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No. 13-1032

In the Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.

BARBARA BROHL, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

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

RESPONDENT'S BRIEF

JOHN W. SUTHERS
Attorney General
DANIEL D. DOMENICO
Solicitor General
MELANIE J. SNYDER*
Deputy Attorney General
GRANT T. SULLIVAN
MICHAEL FRANCISCO
Assistant Solicitors General
1300 Broadway, 8th Floor
Denver, Colorado 80203
(720) 508-6335
**Counsel of Record*
Melanie.Snyder@state.co.us

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 (the "TIA"), provides: "[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." Petitioner Direct Marketing Association's ("DMA") members include Internet retailers who, under Colorado's Act Concerning the Collection of Sales and Use Taxes on Sales Made by Out-of-State Retailers (the "Collection Act"), have the choice of either (1) remitting sales and use taxes on their sales to Colorado consumers, or (2) providing those customers, and the State, with information that allows accurate assessment and payment of those taxes. DMA filed this federal suit challenging the State's authority to require Internet retailers to make that choice. The question presented is:

> Whether the TIA bars the federal courts from enjoining Colorado's efforts to assess and collect taxes it is owed through the Collection Act.

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INTRODUCTION

Even in today's Internet age, Colorado is still home to brick-and-mortar retailers. These retailers, including both local shops (like Denver's Tattered Cover Bookstore) and national chains (like Barnes & Noble) with a physical presence in Colorado must add taxes to the price of their products at checkout and remit those taxes to the State on behalf of customers who otherwise are liable for paying them. This is true for these retailers whether the sales are made in person, online, or over the phone.

Retailers with significant sales (over $100,000 annually), but no physical presence in Colorado, however, have a choice. They can either play by the same rules as in-state retailers, *i.e.*, collect and remit Colorado sales and use tax, or they can choose instead to provide their customers and the State with the information necessary to ensure those taxes are properly assessed and collected. DMA brought this suit on behalf of those of its members who object to having to do either.

To assess, levy, and collect its sales and use tax, Colorado employs a range of measures, but generally its collections depend on the self-assessment, reporting, and payment of taxes due by purchasers or retailers of goods. In this it is hardly unique: "[O]ur tax structure is based on a system of self-reporting. There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975).

But to prevent some taxpayers, wittingly or otherwise, "from escaping taxation thus shifting heavier burdens" to others, *id.* at 146, states cannot rely on good faith and integrity alone. *See* THE FEDERALIST NO. 51 (James Madison). Even in a system of perfect good faith and integrity, tax systems would have to account for other human imperfections, including imperfect knowledge of law and fact, self-interest, and indifference. The Collection Act is Colorado's attempt to respond to this reality — without it, an estimated $172.7 million of taxes on e-commerce went uncollected in Colorado in 2012 alone. Pet.App. at A-5.

DMA sued, arguing that the Collection Act violates various constitutional rights of its members. Before Colorado had the opportunity to implement its method of assessing and collecting tax on remote sales, the federal court enjoined the State's law. The Tenth Circuit, though, recognized that the TIA removes such cases from federal courts' jurisdiction. DMA now argues that was error, regardless of the negative impact on Colorado's efforts to assess and collect taxes it is owed. The TIA does not permit federal courts to enjoin a core component of a state's taxing regime. DMA's effort to severely and artificially restrict the TIA's reach should be rejected.

STATEMENT OF THE CASE

Colorado Sales and Use Tax. Colorado enacted a sales tax in 1935 and a use tax in 1937. These taxes are complementary: sales tax occurs at the time of sale, while use tax is due on the storage, use, or consumption of property within Colorado when sales tax was not paid to a retailer. COLO. REV. STAT. §§ 39-

26-104, 39-26-202, -26-204(1).[1] The purpose of a complementary sales and use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden, regardless of whether it is acquired within or without the state. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 66 (1963). This Court long ago determined that when paired with a sales tax of the same rate, a use tax does not run afoul of the dormant Commerce Clause. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

Like other States, Colorado requires retailers with a physical presence in the state to collect sales taxes from purchasers at the time of the transaction. These retailers must comply with a series of requirements: for example, they must obtain a license; calculate the State and local tax due, including any tax exemptions; collect the tax; file a return; remit the tax to the State; and maintain various records. *See* COLO. REV. STAT. §§ 39-26-101 to -129. Retailers are further required to hold in trust any sales taxes they collect: the funds "shall be and remain public money, the property of the state of Colorado, in the hands of such retailer, and he shall hold the same in trust for the sole use and benefit of the state of Colorado" until paid to the Colorado Department of Revenue (the "Department"). *Id.* § 39-

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[1] Since DMA filed its suit in 2010, Colorado has amended its sales and use tax collection laws, but not in any way that affects the claims presented here. The sections of the Colorado Revised Statutes cited herein are the same in all material respects in the current statutes. *See* H.B. 13-1295, 69th Leg., 1st Sess. (Colo. 2013) (adopted in preparation for potential federal Marketplace Fairness Act, which has not been adopted); H.B. 14-1269, 69th Leg., 2nd Sess. (Colo. 2014) (addressing sufficient physical presence for collection of sales and use tax).

26-118(1). If retailers do not collect the tax from their purchasers, they are themselves liable for any sales and use tax due on the transaction. *Id.* § 39-26-105. Retailers who fail to collect and remit the tax may also be subject to fines and criminal penalties. *Id.* §§ 39-21-118(2), 39-26-204(4), (5).

***Bellas Hess* and *Quill*.** As a result of two decisions from this Court, sales and use tax *collection* may only be required of retailers with a physical presence in the state. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). National retailers with locations in Colorado, like Home Depot or Target, must collect and remit sales and use tax not only on in-store purchases, but also on online and other remote sales. In contrast, Internet and mail-order companies that may have a substantial electronic presence but no physical presence in Colorado, like Amazon.com, are not required to do so.

Despite their advantaged status under *Bellas Hess* and *Quill*, many Internet retailers nevertheless choose to voluntarily collect and remit Colorado sales and use tax. Of the Internet retailers listed in the publication *Top 500 Internet Retailers*, at least 39 do not have a physical presence in Colorado but still elect to collect and remit Colorado sales and use tax. C.A. App. 1932-33. Some Internet-only retailers, however, do not volunteer. Of course, their customers remain liable and must self-assess any tax they owe by filing a return and remitting the tax to the State. COLO. REV. STAT. §§ 39-26-202(1), -204(1). But because few people carefully track their online purchases or pay attention to whether they already paid sales taxes due on

transactions made over the course of a year, self-reporting has proven to be an ineffective means of tax collection. J.A. 28-30.

The Impact of *Quill* on State Tax Revenue in the e-Commerce Age. Retail technology has evolved dramatically since this Court decided *Bellas Hess* and *Quill*. In 1967, annual sales by the national mail-order industry were $2.4 billion. *Bellas Hess*, 386 U.S. at 763. Twenty-five years later, when this Court decided *Quill*, that number had ballooned to $180 billion. 504 U.S. at 329. Today, with the addition of e-commerce, remote sales have grown exponentially. In 2000, e-commerce saw annual sales of $1.06 trillion; by 2008, that number had nearly tripled to $3.16 trillion. J.A. 28.

For two reasons, states' tax collection efforts have not kept pace. First, the states' primary method of tax collection has been off-limits for a significant portion of the industry: retailers without a physical presence in a state are not required to collect and remit taxes. Second, voluntary compliance is weak. J.A. 28-30. The vast majority of purchasers, whether unknowingly or willfully, fail to pay taxes if they are not collected at the time of sale. *See id.* A 2009 analysis estimated that uncollected sales and use tax related to e-commerce nationally would grow to $11.4 billion. Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Sales Tax Revenue Losses from e-Commerce*, 50 ST. TAX NOTES 537, 540 (2009).

