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

BRIEF OF INTERESTED LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are ten professors of law whose research interests include state and local tax law and tax compliance and administration. The names and affiliations (for information purposes only) of amici are included in an addendum to this brief. All of the amici are interested in fair and effective tax administration, as well as the dormant Commerce Clause and its impact on the ability of the states to implement their tax systems consistent with the Constitution.

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[1] In satisfaction of Supreme Court Rule 37.6, amici represent that no portion of this brief was written by counsel for any party to this case, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by amici curiae and their counsel. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by amici curiae.

SUMMARY OF ARGUMENT

Amici agree with respondent that the Tax Injunction Act, 28 U.S.C. § 1341 (TIA), bars federal courts from enjoining the operation of the Colorado Statute at issue, Colo. Rev. Stat. § 39–21–112(3.5), because this lawsuit is intended to create the very kind of premature federal court interference with the operation of the Colorado use tax collection system that the TIA was designed to prevent. To assist the Court in understanding the application of the TIA to this case, amici will (i) place the reporting requirements mandated by the Colorado Statute in the broader context of tax administration and (ii) explain the potential interaction between a decision on the TIA issue in this case and the underlying dispute concerning the dormant Commerce Clause.

Third-party reporting of tax information is a ubiquitous and longstanding feature of modern tax systems. When tax authorities rely on taxpayers to self-report their taxable activities, compliance rates for the collection of any tax is low. A common and successful response to this problem is to rely on third-party reporting. At the federal level, there is, for instance, the use of Form 1099 to report payments that one makes to a non-employee, as well as interest and dividends – all of which might well escape taxation if the IRS did not obtain the information from third parties.

Colorado faced – and faces – a voluntary compliance problem with the collection of its use tax. The use tax is a complement to the sales tax; in-state vendors collect and remit the sales tax, while in-state consumers are responsible for remitting the use tax on purchases made from out-of-state vendors that do not

collect the sales tax. The use tax has exactly the same rate and base as the sales tax. Yet the use tax is collected much less often because in-state consumers do not generally remit it. The Colorado businesses that must collect the sales tax are therefore at a competitive disadvantage compared to out-of-state companies that do not have to collect use tax because consumers treat purchases from these out-of-state sellers as "sales tax free."

If this lawsuit succeeds, the out-of-state sellers that already do not have to collect the use tax will also not have to report the necessary information that Colorado needs to bolster its collection efforts. The harm to the State is compounded because the local businesses that are hurt by this tax gap are the source of other revenue for the State. For instance, the employees of in-state businesses pay state income taxes and make purchases subject to the sales tax. Furthermore, a thriving local economy, which is protected by an enforceable use tax, provides other more intangible benefits to the state. Colorado therefore adopted a third-party reporting solution, like Form 1099, to address its use tax collection gap.

Before waiting to see whether and how Colorado's very traditional and widely employed solution to a typical tax compliance problem worked when implemented, petitioner went to federal court to enjoin the law's application. This is precisely what the TIA forbids: the petitioner is in effect urging the federal courts to interfere with the collection of Colorado's use tax. No one doubts that, if petitioner sought a federal court order directly enjoining the operation of Colorado's use tax, that remedy would be barred by the TIA. Here, petitioner seeks to achieve that end

indirectly by seeking to enjoin the collection of the information that Colorado needs to make the use tax effective. And if petitioner succeeds on the merits, there will still be a use tax, but it will continue to be as ineffective as if it were removed from the statute books entirely with respect to a large, and growing, segment of the economy.

Amici thus agree with respondent that the text of the TIA, along with its legislative history, this Court's precedent, and the larger interests of comity all indicate that the Tenth Circuit was correct. As a matter of federalism, it is not the place of federal courts to undermine an integral element of state tax systems. Amici observe, however, that even a narrow ruling on the scope of the TIA in this Court could have an unexpected - and we would argue undesirable – impact on the federalism concerns that we think should decide this case. This is because any interpretation of the Colorado Statute for purposes of the TIA made by this Court might be erroneously construed as carrying over to interpreting the Statute for purposes of the dormant Commerce Clause. We note that two lower courts that have addressed the merits of this case are divided as to whether the Colorado Statute is a "tax" or a "regulation" and whether that classification should matter. The federal district court believed that the Colorado Statute was sufficiently similar to a tax to merit analysis under the strict nexus test of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The Colorado state court has since disagreed and did not apply the *Quill* test to the Colorado Statute, though it then proceeded to apply a stringent test for discrimination to the Statute and issued a preliminary injunction barring its application.

