No. 13-1032

IN THE

Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,

Petitioner,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

BRIEF OF *AMICUS CURIAE* THE INSTITUTE FOR PROFESSIONALS IN TAXATION IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief in support of DMA's position in this appeal is filed by the Institute for Professional in Taxation ("IPT"). IPT is a Section 501(c)(3) non-profit educational organization founded in 1976 with its principal place of business in Atlanta, Georgia. IPT is dedicated to the uniform and equitable administration of taxes, the minimization of the cost of tax administration and compliance, and the promotion and preservation of fair and non-discriminatory taxation by state and local governments.

IPT has over 4,500 memberships across the United States and in Canada. IPT's members are employed by and/or represent numerous businesses providing products and services throughout the United States, including businesses located outside of Colorado that make retail sales to customers located in Colorado. These businesses are directly affected by Colorado's sales and use tax notice and reporting requirements, and IPT believes that the Tenth Circuit's ruling (the "Ruling"), if adopted by this Court, would be a dramatic reinterpretation of the TIA—a reinterpretation that would give the TIA a far broader scope than this Court found in *Hibbs v. Winn*, 542 U.S. 88 (2004). Accordingly, IPT urges the Court to reverse the

1. In satisfaction of Supreme Court Rule 37.6, IPT represents that no portion of this brief was written by counsel for any party to this appeal, 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 *amicus curiae* and its counsel. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae.*

Tenth Circuit's holding that it lacked jurisdiction over the DMA's appeal and make clear that the TIA does not bar federal court jurisdiction over cases that would not legally prevent a state from "assessing, levying, or collecting" a tax from a single taxpayer.

SUMMARY OF THE ARGUMENT

This appeal concerns the proper scope and application of the TIA, which 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. In the district court, the DMA sought to enjoin a Colorado law that imposes notice and reporting requirements on retailers that (i) sell tangible personal property to Colorado residents but (ii) do not collect Colorado sales or use tax on those sales because they are not legally required to do so. The district court agreed with the DMA and granted a permanent injunction to enjoin enforcement of the notice and reporting obligations imposed under the Colorado law. *See* Appendix to Petition for Certiorari, at B-1. The Tenth Circuit reversed, however, holding that the TIA bars federal court jurisdiction whenever the suit seeks to enjoin "state laws enacted to ensure compliance with and increase use tax collection. . . ." *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904, 913 (10th Cir. 2013); *see also id.* at 914 ("Colorado enacted the notice and reporting requirements to increase taxpayers' compliance with use tax laws and thereby increase use tax

collection."). The Tenth Circuit reached that conclusion *even though it acknowledges that the DMA's suit will not actually affect the tax liability of a single Colorado taxpayer. See id.* at 913 ("Even if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law.").

The DMA has appealed from that overly-broad interpretation of the TIA, and the IPT files this *amicus* brief in support of the DMA to urge this Court to rule in favor of the DMA and to clarify that the TIA does not bar federal court jurisdiction over a suit challenging a secondary aspect of state tax administration, *where the outcome of the suit will not legally prevent Colorado from assessing or collecting tax from a single taxpayer.* Otherwise, IPT fears that upholding the Tenth Circuit's interpretation will invite states to manipulate their laws in order to bring them within the newly-expanded scope of the TIA, thereby severely restricting citizens' ability to challenge many state laws in federal court—even state laws that have little or nothing to do with the "assessment, levy, or collection" of state taxes.

STATEMENT OF THE CASE

The DMA is a non-profit trade association that supports businesses and non-profit organizations that use multi-channel marketing methods (*e.g.,* catalogs, magazines, newspapers, broadcast media, and the internet). In June of 2010, the DMA filed a complaint which sought to enjoin application of the notice and reporting requirements imposed by Colo. Rev. Stat. §§ 39-21-112(3.5)(c) and (d) (the "Colorado Act"), which had been enacted

by the Colorado General Assembly in February of 2010. The Colorado Act requires "each retailer that does not collect Colorado sales tax"—*i.e.*, retailers that are located outside of Colorado and which make sales to Colorado residents, but which do not have any "physical presence" in Colorado (hereinafter, "Remote Retailers")—to satisfy three separate obligations:

> (1) Transactional Notice: In connection with each sale to a Colorado resident, Remote Retailers must notify the purchaser of the purchaser's obligation to self-report and pay Colorado use tax on the transaction;
>
> (2) Annual Purchase Summary: With respect to any purchaser with over $500 in calendar-year purchases from a Remote Retailer, the Remote Retailer must provide a detailed listing of transactions along with a reminder of the purchaser's obligation to self-report and pay Colorado tax, and an additional disclosure regarding the Remote Retailer's obligation to submit the list of transactions to the Colorado Department of Revenue (the "Department"); and
>
> (3) Customer Information Report: Each Remote Retailer must submit an annual report to the Department listing its customers, their addresses, and the total amount of each customer's purchases during the year.

