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

BRIEF FOR THE STATES OF ILLINOIS, ALASKA, ARIZONA, HAWAII, IDAHO, INDIANA, IOWA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 (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 their 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 district courts from enjoining Colorado's efforts to assess and collect the taxes it is owed through the Collection Act and whether principles of comity likewise warranted dismissal of DMA's lawsuit.

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INTEREST OF THE *AMICI CURIAE*

The 24 *amici* States and the District of Columbia submit this brief in support of Respondent Barbara Brohl, Executive Director, Colorado Department of Revenue, to urge affirmance of the judgment of the United States Court of Appeals for the Tenth Circuit that the TIA barred federal district court jurisdiction over DMA's action challenging Colorado's Collection Act. This Court has long recognized the importance of tax collection to the operations of the States, see *Dows v. City of Chicago*, 78 U.S. 108, 109-10 (1870), and the TIA acknowledges the "imperative need of a State to administer its own fiscal operations," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (internal quotation marks omitted). The Tenth Circuit's decision requiring DMA's action to be brought in state court gives effect to the TIA's purposes and history and to the principles of federalism, abstention, and comity that underlie and operate alongside the statute. The decision in this case will affect the scope of the TIA's jurisdictional bar, could also affect the related doctrine of comity, and will undoubtedly impact the well-established state interest in having challenges to state tax laws heard in state court.

STATEMENT

1. DMA is a trade association of businesses and organizations using and supporting multi-channel marketing mechanisms, such as direct mail catalogs, print and broadcast advertisements, and the Internet. Pet. Br. 11. Many DMA members have no store, property, employees, or other physical presence in Colorado and, as such, are not obligated to collect sales and use tax on retail sales to Colorado consumers. *Ibid*.

2. To collect sales and use tax from in-state consumers, Colorado passed the Collection Act, giving non-collecting retailers (who are usually remote, out-of-state retailers, often Internet retailers) the choice between collecting and remitting the sales and use tax or complying with three informational and reporting requirements. Resp. Br. 6. Those three requirements for non-collecting retailers are: (1) notifying purchasers that they may be subject to Colorado use tax; (2) sending Colorado purchasers who buy more than $500 worth of goods from the retailer an annual summary listing dates, general categories, and purchase amounts and reminding the consumers of their obligation to pay use tax; and (3) sending an annual report to the Colorado Department of Revenue listing purchaser names, addresses, and total expenditures. *Id*. at 6-7; COLO. REV. STAT. §§ 39-21-112(3.5)(c)(I), (d)(I)-(II); 1 COLO. CODE REGS. §§ 201-1:39-21-112.3.5(2)-(4).

3. DMA filed this lawsuit in federal district court, claiming that the Collection Act is unconstitutional

under the Commerce Clause, the First Amendment, Colorado consumers' right to privacy, and the Takings Clause. Pet. Br. 12. DMA also sought, and obtained, a preliminary injunction enjoining the operation of the statute on Commerce Clause grounds. Resp. Br. 9. The district court later granted summary judgment to DMA on that basis and permanently enjoined the Collection Act. *Ibid*.

4. On appeal, the Tenth Circuit vacated the injunction and held that the TIA forecloses federal courts from considering DMA's action. Pet. App. A33. In reaching this decision, the court rejected DMA's argument that the TIA applies only to cases brought by taxpayers. Pet. App. A12-A16. Instead, the court held that the statute has broad application and that the TIA bars the action because the statute applies to all actions to restrain or enjoin the collection of state taxes, regardless of the plaintiff's identity. Pet. App. A16-A20. The court also explained that, the TIA aside, "the doctrine of comity also militates in favor of dismissal." Pet. App. 33 n.11.