We think it likely and reasonable for the courts below to look to this Court's decision on the TIA for guidance as to what test to apply under the dormant Commerce Clause. However, amici fear that a decision that held that Colorado's reporting requirement is integral to Colorado's "tax collection" for purposes of the TIA will exert a gravitational pull on the lower courts, encouraging them to continue to apply *Quill*'s physical presence test to the Colorado Statute. The *Quill* test is an especially strict test under the dormant Commerce Clause, and one arguably meant only for "taxes." Thus, a victory for sensible state tax administration and federalism in this Court could be transmuted into a defeat for those principles below. Amici believe that *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), teaches that an answer on the TIA does *not* compel an answer concerning the dormant Commerce Clause. We call this issue to the Court's attention so that the Court is aware of how a decision on the TIA issue might be used – or misused – when the case reaches the merits, either in the state or federal court system. [2]

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[2] We note that the petitioner has already implicitly argued that the TIA does not compel an answer to the dormant Commerce Clause question. In the courts below, the petitioner argued for expansion of the notion of a "tax" in order to spur application of the *Quill* rule, but before this Court petitioner now argues for a narrow interpretation of a "tax," one that would prevent application of the TIA. *See, e.g.*, Brief for Appellee at 51, *Direct Marketing Ass'n v. Brohl*, 735 F. 3d 904 (CA10 2013), 2012 WL 3886467 ("The same principles relied upon by the Court in *Quill* prohibit Colorado from subjecting remote sellers to the notice and reporting obligations of the [Colorado] Act. The parallel between this case and *Quill* is direct . . ."). Amici believe

ARGUMENT

I. Third-Party Reporting Requirements, Such as Those Instituted by Colorado, Are Integral to Tax Collection and Are Shielded from Federal Court Interference by the Tax Injunction Act.

The Colorado Statute is unexceptional in adopting an information reporting solution to solve the problem of a low rate of voluntary tax compliance. Because the Statute's operation is integral to the functioning of Colorado's sales and use tax system, its operation is shielded by the TIA.

A. Background on the Sales and Use Tax

Colorado imposes a sales tax of 2.9% on the sale of tangible personal property in Colorado. Colo. Rev. Stat. § 39–26–104(1)(a), –106(1)(a)(II). The formal liability for this tax is placed on the retailers, but retailers must pass the tax on to their purchasers. *See, e.g.*, Colo. Rev. Stat. § 39-26-108 (retailers may not advertise that they are absorbing the tax). Colorado imposes a complementary use tax at the same rate for the use of tangible personal property acquired out of

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that petitioner is incorrect on both the TIA and dormant Commerce Clause. Among other reasons, this is because both of petitioner's positions undermine state tax systems. A narrower interpretation of the TIA means more litigation in federal courts about matters integral to tax administration, even before provisions have been put into operation. An interpretation of *Quill* that it applies to information reporting systems means, in the context of the internet economy, that more transactions will slip out of the state sales and use tax base, thereby hamstringing a major source of revenue and creating unfair competition for in-state retailers. For further discussion of these issues, see Part II *infra*.

state, for which no Colorado sales tax has been collected; the legal liability for the use tax is placed on the purchasers. Colo. Rev. Stat. § 39–26–202(1)(b), –204(1). Operating together, the two complementary liabilities impose a single tax on the purchase and use of tangible personal property. If a purchase is made in-state, then the retailer is liable for the collection and remittance of the tax. If a purchase is made out-of-state, then only the purchaser is liable for the tax and its remittance. If not for the use tax, state sales taxes would systematically encourage state residents to make their purchases out of state. This Court long ago found that the use tax is constitutional as a means of protecting a state's sales tax base, as well as in-state businesses. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937).[3]

States have looked to vendors to remit the sales tax since the advent of the sales tax during the Great Depression.[4] It is simply too difficult to have

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[3] Justice Cardozo's understanding of the sales-use tax system is worth quoting in full:

> The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales.

Henneford v. Silas Mason Co., 300 U.S. 577, 581 (1937).

[4] The use tax was first developed by California and Washington in 1935 and "[s]ince the early 1960s, all states

individuals keep track of all of their purchases and, without some method of checking compliance, it is very unlikely that individuals would report their purchases in full.

The weakness of relying on voluntary compliance is a problem for all taxes, federal and state, income and sales. The 1943 imposition of withholding of taxes on wages at the federal level is another example of a similar solution to the same basic problem.[5] Rather than wholly rely on each individual employee to remit their income taxes correctly at the end of the year, the federal government chose to put much of the burden of withholding and paying the taxes on the smaller number of employers who are also more likely to have greater bookkeeping capacity. 26 U.S.C. § 3402 (current requirement). When there are no wages to withhold – for instance when a dividend is being paid - the federal government instead relies on information reporting. [6]

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imposing sales taxes also have imposed use taxes." John F. Due & John L. Mikesell, Sales Taxation: State and Local Structure and Administration 245 (2d Ed. 1994).