Colo. Rev. Stat. §§ 39-21-112(3.5)(c)-(d); *see also* 1 Colo. Code Regs. §§ 201-1:39-21-112.3.5.

Under the Colorado Act, non-collecting retailers are subject to substantial penalties if they fail to comply with the Act's notice and reporting requirements. *See* 1 Colo. Code Regs. § 201-1:39-21-112.3.5(2)(f) ($5 penalty per Colorado sale as to which the retailer does not provide the Transactional Notice, up to a $50,000 cap for the first year); *see id.*, subsection (3)(d) ($10 penalty per failure to provide an Annual Purchase Summary, up to a $100,000 cap for the first year); *see id.*, subsection (4)(f) ($10 penalty per excluded name from the Customer Information Report submitted to the Department, up to a $100,000 cap for the first year).

It is undisputed in this case that Colorado residents owe Colorado use tax on purchases of tangible personal property when the Remote Retailer does not collect and remit such tax to the Department. *See Direct Marketing*, 735 F.3d at 906-07, 913. It is also undisputed that pursuant to this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Commerce Clause to the U.S. Constitution prohibits Colorado from requiring retailers who lack "physical presence" in Colorado to collect tax on sales to Colorado residents. *See, e.g., Direct Marketing*, 935 F.3d at 907. Accordingly, in an attempt to make an end-run around the Commerce Clause's protections, the Colorado Act's notice and reporting requirements appear to have been intended to coerce either (i) the state's residents into self-reporting and remitting their use tax liabilities; or (ii) the non-collecting Remote Retailers into collecting and remitting taxes on sales to Colorado customers, simply to avoid the expense and administrative complications of complying with the Colorado Act (regardless of the fact that Remote Retailers are protected from such collection obligations by the Commerce Clause for the very reason

that multi-jurisdiction tax collection and reporting is so onerous).

Because the DMA's members were directly affected by the Colorado Act's new requirements, the DMA filed a suit in federal court, seeking an injunction against application of the Colorado Act because it violates, *inter alia*, the Commerce Clause. *See* Joint App. at 2 (noting docket entry for First Amended Complaint). The district court issued an injunction barring application of the Colorado Act's notice and reporting requirements without discussing the TIA. *See* Appendix to Petition for Certiorari, at B-1 – B-25.

The Department appealed to the Tenth Circuit; in its briefs before the Tenth Circuit, the Department asserted that the TIA did not bar jurisdiction. *See* Brief for Petitioner, at 13. Nevertheless, without seeking additional briefing from the parties, the Tenth Circuit held that the TIA divested the federal courts of jurisdiction over the DMA's challenge to the Colorado Act, reasoning that the TIA bars federal jurisdiction over any suit seeking to enjoin a state law "enacted to ensure compliance with and increase use tax collection. . . ." *Direct Marketing*, 735 F.3d at 913. In so holding, the Tenth Circuit acknowledged contrary opinions regarding the scope of the TIA from the First and Second Circuits but strained to distinguish them. *See United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003); *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975).

For the reasons explained herein, the Tenth Circuit's interpretation of the scope of the TIA is dramatically overbroad. Accordingly, IPT files this *amicus curiae* brief

in support of the DMA and to urge this Court to clarify that the TIA does not bar a suit challenging a secondary aspect of state tax administration—like the Colorado Act's notice and reporting requirements—where the outcome of the suit will not legally affect the tax liability of any taxpayer.

ARGUMENT IN SUPPORT OF PETITIONER

I. Under the Tenth Circuit's Overly-Broad Interpretation, the TIA Bars Federal Court Jurisdiction Over Any Law That Might Increase a State's Collection of Tax Revenue.

