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No. ___-______

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 Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI and APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Direct Marketing Association states the following:

Direct Marketing Association is a not-for-profit corporation, and, as such, has no parent corporation and has issued no stock held by any publicly-traded corporation.

PARTIES TO THE PROCEEDING

Petitioner Direct Marketing Association was the plaintiff and appellee in the proceedings below. Respondent Barbara Brohl, the appellant below, is the Executive Director of the Colorado Department of Revenue. The defendant in the District Court proceedings was the former Executive Director, Roxy Huber. Ms. Brohl was substituted for Ms. Huber for purposes of the appeal.

QUESTION PRESENTED

The Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), provides, with regard to federal court jurisdiction, that "[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." The Tenth Circuit Court of Appeals held that the TIA bars the exercise of federal court jurisdiction over a suit brought by the Petitioner challenging the constitutionality of a Colorado law, Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d), which imposes informational notice and reporting requirements, and substantial penalties for non-compliance, on out-of-state retailers that do not collect Colorado sales tax.

The Tenth Circuit's ruling diverges from this Court's leading precedent and creates a split among the Circuit Courts of Appeals regarding the scope of the TIA's limitation on federal court jurisdiction, presenting the following question:

> Whether the TIA bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration?

§ 39-21-112(3.5)(d)(I)(B) 5
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§ 201-1:39-21-112.3.5(4) 5
§ 201-1:39-21-112.3.5(4)(f) 5

Petitioner Direct Marketing Association ("the DMA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

This case marks an important opportunity for the Court to clarify the proper scope of federal court jurisdiction in light of the TIA. The Tenth Circuit's ruling that the TIA prevents the exercise of jurisdiction over a suit by a group of non-taxpayers challenging state law notice and reporting requirements improperly expands the ambit of the TIA beyond the limits intended by Congress. As described by this Court in *Hibbs v. Winn*, 542 U.S. 88, 107 (2004), Congress intended the Act to serve as a jurisdictional bar only in cases "in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." A writ of certiorari is necessary in this case to permit the Court to reinforce the limits of the TIA consistent with Congressional intent, to resolve a conflict among the circuits concerning the authority of federal courts to hear challenges to non-tax measures that are only indirectly related to the payment of state taxes, and to reiterate the Court's caution that the TIA does not preclude federal court review of "all aspects of state tax administration." *Hibbs*, 542 U.S. at 105 (rejecting argument advanced by state officials regarding the scope of the TIA).

Neither party argued before the Tenth Circuit that the TIA foreclosed federal court jurisdiction in this case. Thus, neither party fully briefed the issues presented by this appeal below. The Tenth Circuit's decision, however, has potentially far-reaching rami-

fications for federal court jurisdiction over actions challenging regulatory measures indirectly related to state taxes. By adopting an interpretation of the TIA that diverges from this Court's definitive statement of Congressional intent in *Hibbs* and conflicts with prior decisions in at least two other circuits, the Tenth Circuit decision risks causing further confusion regarding the proper exercise of federal court jurisdiction over cases falling outside the boundaries of the TIA. At a minimum, the Tenth Circuit's ruling creates a situation in which federal court jurisdiction in light of the TIA differs depending upon the circuit in which a state law is subject to challenge. A writ of certiorari will bring clarity to the application of an important federal statute and avoid further division among the circuits as similar cases arise in the future.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A-1 – A-33) is reported at 735 F.3d 904. The Tenth Circuit's order denying rehearing (App. D-1 – D-2) is not reported. The order of the United States District Court for the District of Colorado granting the DMA's motion for summary judgment and entering a permanent injunction (App. B-1 – B-25) is not reported. The order of the District Court granting a preliminary injunction (App. C-1 – C-17) is not reported.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was issued on August 20, 2013. On September 18, 2013, the DMA filed a petition for rehearing en

banc with the Tenth Circuit. On October 1, 2013, the Tenth Circuit denied the petition for rehearing. On December 19, 2013, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including February 28, 2014. *See* No. 13A633. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The relevant provisions of the Colorado Revised Statutes are reproduced in the Appendix at App. E-1 – E-4.

STATEMENT

1. Petitioner, the Direct Marketing Association, is a not-for-profit corporation with headquarters in New York, New York. C.A. Appx. 48 (*First Amended Complaint ("Compl.")* ¶ 2). Founded in 1917, the DMA is the leading trade association of businesses and nonprofit organizations using and supporting multichannel marketing methods, with thousands of members from all fifty states and numerous foreign countries. *Id.* Members of the DMA market their products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the Internet. *Id.* Many DMA members have no office, store, property, employees or other physical presence in Colorado. C.A. Appx. 52 (*Compl.* ¶ 17). As a result, these non-Colorado retailers are not obli-

gated under state law to collect Colorado sales or use tax on retail sales to Colorado consumers and, moreover, are protected against the imposition of such a sales/use tax collection obligation under the "bright line" substantial nexus standard of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Many DMA members with no physical presence in Colorado do not collect Colorado sales tax. C.A. Appx. 52.