5. This Court granted certiorari on July 1, 2014.

SUMMARY OF ARGUMENT

A hallmark of federal court jurisdiction is the reluctance of the federal judiciary to intrude upon matters of state tax law. Acknowledging the importance of taxation to States' autonomy and fiscal independence, federal courts have long recognized that States must be permitted to administer their tax systems without undue outside interference. The principles underlying this policy, including federalism, comity, and deference to state courts on matters of state law, were incorporated by Congress in the TIA, and the TIA accordingly should be read broadly to serve those principles. In light of these principles, the Collection Act fits securely within the TIA's jurisdictional bar. The Collection Act enables Colorado to collect use tax from Colorado consumers in situations where Colorado is unable to collect sales tax from remote, out-of-State retailers. The increasing shift of commerce to Internet transactions has amplified that need. The Collection Act is an effort to address this problem, and it forms an integral part of the administration of Colorado's tax system. Enjoining the Collection Act would significantly restrain Colorado's ability to assess and collect use tax legitimately due. Therefore, DMA's action challenging the Collection Act is easily within the TIA's scope and purpose.

The TIA aside, principles of comity require the federal court to decline jurisdiction over DMA's challenge. Comity independently works to protect state

tax administration from federal court interference. Application of the comity doctrine is especially apt here where the Collection Act enables Colorado to collect state tax revenue, Colorado courts are better suited than federal courts to fashioning any necessary relief, and the goal of this action is to maintain a competitive advantage for out-of-state retailers from whom sales tax may not be collected over in-state retailers who are subject to the imposition of sales tax. Because DMA seeks to invoke federal judicial authority to prevent the operation of a state law whose purpose is to ascertain and collect taxes, comity should constrain the exercise of federal jurisdiction in this case.

ARGUMENT

I. The TIA Must Be Broadly Construed in Line with Longstanding Precedent Applying the Statute and Consistent with Its History and Purpose, Thus Precluding Federal Jurisdiction over DMA's Challenge.

The TIA precludes federal district courts from exercising jurisdiction over suits that seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. Respondent easily demonstrates that a plain reading of this language reaches DMA's lawsuit. Resp.Br. at 17-21. Nonetheless, DMA insists on a crabbed reading of the statute, arguing, for example, that the words "enjoin, suspend or restrain" refer only to very specific equitable remedies, Pet. Br. at 22-32, and that the statutory terms "assessment, levy or collection" should be given a narrow interpretation, *id*. at 36-39. But an examination of the TIA's history, principles, and purpose demonstrate that even if the statutory language permitted such a cramped reading, a broad reading is, by far, more appropriate.

Indeed, this Court has already rejected an unnaturally restrictive reading of the statute. In *California v. Grace Brethren Church*, this Court held that the TIA "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional," even though the plain terms of the statute do not reference declaratory judgments. 457

U.S. 393, 408 (1982); see *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999).

The Court in *Grace Brethren Church* reached this conclusion by considering the "practical" effect of a declaratory judgment and refusing to read the statute so narrowly as to "defeat[ ] the principal purpose of the" TIA. 457 U.S. at 408. In this case too, it is critical that the Court consider the scope of the TIA against the background of its history and purpose. And the "principal purpose" of the TIA is "'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id*. at 408-09 (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981)); see *id*. at 410 n.22 (Congress's concern was to "divest[ ] the federal courts of jurisdiction to interfere with state tax administration"). Thus, the TIA should be read "consistent with the principles of federalism, comity and non-interference with state fiscal affairs embodied in the Act." *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 375 (3d Cir. 1978) (citing *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976)).

A. The TIA is grounded in a long history of deference to States in matters related to taxation.

The TIA is rooted in principles that were well-established in federal law long before its enactment in 1937. In the nineteenth century, this Court held that a federal court's equitable powers did not allow it to

entertain a suit seeking to enjoin a state tax law on the basis that it was illegal, noting that "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments" so "it is of the utmost important 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,* 78 U.S. 108, 109-10 (1870). *Dows* recognized that interference with state tax collection "may derange the operations of government, and thereby cause serious detriment to the public." *Id*. at 110.

Thus, for decades before the TIA was enacted, this Court exhibited "a proper reluctance to interfere by prevention with the fiscal operations of the state governments" which caused the Court "to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."[*] *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909). Succinctly, "the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States." *Ibid*.; see *Singer Sewing Mach. Co. of New Jersey v. Benedict*, 229 U.S. 481, 484-85 (1913).