This exponential growth in lost tax revenue has caused significant damage to Colorado's fiscal situation. Sales and use tax collections historically account for one-third of Colorado's general fund. J.A. 112. And although taxable e-commerce transactions are

growing, sales and use tax revenue collection in Colorado *decreased* from 2008 to 2010. J.A. 113. This decrease occurred amidst the national recession, when Colorado's budget shortfalls totaled $5.2 billion. J.A. 110. These shortfalls affected a wide range of government programs, from K-12 and higher education to Medicaid. J.A. 111-12. The shortfalls also came at a critical time: when the economy falters, the demand for services goes *up*, increasing the public's need for government services and increasing the demands on Colorado's budget. J.A. 112. A 2010 report estimated that Colorado state and local governments would lose more than $170 million in 2012 alone due to residents' failure to pay sales or use tax on e-commerce purchases from out-of-state, non-collecting retailers. J.A. 30.

Colorado's Response. Colorado responded to this growing problem in 2010 by enacting the Collection Act ("Act Concerning the Collection of Sales and Use Taxes on Sales Made by Out-of-State Retailers"). Colorado's tax collection program gives non-collecting retailers (typically, remote, out-of-state retailers) the choice between collecting the sales and use tax – just like in-state retailers and national retailers with a physical presence – or complying with three information reporting requirements. Pet.App. E-1–E-4. Those three reporting requirements are as follows:

- **The Transactional Notice:** First, non-collecting retailers must notify purchasers that they may be subject to Colorado's use tax. COLO. REV. STAT. § 39-21-112(3.5)(c)(I); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2). Other States have enacted similar transactional notice requirements. *See, e.g.*, KY. REV. STAT. ANN.

§ 139.450 (2014); OKLA. STAT. ANN. tit. 68, § 1406.1 (2014).

- **The Annual Purchase Summary:** Second, non-collecting retailers must send Colorado purchasers who buy more than $500 from the retailer an annual summary listing dates, general categories, and amounts of purchases, and reminding them of their use tax obligation. COLO. REV. STAT. § 39-21-112(3.5)(d)(I) ; 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3). At least one other State has enacted similar annual purchase summary provisions. *See* S.C. Code Ann. § 12-36-2691(E)(3).

- **Customer Information Report**: Third, non-collecting retailers must send an annual report to the Department listing purchaser names, addresses, and total amounts spent. COLO. REV. STAT. § 39-21-112(3.5)(d)(II); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(4). The Customer Information Report allows the Department to engage in its normal audit and enforcement functions.

Modeled after third-party information returns like IRS Forms W-2 and 1099, Colorado's Collection Act will increase voluntary self-assessment by providing purchasers with the information they need to pay their taxes. It also encourages compliance because purchasers know that the seller has reported taxable activity to the Department. *See generally* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1738-39 (March 2010) (comparing third-party information reporting to red

light cameras, which "spur[s] compliance in the first instance"). The U.S. Treasury Department's research confirms this commonsense notion – taxpayer compliance increases dramatically when a third party reports taxable activity to the taxing authority. J.A. 43. As a result, the IRS and Treasury have implemented additional information reporting regimes in recent years. J.A. 44 (describing information reporting requirements for organizations that process credit and debit card payments and for brokerage firms regarding securities transactions).

Implementing the Collection Act. Colorado has made compliance with the Collection Act as easy as possible, which may be satisfied in a number of ways. C.A. App. 1937. For example, retailers may satisfy the Transactional Notice requirement through an online popup window at the time of an online purchase, by including the notice in a packing slip, or through other methods. C.A. App. 1941, 1964-66. The Department has also provided sample language and templates for the Transactional Notice and Annual Purchase Summary, reducing the burden on retailers. C.A. App. 1974-79. Likewise, the Department has provided easy-to-follow submission guidelines for the Customer Information Report. C.A. App. 1980-87.

None of these reporting requirements entail collection or creation of new data. Retailers *already* maintain data for the Annual Purchase Summary and Customer Information Report in their books. C.A. App. 1948-49, 1969. As the record shows, retailers track and maintain purchasing data in very detailed ways. C.A. App. 1943-45.

Colorado's law is also narrowly drawn. Retailers with less than $100,000 in gross annual sales in Colorado are exempt, meaning the vast majority of retailers in the country are exempt. 1 COLO. CODE REGS. § 201-1:39-31-112.3.5(1)(a)(iii)-112.3.5(4); C.A. App. 1940-41. DMA's own expert estimated that retailers would have to create reports for fewer than 20% of Colorado purchasers, and the percentage could be as low as 10%. C.A. App. 1970.

The burdens are well worth the cost of compliance. The estimated annual revenue associated with the Collection Act was initially estimated to be $12.5 million for fiscal year 2011-12 and is expected to increase over time as awareness of Colorado's law and enforcement increases. J.A. 117. The Collection Act is estimated to eventually close the State's ballooning sales and use tax gap by 60%. *Id.*

Proceedings Below. DMA filed this lawsuit in the United States District Court for the District of Colorado and moved for a preliminary injunction based solely on its claims under the Dormant Commerce Clause. C.A. App. 84-114. Following limited factual discovery, the district court issued a preliminary injunction. Pet. App. C-1–C-17. The district court later granted summary judgment to DMA on the same claims and permanently enjoined the Department from collecting the sales and use tax via the Collection Act. Pet.App. B-1–B-25.

On appeal, the Tenth Circuit vacated the district court's judgment based solely on jurisdiction. The court of appeals rejected DMA's argument that the TIA is limited to taxpayer lawsuits, Pet.App. A-12–A-16, and held the TIA deprived the district court of jurisdiction

to enjoin Colorado's tax collection effort. Pet.App. at A-3.

While DMA's petition for certiorari to this Court was pending, DMA filed a state court case against the Department, asserting nearly identical claims. On February 18, 2014, the state district court preliminarily enjoined Colorado's Collection Act. The parties initiated discovery and were in the midst of briefing cross motions for summary judgment when this Court granted certiorari. The state district court stayed further proceedings pending resolution of this appeal.

SUMMARY OF THE ARGUMENT

Under the TIA, "[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. Because DMA does not challenge the availability of a plain, speedy and efficient remedy in Colorado state court, the only question is whether DMA's lawsuit seeks to enjoin or restrain the assessment or collection of any tax under State law. The answer is yes.

DMA seeks to enjoin Colorado's core method of collecting state sales and use taxes on purchases made via the Internet and other remote means. This suit is not merely a challenge to a "secondary aspect of tax administration," as DMA argues. DMA Br., p.47. In the wake of *Quill*, the Collection Act is the only method the State has devised to ensure payment of sales and use taxes on a growing class of transactions that otherwise largely escape assessment and collection. Colorado's

Collection Act is far from speculative or untested — a similar model has been critical to the high level of compliance with the federal income tax. Here, in particular, the Transactional Notice and Annual Purchase Summary promote compliance by arming taxpayers with information necessary to accurately self-assess and pay their taxes. Meanwhile, the Customer Information Report allows the Department to engage in its normal audit and enforcement functions. Enjoining the Collection Act would therefore actually restrain the assessment and collection of Colorado's use tax.

DMA's lawsuit falls within the plain text of the TIA. It cannot reasonably be disputed that the first prong of the TIA is satisfied based on the fact that the district court "enjoined" and "restrained" Colorado's Collection Act. DMA's lawsuit also satisfies the second prong of the TIA, because Colorado's law is aimed at the "assessment" and "collection" of a state tax. The court of appeals was correct: under the TIA, tax "collection" logically includes Colorado's regime of reporting, self-assessment, and payment.