2. Enacted by the Colorado General assembly in February 2010, Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d) ("the Colorado Act") impose notice and reporting obligations on "each retailer that does not collect Colorado sales tax." *Id.* §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(II)(A). The Colorado Act is intended to apply solely to retailers who are protected from the imposition of Colorado sales and use tax collection obligations under *Quill*, *i.e.*, "non-collecting" retailers located outside the state. C.A. Appx. 134 (Re-revised version of House Bill 10-1193, amended after a third reading in the Colorado Senate on February 10, 2010) (the Colorado Act "relates to current law requiring a retailer to collect sales tax from a person residing in this state only if the retailer has sufficient connections with this state"). In June 2010, the Colorado Department of Revenue ("Department") adopted regulations to implement the Act. 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) ("the Regulations").

The Colorado Act and Regulations establish three separate obligations for non-collecting retailers: (1) in connection with each sale to a Colorado customer, the retailer must notify the purchaser that although the retailer does not collect Colorado sales tax, the purchaser is obligated to self-report Colorado use tax to

the Department ("Transactional Notice"); (2) the retailer must provide certain Colorado purchasers (those purchasing over $500 in goods from the retailer) annually, by First Class Mail, a detailed listing of their purchases, while also informing each such customer that s/he is obligated to report use tax on such purchases, and that the retailer is required by law to report the customer's name and total amount of purchases to the Department ("Annual Purchase Summary"); and (3) the retailer must turn over to the Department annually the name, billing address, all shipping addresses, and the total amount of purchases of each of its Colorado purchasers ("Customer Information Report"). *See* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(I)(B), (d)(II)(A); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2), (3), & (4).

The Colorado Act and Regulations also impose substantial penalties on non-collecting retailers who fail to comply with the notice and reporting requirements. *See* Colo. Rev. Stat. §§ 39-21-112(3.5)(c)(II), (d)(III); 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which the Transactional Notice is not given, subject to $50,000 first year cap), (3)(d) ($10 penalty per Annual Summary not mailed, subject to $100,000 first-year cap), (4)(f) ($10 penalty per name not included on a Customer Information Report, subject to a $100,000 first-year cap).

The Colorado Act and Regulations do not, however, apply to in-state, Colorado retailers. Indeed, because retailers doing business in Colorado are required, under Colorado law, to obtain a sales tax license and to collect the sales tax from the purchaser at the time of the sale, the Colorado Act necessarily

excludes in-state retailers from its requirements. *See* Colo. Rev. Stat. §§ 39–26–103(1)(a), 39–26–106(2)(a), 39–26–204(2).

3. The DMA in June 2010 filed a Complaint (amended in July 2010) in the federal District Court for the District of Colorado against the Department's Executive Director,[1] challenging the constitutionality of the Colorado Act and Regulations. C.A. Appx. 46–82 (*First Amended Complaint*). Jurisdiction in the District Court was based on 28 U.S.C. § 1331, in light of the federal questions presented by the Complaint. The DMA alleged multiple constitutional violations resulting from the Colorado Act, including claims under the Commerce Clause, the First Amendment, the right of privacy of Colorado consumers, and the Takings Clause. *Id.*

Soon after initiating the suit, the DMA moved for a preliminary injunction against the law's enforcement based on its Commerce Clause claims (Counts I and II). C.A. Appx. at 84-114. On January 26, 2011, the District Court entered an Order Granting Motion for Preliminary Injunction, enjoining the Executive Director from enforcing the Colorado Act and Regulations. *See* App. C-1 – C-17.

In March 2011, the parties agreed to file cross-motions for summary judgment on the DMA's Commerce Clause claims, with a stay of proceedings on all remaining claims. C.A. Appx. 1677-79. In March 2012, the District Court granted summary judgment

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[1] At the time the Executive Director was Roxy Huber. The current Executive Director, Barbara Brohl, was later substituted for Ms. Huber for purposes of the appeal.

in favor of the DMA on each of the Commerce Clause claims and entered a permanent injunction enjoining the enforcement of the notice and reporting obligations imposed under the Colorado law. *See* App. B-1 – B-25.

4. The Executive Director appealed the entry of the permanent injunction on the merits. C.A. Appx. 2164-66. In their briefs filed with the Court of Appeals, neither party contested federal court jurisdiction. The Defendant addressed the TIA only in a footnote in each brief she filed, asserting that the Court could exercise jurisdiction without running afoul of the TIA. *See, e.g.,* Appellant's Brief at 31 n. 3. The DMA, in a two-page discussion in its jurisdictional statement, addressed those aspects of the TIA necessary to demonstrate its inapplicability. Appellee's Brief at 3-4. No further briefing was requested by the Court of Appeals prior to the issuance of its decision.