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[*] The TIA's jurisdictional bar operates only where "a plain, speedy and efficient remedy" is available in state court. 28 U.S.C. § 1341. Because petitioner does not argue that such a remedy is unavailable in the Colorado courts, that aspect of the TIA is not at issue in this case.

This "guiding principle" that federal courts will not exercise the "extraordinary remedies" of injunctive relief when the rights at issue may be protected elsewhere "is of peculiar force in cases where the suit . . . is brought to enjoin the collection of a state tax" in federal court. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). *Matthews* explained that the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id*. at 525; see *Robinson*, 581 F.2d at 375 (TIA embodies "judicially developed limits on federal equity jurisdiction articulated in" *Matthews*).

When Congress passed the TIA, thereby partially codifying and building upon these principles, it was responding to *Ex Parte Young*, 209 U.S. 123 (1908), and it aimed at "confin[ing] federal court intervention in state government," *Arkansas v. Farm Credit Servs. of Cent. Arkansas*, 520 U.S. 821, 826-27 (1997); see *Rosewell*, 450 U.S. at 522 n.28 ("The [TIA] was only one of several statutes reflecting congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*.") (internal citation omitted).

As the "partial codification of the federal reluctance to interfere with state taxation," *Levin v. Commerce*

Energy, Inc., 560 U.S. 413, 424 (2010) (quoting *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n.* (*NPTC*), 515 U.S. 582, 590 (1995)), the TIA must be interpreted in light of that preexisting doctrine. "'Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the [TIA] in 1937 is one manifestation of this aversion,'" *Hibbs v. Winn*, 542 U.S. 88, 124 (2004) (Kennedy, J., dissenting) (alteration in original) (quoting *NPTC*, 515 U.S. at 586); see also *ibid.* (describing *NPTC* as "summing up this aversion, generated also from principles of comity and federalism, as creating a 'background presumption that federal law generally will not interfere with administration of state taxes'") (quoting *NPTC*, 515 U.S. at 588).

Thus, the purpose of the TIA is to prevent federal courts from "disrupt[ing] the State's tax system." *Ibid.* (citing *Grace Brethren Church*, 457 U.S. at 409 n.22); see also *id.* at 124-25 (Kennedy, J., dissenting) (quoting and citing *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110 (1981) (quoting *Rosewell*, 450 U.S. at 522, "in turn quoting" *Tully*, 429 U.S. at 73)). The TIA acknowledges the "'imperative need of a State to administer its own fiscal operations.'" *Rosewell*, 450 U.S. at 522 (quoting *Tully*, 429 U.S. at 73). Congress "recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Fair Assessment*, 454 U.S. at 102-03.

This recognition that sovereigns require well-functioning taxing regimes is consistent with the TIA's roots as a state-tax analogue to the federal Anti-Injunction Act (AIA). The AIA, which precludes injunctions against the collection of federal taxes, "responded to 'the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue.'" *Hibbs*, 542 U.S. at 122 (Kennedy, J., dissenting) (quoting *South Carolina v. Regan*, 465 U.S. 367, 388 (1984) (O'Connor, J., concurring in judgment)). The AIA "'evidence[s] a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration.'" *Ibid.* (quoting *Regan*, 465 U.S. at 399 (O'Connor, J., concurring in judgment)). The same principle is embodied in the TIA.

B. Important policies of federalism, respect for state sovereignty, and equitable abstention underlie the TIA.

The strong disinclination of federal courts to interfere with state tax administration also finds support in the well-established principle of federalism. See *Tully*, 429 U.S. at 73. Federalism represents a "sensitivity to the legitimate interests of both State and National Governments . . . [through] which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Thus, in *Fair Assessment*

this Court explained that federalism is one of the reasons that federal courts "refuse to enjoin the collection of state taxes." 454 U.S. at 111. The TIA, in conjunction with the related doctrine of comity, "serves to minimize the frictions inherent in a federal system of government and embodies longstanding federal reluctance to interfere with state taxation." *Capra v. Cook Cnty. Bd. of Review*, 733 F.3d 705, 713 (7th Cir. 2013) (internal quotation marks omitted); see *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 687 (7th Cir. 2014) ("[The TIA] furthers a healthy respect for federalism by preventing federal courts from interfering with the vital state function of collecting taxes.").