This Court's precedent recognizes that the text, history, and purpose of the TIA require a broad application of this jurisdictional bar to federal suits that would enjoin state revenue-collection measures. Congress designed the TIA as a "broad prophylactic" prohibition against federal court interference in the administration of state tax laws. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 524 (1981). Indeed, this Court has expressly warned that "federal courts must guard against interpretations of the [TIA] which might defeat its purpose and text." *Arkansas v. Farm Credit*

Servs. of Cent. Ark., 520 U.S. 821, 827 (1997). DMA's strained and disjointed interpretation of the TIA would do just that.

DMA's attempt to expand the limited exception in *Hibbs v. Winn*, 542 U.S. 88 (2004), such that the TIA does not apply to suits brought by "non-taxpayer" plaintiffs should be rejected. This reading cannot be reconciled with the TIA's text or its purposes. Moreover, DMA's members are not "outsiders" to the state's compensatory sales and use tax scheme. Such attempted distinctions elevate form over substance and invite artful pleading not permitted by the TIA.

Affirming the Tenth Circuit's decision will not create an unwarranted expansion of the TIA. There is much room between DMA's suggested extremes: this Court need not limit the TIA only to suits brought by taxpayers contesting their own tax liability, and neither must the Court apply the TIA to any suit challenging all aspects of state tax administration. Instead, the Court should read the TIA according to its plain meaning. Federal suits challenging a state's chosen method of tax assessment and collection are jurisdictionally barred. Applying the TIA here furthers Congress's purpose of protecting the primacy of state court review of challenges to state tax assessment and collection regimes.

Finally, DMA's lawsuit is also barred for a second, independent reason — comity. Even where the TIA may not apply, "principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell*, 450 U.S. at 525 n.33. The comity doctrine is "[m]ore embracive than the TIA" and operates to "restrain[ ] federal courts from entertaining claims for

relief that risk disrupting state tax administration." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010). DMA's lawsuit presents that very risk here. Accordingly, comity considerations "demand deference to the state adjudicative process." *Id.* at 416.

ARGUMENT

I. The Tax Injunction Act bars DMA's lawsuit because it seeks to enjoin and restrain the methods Colorado uses to assess and collect its sales and use taxes.

DMA's lawsuit seeks to deny the State of Colorado the tools it needs to assess and collect its sales and use taxes. The TIA deprives federal courts of jurisdiction to hear such an action. The lawsuit seeks to "enjoin . . . or restrain" the State from being able to "assess[ ] . . . or collect[ ]" its taxes; it thereby interferes with "the imperative need of a State to administer its own fiscal operations." *Rosewell*, 450 U.S. at 522 (quotation omitted). Contrary to DMA's suggestion, *Hibbs* did not limit the TIA's jurisdictional bar to suits brought by taxpayers seeking to avoid their own state tax liability. Moreover, DMA's members are not "outsiders" to the state's compensatory sales and use tax scheme. DMA's effort to artificially limit the scope of the TIA and thereby enable significant federal interference with state tax systems should be rejected.

A. DMA challenges the central method by which Colorado seeks to collect the taxes owed on Internet and other remote sales.

The purpose of Colorado's sales and use tax regime is to collect taxes. The Collection Act is an important part of that regime — it is Colorado's chosen method for ensuring reporting and payment of taxes on a growing class of transactions that largely escape assessment and collection without it. No party seriously disputes that the Collection Act significantly increases Colorado's collection of taxes. The primary premise of DMA's argument, that the Collection Act comprises only "non-tax, regulatory measures" that are merely a "secondary aspect of state tax administration," is simply inaccurate. Through this suit, DMA is attempting to have the federal courts interfere with an important method by which Colorado assesses and collects taxes on sales in Colorado by retailers without a physical presence in the State. The Collection Act is no more "secondary" than the federal requirement that payments to independent contractors be remitted on a Form 1099-MISC to the IRS and the contractor.

At both the federal and state levels, self-assessment and voluntary payment are an integral part of collecting tax revenue. In the federal income tax system, for example, taxpayers are responsible for "comput[ing] the tax due and then fil[ing] the appropriate form of return along with the requisite payment." *United States v. Galletti*, 541 U.S. 114, 122 (2004). The same is true of Colorado's sales and use tax system. *See*, *e.g.*, COLO. REV. STAT. §§ 39-26-105 (requiring retailers to file returns and remit sales tax)

and 39-26-204(1), (2) (requiring filing of returns by purchaser or retailer, as applicable, with payment of tax owed). This Court has acknowledged the vital importance of the self-regulatory aspects of these tax systems. *See Bisceglia*, 420 U.S. at 145; *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 60 (1974); *Comm'r v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944).

But, as the Court has also recognized, imposing a tax without any means of determining who owes how much "would be to ignore [ ] reality." *Bisceglia*, 420 U.S. at 145. The Court therefore has consistently upheld the use of compulsory tax compliance methods, like subpoenas, investigations, and audits. *United States v. Euge*, 444 U.S. 707, 711 (1980); *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984). These methods no doubt incentivize voluntary taxpayer compliance. Self-assessment coupled with third-party verification has been highly successful in the federal income tax context. The "vast majority" of tax revenue is collected from taxpayers who self-assess and remit. *See* J.A. 37 (citing estimated 84% compliance rate). The taxing authority's investigatory tools serve as "a crucial backstop in a tax system based on self-reporting." *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014). DMA's suit would allow Colorado to retain its sales and use tax, but remove from it the crucial information necessary to assess and collect it.

In the sales and use tax context, retailers have traditionally played a central role in the tax assessment and collection system. States have long required retailers doing business in the state to collect sales and use tax from their customers and to remit the taxes to the state. *See, e.g., Nat'l Geographic Soc'y v.*

Cal. Equalization Bd., 430 U.S. 551, 555 (1977) (discussing necessity of imposing this tax collection burden on retailer and stating "the impracticality of its collection from the multitude of individual purchasers is obvious") (citing *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 343 (1954)). The states' authority to impose this tax collection duty on retailers is well settled. *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207, 212 (1960) (stating imposition of such duty is "a familiar and sanctioned device") (quoting *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 338 (1944)). As a result of *Quill* and *Bellas Hess*, however, remote retailers have been removed from their traditional role as collecting agents of the state.

This "*Quill* exception" has placed the states in a tough spot. Taxable transactions via e-commerce have skyrocketed, but states' tax collections have not kept pace because remote retailers are exempt under *Quill* from the requirement to collect and remit the taxes. But pure self-assessment and self-payment, without any third-party reporting, is ineffective. *See* J.A. 28-30, 43. Without aggregate information on Internet and remote purchases, it remains very difficult for consumers to self-assess, file returns, and pay the taxes they owe. Consumers may not have retained records of their Internet purchases and may have lost track of whether or not they paid tax at checkout. Likewise, state taxing authorities lack information to perform their standard audit and enforcement functions. As this Court has recognized, it is critical not just that a state obtain "tax information in some form"; it is equally important that the information is of "such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be

readily accomplished." *Lane-Wells Co.*, 321 U.S. at 219, 223.

Colorado's Collection Act fills the void. It constitutes a reasonable response to the dramatic loss of tax revenue caused by the confluence of the *Quill* exception and the reality of growing e-commerce. Pet.App. E-1–E-4. The Transactional Notice and Annual Purchase Summary provided to purchasers promote compliance with and payment of the use tax by arming them with the information necessary to accurately self-assess and pay the tax owed. Similar to federal information returns like the W-2 and 1099, the Customer Information Report filed with the Department allows the matching of information provided by retailers and purchasers to determine the proper amount of tax assessed. The Collection Act thus enables both self-assessments and voluntary remittance performed by purchasers, as well as compulsory audits, assessments, and collections initiated by the Department.