On August 20, 2013, the Tenth Circuit issued its opinion and accompanying judgment. *See* App. A-1 – A-33. The Court ruled that the TIA divested the District Court of jurisdiction to enjoin enforcement of the Colorado Act. *Id.* at A-33. The Court, therefore, did not reach the merits of the DMA's Commerce Clause claims, on which the District Court awarded the DMA summary judgment. *Id.* at A-3.

The Court of Appeals acknowledged that the DMA's suit "differs from the prototypical TIA case." *Id.* at A-18. The Court further conceded that "[e]ven if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." *Id.* How-

ever, focusing on the word "restrain" in the TIA, the Court determined that the DMA's challenge to the Colorado Act was subject to the TIA because the suit "if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." *Id.* at A-17. The Tenth Circuit concluded that the TIA applies "both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's use tax statutes and regulations that aims to enforce and increase use tax collection." *Id.* at A-19.

In reaching its decision, the Tenth Circuit acknowledged this Court's caution that the TIA is not a "sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Id.* at A-20 – A-21 (*citing Hibbs*, 542 U.S. at 105). The Court of Appeals concluded, however, that the sole distinction under the TIA is between suits that would have the effect of increasing state tax revenues (like the challenge to state tax credits in *Hibbs*), over which jurisdiction is not prohibited, and suits that would "reduce the flow of revenues to the state," which trigger the TIA. *Id.* at A-21 (citing *Hibbs*, 542 U.S. at 106). The Tenth Circuit further concluded that, under *Hibbs*, the applicability of the TIA turns on "whether the plaintiff's lawsuit seeks to prevent 'the State from exercising its sovereign power to collect . . . revenues,'" regardless of whether the plaintiff is a taxpayer challenging its own state tax liability or, instead, a non-taxpayer group like the DMA. *Id.* at A-15.

The Tenth Circuit also declined to follow two conflicting decisions from other circuits, cited by the DMA in its jurisdictional statement. First, the Court

of Appeals conceded that its ruling is at odds with the First Circuit's decision in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), *see* App. at A-22, which addressed the limitation on federal court jurisdiction under the Butler Act, 48 U.S.C. § 872, the Puerto Rico analog to the TIA. The Tenth Circuit expressly declined to follow the First Circuit's reasoning that there is no statutory bar to federal court jurisdiction over a suit that "[does] not challenge the amount or validity of [a state] tax, nor the authority of the [state revenue official] to assess or collect it." *See* App. at A-22 (brackets added).

The Tenth Circuit further deemed the Second Circuit's decision in *Wells v.* Malloy, 510 F.2d 74 (2nd Cir. 1975), to be inapplicable. *Id.* at A-23. The Court conceded, as noted by Judge Friendly in *Wells*, that the TIA does not preclude jurisdiction over every suit that seeks to enjoin any state law that "could possibly secure tax payment." *Id.* (citing *Wells*, 510 F.2d at 77). The Tenth Circuit, however, deemed *Wells* to be inapplicable on the ground that the Colorado Act imposes obligations that are intended to promote tax compliance "in the first instance," whereas the state law in *Wells* prescribed a sanction for taxpayers that had failed or refused to pay a tax. *Id.*

5. On September 18, 2013, the DMA filed a petition for rehearing en banc by the Tenth Circuit. On October 1, 2013, the Court of Appeals denied the request. *See* App. D-1 – D-2.

6. On November 5, 2013, the DMA filed suit in Colorado state court in an effort to reestablish the injunction against the Colorado Act before the annual requirements imposed on non-collecting retailers

(*i.e.*, the Annual Purchase Summaries and Customer Information Reports) took effect.

The DMA also elected to pursue a petition for a writ of certiorari from this Court, given the significance to its members of the Tenth Circuit's decision dismissing the case on jurisdictional grounds. On December 19, 2013, the Court granted the DMA an extension of time to file a petition for a writ of certiorari. *See* No. 13A633.

On February 18, 2014, the state District Court for the City and County of Denver granted the DMA's motion for a preliminary injunction and entered an order enjoining enforcement of the Colorado Act. Proceedings in the state court action are ongoing.

REASONS FOR GRANTING THE PETITION

Since its enactment in 1937, the TIA has served as a restriction on the exercise of federal court jurisdiction, consistent with Congressional intent to foreclose federal court challenges brought by taxpayers seeking to circumvent state administrative procedures and remedies for contested state tax assessments. The Tenth Circuit's decision interpreting the TIA to bar federal jurisdiction over the DMA's constitutional challenge to the informational notice and reporting obligations imposed on a defined set of non-taxpayers under a Colorado law which neither imposes a tax, nor requires the collection of a tax, improperly expands the TIA to a lawsuit outside the scope of the jurisdictional limitation intended by Congress. Although the Tenth Circuit purports to follow this Court's authoritative decision in *Hibbs* concerning the intent of Congress in enacting the

TIA, the Tenth Circuit disregards *Hibbs*' teaching. At the same time, the Tenth Circuit expressly rejects the reasoning of the First Circuit in a strikingly similar case, and fails to follow persuasive authority from the Second Circuit interpreting the TIA in light of the same legislative history reviewed by this Court in *Hibbs*. Certiorari is therefore warranted because the decision below presents an important issue of federal court jurisdiction and creates a conflict among the circuits as to the proper application of the TIA to cases challenging secondary elements of state tax administration.