1. *State courts are better suited than federal courts to construe state statutes*.

This Court's construction of the TIA's scope has been guided in part by the practical realization that, in challenges to state tax laws, "'federal constitutional issues are likely to turn on questions of state tax law, which . . . are more properly heard in the state courts.'" *Grace Brethren Church*, 457 U.S. at 410 (quoting *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part); see *Case Comment, Federal Injunctive Relief in State Tax Cases: Lasalle v. Rosewell*, 93 HARV. L. REV. 1016, 1022 (1980) ("Congress sought to shift the flow of tax cases from federal to state courts."). State tax systems are complex systems with intertwined provisions, making

interference by federal courts particularly inappropriate. As this Court has explained:

> 'The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'

Levin, 560 U.S. at 422 n.2 (quoting *Perez*, 401 U.S. at 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)); see also *id.* at 428 n.7 ("State courts also have greater leeway to avoid constitutional holdings by adopting 'narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state

interests.'") (quoting *Moore v. Sims*, 442 U.S. 415, 429-30 (1979)); *Hibbs*, 542 U.S. at 123 (Kennedy, J., dissenting) (quoting *Grace Brethren Church,* 457 U.S. at 410 (quoting "with approval" a portion of the above passage from *Perez*)).

2. *State courts are better suited than federal courts to fashion remedies that may affect state law.*

As this Court has emphasized, state courts, rather than federal courts, should fashion remedies that involve substantive and discretionary changes to state tax systems. See, e.g., *Levin*, 560 U.S. at 429. In a case like this one, this factor is quite significant. Assuming *arguendo* that petitioner were to prevail on the merits in this case, an appropriate remedy *might* be to simply strike down the Collection Act. See Pet. Br. at 62-63. But it might be to adjust aspects of it to account for, for example, the varying intensity of Internet retailers' contacts with Colorado. If there is room for discretion or experimentation in fashioning a remedy, "surely the [state] courts are better positioned to determine — unless and until the [state] Legislature weighs in — how to comply with the [constitutional] mandate." *Levin*, 560 U.S. at 429 (citing *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 817-18 (1989)); cf. *id.* at 426-27 (explaining that when there is unlawful discrimination in tax classifications, a court could raise one party's taxes as a remedy *or* it could lower the other's); *id.* at 427-28 (noting that ultimately remedy is question of state law).

Such potential complications of remedy distinguish this case from *Hibbs*, where the Court allowed federal jurisdiction over a challenged tax credit. See *Hibbs*, 542 U.S. at 108-10. There, as this Court explained in *Levin*, the only possible remedy, were the tax credits found unconstitutional, would have been to invalidate them altogether. *Levin*, 560 U.S. at 431. And such complications distinguish this case from others, like *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which this Court reviewed a state high court's ruling on an issue of federal constitutional law. See *Levin,* 560 U.S. at 427 ("[W]hen this Court — on review of a state high court's decision — finds a tax measure constitutionally infirm, 'it has been our practice,' for reasons of 'federal-state comity,' 'to abstain from deciding the remedial effects of such a holding.'") (quoting *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 176 (1990) (plurality opinion)). But remand to state court is not possible when the lower federal courts take jurisdiction, *id.* at 428, providing another reason why federal jurisdiction in the lower courts is inappropriate.

And even if the hypothetical remedy in *this* case were to involve simply striking down the offending part of the law, the TIA must be read for all cases. Cf. *Hibbs*, 542 U.S. at 125 (Kennedy, J., dissenting) (noting that although that case might not involve disputes over the meaning of state law, such disputes will certainly arise in other cases). Given the need for States to experiment with ways to capture tax revenues due from Internet sales, see Resp. Br. at 5-9, it is unlikely that this case

will be the last to challenge the constitutionality of such measures. To the extent that any of those challenges are successful, they might well require the kind of injunctive relief this Court has said is peculiarly inappropriate for federal courts to order. That practical acknowledgment that state courts are in the best position to fashion remedies when state tax laws are found unconstitutional applies to consideration of the Collection Act here and warrants application of the TIA to bar federal court jurisdiction.