A. The Tenth Circuit Did Not Cite Any Cases or Other Authorities in Support of Its Interpretation of the TIA.

In *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904, 910 (2013), the Tenth Circuit recognized that it needed to consider the TIA's potential jurisdictional limitation before considering the DMA's substantive challenge to the Colorado Act. It moved quickly to mention this Court's seminal decision regarding the scope of the TIA, *Hibbs v. Winn*, 542 U.S. 88 (2004), and it recognized this Court's admonition that the TIA "proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—i.e., assessment, levy, and collection." *Direct Marketing*, 735 F.3d at 911 (citing *Hibbs v. Winn*, 542 U.S. at 105 n.7).

However, rather than directly apply the language and reasoning of *Hibbs v. Winn*, the Tenth Circuit instead embarked upon interpreting the TIA through the lens

of its own most recent decisions regarding the TIA. *See Direct Marketing*, 735 F.3d at 911-12. It then noted that some federal courts have applied the TIA to suits by third parties who sought to "disrupt" state tax collection, but it failed to identify what "disruption" means in the context of the TIA, and it added the unusual note that the Supreme Court in *Hibbs v. Winn* "did not criticize these decisions." *See id.* at 912. The Tenth Circuit then proceeded to state that the "key question [in applying the TIA] is whether the plaintiff's lawsuit seeks to prevent the State from exercising its sovereign power to collect . . . revenues," but again without any discussion of the precise meaning of any term relevant to its "key question." *Id.* at 912 (citing *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007)) (punctuation omitted). It is therefore not terribly surprising that the Tenth Circuit ended up with an interpretation of the TIA that is both contrary to the language of the statute and in contravention of this Court's holding in *Hibbs v. Winn*; after all, it did not closely consider either as it began to interpret the statute's scope.

The next step in the Tenth Circuit's interpretation of the TIA appears to have led to its new, dramatically over-expansive reading of the statute. Noting that the TIA prohibits suits that would "*restrain* the . . . collection" of a state tax, the Tenth Circuit turned to the dictionary to find the "broader ordinary meaning" of the term "restrain," and then recited this Court's "instruction that the TIA is a broad jurisdictional prohibition." *Direct Marketing*, 735 F.3d at 912-13 (emphasis in original). Thus, primed to interpret and apply the TIA "broadly," the Tenth Circuit proceeded to apply the TIA using a test that stretches the scope of the TIA far beyond any court's prior application of that statute. The Tenth Circuit held that the DMA's suit was barred under the TIA because a

> lawsuit seeking to enjoin state laws enacted to ensure compliance with and increase use tax collection, like DMA's challenge here, would "restrain" state tax collection. Such a lawsuit, if successful, would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue.

Id. at 913. In reaching that broad new holding, the Tenth Circuit did not cite to *any* cases or other authorities. *Id.* Furthermore, it acknowledged that the DMA's suit was unlike other TIA cases, in that "[e]ven if DMA's constitutional attack . . . were successful, Colorado consumers would still owe use taxes by law." *Id.* Nevertheless, the Tenth Circuit concluded—again, without citing to any case or other authority—that the suit's mere "potential to restrain tax collection" triggers application of the TIA and precludes federal court jurisdiction. *See id.*; *see id.* at 917 ("The state's notice and reporting obligations, while not taxes themselves, were enacted with the sole purpose of increasing use tax collections.").

As discussed in the following sections, the Supreme Court (in *Hibbs v. Winn*) and all of the federal circuit courts to have considered the TIA (other than the Tenth Circuit) have held that the scope of the TIA is not nearly so broad.

B. The TIA Does Not Bar Federal Court Jurisdiction Over a Suit Whose Outcome Will Not Affect the Tax Liability of a Single Taxpayer.

According to this Court, the TIA was never intended "to prevent federal court interference with all aspects of

state tax administration"; rather, the TIA "proscribes interference *only* with those aspects of state tax regimes that are needed to produce revenue—*i.e.,* assessment, levy, and collection." *Hibbs v. Winn*, 542 U.S. at 105, 105 n.7 (emphasis added). Yet despite acknowledging this Court's discussion of the scope of the TIA in *Hibbs v. Winn*, the Tenth Circuit ignored that precedent and adopted its own interpretation of the scope of the TIA in complete contradiction of *Hibbs,* holding that the TIA bars federal jurisdiction *every time* the challenged law at issue is intended to "increase tax collections." *See Direct Marketing*, 735 F.3d at 914, 917.