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT IN *HIBBS V. WINN* REGARDING THE SCOPE AND INTENT OF THE TIA.

A. Congress Intended The TIA To Apply Solely To Cases, Unlike The DMA's Suit, In Which Liability For State Taxes Is Disputed.

By its terms, the TIA precludes federal court jurisdiction over suits that seek to "enjoin, suspend or restrain the assessment, levy or collection" of state taxes, so long as a plain, speedy and efficient remedy for such a suit exists in a state forum. 28 U.S.C. § 1341. In interpreting the TIA, this Court and lower courts have long looked not only to the language of the Act, but also to the legislative history reflecting Congressional intent underlying the TIA. *See, e.g.*, *Jefferson County v. Acker*, 527 U.S. 423, 434-35 (1999) (noting that, in enacting the TIA, Congress drew in particular on the Anti Injunction Act, 26

U.S.C. § 7421(a)); *Wells*, 510 F.2d at 77 (interpreting the meaning of the term "collection" as used in the TIA in light of its legislative history).

The most recent, and most authoritative, review of the TIA is set forth in this Court's opinion in *Hibbs*. *See Luessenhop v. Clinton County, N.Y.*, 466 F.3d 259, 268 (2nd Cir. 2006) (noting that *Hibbs* represents the "definitive ruling on the proper interpretation of the TIA"). There, the Court reviewed a challenge under the Establishment Clause to an Arizona tax credit for contributions to parochial schools brought by taxpayers who did not qualify for the credit. 542 U.S. at 94-95. The state's Director of Revenue urged that the TIA should be read to foreclose "federal-court interference with all aspects of state tax administration." *Id.* at 105.

The Court undertook a thorough examination of both the legislative history of the TIA and the Court's prior decisions concerning its scope. The Court found that "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." 542 U.S. at 104-05. The Court further determined that its own TIA precedents likewise showed that the TIA had been consistently interpreted to apply "only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107. These boundaries on the intended scope, and the actual application, of the TIA demonstrate that other types of cases, outside its ambit, are not subject to the TIA's jurisdictional bar.

In this case, the Colorado Act challenged by the DMA neither imposes a tax on affected out-of-state retailers, nor requires them to collect a tax. Rather, the Colorado Act and Regulations impose informational notice and reporting requirements (the Transactional Notice, Annual Purchase Summary, and Customer Information Report) specifically on retailers that are not subject to Colorado sales tax obligations. As a result, the DMA's suit challenging the Act and Regulations does not seek to enjoin, or suspend or restrain the assessment, levy or collection of any state tax. Moreover, the only monetary impositions under the Act and Regulations are substantial penalties levied against non-collecting retailers who fail to comply with the prescribed notice and reporting obligations. It is well-established that a suit challenging the imposition of a penalty is not within the scope of the TIA. *E.g., Chamber of Commerce v. Edmondson*, 594 F.3d 742, 761-64 (10th Cir. 2010); *see also National Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2584 (2012) (federal court jurisdiction to review the penalty provision of the Patient Protection and Affordable Care Act is not foreclosed under Anti-Injunction Act).

In short, the DMA's suit does not contest the Colorado tax liability of its affected members (who are not taxpayers) or of anyone else (namely, the Colorado purchasers who owe the use tax). Indeed, there is no dispute that use tax is due on the purchases made by Colorado consumers. It is the non-tax, notice and reporting obligations imposed on non-collecting retailers under the Act that place the DMA's challenge

outside the scope of the TIA, as defined by this Court in *Hibbs*.[2]

B. The Tenth Circuit's Ruling Expands The TIA To Bar Suits Challenging Secondary Aspects Of State Tax Administration.

Because the Colorado Act and Regulations do not themselves impose a tax, or the obligation to collect a tax, it is evident that they are, at most, a secondary aspect of the state's overall scheme for the administration of its taxes. The Tenth Circuit acknowledged that "[e]ven if the DMA's constitutional attack