3. *Equitable abstention doctrines support a broad reading of the TIA.*

The TIA's preclusion of federal jurisdiction over DMA's action is consistent with abstention principles developed by this Court. Under the doctrine of abstention, "a [d]istrict [c]ourt may decline to exercise or postpone the exercise of its jurisdiction." *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996). The power to abstain "derives from the discretion historically enjoyed by courts of equity." *Id.* at 728. Likewise, federal courts' reluctance to hear cases seeking to enjoin state tax laws stems from the courts' longstanding equitable discretion. See *Grace Brethren Church*, 457 U.S. at 412 (quoting *Dows*, 78 U.S. at 110); *Rosewell*, 450 U.S. at 522.

Abstention principles counsel in favor of requiring DMA's challenge to be brought in state court. The abstention inquiry balances the "strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court" against States' interests in resolving questions of state law and in maintaining control over questions that concern important local problems. *Quackenbush*, 517 U.S. at 728. Thus where the vital concern of protecting "the fiscal integrity" of a State's public assistance program is concerned, abstention is proper. *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977). Similarly here, Colorado's vital concern of protecting its tax revenues is at the forefront of this action, and abstention principles require that these interests be vindicated in state court. See *Quackenbush*, 517 U.S. at 719 (noting that the holding of *Fair Assessment*, 454 U.S. at 115, that a § 1983 action based on enforcement of a state tax scheme could not be maintained in federal court, was based in part on abstention principles).

Moreover, where federal suits challenge complex state statutory schemes, like tax laws, abstention principles have greater force. See *Moore*, 442 U.S. at 427 (abstention principles "reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework"). Abstention principles also accord significant weight to the prospect of "undue

interference" with Colorado's tax administration and procedures for hearing challenges to its tax laws. See *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359-60 (1989) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 327, 334 (1943)). Finally, abstention principles are applicable where, as here, the "exercise of federal review of the question in a case . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). Colorado's collection of tax revenues is just such a matter of substantial public concern, as it directly impacts many important state programs including K-12 education, Medicaid, and higher education. JA111-12; see *Dows*, 78 U.S. at 109-10. In sum, application of the TIA's jurisdictional bar to DMA's action is informed, and supported, by the application of well-settled abstention principles as well.

C. The history behind and principles underlying the TIA demonstrate that it must be read to reach cases like this one.

In light of these principles, the TIA cannot be limited only to injunctions concerning statutes that actually impose a tax upon a plaintiff, as petitioners suggest, Pet. Br. at 41-43. In this case, the Collection Act is the part of Colorado's tax regime that enables it to obtain information necessary to enable it to collect sales or use tax on a high volume of transactions. Resp.

Br. at 5-9. Enjoining the operation of this provision is tantamount to enjoining the collection of sales or use tax on those many Internet transactions within its legitimate taxing authority. This would wreak the same havoc on Colorado and its revenue-collecting efforts that federal courts have continually and assiduously avoided, since long before the TIA was enacted. See *Matthews*, 284 U.S. at 525-26; *Boise Artesian*, 213 U.S. at 281; *Dows*, 78 U.S. at 109-10.

DMA's action thus would interfere with state tax administration and revenue collection and is well within the breadth of the TIA. For that reason, petitioner's reliance on *Hibbs* is misplaced. Indeed, *Hibbs* explained that the purpose of the TIA was to restrict district-court jurisdiction "over suits relating to the collection of State taxes." 542 U.S. at 104 (internal quotation marks omitted). While *Hibbs* held that the TIA was not intended to prevent interference "with all aspects of state tax administration," *id*. at 105 (internal quotation marks omitted), the Court went to great lengths to distinguish between actions that seek to avoid the payment of taxes, which are covered by the TIA, and third-party challenges to tax credits that, if successful, would have the effect of increasing state revenue, *id*. at 108-11. Thus, *Hibbs* read this Court's precedents as tethered to "their secure, state-revenue-protective moorings." *Id*. at 106. This case is also firmly tethered to those moorings because here DMA challenges a state tax law that is revenue-generating in its purpose, and if that challenge is sustained, Colorado's ability to collect

sales and use tax on a large number of transactions will be severely hampered. DMA's lawsuit, then, is well within *Hibbs*'s understanding of the scope of the TIA.