[5] Current Tax Payment Act of 1943, Pub. L. No. 78-68, ch. 120, sec. 2(a), §§ 1621-22, 57 Stat. 126, 126-35.

[6] 26 U.S.C. § 6041(a) ("All persons engaged in a trade or business and making payment in the course of such trade or business to another person . . . of $600 or more in any taxable year . . . shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.").

States with income taxes also generally require withholding, including on income earned by residents of other states.[7] Indeed, withholding of the income of non-residents preceded withholding more broadly because of the particular challenge states perceived in collecting the tax due from non-residents.[8] This Court long ago accepted such a differential scheme of tax administration as constitutional. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 76 (1920) ("The contention that an unconstitutional discrimination against noncitizens arises out of the [challenged] provision . . . [which] confin[es] the withholding at source to the income of nonresidents is unsubstantial. That provision does not in any wise increase the burden of the tax upon nonresidents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it.").

B. Obligations of Colorado Retailers

Colorado retailers have a legal obligation to collect the sales tax and to remit it to the state on a particular schedule, usually on a monthly basis. Colo. Rev. Stat.

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[7] *See, e.g.*, Cal. Rev. & Tax Code § 18662 (authorizing withholding); *see also* RIA, All States Tax Guide P 227 (2014) (Table: Wage and Other Withholding and Information Returns) (Most states have some withholding and/or information reporting requirement).

[8] States also rely on information sharing with the federal government, which, as just noted, requires extensive information reporting. *See, e.g.,* Otto G. Stolz & George A. Purdy, *Federal Collection of State Individual Income Taxes*, 1977 Duke L.J. 59, 71 (1977).

§ 39-26-105(1)(b)(I). Colorado retailers must maintain records of their sales for a period of three years. Colo. Rev. Stat. § 39-26-116. Colorado retailers hold sales tax revenue in trust, and there is a lien on the property of the retailers in connection with the sales tax. Colo. Rev. Stat. §§ 39-26-117, - 118. It is a felony for a retailer not to file a return with the State or to file a fraudulent return; significant monetary penalties can also apply. Colo. Rev. Stat. § 39-26-118, -120-21.[9]

C. Use Tax Collection

Tax compliance increases based on the amount of third-party reporting required. At the federal level, the latest analysis from the GAO puts the non-compliance level at 56% when there is little or no third-party reporting, while the non-compliance rate for ordinary wages and salaries is only 1%. U.S. Gov't Accountability Office, GAO-12-651T, *Tax Gap: Sources Of Noncompliance And Strategies To Reduce It*, at 6 (2012). When it comes to use tax compliance by individual consumers, the percentage is far lower than the reported percentages for complying with the federal income tax. For example, California has implemented a large number of measures intended to spur voluntary compliance, including providing lookup tables and a use tax line on its personal income tax form. California State Board of Equalization, *Addressing the Tax Gap*,

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[9] For a more complete list of the obligations of in-state retailers, see Corrected Brief of Multistate Tax Commission as Amicus Curiae, DMA v. Brohl, 735 F. 3d 904 (CA10 2013), 2012 WL 3886451 (Addendum). Colorado retailers are entitled to retain a small amount of the sales tax they collect to compensate them for their administrative burden. Colo. Rev. Stat. § 39-26-105(1)(c)(I)(A).

http://www.boe.ca.gov/news/tax_gap.htm (detailing California efforts); Daily Tax Report (BNA), *States See Little Revenue From Online Sales Tax Laws, Keep Pressure On Congress*, Jan. 6, 2014 at J-1; *see also* Nina Manzi, Minnesota House of Representatives Research Department, *Policy Brief: Use Tax Collection on Income Tax Returns In Other States* (2012) (survey of state efforts). Nevertheless, in 2012 California estimated that it only collected the use tax on about 4% of sales from non-collecting out-of-state vendors on which the use tax was due. California State Board of Equalization, *Revenue Estimate: Electronic Commerce and Mail Order Sales*, Rev. 8/13, at 7 tbl.3 (2013) (comparing estimate of total remote sales with estimate of total sales on which use tax was paid).

The most direct solution to the problem of collecting the use tax is to require out-of-state vendors to collect the tax just like in-state vendors. Indeed, such vendors are required to collect the use tax, but only if they have physical presence in the state mandating collection.

The physical presence requirement emerges from this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), as re-affirmed, though importantly modified, by this Court in *Quill v. North Dakota*. *Quill* holds that it is a violation of the dormant Commerce Clause for a state to impose a use tax collection obligation on any retailer that does not have a physical presence in the state. *Quill*, 504 U.S. at 313-19. Therefore, under *Quill*, Colorado cannot impose the obligation to collect the use tax on vendors that have no physical presence in Colorado.