The holdings of other federal circuit courts—decisions issued both before and after *Hibbs v. Winn*—echo the thoughtfully delineated scope of the TIA as set forth in *Hibbs*. Collectively, those cases demonstrate that the TIA has never been applied as broadly as the Tenth Circuit did in this case; furthermore, they demonstrate that the TIA has never been understood to bar federal jurisdiction over a suit *when the suit's outcome will not affect the tax liability of a single taxpayer. See, e.g., Hibbs v. Winn*, 542 U.S. at 107 ("In sum, this Court has interpreted and applied the TIA 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."); *Bellsouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 503-04 (6th Cir. 2008) ("The [TIA] does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have *some* negative impact on local revenues; it strips jurisdiction over claims seeking to enjoin the collection of State 'tax revenue.'") (emphasis in original) (citing *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005)); *United Parcel Service, Inc. v.*

Flores-Galarza, 318 F.3d 323, 331 (1st Cir. 2003) ("Not every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court."); *Hexom v. Oregon Dep't of Tax.*, 177 F.3d 1134, 1136 (9th Cir. 1999) ("Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow."); *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986) ("Although the district court concluded that § 1341 applies to any federal litigation touching on the subject of state taxes, neither the language nor the legislative history of the statute supports this interpretation.").

But perhaps the most cogent explanation of the scope of the TIA was offered by Judge Friendly in *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), in which he explained:

> "Collection," of course, could be read broadly to include anything that a state has determined to be a likely method of securing payment. . . . We do not believe, however, that Congress intended to go so far. The 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*. . . .

Id. at 77 (citations omitted) (emphasis added). Thus, numerous federal courts—including this Court—have considered the scope of the TIA and have concluded that it was not intended to bar any and all actions that might somehow affect state tax revenues; rather, the TIA has been applied only when the action will directly affect the assessment, levy, or collection of taxes *from a particular taxpayer.*

The Tenth Circuit actually considered *Wells* in its decision below and attempted to distinguish its holding from that court's decision. *See Direct Marketing*, 735 F.3d at 915-16. The Tenth Circuit explained that in *Wells*, the plaintiff sought to enjoin a Vermont law "that required suspension of his driver's license for failure to pay motor vehicle taxes"—taxes that were undeniably owed by the taxpayer. *Id.* (citing *Wells v. Malloy*, 510 F.2d at 76). According to the Tenth Circuit, its holding is distinguishable from the decision in *Wells*, because the DMA lawsuit "targets measures that attempt to ensure tax compliance in the first instance," while the provision at issue in *Wells* was a sanction "imposed after a taxpayer has admittedly refused to pay taxes." *Id.* at 916. It added that the Colorado Act is "not a reactive and punitive 'general use of coercive power' to entice tax payment from individuals who admittedly refuse to pay . . . ." *Id.* Thus, by the Tenth Circuit's reasoning, the TIA bars the DMA's suit because it involves a challenge to a Colorado law that is intended to increase tax compliance "in the first instance," rather than to punish a delinquent taxpayer with a non-tax-related penalty.

The Tenth Circuit's attempt to distinguish *Wells v. Malloy* is glaringly deficient. First, the Second Circuit's

attempt to precisely define the TIA's use of the term "collection" serves to highlight that the Tenth Circuit's interpretation of that same term is much too broad; under the Tenth Circuit's holding, "collection" in the TIA applies to any activity that is in any way related to "generating revenue." *Direct Marketing*, 735 F.3d at 913. *Contrast id.* at 917 ("The state's notice and reporting obligations, while not taxes themselves, were enacted with the sole purpose of increasing use tax collection.") *with Wells*, 510 F.2d at 77 (detailed discussion, including legislative history, of the meaning of the term "collection" in the TIA) *and Hibbs v. Winn*, 542 U.S. at 101 ("In § 1341 and tax law generally, an assessment is closely tied to the collection of a tax, *i.e.*, the assessment is the official recording of liability that triggers levy and collection.").