Since the Collection Act is an integral part of the State's tax collection system, DMA's suit is precisely the type of challenge that the TIA withdraws from federal court jurisdiction.

B. The plain text of the Tax Injunction Act bars DMA's suit.

The TIA by its terms applies to any federal suit that seeks to "enjoin, suspend or restrain the assessment, levy or collection" of any state tax. 28 U.S.C. § 1341. Because DMA seeks, and obtained, an injunction, little doubt exists that the TIA's first prong ("enjoin, suspend or restrain") is satisfied. In addition to seeking the precise equitable relief named in the TIA, the Tenth

Circuit correctly interpreted the term "restrain" to encompass DMA's requested relief. Since the term "restrain" is not defined in statute, the court of appeals reasonably construed the term according to its ordinary meaning, which is to "limit, restrict, or hold back." Pet.App. A-17. (citing dictionary definitions); *see FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (stating that when statute does not define term, it is typically given its ordinary meaning). Either way, taken apart or together, DMA's lawsuit fits comfortably within the TIA's first operative phrase. DMA appears to acknowledge as much. DMA Br., pp. 31-32 (stating that first phrase is "properly interpreted to encompass all forms of equitable relief that might prevent state officials from carrying out the 'assessment, levy or collection' of a state tax").

DMA's challenge also satisfies the TIA's second prong ("assessment, levy, or collection of any tax under State law") because the Collection Act represents an integral facet of both the "assessment" and "collection" of Colorado's sales and use tax. Taken apart or together, the terms "assessment" or "collection" apply to the target of DMA's injunction.

Generally speaking, the term "assessment" refers to the calculation or recording of a tax liability. *Galletti*, 541 U.S. at 122. As used in the TIA, "assessment" is "closely tied to the collection of tax," and has a "collection-propelling function." *Hibbs*, 542 U.S. at 101-02. In other words, assessment leads to collection. The first step of the assessment process varies depending in part on the type of tax at issue. For example, property taxes are often assessed in the first instance by the taxing authority, while income tax begins with a self-

assessment. *Id.* at 100 n.3. In the income tax context, if the taxing authority rejects a self-assessment, it then calculates the proper amount of liability and records that number in its books as its assessment. *See Galletti*, 541 U.S. at 122. In the traditional sales tax context (and in the pre-*Bellas Hess* use tax context), a different method of assessment applies. The tax is calculated — that is, assessed — at the outset not by the taxing authority or by the purchaser who owes the tax, but rather by the retailer who then collects the tax from the purchaser at the point of sale and remits it to the State. *See* COLO. REV. STAT. § 39-26-105.

Nor does the TIA define the term "collection," and this Court has not yet opined on the term's limits. In general, to "collect" means "to bring together into a band, group, assortment or mass" or "to receive, gather, or exact from a number of persons or other sources." Webster's International Dictionary 444 (3d ed. 2002). Thus, any injunction that blocks a state's effort to receive or extract tax payments is contrary to the TIA's language.

By seeking to enjoin or restrain operation of Colorado's Collection Act, DMA asked a federal court to enjoin or restrain the State's "assessment" and "collection" of its use tax. Under any tax system, an "assessment" — the predicate to "collection" — requires the identity of a taxpayer and a calculation of the taxes owed. By enjoining Colorado's law, the district court deprived Colorado of both necessary elements of that equation and thus enjoined and restrained the assessment and collection of sales and use taxes themselves.

In the most analogous case to date, *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327 (9th Cir. 1989), the Ninth Circuit held the TIA bars an employee suit seeking to enjoin an employer from producing earnings records and other tax-related information to state taxing authorities. The TIA applied because the suit, if successful, would have rendered the states "unable to obtain the information necessary for [tax] assessment." *Id.* at 328. It was of no consequence that the requested injunction would restrain assessment "indirectly rather than directly." *Id*; *accord Gass v. County of Allegheny*, 371 F.3d 134, 136 (3d Cir. 2004) (holding TIA barred lawsuit challenging state-tax appeals procedure because "appeal process is directed to the . . . ultimate goal and responsibility of determining the proper amount of tax to assess"); *Amos v. Glynn County Bd. of Tax Assessors*, 347 F.3d 1249, 1255 (11th Cir. 2003) (finding it "undisputed" that a challenge to a method of assessing property value would restrain state's tax assessment scheme, thus triggering TIA); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 454 (7th Cir. 1999) (holding TIA "withdraws federal jurisdiction even over actions that would indirectly restrain the assessment, levy, or collection of taxes"); *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) (holding TIA "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself."). Indeed DMA acknowledges that "[t]axpayers (or their proxies) who challenge the process for obtaining information regarding their tax liability necessarily challenge the assessment of taxes against them." DMA Br., p. 49.

For good reason, therefore, DMA spends little time in its brief disputing that the Collection Act is directed

at assessment and collection. Instead, the bulk of DMA's argument is that the Tenth Circuit misapplied the word "restrain" in light of that term's equitable history. *Id*., pp. 21–36. That argument misses the mark. Once it is clear that the Collection Act is directed at assessment and collection of a valid tax, it necessarily follows that DMA's lawsuit would enjoin, suspend, and restrain Colorado's assessment and collection. The TIA requires nothing more. Because DMA seeks injunctive and declaratory relief that would restrain Colorado's chosen method of assessing and collecting its use tax — and because the outcome of DMA's suit would be to decrease state tax revenue — the Tenth Circuit correctly concluded that this suit "falls within the 'traditional heartland of TIA cases.'" Pet.App. A-19 (quoting *Hill v. Kemp*, 478 F.3d 1236, 1250 (10th Cir. 2007)).

C. Applying the Tax Injunction Act to DMA's suit furthers Congress's purpose of precluding federal interference with state tax assessment and collection.

This Court's precedents recognize the text, history, and purpose of the TIA require broadly applying it to actions seeking to enjoin state revenue-collection measures. The Court has long cautioned against the danger of interfering with the administration of state tax systems. "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the *modes adopted to enforce the taxes levied* should be interfered with as little as possible." *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) (emphasis added). *Accord Farm Credit*

Servs. of Cent. Ark., 520 U.S. at 826 ("The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary. The States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation.").

Worried that lower federal courts had become "free and easy with injunctions" against the states, Congress found it necessary to enact the TIA's jurisdictional bar. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 129 (1981) (internal quotations omitted). The TIA is "broad" and "prophylactic" and drastically limits federal court jurisdiction to interfere with the important local concern of the collection of taxes. *Rosewell*, 450 U.S. at 524. Congress sought to prevent disruption to state finances caused by the withholding of state tax revenue, and further sought to eliminate the disparity of large out-of-state corporations invoking federal diversity jurisdiction to challenge state tax laws when such relief was unavailable to local taxpaying citizens. *See Hibbs*, 542 U.S. at 104; DMA Br. App., pp. at 4-5, Congressional Record - Senate; Collection of State Taxes – Jurisdiction of Federal District Court (Feb. 19, 1937). The TIA "'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.'" *Rosewell*, 450 U.S. at 522 (quoting *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)). It is a legislative codification of the "strong" presumption against "federal interference with state tax administration." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 590 (1995).