D. Implication of the Use Tax Collection Gap

Before the explosion of electronic commerce, the use tax collection gap was a much less serious problem, although mail-order companies like LL Bean – and Quill itself - have long been a problem for state use tax collection. The latest estimates that amici are aware of projected the total use tax collection gap facing the states collectively at over $11 billion in 2012, with the revenue lost to Colorado estimated at about $170 million. Donald Bruce et al., *State and Local Sales Tax Revenue Losses From E-Commerce*, 52 State Tax Notes 537, 545 (May 18, 2009). This collection gap is only likely to grow. *See generally id.* And this gap is more than a revenue problem because this particular tax gap directly favors out-of-state retailers at the expense of in-state retailers who must collect the sales tax and are therefore placed at a competitive disadvantage.

Recent studies confirm that a sizeable number of online consumers actively seek to avoid paying the use tax, which explains why sellers resist collecting it - or, as in this case - even reporting the taxable transaction to the purchaser or to the state tax officials where the purchaser resides. *See* Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 American Economic Review 1, 4 (2014) ("We estimate that on average, the application of a 10 percent sales tax reduces purchases by 15 percent among [E-Bay] buyers who have clicked on an item."); Brian Baugh et al., *The "Amazon Tax": Empirical Evidence From Amazon And Main Street Retailers* (Nat'l. Bureau of Econ. Research, Working Paper 20052, 2014) at *3. (studying how consumers reacted in the small number of states in which Amazon.com has begun to collect the use tax and,

among other things, finding "a 19.8% increase in purchases at the online operations of competing retailers [that do not collect the use tax]. . ., [and] a 2.0% increase in local brick-and-mortar expenditures. . . .").[10] These studies suggest the large scale of the losses suffered by in-state businesses as a result of a constitutional rule meant to provide a level playing field for out-of-state businesses.

Amici note that systematically disadvantaging in-state business in this way is inconsistent with the modern dormant Commerce Clause. As Justice Stone put it, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). To be sure, the ruling in *Quill* does seem to systematically disadvantage in-state commerce, as the dissent in *Quill* observed. *Quill*, 504 U.S. at 329 ("If the Commerce Clause was intended to put businesses on an even playing field, the majority's rule is hardly a way to achieve that goal.") (White, J., dissenting). Yet the majority in *Quill* never questioned this underlying purpose of the dormant Commerce Clause, *id.* at 309, and cited *Western Live Stock* favorably. *Id.*[11] Rather, and also following *Western Live Stock*,

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[10] Even more dramatically, these researchers found that "[w]hen [they] look[ed] at the sales of Amazon Marketplace merchants, who are generally not subject to the Amazon Tax, the large sales (≥$300) of these retailers increase by 60.5% after the tax goes into effect." *See* Baugh et al., *supra*.

[11] *Cf.* Charles A. Trost, Federal Limitations on State and Local Tax § 9:2 (2d ed. 2002) ("[I]t will be seen that, after some

the majority in *Quill* held that collection of the use tax placed too great a burden on retailers who sold remotely into several states as compared to in-state retailers, in part because of the multiplicity of jurisdictions, with a variety of tax rates, that a seller like Quill would have to satisfy. *See id.* at 313 n.6; *see also Western Live Stock*, 303 U.S. at 255-56 ("The vice characteristic of those [tax measures] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.") (internal citations omitted).

E. Colorado Imposes Third-Party Reporting

In response to the use tax collection gap and its impact on local businesses, Colorado turned to an information reporting solution. Three reports are required by the Colorado Statute. First, a notice must be sent by the seller to the purchaser, with each purchase, that Colorado use tax may be due. Colo. Rev. Stat. § 39–21–112(3.5)(c)(I). Second, an annual notice must be sent to anyone who purchased more than $500 in goods from that retailer during the previous year. Colo. Rev. Stat. § 39–21–112(3.5)(d)(I)(A); 1 Colo. Code Regs. § 201–1:39–21–112.3.5(3)(c) (defining "de minimis Colorado purchaser"). Third, an annual notice must be sent to

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years of judicial peregrinations . . . the Court has now returned to essentially the same approach as that used in *Western Live Stock*.").

the Colorado Department of Revenue identifying all purchases made by Colorado residents and sent into the State that year. Colo. Rev. Stat. § 39–21–112(3.5)(d)(II)(A). A retailer that makes less than $100,000 worth of sales into Colorado does not need to provide any of these notices. 1 Colo. Code Regs. § 201–1:39–21–112.3.5(1)(a)(iii) (definition of a "retailer that does not collect Colorado sales tax."). Monetary penalties apply for non-compliance; the penalties are capped for the first year of the program and may be waived. Colo. Rev. Stat. § 39–21–112(3.5)(c)(II), (d)(III)(A)-(B).