Second, the distinction between a tax "compliance" measure and a tax "coercion" measure is much finer than the Tenth Circuit acknowledges. According to the Tenth Circuit, the Vermont provision in *Wells* was "coercive" because it was a punishment imposed on a delinquent taxpayer. However, what if the plaintiff had instead been required to pay his motor vehicle tax as a prerequisite to receiving or renewing his driver's license? That law, while nearly identical to the *Wells* provision in practical effect, would appear to be a "compliance" measure under the Tenth Circuit's reasoning. And what if the tax that must be paid as a prerequisite was not a motor vehicle tax, but some other tax (such as the use tax at issue in this case)? The Tenth Circuit's holding suggests that any such "tax compliance" measure could not be challenged in federal court pursuant to the TIA, because such measure is intended to increase the state's tax collections (rather than to punish a delinquent taxpayer).

Finally, the notice and reporting requirements in the Colorado Act can only be described as exactly the type of "coercive" measures to which Judge Friendly was referring in *Wells*. As described *supra*, the Colorado Act imposes three obligations on Remote Retailers: a Transactional Notice that must be sent with each transaction; an Annual Purchase Summary that must be sent by Remote Retailers to purchasers who make over $500 in purchases during the year; and the Customer Information Reports that the Remote Retailers must send to the Department with details regarding each customer and the total amount of its purchases during the year.

None of those requirements involves an "assessment, levy, or collection" of any state tax, and upholding the DMA's challenge to any or all of those obligations will not have any legal impact on the Department's ability to "assess, levy, and collect" use taxes from the taxpayers who owe them. *See Direct Marketing*, 735 F.3d at 913 ("Even if DMA's constitutional attack . . . were successful, Colorado consumers would still owe use taxes by law."). Thus, the intention behind the Colorado Act's requirements is apparent: to "coerce" Colorado residents into self-assessing their use tax obligations (by reminding them of their obligations and informing them that the Remote Retailer will disclose such purchases to the Department) and/or to "coerce" the Remote Retailers into beginning to collect tax (so that they are no longer subject to the onerous notice and reporting requirements, and substantial penalties, of the Colorado Act). Indeed, the Department's Tax Policy Director admitted as much by stating the state's hope that the Remote Retailers would find the Colorado Act's requirements so "unpleasant" that they would voluntarily begin collecting Colorado use tax,

rather than comply with the Act's notice and reporting requirements. *See* Brief for Petitioner, at 45 n.8.

Ultimately, it should not be dispositive whether the notice and reporting requirements in the Colorado Act are "tax compliance" measures (as characterized by the Tenth Circuit) or "coercive" measures. Moreover, IPT avers that the Tenth Circuit's lack of authority for its expansive new interpretation of the TIA, coupled with its thin attempt to distinguish its holding from the careful language of *Wells* and other important cases to have interpreted the TIA, demonstrates just how far the Tenth Circuit has colored outside the lines in this case. The TIA plainly does not turn on whether a law is somehow related to a state's "enforcement" of a tax or to tax "compliance" in general (whatever "enforcement" and "compliance" mean as used by the Tenth Circuit), and it certainly does not bar federal court jurisdiction whenever the challenged state law was enacted to "increase tax revenues." *See, e.g., United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 331 (1st Cir. 2003) ("Not every statutory or regulatory obligation that may aid the Secretary's ability to collect tax is immune from attack in federal court.").

Thus, IPT files this *amicus curiae* brief in order to urge the Supreme Court not to countenance the Tenth Circuit's broad expansion of the TIA's jurisdictional bar in this case. Instead, the Court should reiterate its prior holdings and clarify that the TIA applies only when the action will directly affect the assessment, levy, or collection of taxes *from a particular taxpayer. See, e.g., Hibbs v. Winn*, 542 U.S. at 107 ("In sum, this Court has interpreted and applied the TIA 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."); *Wells*, 510 F.2d at 77 (In enacting the TIA, "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 . . . ."); *see also id.* Brief of Petitioner, at 18-21 (tracing history of cases interpreting the TIA and identifying the three elements of a "prototypical" suit to which the TIA has been applied as a bar).

II. To Uphold the Tenth Circuit's Interpretation Would Invite States to Manipulate Their Laws—Including Non-Tax Laws—To Come Within the TIA's Broad New Scope.

A. If the Tenth Circuit's Holding Stands, a State Will Be Able to Block Its Citizens' Ability to Challenge a State Law in Federal Court Simply By Tying That Law to a Tax Collection Measure.