This Court has consistently furthered these aims by instructing that "federal courts must guard against interpretations of the [TIA] which might defeat its purpose and text." *Farm Credit Servs. of Cent. Ark.*, 520 U.S. at 827. So long as a plain, speedy, and efficient remedy exists in state court,[2] the TIA bars any suit seeking to invoke the federal district court's equitable jurisdiction to interfere with the a state's tax assessment and collection system. It is well settled that the TIA divests the federal courts not only of jurisdiction to issue an injunction, "but also of jurisdiction to take actions that suspend or restrain the assessment and collection of state taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). "[T]he declaratory judgment 'procedure may in every practical sense operate to suspend collection of the state taxes. . . .'" *Id*. (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)).

Unsurprisingly, therefore, courts have applied the TIA's federal tax counterpart, the Anti-Injunction Act, to bar both direct challenges to federal taxes *and* suits that would interfere with activities that may culminate

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[2] The Tenth Circuit identified three plain, speedy and efficient state remedies available to challenge the Collection Act. Pet.App. A-26–A-32. DMA does not take issue with this portion of the court's opinion, although it criticizes Colorado's choice to not place a challenge mechanism within the law itself. DMA Br., p. 35 n.2. Any argument on this point should be deemed forfeited, but even if not, the argument fails. DMA has availed itself of one plain, speedy and already effective state remedy: litigating the same claims in Colorado state court. More to the point, it has obtained just the sort of preliminary injunctive relief it sought in this federal case.

in the assessment or collection of taxes.[3] In *Bob Jones Univ. v. Simon*, this Court held the Anti-Injunction Act barred a university's suit challenging the IRS's revocation of a charitable organization's tax exempt status because such a suit would "interrupt the assessment and collection of taxes." 416 U.S. 725, 739 n.10 (1974). Although the university did not directly challenge any specific assessment or collection activity undertaken against either itself or any charitable donor, the Court determined the suit would prevent the IRS from assessing and collecting federal income, social security, and unemployment taxes. *Id*. at 738-39. *Accord Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 405 (4th Cir. 2003) ("[I]t is clear that the [AIA] extends beyond the mere assessment and collection of taxes to embrace other activities, such as an audit to determine tax liability, that may culminate in the assessment or collection of taxes."); *Koin v. Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (holding AIA barred suit seeking declaration that materials subject to criminal suppression order could not be used for civil tax assessment because while suit did not "directly and expressly aim at assessment," it was "directed expressly at the means to that end, and . . . is substantially aimed at restraining the assessment.").

DMA insists this case should be outside the TIA's reach because the lawsuit will not alter the amount of taxes consumers owe (and are legally obligated to remit) on each of their many relevant retail

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[3] The Court has repeatedly recognized the common purposes and language of the two acts and interpreted them consistently. *E.g., Hibbs*, 542 U.S. at 102 ("In composing the TIA's text, Congress drew particularly on . . . the Anti-Injunction Act").

transactions.[4] This may be true in the most theoretical of senses, but is patently untrue as a matter of practical fact. The reality is that if a state cannot ensure customers receive accurate information about what they owe, it unsurprisingly encounters very little compliance with the requirement that they self-assess, report, and pay the tax. And if the state itself has no way of assessing who owes what, it has no way of collecting those taxes. The suit brought by DMA would enjoin a measure by which Colorado seeks to collect a large portion of hundreds of millions of dollars that today it cannot collect. That DMA's members' customers already owe that amount is irrelevant to whether Colorado can be enjoined from trying to collect it from them.

D. The *Hibbs* exception does not extend to lawsuits challenging revenue-generating tax laws.

DMA's main argument, in the face of decades of contrary precedent from this Court and lower courts, is that the Court should expand the exception to the TIA it developed in *Hibbs* to apply to cases like this that would block revenue collection. DMA argues that the *Hibbs* decision means that the TIA cannot apply to any plaintiff who is a so-called "non-taxpayer" or "outsider" whose own tax liability is not at issue. DMA Br., pp. 15,

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[4] This is an odd focus since the TIA undoubtedly covers many actions that would not necessarily alter the amounts technically owing. An injunction blocking a lien, for example, or to prevent the garnishment of wages, would plainly enjoin or restrain the collection of a tax. *See, e.g., RTC Commercial Assets Trust 1995-NP3-1*, 169 F.3d at 453. Yet they would be exempt from the TIA under DMA's narrow interpretation.

18-21. But *Hibbs* was a response to a particular set of circumstances, and its application makes no sense in the present context.

Hibbs involved a challenge to a state tax credit that, if successful, would have resulted in an *increase* in the state's tax receipts — indeed, *Hibbs* involved the state's decision to *spend* money, not collect it. 542 U.S. at 108. The Court held that the TIA did not preclude the federal district court's jurisdiction because the plaintiffs did not seek to impede Arizona's receipt of tax revenues. *Id.* at 93.

Emphasizing the TIA's "state-revenue-protective moorings", *id.* at 106, the Court distinguished suits contesting state tax liability that would *reduce* state revenues if successful from challenges to the award of tax benefits that would have the effect of *enlarging* state receipts. *Id*. at 108. Ultimately, the Court held that an Establishment Clause challenge to Arizona's tax credit would have "no negative impact on tax collection" and thus did not implicate any of the TIA's underlying purposes. *Id*. at 94. This focus is repeated throughout the opinion. *See id.* at 108 (stating TIA does "not stop third parties from pursuing constitutional challenges to tax *benefits* in a federal forum." (emphasis added)); *id.* at 108-09 ("'*There was no articulated concern about federal courts' flogging state and local governments to collect additional taxes*.'" (quoting *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986)) [(emphasis in original)]; *Hibbs*, 542 U.S. at 109 (stating TIA "'has been held inapplicable to efforts to require collection of additional taxes, as opposed to efforts to inhibit the collection of taxes'" (quoting *In re Jackson County*, 834 F.2d 150, 151-52 (8th Cir. 1987))).

DMA would have the Court ignore this fundamental feature of *Hibbs* and instead focus on the identity of the plaintiff. There is no justification for doing so. Contrary to DMA's suggestion, *Hibbs* does not limit the TIA's jurisdictional bar to suits brought by taxpayers contesting their own liability. Neither the TIA's text, its purpose, nor this Court's precedent requires such a narrow reading of its scope and breadth. *See Levin*, 560 U.S. at 430 (referring to *Hibbs* as a "poor fit" under the TIA).

To the contrary, the Court has already recognized that the TIA applies regardless of the identity of the plaintiffs. *See Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 339 (1990) (holding TIA applies to suit brought by taxpayer's shareholders, not taxpayer itself). Limiting the TIA to suits brought by taxpayers challenging their own liability, the *Alcan* Court recognized, would "elevate form over substance." *Id*. at 339. Similarly, in *Bob Jones*, the Anti-Injunction Act applied to the suit brought by the non-taxpayer university because the requested relief would alter the tax liability of the university's donors. 416 U.S. at 739. These cases recognize that the TIA is not concerned with the identity of the plaintiff, but rather the effect of the suit on the state's revenue collection efforts. A taxpayer is surely the most likely plaintiff in a case seeking to enjoin or restrain the assessment or collection of taxes, but there is no reason another entity or group might not seek to do so.

Consistent with the TIA's application to taxpayers and non-taxpayers alike, the Anti-Injunction Act has been routinely applied to non-taxpayers who play an important role in the tax system or the taxable event.