Crucially, the Colorado Statute does not require a retailer to calculate a sales tax rate for the particular geographic area to which the sale was made. There are thousands of overlapping jurisdictions in the United States with the power to impose the use tax, and it was, at least in part, because of the difficulty in computing individual tax liability that this Court decided to retain a bright-line physical presence test in *Quill* and thus to leave the problem of balancing interests to legislatures, particularly to Congress. Congress is better suited to balance the interests of states in collecting the use tax with the interests of interstate retailers who could be overburdened. *Quill*, 504 U.S. at 313 n.6, 318. This case does not require the same balancing, as Colorado does not require any out of state retailer to collect or even calculate any tax. As a result, the burdens imposed are minimal. The initial transactional notice could easily be satisfied by adding a short statement on the invoice that is sent to every purchaser with the product. As for the annual notice, virtually every business, especially every larger business, keeps track of its customers, especially those customers who purchase over $500 in

merchandise. Accordingly, automatically notifying these customers (and the Department of Revenue) is a minor burden, and surely much less a burden than remitting tax revenue to one, let alone several thousand, jurisdictions.[12]

In sum, the Colorado Statute is a modest requirement on one party to a taxable transaction to report information, which it typically collects in any event, to the taxing authorities. This obligation is only imposed on relatively large businesses, and failure to make the report subjects the obligated business to moderate financial penalties of the type generally levied for failure to comply with a tax measure and does not subject that party to collateral consequences outside of the tax system, such as the loss of a valuable license. If this Court holds, as it should, that the Statute is shielded from federal court interference by the TIA, then this holding would not threaten to

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[12] Amici observe that the challenge of properly calculating and remitting use tax revenues to thousands of jurisdictions has declined precipitously since *Quill* was decided because of major advances in computers and the ability to make payments online. Indeed, many states have, among themselves, decided it would be economical to provide the necessary software to retailers for free. *See, e.g.,* Streamlined Sales and Use Tax Agreement § 305(E) ("Each member state that has local jurisdictions that levy a sales or use tax shall . . . . [p]rovide and maintain a database of all sales and use tax rates for all of the jurisdictions levying taxes within the state."). A bill has passed the United States Senate that would allow states to require collection of the use tax if, among other things, the state made such software available for free. Marketplace Fairness Act of 2013, S. 743, 113th Cong. § 2(b)(2)(D)(ii)(2013). In anticipation of the passage of such a bill, Colorado passed a statute instructing the Department of Revenue to make such a database available. Colo. Rev. Stat. § 39-26-105.3(7)-(10).

unleash the parade of horribles portended by petitioner and its amici. This is because the Statute requires the provision of readily available and narrow tax information, by a party to a taxable transaction, to tax authorities, for the purpose of enforcing that very same tax. Thus this provision is readily distinguishable from the scenarios sketched by the petitioner and its amici. *See, e.g.*, Direct Marketing Association Br., pp. 52-53 (example of common carriers being required to inspect packages.); Institute for Professionals in Taxation Br., pp. 16-20 (example of withholding licenses to ensure compliance). To be sure, there are limits to the protection offered by the TIA, and, as state laws approach – and go beyond – these limits, there are hard cases. Perhaps some of the scenarios feared by the petitioner and its amici represent such cases. The Colorado Statute, however, does not present a hard case.

F. Additional Context on Third-Party Reporting

The federal government recently (2010) adopted a third-party reporting regime to meet a challenge analogous to that facing Colorado. Specifically, non-US banks must report U.S. account holder information to the U.S. government in order to avoid U.S. withholding taxes. 26 U.S.C. §§ 1471-74 (Foreign Account Tax Compliance Act). The United States faces practical obstacles in getting U.S. investors with non-U.S. bank accounts to properly report and pay their taxes. Among other obstacles, the United States cannot, of course, compel foreign governments to collect U.S. taxes, just as Colorado cannot compel out-of-state retailers to collect the use tax. Rather than continue to rely on the ineffective expedient of

voluntary reporting, the federal government, like Colorado, has turned to third-party reporting.

Third-party reporting is at the heart of all modern tax systems, including the tax system most commonly found in the rest of the world: the Value Added Tax (VAT), especially in its most common form, which uses the credit-invoice method. Sijbren Cnossen, *A VAT Primer for Lawyers, Economists, and Accountants*, 124 Tax Notes 687, 692 (Aug. 17, 2009) (150 countries have a VAT, including all other members of the OECD). A credit-invoice VAT relies on third-party reporting in the following way: at each sale of a good along the chain of production, the business selling the good is obligated to pay the full tax due. However, each business is also entitled to a credit for the tax remitted by the business that handled the good earlier in the value chain; it is the difference between the value of the input and the output that constitutes the "value added," which is the base of the tax. *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 362 (1991) ("[T]he sale price of a product is the total of all value added by each step of the production process to that point.") It therefore makes sense for each business in the chain to make certain that its suppliers paid the tax properly, lest their own credit be placed in jeopardy. There is evidence that this third-party reporting system spurs compliance. *See, e.g.*, Dina Pomeranz, *No Taxation Without Information: Deterrence and Self-Enforcement in the Value Added* Tax (Harv. Bus. Sch., Working Paper 13-057, 2013) at 24. ("This paper investigates the effectiveness of the Value Added Tax in facilitating tax enforcement . . . and shows that in line with a growing recent literature, information reporting plays a crucial role for effective taxation.").

