the limits on the meaning of "collection" of a tax for purposes of the TIA, and which contradict the Tenth Circuit's conclusion that the TIA applies to measures which merely promote voluntary compliance by taxpayers, *see* Pet'r. Br. at 39-45, the Respondent fails to refute the reasoning of either court.

Instead, she suggests that the regulation at issue in each case was more coercive than the notice and reporting obligations imposed on out-of-state retailers under the Colorado Act. Resp. Br. at 36-37. There is no question that the Colorado Act is coercive. The law

does not afford affected retailers a "choice," as the Respondent repeatedly insists; it compels retailers to forego their constitutional rights under *Quill* or face adverse consequences. But whether the Colorado Act is more, or less, coercive than the laws at issue in *UPS* and *Wells* is not the point. None of these laws' requirements constitute the "collection" of a tax within the meaning of the TIA.

V. THE DOCTRINE OF COMITY DOES NOT APPLY.

The TIA is rooted in the principles of comity. *Levin*, 560 U.S. at 423-24 (discussing the origins of the TIA). While the former is a jurisdictional rule, the latter is a prudential doctrine. *Id.* at 432. The Respondent, rather than asserting comity (or the TIA), elected to "seek an expedited ruling" from the courts below. *See* Resp. Opp. to Pet. for Cert. at 5-6 n.1; Appellant's Brief at 31 n.3. Therefore, this Court need not address comity now. *Levin*, 450 U.S. at 432 (federal courts need not consider comity where the State itself elects to proceed in a federal forum).

Comity is not a bar to the DMA's claims in any event. None of the interests which underlie the doctrine of comity are implicated by its claims. Pet'r Br. at 59-64. The DMA's suit does not challenge a state tax assessment, is not bypassing state procedures, presents no issues requiring the interpretation of state law, and will not affect tax administration in any manner differently than would an identical

action in state court. Moreover, the Colorado Act targets exclusively out-of-state, non-taxpayers. The DMA's challenge to the law's regulatory requirements is straightforward and does not obscure an alternative, tax-motivated objective. The concerns of non-interference with state affairs that motivate comity do not apply, and thus "nothing would be lost in the currency of comity or state autonomy by permitting [this case] to proceed in a federal forum." *Levin*, 560 U.S. at 431.[5]

The Respondent focuses her comity argument on the factors discussed in *Levin.* In order for comity to dictate dismissal of the DMA's suit, however, no single *Levin* factor is sufficient; it is the "confluence" of all the factors that "demand[s] deference to the state adjudicative process." *Levin*, 560 U.S. at 431-32 (brackets added). None of the *Levin* factors applies here.

Of "key importance" is the third *Levin* factor, *i.e.,* whether the claims in question afford alternative forms of possible relief by a reviewing court. *Id.* at 426-28. The Respondent argues that there are multiple possible remedies because a Colorado state court could "sever any discrete portion" of the Colorado Act that is ruled to be unconstitutional. Resp. Br. at 43.

[5] Moreover, where comity is not a bar to the exercise of federal court jurisdiction, the TIA cannot be. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (the TIA is but a "partial codification" of comity).

Severance, however, is not an option unique to state courts; a federal court also has an obligation to examine severance. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-31 (2006) (in finding that a portion of a state law is unconstitutional, court must determine whether severance is appropriate). If severance of one or more of the elements of the Colorado Act is required to sustain its constitutionality, a federal court will enter that remedy.

The Respondent's arguments regarding the other *Levin* factors are equally unavailing. Respondent claims, with regard to the second factor, that the DMA's suit seeks to secure both competitive and litigation advantages for its members. Resp. Br. at 42-43. To the contrary, DMA seeks to prevent Colorado from imposing unconstitutional regulatory requirements upon its affected members. As for the first *Levin* factor, the Respondent claims that deference to the state courts is required because the DMA's suit does not concern any fundamental right. *Id.* at 42. The Court in *Levin* noted, however, that retention of federal court jurisdiction is appropriate in cases involving economic legislation that "employ[s] classifications subject to heightened scrutiny *or* impinge[s] on fundamental rights." 560 U.S. at 426 (italics and brackets added). The Colorado Act, on its face, imposes different obligations on out-of-state retailers than it imposes on in-state retailers, thus triggering "strictest scrutiny" under the Commerce Clause. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 101 (1994) (facial discrimination

triggers scrutiny so stringent it may be a "fatal defect") (citation omitted). Federal courts need not give deference to state courts when reviewing state laws that discriminate against interstate commerce on their face. The doctrine of comity is not applicable in this case.

CONCLUSION

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

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Respectfully submitted,

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