See, e.g., *Judicial Watch*, 317 F.3d at 405 ("[I]t is clear that the Anti-Injunction Act extends beyond the mere assessment and collection of taxes to embrace other activities, such as an audit to determine tax liability, that may culminate in the assessment or collection of taxes."); *Kemlon Products & Dev. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981) ("We agree with the Seventh Circuit that 'this ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes.'" (quoting *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976))), *modified on other grounds*, 646 F.2d 223 (5th Cir. 1981); *Neilson v. United States*, 674 F. Supp. 2d 248, 254 (D.D.C. 2009) (applying AIA to bar action involving summons issued to third-party financial institutions with knowledge of taxpayer's tax liabilities). Indeed, the Court has explicitly held that the plain meaning of the Anti-Injunction Act's prohibition against suits for the purpose of restraining the collection of any tax should apply no matter who brings the suit. In *Bob Jones*, the Court noted that in response to an overly literal and technical reading of the Anti-Injunction Act — similar to that being urged by DMA here — Congress was forced to add clarifying language. 416 U.S. at 731 n.6; *see* 26 U.S.C. § 7421(a) (adding "by any person, whether or not such person is the person against whom such tax was assessed"). But, the Court explained, this language is simply "declaratory, not innovative"; it is "a reaffirmation of the plain meaning" of the original act, which was never meant to be limited to suits brought directly by taxpayers. *Bob Jones*, 416 U.S. at 731 n.6. The same is true of the TIA. *E.g., Hibbs*, 542 U.S. at 102 ("In composing the TIA's text,

Congress drew particularly on . . . the Anti-Injunction Act").

To expand *Hibbs* as DMA suggests would dramatically restrict the TIA. Under DMA's view, *any* law that is a vital part of the collection and assessment of state taxes may be challenged in federal district court so long as it does not directly impose a tax and the suit is brought by a third party. This would include employer reporting, bank reporting of non-wage income, and many other third-party reporting regimes central to tax assessment and collection. Both federal and state self-reporting tax systems routinely include requirements applicable to "non-taxpayer" persons possessing information related to tax liability. For example, the Internal Revenue Code ("IRC") imposes numerous record-keeping requirements on persons other than the taxpayer immediately liable. *See, e.g.,* 26 U.S.C. § 7603(b) (identifying various "third-party recordkeepers," including banks, consumer reporting agencies, attorneys, and accountants); *cf.* COLO. REV. STAT. § 39-21-113(1)(b) (imposing records retention requirements on persons liable for filing report in connection with any tax imposed). The IRC also imposes a wide variety of information-reporting requirements. *See, e.g.,* 26 U.S.C. § 6041, *et seq*. (Part III, Subpart B - Information Concerning Transactions With Other Persons) (including information on payments of dividends, corporate earnings, and profits; organization or reorganization of foreign corporations; social security benefits; higher education tuition and related expenses; and credit for health insurance costs). These third-party reporting requirements on "non-taxpayers" are every bit as critical to the tax assessment and collection system as a taxpayer's self-

assessment. Challenges to such requirements therefore trigger the same jurisdictional bars as challenges to the taxes themselves. No meaningful distinction exists between suits brought by taxpayers and those brought by other persons subject to laws central to a state's tax assessment and collection laws.[5]

This is not a case that depends on arguing that the TIA covers "all aspects of tax administration.'" *Cf.* DMA Br., p. 21 (quoting *Hibbs*, 542 U.S. at 105). At most, this is about the administration of the tax assessment and collection system — not some ancillary aspect of state tax administration. By contrast, activities like the gathering and publication of statistics and reports, although part of tax administration, are not covered by the TIA. *See, e.g.,* 26 U.S.C. § 6103(b)(4) (defining "tax administration" to include not only "assessment, collection, enforcement, [and] litigation" under tax laws, but also activities such as development and formulation of tax policy related to existing and proposed laws and gathering of statistical information); *cf.* COLO. REV. STAT. §§ 24-35-108 (establishing authority of Department to collect taxes); 24-35-108.5

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[5] DMA's and its amici's citation to cases involving challenges to revenue-neutral laws or policies, *i.e.*, laws that neither act to increase or decrease *tax* revenues, are therefore inapposite. *See*, *e.g.*, *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 502-03 (6th Cir. 2008) (challenged law prohibited telephone company from informing customers about tax imposed on company); *Mobil Oil Corp. v. Dubno*, 639 F.2d 919, 922 (2d Cir. 1981) (challenged law contained anti-pass-through provision); *Fredrickson v. Starbucks Corp.*, 980 F. Supp. 2d 1227, 1232-33 (D.C. Ore. 2013) (challenged employer policy did not affect taxpayer's obligation to pay taxes on tips).

(requiring the Department to publish annual reports on taxes paid).

The Tenth Circuit, following the Fifth Circuit, thus recognized the straightforward and limited reach of the *Hibbs* exception. The court of appeals properly interpreted *Hibbs* to render the TIA inapplicable only to challenges that (1) are brought by a non-taxpayer, and (2) would not deplete state revenues. *See* Pet.App. A-15 n.6 (quoting *Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005)). This sensible line recognizes the fundamental distinction between the true third-party, outsider attack on state tax expenditures at issue in *Hibbs* and the revenue-generating measures here that are central to Colorado's tax collection effort.[6]

Even if the TIA were to be limited to suits brought by "insiders," it would apply here. This Court in *Levin* refined its *Hibbs* exception, explaining that the plaintiffs in *Hibbs* were "outsiders" to the tax system who did not object to their own treatment under the tax code and whose own liability was not relevant. *Levin*, 560 U.S. at 430. In contrast, the *Levin* plaintiffs

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[6] To the extent *Hibbs* may be read to drastically limit the TIA to federal suits by taxpayers seeking to contest their own liability, it should be revisited. *See Levin*, 560 U.S. at 433 (Kennedy, J., concurring) (stating *Hibbs* remains "doubtful" but acknowledging nothing in *Levin* majority expands *Hibbs*); *id.* at 437 (Alito, J., concurring) (stating continuing viability of *Hibbs*' foundation "is a question that can be left for another day."); *id.* at 433 (Thomas, J., concurring) (remaining "skeptical" of *Hibbs*' holding but stating "it is not necessary for us to revisit that decision to hold that this case belongs in state court."). At the very least, this Court should clarify that *Hibbs* applies only to tax credits or expenditures, not to revenue-generating laws.

objected to their own tax situation, "measured by the allegedly more favorable treatment accorded [their competitors]." *Id*.

Similarly, DMA's members cannot be described as "'outsiders' to the revenue-raising state-tax regime they ask the federal courts to restrain." *See id.*, 560 U.S. at 435 (Thomas, J., concurring in the judgment). As the Complaint shows, DMA objects to its members' "tax situation" as measured by the allegedly more favorable treatment accorded to in-state Colorado retailers who are not granted the choice offered by the Collection Act. *See*, *e.g.*, C.A. App. 17 ("The Act does not impose these notice and reporting obligations upon Colorado retailers."); C.A. App. 26 (stating the Collection Act imposes "upon out-of-state retailers who do not collect Colorado sales tax . . . notice and reporting obligations . . . that the Act does not impose on Colorado retailers.").

In the compensatory sales and use tax scheme, *all* retailers who make sales in Colorado, whether collecting or non-collecting, are "insiders" to the sales and use tax system. They are parties to the very transaction being taxed. If not for *Quill* they would be liable directly for the tax itself. They possess direct, firsthand, critical source information about the taxable sales. This is in direct contrast to the common carriers in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("*UPS I*"), where common carriers were required to either withhold package delivery if excise tax had not been paid or pre-pay the excise tax on behalf of the recipient. The court held that Puerto Rico's TIA analog, the Butler Act, was inapplicable. Unlike DMA's members, these common

carriers were in no measure insiders – they were not an original party to the transaction being taxed, nor did they have any firsthand access to the source tax information about the package. *See id*. at 327 & n.4 (requiring UPS to collect information from shipper – a party to taxable transaction – in order to determine tax owed).