Of course, just because third-party reporting is a common and crucial element of tax administration in general does not necessarily mean that it was appropriate – or promising – for Colorado to use it in the use tax context. But here its use is highly appropriate as measured by neutral criteria used to judge such matters. In 2010, one of the leading experts in tax compliance synthesized the information-reporting literature and arrived at six criteria to indicate whether introducing an information reporting regime would be advisable. Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 Fordham L. Rev. 1733 (2010). The Colorado Statute scores highly under each criterion. For instance, the reporting requirement is properly being imposed on a party with greater bookkeeping infrastructure and also on the less numerous party (i.e., retailers versus consumers).[13]

Given the centrality of third-party reporting to tax administration in general, and its aptness for this problem in particular, amici believe that the Tenth Circuit was correct in concluding that enjoining the operation of the Colorado Statute constituted "restrain[ing] the assessment, levy or collection" of Colorado's use tax. 28 U.S.C. § 1341.

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[13] For completeness, the remaining four criteria favoring information reporting are: the revenue loss should be worth the administrative cost, the two parties should have an arms-length relationship, the information collected should be sufficient for enforcement purposes, and there should not be an easy way to avoid the reporting requirement. Lederman, *supra* at 1739-41.

II. How this Court Decides the Question Presented on the TIA May Impact How the Lower Courts Adjudicate the Merits

Whatever this Court decides in this case regarding the TIA, the dispute about the constitutionality of the Colorado Statute will continue. Having lost before the Tenth Circuit on the grounds of the TIA, petitioner asked a Colorado state court to preliminarily enjoin operation of the Colorado Statute. Petitioner was successful there, just as it was before the federal district court. Order Granting Preliminary Injunction, *Direct Marketing Ass'n v. Department of Revenue and Barbara Brohl*, Case No. 13 CV 34855 (District Court for the City and County of Denver) (Feb. 18, 2014); *Direct Marketing Ass'n v. Huber*, 2012 WL 1079175 (D. Colorado) (Mar. 30, 2012).[14] However, the two courts disagreed with one another on how to conduct their analysis, and amici disagree with the analytical rubric utilized by both. Although the merits dispute concerning the dormant Commerce Clause is beyond the question presented, this Court's TIA decision, even if narrowly written, might influence the resolution of the merits because both sides will look to the ruling here to provide guidance for what will be argued in either the state or federal court thereafter.

As this Court observed in the context of suits under Section 1983, "an injunction issued by a state court pursuant to § 1983 is just as disruptive as one entered by a federal court." *Nat'l Private Truck*

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[14] The district court's opinion is included as Appendix B to the Petition for Certiorari. Subsequent cites to this decision will be to Appendix B.

Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 591 (1995). Accordingly, this Court, "[g]iven the strong background presumption against interference with state taxation," concluded that "[w]e simply do not read § 1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists." *Id.* at 590-91. Here, it is possible that an interpretation of the TIA that protects states' control over their revenue function could, ironically, fortify a procrustean interpretation of what is permissible under the dormant Commerce Clause. Such interpretation could, in turn, inadvertently, undermine state control over its revenue function. *Cf. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake. . . .").

There are two related issues on which the lower courts are split or confused in connection with the Colorado Statute. First, they are uncertain on whether to apply the physical presence test of *Quill* to this Statute and, second, whether this Court applies a stricter test under the dormant Commerce Clause for tax statutes than it does for regulatory statutes unrelated to taxation. However this Court decides the breadth of the TIA, the lower courts will look to this Court's decision for guidance as to how to resolve these merits issues. In amici's view, a decision as to the scope of the TIA should not compel lower courts to apply any particular test to the Colorado Statute because the TIA question is a matter of statutory interpretation, informed by comity concerns, and the merits question is a matter of constitutional

interpretation, motivated by concern with maintaining a national free market. Nonetheless, the relevant factors in both inquiries do overlap to some degree. For instance, if this Court were to find that the information reporting requirement at issue in this case is so entwined with Colorado's use tax such that it should be shielded by the TIA, then perhaps the special concerns with the use tax that animated this Court's decision in *Quill* should also apply to the information reporting requirement. Thus the lower courts will be watching this TIA ruling for signs of how the merits question should be resolved.