Nor is it remarkable to apply the TIA to a statute that imposes informational requirements on a party. In *Grace Brethren Church*, for instance, this Court rejected the claim that "recordkeeping, registration, and reporting requirements" imposed on the taxpayer sufficed to overcome the application of the jurisdictional bar. 457 U.S. at 415-17. The fact that the Collection Act imposes recordkeeping requirements on DMA therefore does not insulate this challenge from the TIA's jurisdictional bar.

There is no dispute that in attempting to collect use tax from in-state consumers, Colorado is engaged in a legitimate, and vital, state activity. But the context in which Colorado exercises its taxing authority is defined by this Court's decisions in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill*, 504 U.S. 298. Under those cases, Colorado may not require remote Internet sellers to collect and remit sales tax. See Resp. Br. 4-6. As Internet sales account for an increasingly large proportion of sales, States face new hurdles in tax collection, and are left to attempt to collect use tax from consumers themselves with few good options to do so. *Id*. at 16-17. In the post-*Quill* universe, where States are attempting to capture use tax on the increasing volume of Internet sales, the risk of a federal injunction throwing state tax

administration "into disarray" is particularly high. See *Rosewell,* 450 U.S. at 527. And particular deference is appropriate with respect to "commercial matters over which [states] enjoy[ ] wide regulatory latitude." *Levin*, 560 U.S. at 431. This case is just such a matter.

II. Comity Principles Preclude Federal Court Adjudication of Claims Challenging Revenue-Generating Aspects of State Tax Laws.

Even were this Court to conclude that the TIA does not reach DMA's lawsuit, it should still hold that, based on comity principles, the Tenth Circuit correctly dismissed the case. In *Levin*, this Court rejected the notion that "[a] broad view of the comity cases . . . would render the TIA 'effectively superfluous.'" 560 U.S. 413, 432 (quoting *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094, 1099 (6th Cir. 2009)). Instead, this Court explained the interconnected relationship between comity principles and the TIA, noting that "'the principle of comity which predated the [TIA] was not restricted by its passage,'" *id.* at 424 (quoting *Fair Assessment*, 454 U.S. at 110), and reiterated that "'the [TIA] may be best understood as *but a partial codification* of the federal reluctance to interfere with state taxation,'" *ibid.* (alteration in original) (emphasis added) (quoting *NPTC*, 515 U.S. at 590; *see also id.* at 433-34 (Thomas, J., concurring in judgment) ("Congress' decision to prohibit federal jurisdiction over cases within the [TIA]'s scope did not disturb that jurisdiction, or the comity principles that guide its exercise, in cases outside the Act's purview."). Comity

thus provides an additional and independent basis to conclude that district courts may not entertain claims that would frustrate the revenue-raising function of state laws that operate to determine or collect state tax liabilities.

A. Comity serves the essential purpose of protecting state taxation from unnecessary and intrusive federal court interference.

As discussed, this Court has repeatedly held that federal-law challenges to the administration of state tax laws must be brought in state fora and that federal courts do not provide an alternative avenue to bypass those procedures. Most recently, this Court stated: "More embracive than the TIA, the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." *Levin*, 560 U.S. at 417; see *NPTC*, 515 U.S. at 586 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."); *Fair Assessment*, 454 U.S. at 101-02 (comity prevented a federal court from adjudicating a claim for damages in § 1983 action seeking redress for "the allegedly unconstitutional administration of a state tax system"); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-301 (1943) (extending comity principles to declaratory judgment action concerning constitutionality of state tax).

Comity thus applies in cases like this one, in which the petitioner could raise the same claims in state court (and has in fact done so, Resp. Br. 10), but has attempted to invoke the judicial authority of the federal courts to prevent the operation of a state law whose central purpose is to enable the State to ascertain and collect indisputably lawful taxes. Indeed, "[c]omity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Levin*, 560 U.S. at 421.