[2] It is worth noting that, to the extent there is a state court remedy available to out-of-state retailers for contesting the notice and reporting obligations imposed under the Colorado Act, it is a general declaratory judgment action under the state version of the Uniform Declaratory Judgments Law, Colo. Rev. Stat. § 13-51-101 *et seq.*, and not one "tailormade for taxpayers." *See Hibbs*, 542 U.S. at 107 (TIA's jurisdictional limitation must be read "harmoniously" with the requirement that state law must provide a plain, speedy and efficient remedy "tailormade for taxpayers"). Indeed, the Colorado Act itself contains no provision setting forth a remedy for challenging either the notice and reporting obligations, or the imposition of a penalty for non-compliance. *See generally* Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d). The absence of such a specific administrative remedy for challenging the Act further indicates that the Colorado Act is not among the types of state laws that Congress dictated should be challenged only in state court. *Id.* at 104-05 ("in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority").

on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." App. at A-18. The Court determined, however, that the TIA applies to the DMA's claims on the grounds that the challenge to the notice and reporting requirements would "restrain" the collection of Colorado use tax from purchasers within the meaning of the TIA. *Id.* ("Although the DMA does not directly challenge a tax, it contests the *way* Colorado wishes to collect a tax.") (italics in original). According to the Tenth Circuit, the TIA applies "both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's tax statutes and regulations that aims to enforce and increase tax collection." *Id.* at A-19.

In *Hibbs*, this Court squarely rejected the argument, advanced by the Arizona Director of Revenue, that the TIA "immunizes from federal review 'all aspects of state tax administration.'" 542 U.S. at 105. The Tenth Circuit acknowledged in the decision below that the TIA is not an outright bar to jurisdiction over all suits related to state tax administration, but dismissed this Court's caution in *Hibbs* regarding over-application of the TIA as describing solely a distinction between federal lawsuits that would not curb state revenue collection, and thus fall outside the TIA, and those that would reduce the flow of revenue to the state, and thus trigger the TIA. App. at A-21. The Tenth Circuit's narrow reading of *Hibbs* ignores the underlying intent of Congress and unduly expands the scope of the TIA.

While focusing on selected dictionary definitions of the word "restrain," the Tenth Circuit fails to address the meaning of the term "collection" as used by

Congress in the TIA. In *Hibbs*, the Court quoted from the Second Circuit's decision in *Wells,* where Judge Friendly concluded that the TIA does *not* extend to suits challenging aspects of state tax administration that would produce state tax revenue only indirectly:

> "The [TIA's] context and the legislative history ... lead us to conclude that, in speaking of 'collection,' Congress was referring to methods similar to assessment and levy, *e.g.,* distress or execution ... that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes *imposed upon them* ...."

Hibbs, 542 U.S. at 109 (quoting *Wells*, 510 F.2d at 77) (italics added by the Court). Like the driver's license suspension provision in *Wells*, the notice and reporting obligations imposed on non-collecting retailers under the Colorado Act are nothing more than coercive regulatory measures designed to secure payment of taxes indirectly. In fact, the Transactional Notice and Annual Purchase Summaries of the Act can never result in any "collection" of the use tax in the manner Judge Friendly found Congress intended (*i.e.,* direct methods such as assessment, levy, distress or execution). Although Colorado consumers receiving such notices may choose to self-report and pay the use taxes they owe, in no sense would the no-

tice requirements imposed on non-collecting retailers promote the Department's affirmative efforts to collect the use tax from the consumers, within the meaning of the TIA.

II. THE TENTH CIRCUIT'S DECISION BELOW CONFLICTS WITH AUTHORITATIVE DECISIONS OF THE FIRST AND SECOND CIRCUITS.

A. First Circuit: *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003).

The Tenth Circuit's ruling that the TIA broadly applies to administrative procedures designed to promote payment of the use tax by consumers also conflicts with the decisions of other Courts of Appeals. In a closely analogous case, the First Circuit rejected the contention that the Butler Act, the Puerto Rico analog to the TIA,[3] bars federal court jurisdiction over a challenge to a law that, like the Colorado Act, sought to compel a third-party to comply with burdensome regulatory requirements related to excise taxes owed by local residents on the interstate shipment of goods. *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("*UPS*").

The Puerto Rico law challenged by UPS prohibited an interstate commercial air carrier from deliver-

[3] The Butler Act provides that "[n]o suit for the purpose of restraining the assessment or collection of a tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico." 48 U.S.C. § 872.

ing a package to a recipient in Puerto Rico unless the recipient provided the carrier with a certificate from the Puerto Rico Department of Treasury indicating that the excise tax due on the package's contents was paid. *Id.* at 326. Failure to obtain the certificate subjected the air carrier to fines and to payment of the tax on the package's contents. *Id.* As an alternative to obtaining the certificate, carriers could prepay the taxes due to the Department and seek to collect them from the recipient. *Id.* The prepayment option further required the carriers to comply with a complex statutory scheme akin to federal customs regulations. *Id.* On a daily basis, the carriers were required to provide the Department with an invoice and shipping manifest for each package. The carriers were required to calculate and remit the taxes due from the recipients, and to maintain extensive records regarding prepayment of the taxes. *Id.* at 326-27.