And, in fact, the federal district court and the Colorado state court have already split on the applicability of the *Quill* rule to the Colorado Statute. Compare District Court Order at Pet. App. B-19 ("I conclude that the burdens imposed by the [Colorado] Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*.") with State Court Order at *28 ("I think it likely that *Quill* is limited to taxation, and therefore will be found on the merits to have no application to this case.").

Quill actually has three holdings that are potentially relevant for the Colorado Statute. First, *Quill* held that imposing a collection requirement on out-of-state retailers did not violate the Due Process Clause of the 14th Amendment so long as there was purposeful availment and minimal contacts between the taxpayer and the state. *Quill*, 504 U.S. at 308. Petitioner has not contended – nor could it – that the Colorado Statute facially violates the Due Process rights of out-of-state retailers.

Second, until *Quill*, there was no formal distinction between the nexus analysis required under

the Due Process Clause and the nexus analysis required under the dormant Commerce Clause. *Quill* established that the "substantial nexus" test under the dormant Commerce Clause was more demanding than the test under the Due Process Clause. *Quill*, 504 U.S. at 313 ("[T]he 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to the State's suggestion, a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause."). Because *Quill* arose in an analysis of prong one of the four-part test for taxes established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this more demanding nexus requirement, so far as amici know, has only been used to analyze measures requiring the collection of taxes by out-of-state sellers. *See, e.g.*, *Ferndale Labs., Inc. v. Cavendish*, 79 F.3d 488, 494 (CA6 1996). It is therefore unclear if this heightened nexus requirement should be applied to the Colorado Statute which does not require the collection or calculation of any tax, but does impose a modest reporting requirement.

Quill's third holding is that, as to out-of-state use tax collection obligations, the substantial nexus requirement of the *Complete Auto* Test is a bright-line rule that only retailers with a physical presence in a state can be compelled to collect that state's use tax. *Quill*, 504 U.S. at 313-19. The district court found that this holding applied to the Colorado Statute, even though it does not require the collection or remission of any tax and, accordingly, ruled for petitioner on this ground. District Court Order at Pet.App. B-17-20.

The Colorado state court did not agree that the *Quill* rule applies so broadly. State Court Order at *16-22.

There is a second way in which a TIA ruling may impact the underlying merits issue and, again, this potential spillover is caused by the fact that, in deciding this case, this Court must decide if the Colorado information requirements are sufficiently implicated in the Colorado tax system to merit protection under the TIA. Many commentators believe that this Court subjects taxes and regulations to two different analyses in a manner unrelated to *Quill*, and if these commentators are correct, then the lower courts should subject the Colorado Statute to a different test depending on whether it more resembles a tax or a regulation. *See, e.g.*, Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 Iowa L. Rev. 541, 599 (2010); Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine*, 29 Virginia Tax Review 407, 441 (2010).

As a general matter, and certainly in the context of regulations, this Court has allowed even a facially discriminatory state law to survive dormant Commerce Clause scrutiny if the state could demonstrate that the law "serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (internal quotation marks omitted). *Maine v. Taylor* is the leading example of a case where a facially

discriminatory regulation was upheld because a state made this showing. In that case, Maine imposed a ban on the importation of live baitfish; the district court upheld the ban in part because it "concluded that less discriminatory means of protecting against the[] [biological] threats [posed by the fish] were currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised." *Id*. at 143. This Court upheld the decision of the district court over a dissent that would have required the State to demonstrate its lack of alternatives with "far greater specificity." *Id*. at 153 (Stevens J., dissenting).

In contrast to *Maine v. Taylor*, many commentators believe that, in the case of taxes, states are not given the chance to make this exculpatory showing. In other words, once a state tax law is shown to be discriminatory, then it is unconstitutional without regard to its larger context. *See* Zelinsky, *supra* ("In the wake of *Complete Auto*, the Court has generally invalidated discriminatory state taxes without affording the taxing states the opportunity to defend their respective tax laws as necessary to further legitimate public purposes."). That is, in the case of taxes, a state would not have the chance to justify its taxing scheme as Maine did for its regulation.

The two trial courts below in this case did not explicitly reject the possibility that a discriminatory tax statute might be upheld because there was no reasonable alternative. Rather, both courts cursorily rejected the arguments made by the State to justify its reporting law and proceeded to grant petitioner an injunction despite the importance of information

reporting and the holding of *Maine v. Taylor*. District Court Order at Pet. App. B-15; State Court Order at 24 ("I will not at this stage discuss in any detail the facts Defendants have put forth to show there are no reasonable non-discriminatory alternatives, except to say I think it unlikely, on this record, that Defendants will be able to meet this almost impossible burden."). Amici believe that such a cursory application of the test for facial discrimination is tantamount to not giving the State a chance to justify its statute at all, assuming *arguendo* that there is a constitutionally relevant difference in treatment. Therefore, these analyses run counter to the holding of *Maine v. Taylor* and cannot be sustained.[15]

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[15] The authors of the leading treatise on state and local taxation found the federal district court's decision problematic for similar reasons to those advanced by amici:

> Our concern with the [district] court's discrimination analysis is that it proves too much, suggesting that any differential treatment in tax administration between in-state and out-of-state businesses gives rise to a substantial likelihood of prevailing on a Commerce Clause discrimination claim. Long ago, for example, the Supreme Court sanctioned—at least in the context of the Privileges and Immunities Clause—differential treatment of in-state and out-of-state taxpayers, when there was discrimination in the substantive tax burden and the measures related to enforcement practicalities.