B. Comity is not limited to suits by taxpayers challenging state laws that directly impose or enforce their tax liabilities.

This Court should reject the limitations on comity that petitioner advocates. The doctrine is not limited to suits brought by a taxpayer challenging a law establishing or enforcing the taxpayer's own liability. Nor is it limited to laws that directly determine or enforce a tax liability, as opposed to laws that provide a mechanism to achieve those objectives.

This Court has never held that a necessary element for applying comity is that the action be brought by a taxpayer disputing its own tax liability. To the contrary, in *Fair Assessment*, the first-named plaintiff was not a taxpayer affected by the allegedly unconstitutional aspects of the local tax laws, but instead was a nonprofit corporation formed by taxpayers "to promote equitable enforcement of property tax laws." 454 U.S. at 105. The

Court nonetheless treated it the same as the other plaintiffs, who were taxpayers, based on the same comity principles at issue here. *Id.* at 105-07.

More recently, *Levin* specifically rejected the conclusion that the comity doctrine is limited only to suits brought by taxpayers asserting federal-law grounds to reduce their own alleged tax liability. *Levin*, 560 U.S. at 425-26. To the contrary, *Levin* held that comity precluded federal court jurisdiction over a suit by commercial actors seeking to *increase* their competitors' taxes. *Ibid*. Thus, no argument can be made that comity applies only to suits by a taxpayer to *reduce* its own tax burden.

Nor does *Levin* suggest that comity principles are limited to suits filed by taxpayers asserting a constitutional or other federal-law attack on state laws that determine or collect their own tax liabilities. Distinguishing the Court's prior decision in *Hibbs,* which dealt almost entirely with the TIA, *Levin* pointed out that the *Hibbs* plaintiffs' claim "was essentially an attack on the allocation of state resources for allegedly unconstitutional purposes," similar to earlier suits contesting "state allocations to maintain racially segregated schools," and that the plaintiffs' "own tax liability was not a relevant factor" for their claim. *Id.* at 430. *Hibbs*' brief comment in a footnote about comity, *Levin* explained, was best read as affirming that comity was a "poor fit" for a "federal challenge by a third party who objected to a tax credit received by others, but in no

way objected to her own liability under any revenue-raising tax provision." *Ibid*. Thus, *Levin* distinguished between challenges to allocations of state resources and challenges to taxing regimes. Read in context, these statements cannot fairly be read to establish a new rule allowing federal court jurisdiction over claims challenging revenue-generating features of a State's tax laws except for suits by a taxpayer contesting some aspect of its own tax liability.

Moreover, limiting the comity doctrine to suits by a taxpayer, as DMA argues, would not only defeat its core purpose in many cases, but would also encourage creative challenges to state tax administration in federal court through third-parties. In many circumstances, a person other than the ultimate taxpayer (even if not a proxy for the taxpayer's interests, such as a voluntary association) may have standing under Article III to bring an action alleging that some aspect of state tax law is unconstitutional. Consequently, restricting comity's reach to suits brought by a taxpayer challenging a law affecting its own tax liability would invite federal court adjudication of claims that seek to impede the determination and collection of state tax liabilities. But such suits, no less than challenges by taxpayers to state laws governing their own tax liability, are equally offensive to comity principles.

Levin also specifically rejected the notion that *Hibbs* "diminished the force" of the comity doctrine, stating that the Court "intended no such consequential

ruling." *Id*. at 430. And *Levin*'s many references to comity negate any suggestion that it narrowed the doctrine's scope, especially without having declared that intention explicitly. See, e.g., *id.* at 417 ("[t]he comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration"); *id.* at 422 (stating that the Court's prior comity decisions show "a proper reluctance to interfere by prevention with the fiscal operations of the state governments") (citation and internal quotation marks omitted); *id.* at 429 (noting that if the federal court granted the relief the petitioners requested and "reshape[d] the relevant provisions of Ohio's tax code," it "would engage in the very interference in state taxation the comity doctrine aims to avoid").

