No. 13-1032

IN THE
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION
Petitioner,
v.

BARBARA BROHL,
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

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

BRIEF OF TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents both that all parties were provided notice of *Amicus*'s intention to file this brief at least 10 days before its due date and that all parties have

Tax Foundation submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and principled tax policy.

This Court's decision will provide guidance on the line between states' power to shape their tax systems, including notification and consumer reporting requirements, and the limits on that power guarded by the Commerce Clause. Because *Amicus* has testified and written extensively on taxpayer protections and because this Court's decision may resolve a significant dispute over the interpretation of the governing statute, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

DMA seeks to challenge the regulatory reporting and notice regime under Colorado law, not the state's ability to collect a use tax. Courts have held, that to the extent a statute challenged is regulatory rather than revenue raising in purpose, the measure does not constitute a tax, and federal courts retain jurisdic-

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filed letters with the clerk of the Court granting blanket consent to the filing of *amicus* briefs.

tion. If the lower court's conclusion that Tax Injunction Act enjoins DMA's suit stands, it will allow states to insulate over-arching regulatory regimes from proper judicial review by claiming they are a part of "tax collection" measures. The lack of limits suggested by the Tenth Circuit's decision would provide an absolute bar to a virtually endless list of state actions.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW CONVERTS THE TAX INJUNCTION ACT INTO A VEILED VEHICLE BY WHICH STATE ACTIONS ARE INSULATED FROM CHALLENGE EVEN WHEN THEY DO NOT ENJOIN COLLECTION OF A TAX.

DMA seeks to challenge the regulatory reporting and notice regime under Colorado law and not their ability to collect a use tax. Colorado is not seeking to collect from DMA, or its non-remitting Colorado members. *See* COLO. REV. STAT. 39-21-112.3.5(2)-(3); Pet. App. at A-17. Colorado consumers purchasing from DMA members have an obligation to pay use tax, but DMA members without physical presence in the state face no state requirement to collect the tax. *See Direct Marketing Association v. Brohl*, --- F.3d ----, No. 1:10-CV-01546-REB-CBS at 52 (10th Cir. Aug. 20, 2013). As this Court reaffirmed in *Quill*, it is unconstitutional under the "negative" or "dormant" aspect of the Commerce Clause to mandate that a retailer with no in-state physical presence must collect state sales or use taxes. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315-18 (1992) (reaffirming Commerce Clause holding in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)). However, Colorado tries to side-step this issue

by imposing an onerous two-part reporting requirement for retailers with no in-state presence.[2] *See* COLO. REV. STAT. 39-21-112.3.5(2)-(3).

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[2] The first requirement for non-collecting retailers is to "notify Colorado purchasers that sales or use tax is due on certain purchases . . . and that the state of Colorado requires the purchaser to file a sales or use tax return." COLO. REV. STAT. 39-21-112(3.5)(c)(I). This notice must be included in every transaction with a Colorado purchaser, 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2)(a), and shall inform the purchaser that (1) the retailer has not, collected sales or use tax, (2) the purchase is not exempt from Colorado sales or use tax, and (3) Colorado law requires the purchaser to file a sales or use tax return and to pay tax owed. *Id.* § 201-1:39-21-112.3.5(2)(b). According to the Department, the transactional notice "serves to educate consumers about their state use tax liability with the aim of increasing voluntary compliance." Aplt. Br. at 12.

The second requirement for non-collecting retailers is to mail annual notices to any customer with a Colorado address who purchased more than $500 in goods from that retailer in the preceding calendar year. 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3)(a), (c). The summary must be sent by January 31 of each year and the envelope containing it must be "prominently marked with the words 'Important tax document enclosed.'" *Id.* § 201-1:3 9-21-112.3.5(3)(a)(i), (vi). The summary must inform Colorado consumers of purchase dates, items bought, and the amount of each purchase made in the preceding calendar year. *Id.* § 201-1:39-21-112.3.5(3)(a)(ii). The annual summary tells purchasers they have a duty to "file a sales or use tax return at the end of every year" in Colorado and must inform customers that the retailer is required to report to the Department the customers' total purchase amounts from the preceding calendar year. *Id.* § 201-1:39-21-112.3.5(3)(a)(iii), (iv). According to the Department, the annual summary "arms the consumer with accurate information to facilitate reporting and paying the use tax." Aplt. Br. at 13.