Hellerstein, Hellerstein & Swain, State Taxation ¶ 19.02[7][b] (3d ed., updated through 2014) (citing *Travis v. Yale & Towne Mfg. Co*., 252 U.S. 60 (1920)). In the view of amici, the Colorado state court's analysis is similarly over-broad. *See* State Court Order at *23-24; *cf. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 550 U.S. 330, 342 (2007) (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.").

Amici do not believe that there should be an unforgiving rule for evaluating the alleged discriminatory nature of taxes – or any other state action – in part because it does not show due respect to the states as sovereigns. Although this issue is not before the Court, amici bring it to the Court's attention so that the Court understands that its ruling on the TIA might make it more likely that a more unforgiving test will be applied to the Colorado Statute.

More generally, amici contend that labels on the nature of the statutory authority should not matter for constitutional analysis and that there should be only one test for discrimination under the dormant Commerce Clause. There is no doubt that taxes and regulations can serve different ends and that, furthermore, there may be distinctions based on those differences under the TIA. Nevertheless, taxes and regulations are often policy substitutes. Crucially, both taxes and regulations can be used to encourage or discourage behavior. Furthermore, regulations can be used to raise revenue indirectly and even to redistribute wealth.[16] The hallmark of modern dormant Commerce Clause jurisprudence is a commitment to pragmatism[17] and therefore we do not think that the label should matter in most, if not virtually all, cases.

This Court's decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), is a particularly important application of this commitment to substance over form when it

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[16] Richard A. Posner, *Taxation as Regulation*, 2 Bell J. Econ. and Mgmt. Sci. 22 (1971).

[17] *See, e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 287-88 (1977) (rejecting importance of labels).

comes to constitutional analysis. In *NFIB v. Sebelius*, the label that Congress used in a statute – namely the individual insurance "mandate" – was respected when the question before the Court was whether another statute passed by Congress – the Anti-Injunction Act, 26 U.S.C. § 7421(a) [AIA] – applied or not. *Id.* at 2583 ("The Anti–Injunction Act and the Affordable Care Act [ACA], however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text."). Because Congress could just re-write the AIA to change its scope, it could also specifically craft a provision in another statute, the ACA, in a manner that avoided application of the AIA. However, despite its non-tax label and despite honoring that label for purposes of the AIA, the Court found this same mandate was a proper exercise of Congress' taxing power. *See id.* at 2594-98. For purposes of constitutional analysis, this Court did not look to labels, but to substance. *Id.* [18]

NFIB v. Sebelius therefore instructs the lower courts not to assume that a tax for purposes of the TIA is a tax for constitutional purposes. Nevertheless, a decision by this Court that held, as we believe it should, that the Colorado Statute is central to tax administration and thus is shielded by the TIA, could be read to suggest that this Court also agrees that the Colorado Statute should be analyzed as a "tax" for purposes of the dormant Commerce Clause. Amici believe that there are specific reasons why such a

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[18] Amici note that the special reasoning that indicated the label mattered for purposes of the AIA do not apply to the TIA. This is because the TIA, unlike the AIA, is aimed at protecting the revenue function of a *different* sovereign, namely the states.

suggestion is not correct – or, at least should not be assumed to be so by the lower courts. Most fundamentally, the TIA and the dormant Commerce Clause serve different, not always complementary, purposes. The TIA, as enacted by Congress, protects a core element of state sovereignty from the interference of federal courts. The dormant Commerce Clause, as developed by this Court, preserves a common national marketplace, which is ultimately to the advantage of all of the participants in a federal system, even if, on occasion, individual state actors object to particular applications. Thus, a special tax on imports into a state would be protected from federal injunction by the TIA, but would almost certainly fail as a violation of the dormant Commerce Clause. Or, to take another scenario, a state regulation that facially discriminated against interstate commerce would not fall within the ambit of the TIA's protection, but would likely fail dormant Commerce Clause analysis. Here, amici believe, we have the converse case: the Colorado Statute merits protection under the TIA because it is essential to Colorado's tax system, but, because it does not undermine the national marketplace, it also does not fail dormant Commerce Clause analysis.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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