Adopting a position strikingly similar to the reasoning of the Tenth Circuit in this case, the Puerto Rico Department of Treasury argued that the Butler Act barred federal court jurisdiction because the suit constituted a challenge to the statutory and regulatory mechanism adopted to promote "collection" of the Puerto Rico excise tax. *Id.* at 330. The First Circuit disagreed. The Court noted that "[n]ot every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court." *Id.* at 331. In a passage that might have been written for this case, the First Circuit further explained why the Butler Act did not bar jurisdiction over the suit. The Court noted that UPS "did not challenge the amount or validity of the tax due from consumers, nor the authority of [revenue

officials] to assess or collect it." 318 F.3d at 330-31 (brackets added). The Court held that the regulatory provisions adopted by Puerto Rico, which relied on "the threat of sanctions against private parties who do not even owe the tax at issue" to produce tax money indirectly, did not constitute "a system of tax collection" within the meaning of the Butler Act. *Id.* at 331.

In its decision below, the Tenth Circuit expressly declined to follow *UPS*. App. at A-22. The Court found the reasoning of the First Circuit in *UPS* to be "in conflict with our own binding case law," relying on two demonstrably less analogous Tenth Circuit decisions regarding the TIA. *Id.* (citing *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986) and *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008)). *Brooks* involved a challenge, on civil rights grounds, by two Native American brothers to the seizure by Oklahoma revenue officials of cigarettes offered for sale without tax stamps. 801 F.2d at 1239. The Oklahoma cigarette tax is collected directly from vendors through the distribution by the Tax Commission of stamps to be affixed to the product prior to sale, with cigarettes offered for sale without the stamp subject to seizure. *See* Okla. Stat., tit. 68, §§ 302, 305. The plaintiffs thus directly contested the manner in which the taxes they owed were collected, bringing their civil rights claims squarely within the ambit of the TIA. *Brooks*, 801 F.2d at 1239.

In *Hill*, certain Oklahoma citizens brought a suit seeking, on Establishment Clause grounds, to enjoin Oklahoma laws that allowed motorists to obtain state license plates bearing the messages "Adoption

Creates Families" and "Choose Life." 478 F.3d at 1239-40. The Tenth Circuit determined that the charge assessed to obtain the license plates was a tax within the meaning of the TIA and not a regulatory fee. *Id.* at 1246. The Court further held, despite the fact that the plaintiffs had not chosen to pay for a license plate bearing either message, that their claims were nevertheless subject to the TIA because they sought to enjoin directly a state revenue-raising measure. *Id.* at 1249.

In contrast to the close parallel between *UPS* and this case, neither *Brooks* nor *Hill* presents even remotely analogous issues. Neither case concerned a challenge to burdensome, non-tax regulatory requirements imposed on non-taxpayers that are only indirectly related to a tax due from others. The First Circuit's decision regarding the proper scope of federal jurisdiction in *UPS* is directly on point, and the Tenth Circuit's decision not to follow its reasoning places the ruling below in clear conflict with the First Circuit.

B. Second Circuit: *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975).

The Tenth Circuit's decision is also in conflict with decisions of the Second Circuit Court of Appeals including, most notably, Judge Friendly's decision in *Wells*. There, the Second Circuit reviewed a challenge by a Vermont taxpayer to a statute that allowed the suspension of a motorist's driver's license for failure to pay the excise tax on his vehicle. 510 F.2d at 76. The plaintiff did not dispute that he owed the tax and admitted that he had failed to pay it as a result of financial inability. *Id.* The plaintiff

challenged the suspension of his driver's license on the ground that classifying motor vehicle operators based on their payment (or non-payment) of the excise tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

Just as the Tenth Circuit asserts in the decision below, the state defendant in *Wells* argued that the plaintiff was seeking to "restrain the collection" of the state excise tax within the meaning of the TIA. *Id.* at 77. Judge Friendly noted that the term "collection" might be read "broadly to include anything that a state has determined to be a likely method of securing payment," but concluded that in enacting the TIA, Congress had not "intended to go so far." *Id.* Reviewing the same legislative history that the Supreme Court reviewed in *Hibbs*, the Court held that the term "collection," as used in the TIA, was meant to apply to state procedures "that would produce money or other property directly, rather than indirectly through a more general use of coercive power" and *not* to an "unusual sanction for non-payment of a tax admittedly due." *Id.* Although the Vermont statute was plainly intended to generate revenue by compelling payment of the tax, Judge Friendly held that the TIA did not apply. *Id.*