There is likewise no merit to the notion that, for matters of state tax administration, comity applies only to suits targeting laws that directly implement tax collection, as opposed to laws that indirectly support a State's tax scheme. See Pet. Br. at 59. Even if such a distinction could be practically applied, the policy underlying the comity doctrine would be frustrated by such a limitation. That policy, which reflects the notion that tax revenues are the lifeblood of state government, applies to every aspect of a State's law that is integral to the revenue-generating operation of its tax scheme. State tax laws, like their federal counterparts, are replete with provisions that do not directly impose a tax or implement its collection, but instead establish

auxiliary modes for implementing the tax, such as third-party reporting requirements. Such integral laws are not beyond comity's reach.

C. Comity bars DMA's action.

Even more clearly than in *Levin*, where the plaintiffs challenged tax benefits available to other taxpayers, comity dictates that the federal court should decline to exercise jurisdiction here. Unlike a tax credit, which operates to reduce a State's tax revenues, the informational requirements imposed by the Collection Act enable Colorado to *collect* taxes, by identifying taxpayers and their use-tax liabilities. Indeed, as a practical matter, this provision may well be indispensable to the accomplishment of that goal and the corresponding collection of the related tax revenues.

While the Court in *Levin* relied on a "confluence of factors" to conclude that comity barred that case, 560 U.S. at 431-32, it did not purport to establish a new legal test that must be applied in every case. Nor did it hold that the particular circumstances it identified as supporting comity's application in that case were collectively necessary to the application of the doctrine in other cases. See *id.* at 432 (stating that, "[i]ndividually, these considerations *may* not compel forbearance on the part of federal district courts") (emphasis added).

In any event, the factors the Court relied on in *Levin* demonstrate that comity principles apply here as

well. First, the law challenged by petitioner, requiring some of its members to provide information regarding their sales to Colorado residents, does not implicate a "fundamental right" or trigger "heightened judicial scrutiny." *Id*. at 431. Emphasizing that the suit involved a law addressing "commercial matters over which Ohio enjoys wide regulatory latitude," *ibid*., *Levin* easily recognized that the challenged law was subject only to traditional Commerce Clause analysis. Moreover, while the tax provisions challenged in *Levin* required the plaintiff to pay higher taxes than its local counterparts, here the Collection Act actually treats out-of-state retailers with more deference than local ones. In-state retailers have no choice but to collect and remit sales and use taxes; out-of-state retailers can choose to do so (and some do), but they can instead choose the less onerous reporting mechanism DMA now challenges. In effect, then, petitioner's constitutional claims seeks to protect economic discrimination in favor of its members, not, as in *Levin*, to eliminate economic discrimination against them.

The second consideration emphasized in *Levin* — that the plaintiff there was seeking to improve its competitive position compared to other market participants — similarly supports the conclusion that comity applies in situations like the one presented here. The unmistakable goal of petitioner's claims in this case is to maintain for its members the competitive advantage they have over in-state retailers. If out-of-state retailers do not collect and remit sales or use taxes

on their purchases, Colorado customers, either innocently or with the goal of evading taxes, may choose them over local retailers because their goods will appear to have a lower out-of-pocket cost. Regardless of whether petitioner's Commerce Clause challenge has merit as a constitutional matter, this aspect of its challenge further diminishes its argument that it should be able to pursue that claim in federal court.

The last factor on which the Court relied in *Levin* — that a state court was uniquely positioned to implement the appropriate remedy if the plaintiffs' claim had merit, choosing between eliminating the contested tax benefits or extending them to other parties, *id*. at 431-32 — further supports the application of comity here because Colorado state courts are in a better position to determine the appropriate remedy. See *supra* pp. 14-16.

Thus, this case fits comfortably within the scope of comity's application to challenges to state tax administration. Petitioner's suit challenges a statute that is integral to the revenue-generating operation of Colorado's tax laws. Allowing petitioner's claim to proceed in federal court, despite the availability of equivalent relief in state court, would conflict with the very interests that lie at the heart of comity principles in the area of state tax administration and would have the unwarranted effect of treating state courts as inferior guardians of constitutional rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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