The Collection Act offers DMA's members the choice to comply with its reporting requirements in lieu of collecting and remitting sales and use tax, a choice unavailable to in-state retailers. This fact does not render DMA's members third-party outsiders in any reasonable sense. The advantage they have over physically present retailers should not be multiplied by giving them a litigation advantage as well. *See Hibbs*, 542 U.S. at 104 (noting one purpose of TIA was to prevent undue advantage to out-of-state litigants).

E. Applying the Tax Injunction Act here does not unduly expand its scope but rather furthers Congress's purpose of protecting the primacy of state court review.

In its effort to shrink the TIA's scope and expand *Hibbs*, DMA and its amici raise an array of policy concerns and allegedly dangerous hypothetical extensions of the TIA's coverage. To the extent these are legitimate policy concerns (and they are not), the courts are not the forum to raise them. Congress deliberately chose to word the TIA broadly, and if DMA and its amici desire a narrowing construction, Congress can provide that remedy.

1. Applying the TIA here will not create an unwarranted expansion of the jurisdictional bar.

DMA argues affirming the Tenth Circuit's decision here will lead to a parade of horribles. But there is much room between DMA's suggested extremes of limiting the TIA to suits brought by taxpayers contesting their own tax liability, no matter the impact on the State, and sweeping applications of the TIA to bar all challenges to state laws with speculative or distant impacts on tax collection.

DMA cites, for instance, *Florida Bankers v. U.S. Department of Treasury*, involving a regulation requiring financial institutions within the United States to report the interest earned by non-resident alien accountholders to the IRS. *See* 2014 U.S. Dist. LEXIS 3521 (D.D.C. Jan. 13, 2014); DMA Br., pp. 45-48. Although the alien account holders did not owe U.S. taxes, the IRS sought to use the reported information to exchange similar information with foreign governments about U.S. account holders overseas. 2014 U.S. Dist. LEXIS 3521 (D.D.C. Jan. 13, 2014). The district court declined to apply the Anti-Injunction Act to bar a suit brought by certain financial institutions. Whether that was the correct decision is debatable. But even if it was, there is no reason affirming the court of appeals' decision here would necessitate a different outcome there. The financial institutions in *Florida Bankers* did not have any relationship to a taxable transaction or access to, much less firsthand knowledge of, tax information related to domestic tax collection. Unlike DMA's members here, the financial institutions

were not parties to taxable domestic transactions and, thus, were more akin to "outsiders."

The same is true for DMA's hypothetical common carriers charged with searching for cocaine. DMA Br., pp. 52-54. Much like the common carriers in *UPS I,* or the parties seeking to reallocate state resources in *Hibbs*, the common carrier is an "outsider[ ] to the tax expenditure," *Levin*, 560 U.S. at 430, possessing no direct, firsthand knowledge of the contents of the package or the tax owed on its contents. A common carrier in this hypothetical is not a party to any relevant taxable transaction.

The concern about states loading up their tax codes with veiled regulatory measures is equally misplaced. *See, e.g.,* Br. of Amicus Inst. for Prof'ls in Taxation, pp. 16-21. Some of the identified "guises" are no doubt integral to our tax system, such as interest-income reports from banks, and would be subject to the TIA just as surely as a challenge to the wage-withholding reporting regime would be. *See Blangeres*, 872 F.2d at 328; *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 403 (3d Cir. 1982). But others having no relation to tax production — like a gun or fishing permit — can readily be filtered out through the well-developed jurisprudence distinguishing taxes from regulatory measures and fees. *See* 3A SUTHERLAND STATUTORY CONSTRUCTION § 66:10 (7th ed.) (collecting cases). *Accord Hill*, 478 F.3d at 1244 (citing 1 Thomas M. Cooley, THE LAW OF TAXATION 98 (4th ed. 1924)); *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.,* 143 F.3d 1006, 1011 (5th Cir. 1998); *see also Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582-84 (2012) (distinguishing taxes from penalties). Although a law

may sometimes possess a mix of regulatory and tax-generating purposes, none of the examples cited by DMA's amici bears any resemblance to the pure tax assessment and collection system being challenged here. And again, DMA argues as if application of the TIA renders litigants wholly unable to bring their claims at all, when in fact all it means is they must begin in state court.

Wells v. Malloy, 510 F.2d 74 (2d Cir. 1975), is of limited use to DMA for different reasons. DMA argues it shows the TIA should be inapplicable to "coercive" revenue raising measures and that the Collection Act is one such coercive measure. *See id.* (requiring suspension of driver's license if tax not paid on vehicle). In *Wells*, the court stated that the TIA did not cover tax regulations that operate to produce tax money "through a more general use of the coercive power." *Id*. at 77. In other words, the court held that regulations that impose a sanction on taxpayers who refuse to pay a tax due fall outside the TIA. *See* Pet.App. A-23; *Wells*, 510 F.2d at 76.

This bears little relation to the Collection Act. Rather than revoking an important license for failure to pay a tax, the law being challenged here gives DMA's members the option of either collecting the tax at "checkout" or complying with the information reporting requirements.

The analogy would be more apt had Colorado prohibited retailers from making sales in Colorado if they failed to collect and remit sales taxes, but it did not. Such was the case in *UPS I*, the tax regulation threatened the common carrier with loss of its business license if it delivered a package without ensuring the

excise tax was paid.[7] *See UPS I*, 318 F.3d at 331. Moreover, the common carrier in *UPS I* was in no way a party to the taxable transaction. *See id*. Here, as explained, every DMA member with standing to challenge Colorado's laws is an "insider" to the transaction that results in the tax being owed.

In any case, it is questionable whether *this* coercion distinction drawn by DMA should have any bearing on the TIA's application. The tax system necessarily relies on legal compulsion to be effective. *See Bisceglia*, 420 U.S. at 145 (noting tax system contains elements of both "legal compulsion" and "self-reporting"). *See also Sebelius*, 132 S. Ct. at 2596 (Roberts, C.J.) (stating "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." (alteration in original) (internal quotation marks omitted)). Limiting the TIA's reach to "pure" tax measures that do not contain a measure of legal compulsion would leave nothing of it.

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[7] Later First Circuit cases interpreting the Butler Act, including follow-up litigation to *UPS I*, no longer rely on a "coercion" analysis when determining whether the district courts possess jurisdiction. *See Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1, 6-7 (1st Cir. 2010); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 13-14 (1st Cir. 2009); *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14-15 (1st Cir. 2004) ("*UPS II*"). Following *Hibbs*, each of these circuit court cases invokes a "revenue-raising" analysis when applying the Butler Act. None even mentions the word "coercion," implicitly recognizing the inevitable line-drawing problems such an analysis entails.

2. State courts can be trusted to enforce the Constitution.

DMA suggests an additional factor counsels against applying the TIA under the circumstances presented here: this Court should give effect to the perception apparently held by out-of-state litigants that a state court cannot, or will not, fairly and impartially apply federal law. DMA Br., pp. 54-57. The suggestion that state courts are incapable of neutrally applying federal law has been rightly and routinely rejected by this Court. In rebuffing such an argument in the face of a challenge to the TIA, this Court stated:

> [We] are unwilling to assume that there now exists a general lack of appropriate sensitivity to the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Grace Brethren Church, 457 U.S. at 417 n.37 (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)); *see also Alexander v. Americans United, Inc.*, 416 U.S. 752, 759 (1974) (stating "decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim" does not preclude application of Anti-Injunction Act).

Basic federalism principles dictate that state courts have the obligation to uphold federal law and are capable of doing so. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism."). DMA's concern appears to originate solely from its members'

perception regarding the impartiality of state courts, and is not based on any factual showing that state courts cannot fairly apply federal law. Acceding to a perception in the community that state courts are inadequate is no less invidious to basic principles of federalism than actually crafting a doctrine based on the inadequacy of state courts. *See id.* at 276 ("It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.").