In its decision below, the Tenth Circuit purports to endorse Judge Friendly's conclusion that the TIA does not extend so far as to bar "any action challenging a state law that could possibly secure tax payment." App. at A-23. The Tenth Circuit's own reasoning, however, is at odds with the principle it professes to approve. Earlier in the Tenth Circuit's opinion the Court concludes that the DMA's claims are barred *precisely because* they purport to chal-

lenge Colorado's "chosen method to secure [use] taxes." *Id.* at A-18. *Wells* stands for the proposition that the TIA does not prevent a challenge to any and all state measures, however indirect, that are intended to increase taxpayer compliance, but that is precisely the manner in which the Tenth Circuit applied the TIA to the Colorado Act below. Despite the Tenth Circuit's statement that it agrees with the reasoning of *Wells,* the decision below cannot be reconciled with *Wells*' holding.[4]

The Tenth Circuit also strives to distinguish *Wells* on the grounds that it concerned a "punitive" measure imposed on a taxpayer that had refused to pay taxes, in contrast to the Colorado Act, which it describes as outlining measures that "attempt to secure tax compliance in the first instance." *Id.* at A-23. Judge Friendly, however, rejected a similar invita-

[4] The Second Circuit later reaffirmed its reading of the proper scope of the TIA in *Luessenhop v. Clinton County, N.Y.*, a due process challenge to the adequacy of a foreclosure notice given to property taxpayers by local authorities. 466 F.3d at 264-68. Although the language of the TIA might allow multiple interpretations, the Court restated the conclusion reached in *Wells* that the intent of Congress in enacting the TIA was to foreclose federal court jurisdiction to plaintiffs seeking to contest the validity of the taxes imposed upon them, not to prevent the exercise of jurisdiction over all cases that are somehow related, even indirectly, to state tax administration. *Id.* at 264-65 (citing *Wells*, 510 F.2d at 77). The Second Circuit concluded that "dismissing plaintiffs' causes of action because they pertain to state tax administration in the most general sense would be a patent misreading of the TIA." *Id.* at 265.

tion to parse between "collection" and "enforcement" measures based on the timing of their application, and instead construed the TIA's use of the term "collection" to mean direct revenue raising measures, rather than indirect means of contriving payment. 510 F.2d at 77. The Act and Regulations are, in any event, unquestionably punitive and coercive as to out-of-state retailers, who face significant sanction by the state for electing, consistent with *Quill*, not to collect Colorado use taxes that all parties acknowledge are due from, but may go unpaid by, the Colorado consumers who are obligated to report them.[5]

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[5] The Tenth Circuit's decision also conflicts with decisions in other circuits confirming federal court jurisdiction to enjoin regulatory penalties. The DMA's Complaint sought to have all of the relevant provisions of the Colorado Act and Regulations enjoined—of which the penalty provisions are an integral part. C.A. Appx. 81-82 (*Compl., Prayer for Relief*). Moreover, in its request for a permanent injunction, the DMA specifically referred to the penalty provisions in its discussion of irreparable harm. C.A. Appx. 1723.

Under prevailing law, the portion of the DMA's suit seeking to enjoin the regulatory penalties is not barred by the TIA. For example, the Seventh Circuit in *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448 (7th Cir. 1999), affirmed a lower court's decision to exercise jurisdiction over the plaintiff's challenge to the portion of a state tax law that imposed penalties for failure to remit the tax in question. 169 F.3d at 457-58. Under the reasoning of *RTC Commercial*, the portions of the DMA's claims challenging the imposition of penalties against out-of-state retailers for non-compliance with the Colorado Act are plainly not barred by the TIA.

III. THE DOCTRINE OF COMITY DOES NOT APPLY TO FORECLOSE JURISDICTION IN THIS CASE.

The significance of the TIA, and of this Court's definitive decision in *Hibbs* regarding its scope, is sometimes over-shadowed by the "more embracive" doctrine of comity, discussed by the Court in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 424 (2010). That is not the case here. The Tenth Circuit referenced comity, in a footnote, as an additional factor that "militates in favor of dismissal" of the DMA's claims, App. at A-33 n.11, but the doctrine of comity does not apply, as the reasoning of *Levin* itself makes clear.

The Court in *Levin* found that a "confluence of factors," taken together, dictated dismissal, on comity grounds, of a suit alleging discriminatory treatment of a group of "independent marketers" under Ohio's system for the taxation of natural gas. 560 U.S. at 431. *First*, the Court noted that there was no fundamental Constitutional right or classification subject to heightened scrutiny involved in the taxpayers' challenge. *Id.* *Second*, by complaining about their relative tax burden in comparison to their competitors, the plaintiffs were seeking to enlist the federal courts to improve their competitive position in the Ohio market. *Id.* *Third*, Ohio courts were "better positioned than their federal counterparts" to correct any unconstitutional discrimination resulting under state law, and were not limited by the TIA, as a federal district court would be, in the remedy they could prescribe. *Id.* at 431-32. The Court concluded that "[i]ndividually, these considerations may not compel forbearance on the part of federal district

courts; in combination, however, they demand deference to the state adjudicative process." *Id.* at 432.