Several states including: Oklahoma, South Dakota, and Vermont have also enacted statutes with the requirement that taxpayers be notified about their use tax obligation, but these states only require notification at the time of purchase. *See* OKLA. STAT.

This Court has stated that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." *Arkansas v. Farm Credit Servs. of Cent. Ark.,* 520 U.S. 821, 827 (1997). The Tax Injunction Act applies when (1) the surcharge at issue must constitute a "tax" and (2) the available state remedies are "plain, speedy and efficient." *See Miami Herald Pub. Co. v. City of Hallandale,* 734 F.2d 666, 670 (11th Cir. 1984), *clarified,* 742 F.2d 590 (11th Cir. 1984). The TIA "was part of a broad congressional response to the increased exposure of state officials to suits for injunctive relief after *Ex Parte Young* (209 U.S. 123 (1908))." *See* Note, "The Tax Injunction Act and Suits for Monetary Relief," 46 U. CHI. L. REV. 736, 739 (1979); *Hargrave v. McKinney,* 413 F.2d 320, 325 (5th Cir. 1969); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4236 at 407–08 (1983).

The TIA has jurisdictional limits, which include that the state is imposing a "tax" and that there are adequate remedies in state court. See generally, 28 U.S.C. § 1341. Courts have held, that to the extent the

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§ 710:65-21-8; S.D. CODIFIED LAWS § 10-63-2; VT. STAT. ANN. tit. 32, § 9783(b)-(c). North Carolina's regulatory ruling imposing requirements similar to the Colorado law were challenged by the ACLU and the ruling was subsequently invalidated by a federal judge and abandoned by the department. *See* Tiffany Kaiser, *Amazon Privacy Lawsuit Settled Between NC Department of Revenue, ACLU*, Daily Tech, Feb. 9, 2011, http://goo.gl/vIUXNe. *See also* Joseph Henchman, *The Marketplace Fairness Act: A Primer on the Quill Physical Presence Rule, the Streamlined Sales Tax Project, State "Amazon" Tax Laws, the Hybrid Origin-Sourcing Proposal, and Proposed Federal Legislation*, TAX FOUNDATION BACKGROUND PAPER NO. 69 (Jul. 2014), http://taxfoundation.org/article/marketplace-fairness-act-primer.

statute challenged is regulatory rather than revenue raising in purpose, the measure does not constitute a tax, and federal courts retain jurisdiction. See *Mobil Oil Corp. v. Tully*, 639 F.2d 912, 917-18 (2d Cir. 1981); *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975) (allowing the challenge of the Vermont Motor Vehicle Tax under the equal protection rights clause of the fourteenth amendment since the attack did not seek a restraint upon the assessment, levy or even the collection of the tax). Colorado is instead imposing extraneous regulatory requirements upon these retailers. In examining the related Butler Act, the First Circuit stated, "Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar . . . . Such an interpretation extends the concept of tax collection and therefore the breadth of the Butler Act, too far." *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 331 (1st Cir. 2003).

Allowing the TIA to enjoin DMA's suit will allow states to pass over-arching regulatory regimes as part of "tax collection" measurers. Using the standard of the Tenth Circuit, any state action that seemingly touches on state revenue, no matter how tangentially, would invoke TIA's bar to federal court jurisdiction. The Ninth Circuit has recognized that such an approach is beyond the scope of the TIA. "Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow." *Hexom v. Oregon Dep't of Tax.*, 177 F.3d 1134, 1136 (9th Cir. 1999). Commentators have noted that "[w]ith a reading of the TIA that expands to the bounds of comity, almost no cases even remotely involving state taxation will be able to be heard in

federal court, even when a state agrees to submit itself to federal jurisdiction." David Sawyer, "News Analysis: U.S. Supreme Court Puts Tax Injunction Act Back in Focus," *State Tax Today*, at 11 (Jul. 7, 2014).

Good policy dictates that the TIA must be bound by some limits. The lack of limits suggested by the Tenth Circuit's decision would provide an absolute bar to a virtually endless list of state actions.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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