In any event, DMA's argument again flounders for an additional reason. The TIA expressly allows for relief in federal court where there is no "plain, speedy, and efficient remedy" available. 28 U.S.C. § 1341; *see Hibbs*, 542 U.S. at 113 (Kennedy, J., dissenting) ("Dismissive treatment of state courts is particularly unjustified since the TIA, by express terms, provides a federal safeguard: The [TIA] lifts its bar on federal-court intervention when state courts fail to provide a 'plain, speedy, and efficient remedy.'"). That is, if DMA's members are correct that a particular state's courts are inadequate, the TIA grants them their day in federal court. But the current posture of this case belies any such claim: DMA has already brought a state court suit and won a preliminary injunction. DMA is in no position to complain of an inadequate Colorado state court remedy.

The adequacy of the state court remedy is further guaranteed by the availability of final appellate review in this Court. Members of this Court have made clear they "stand[ ] at the ready" to review decisions of state

courts on these types of tax matters. *Hibbs*, 542 U.S. at 121 (Kennedy, J., dissenting).

Finally, one of the TIA's two "closely related, state-revenue-protective objectives" 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 required taxpayers to pay first and litigate later." *Id.* at 104. If the instant case is outside the reach of the TIA, then remote retailers will have yet one more advantage over those with a physical presence in a given state. They will be able to seek injunctive relief in the federal courts while the local retailer, or the out-of-state corporation with a physical presence in the state, will have recourse only to the state courts. This result would be yet another violation of the TIA's purpose.

Two considerations counsel nonetheless in favor of reading the TIA to cover revenue-protective measures. First, unlike the Anti-Injunction Act, the TIA is not a complete bar to an injunction — as the intervening history of this very case shows, it merely moves such claims into a state forum. And finally, to the extent any of these horribles were to come true, Congress remains free to — and does — exempt specified categories of state taxation from the TIA when it desires. *See, e.g., Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457-58 (1987) (discussing exception to TIA created by Railroad Revitalization and Regulatory Reform Act, allowing railroads to challenge discriminatory state taxes in federal court). The Court should reject the

invitation to do for DMA what Congress has not elected to do.

II. Although the TIA provides the smoothest path to dismissal, this Court may also affirm based on comity principles.

The Tenth Circuit ruled that, in addition to the TIA, principles of comity compelled dismissal of DMA's federal suit. Pet.App. A-33 n.11. Because the TIA's mandatory jurisdictional bar should apply, this Court need not specifically invoke notions of comity. Nevertheless, comity principles provide an independent basis, or at least additional support, for affirmance.

To begin, the court of appeals' decision to address comity even where the issue was not briefed below does not constitute error. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408 (1964) (addressing respondents' comity argument "[e]ven though the respondents did not raise this point in the lower courts"), *superseded by statute on other grounds*, 22 U.S.C. § 2370(e)(2); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 490 (9th ed. 2007) ("[A] party satisfied with the action of a lower court should not have to appeal from it in order to defend a judgment in his or her favor on any ground"); *see also District Lock & Hardware, Inc. v. District of Columbia*, 808 F. Supp. 36, 43 (D.D.C. 2011) (collecting cases holding principle of comity cannot be waived in state tax matters "even if the state is willing.").

Moreover, the TIA is best understood as a "partial codification" of comity, expressing federal reluctance to interfere in state affairs. *Nat'l Private Truck Council,*

Inc., 515 U.S. at 590. Because comity principles are embraced within the TIA's legislative history and text, two issues advanced by DMA, the Department is permitted to seek affirmance of the Tenth Circuit's decision in full. *See Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) (adjudicating issue "fairly comprised" in question set forth and stating, "[i]n any event, consideration of issues . . . not presented in the Court of Appeals is not beyond our power, and, in appropriate circumstances, we have addressed them.").

In *Levin*, this Court synthesized a "confluence" of three factors to be analyzed when determining whether comity principles compel forbearance to state adjudications: (1) the State's freedom to make tax classifications (as opposed to the State's inability to make suspect classifications based on protected personal attributes of regulated persons), (2) whether a goal of the suit is to improve a plaintiff's competitive position in the market place, and (3) the State court's relative flexibility to correct any violation. 560 U.S. at 431. The Tenth Circuit's decision under these factors to defer to the State's adjudicative process is manifestly correct and should not be disturbed. Pet.App. A-33 n.11.

Under the first factor, no suspect classification or fundamental right is implicated here. Like the *Levin* plaintiffs, DMA asserts violations of the Commerce Clause. 560 U.S. at 430-31. Those assertions are insufficient to overcome the "demand[ed] deference" owed to the state courts. *Id.* at 432.

The second factor is equally unavailing. Through its requested relief — permanent enjoinment of the Collection Act — DMA seeks to maintain its members'

perceived price advantage at the checkout counter over their in-state competitors who must charge and collect Colorado's sales and use tax. Now, DMA members seek to parlay this *Quill*-created competitive advantage into a further benefit: direct access to the federal district courts. DMA's competitors have no such access. This is contrary to the impetus of the TIA. *See, e.g., Hibbs*, 542 U.S. at 104. Accordingly, DMA is requesting "federal-court aid" in an endeavor to improve its members' competitive position. *See Levin*, 560 U.S. at 431. Comity compels the Court to decline the request.

The third and final *Levin* factor — the state court's relative flexibility in correcting any violation — also supports the Tenth Circuit's decision. Wholesale invalidation of Colorado's Collection Act is not the *only* possible remedy in the event a constitutional infirmity is proven. Colorado's state courts, unconstrained in their remedial options by the TIA, may sever any discrete portion of the Collection Act that is constitutionally infirm. *E.g., Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1280 (Colo. 2001). It remains to be seen whether DMA will carry its burden of demonstrating unconstitutionality as to the entire statutory scheme, a single discrete subpart, or none at all. In any event, being "more familiar with state legislative preferences," *Levin*, 560 U.S. at 432, Colorado's state courts may attempt "to implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.* at 427.

Other "'special reasons'" rooted in comity also justify the Tenth Circuit's decision to adhere to the policy of federal noninterference. *Id.* at 422 n.2 (quoting *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J.,

concurring in part and dissenting in part)). Justice Brennan more than 40 years ago cautioned that concern over "damage to the State's budget" and state "insolvency" counsel in favor of state courts exercising jurisdiction in the first instance. *Perez*, 401 U.S. at 127 n.17 (Brennan, J., concurring in part and dissenting in part). He explained that federal constitutional issues will likely turn on questions of state tax and regulatory law, which "are more properly heard in state courts." *Id.* Justice Brennan's concerns apply with particular force here. DMA is not challenging an incidental licensing fee or service charge. DMA attacks the core method Colorado has chosen to collect the use tax on remote sales. This suit should be heard — and currently is being heard — in Colorado state court.

Accordingly, although the TIA provides the "proper" avenue of dismissal, *Levin,* 560 U.S. at 434 (Thomas, J., concurring), principles of comity offer independent and supporting grounds for upholding the lower court.

CONCLUSION

The court of appeals should be affirmed.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General
DANIEL D. DOMENICO
Solicitor General
MELANIE J. SNYDER*
Deputy Attorney General
GRANT T. SULLIVAN
MICHAEL FRANCISCO
Assistant Solicitors General
1300 Broadway, 8th Floor
Denver, Colorado 80203
(720) 508-6335
**Counsel of Record*
Melanie.Snyder@state.co.us

Counsel for Respondent

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