The Court placed particular emphasis on the third factor as central to the comity analysis, *i.e.*, the existence of alternative possible remedies to achieve equal treatment under the law, pending correction by the state legislature. *Id.* at 427-28. The Court explained that it has traditionally left to state courts upon remand the determination of what form of relief is preferable to remedy unlawful discrimination resulting from unconstitutional state statutes. *Id.* Lower federal courts, however, lack the power to send cases to state courts for decision on the proper remedy, and thus comity principles suggest that federal district courts must refrain from exercising jurisdiction in the first place, where a state court forum is available to plaintiffs. *Id.* at 428.

The principles enunciated by the Court in *Levin* do not lead to the conclusion that the District Court in the present case was required to refrain from exercising its jurisdiction over the DMA's suit as a matter of comity. Most significantly, there is no remedy other than suspension of the Colorado Act's notice and reporting requirements available in response to the DMA's claims. Extending such obligations to in-state, Colorado retailers would be nonsensical, since sales tax collection at the point-of-sale renders use tax reporting by the consumer unnecessary. Nor would such an illogical approach cure the violation alleged by the DMA in Count II, *i.e.,* that the State lacks the power under the Commerce Clause to impose the notice and reporting obligations on out-of-state retailers with no physical presence in the state.

C.A. Appx. at 65-67.[6] In short, "[b]ecause state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting" the DMA's claims to be litigated in federal court. *Levin*, 560 U.S. at 431.

Moreover, the other factors identified by the Court in *Levin* are not present here. The DMA is not seeking to enlist the federal courts to "increase a competitor's tax burden." *Levin*, 560 U.S. at 426. The DMA's suit will not, in any respect, alter the tax collection obligations of other retailers, in-state and out-of-state alike, that are required to collect Colorado sales and use taxes. Rather, the DMA's suit seeks to protect its members from discriminatory regulatory obligations that violate the members' constitutional rights and those of its members' customers. Finally, although Commerce Clause rights are not typically considered to be among those classified as "fundamental," discrimination against interstate commerce triggers a form of heightened scrutiny so strict as to result in a virtual *per se* rule of unconstitutionality. *Oregon Waste Sys., Inc. v. Department of*

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[6] Although the DMA's constitutional claims other than its Commerce Clause claims (Counts I and II) were not before the Tenth Circuit, it is worth noting that there could likewise be only one remedy for the DMA's claims for violation of the First Amendment, for intrusion upon the Privacy rights of Colorado consumers, and for the unlawful seizure of retailers' customer list information without due process or just compensation under the Takings Clause. Indeed, extending the Act's requirements to in-state, Colorado retailers would merely expand, not alleviate, these constitutional harms.

Envtl. Quality, 511 U.S. 93, 99 (1994). Such heightened scrutiny militates against declining jurisdiction on comity grounds. *See Levin*, 560 U.S. at 426 (commenting that comity requires deference to states with regard to economic legislation that "does not employ classifications subjected to heightened scrutiny or impinge on fundamental rights"). In short, comity is not a bar to the DMA's suit.

IV. THIS CASE AFFORDS THE COURT THE OPPORTUNITY TO CLARIFY LEGAL DOCTRINE CONCERNING AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE PROPER EXERCISE OF FEDERAL COURT JURISDICTION.

A writ of certiorari is particularly warranted in this case so that the Court may clarify the limits of TIA's jurisdictional bar with respect to suits challenging secondary aspects of state tax administration. *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1761 (2013) ("it is important to have a uniform interpretation of federal law"). Moreover, as Justice Harlan explained, "[c]larity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States v. Sisson*, 399 U.S. 267, 307 (1970).

In the proceedings below, neither the parties, nor the District Court, perceived the TIA to be a bar to federal court jurisdiction over the DMA's claims. The Executive Director did not move to dismiss the DMA's Commerce Clause counts on TIA grounds,

and subsequently informed the Court of Appeals that the TIA did not foreclose its exercise of jurisdiction over the appeal. Appellant's Brief at 31 n. 3. The DMA, for its part, has consistently asserted that the TIA does not apply. Perhaps most significantly, the District Court did not perceive the TIA to be an obstacle to its exercise of jurisdiction over the DMA's claims, determining on summary judgment that the Colorado Act and Regulations, on their face, violate the Commerce Clause.

Together, the parties and the District Court expended substantial resources litigating to conclusion the DMA's Commerce Clause claims. More than three years after the DMA filed suit, and some 31 months after the District Court first suspended enforcement of the Colorado Act, the Tenth Circuit determined that federal court never had jurisdiction over the DMA's claims. As even the Tenth Circuit acknowledged, however, the DMA's suit does not present the "prototypical TIA case." App. at A-18. Issuance of a writ of certiorari will allow the Court to provide guidance to litigants, including both private parties and state officials, as well as to lower courts, concerning the proper application on the TIA, so that future cases presenting important constitutional questions on the merits can be resolved without undue delay and confusion regarding jurisdictional matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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