According to the Tenth Circuit, a law is sufficiently related to the "collection" of tax (and therefore triggers application of the TIA) so long as it was enacted with the purpose of "increasing tax collection." *See, e.g., Direct Marketing*, 735 F.3d at 914, 917. However, as discussed in this section, upholding the Tenth Circuit's interpretation would invite states to manipulate their laws—including *non-tax laws*—by tying the new law in some way to the state's collection of tax revenues, thereby triggering application of the TIA and prohibiting many citizens from challenging questionable state laws in federal court.

In its decision, the Tenth Circuit insists that it would not interpret the TIA to apply "to any action challenging a state law that could possibly secure tax payment." *See id.* at 916. However, while the Tenth Circuit claims that it would not apply the TIA to "coercive" measures, upholding its broad application of the TIA to any and all "tax compliance" measures would create a substantial opening for states to block citizens' access to federal courts by tying new or revised laws—including laws that have nothing to do with taxes—to the state's tax reporting, enforcement, and/or collection mechanisms. Because the TIA applies with respect to state sales/use taxes (*i.e.*, the type of tax that is at issue in this case) as well as *all other types of state and local taxes*, it is important to note that states would have a wide variety of tax types and tax provisions with which to clothe a new law in the guise of tax collection. For example:

- Bank Reporting Requirements: In order to verify whether individuals and entities are reporting all of their income and properly filing all of their required tax returns, State X could pass a law requiring banks to turn over the bank statements and other bank transaction information with respect to their individual and entity customers. Under the Tenth Circuit's holding, both the bank and any affected citizen would be unable to challenge the law in federal court on constitutional grounds because the law was enacted to increase state tax collections.

- Employee Personal Information Reporting: In order to determine whether employees were reporting all of their income and otherwise complying with the state's tax laws, State X could pass a law requiring employers to collect and turn over detailed personal information regarding its employees. Again, under the Tenth Circuit's holding, such an aggressive and intrusive law would not be subject to constitutional challenge in federal court, so long as it was enacted for the purpose of "increasing tax collection," even if it merely does so indirectly by providing information that allows the state to assess taxpayers for any amounts determined to be owed. *Cf. Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 763-64 (10th Cir. 2010) (holding that the TIA did not bar federal court jurisdiction of a challenge to an Oklahoma employment provision related to the employment of illegal aliens, where compliance with the verification requirement did not directly generate any revenue for the state; according to the court, "It strains credulity to argue that the primary purpose of a law is to raise revenue when compliance with the law produces no revenue at all.").

- Licenses and Permits: In order to verify and ensure compliance with any type of tax (including but not limited to income taxes,

franchise taxes, sales taxes, property taxes, or business license taxes), State X could pass a law requiring citizens to pay all of their taxes and receive a "tax clearance certificate" as a prerequisite to issuing numerous types of government-issued licenses and permits (*e.g.*, gun permits, driver's licenses, fish and game licenses, business licenses, marriage licenses, *etc.*). Under the Tenth Circuit's holding, imposing a tax compliance prerequisite should trigger application of the TIA, because the state law is being used to ensure tax compliance "in the first instance" and to increase tax collections. *Cf. Wells v. Malloy*, 510 F.2d at 76-77 (holding that the TIA did not bar federal jurisdiction for a challenge to Vermont's law which suspended the citizen's driver's license because of his failure to pay motor vehicle taxes).

- Notice and Reporting Requirements for Shippers: Finally, a state could extend notice and reporting requirements (similar to those in the Colorado Act) to the interstate *shippers* who deliver Remote Retailers' sales to the purchasers located within the state. The shippers would not be able to bring any constitutional challenges in federal court under the Tenth Circuit's interpretation, because the law would be intended to increase the state's tax collections by (a) reminding purchasers of their tax obligations; and (b) notifying them

> of their annual shipments and disclosing that the shipper will be reporting such shipments to the state.

IPT could continue to proffer examples that become more and more extreme, but it believes that the previous examples readily illustrate the danger of the Tenth Circuit's expansive interpretation of the scope of the TIA. Furthermore, as those examples help to demonstrate, in interpreting the TIA it is important to make sure that the practical effect of a state's law is considered, and whether a state's "assessment, levy, or collection" of tax from a taxpayer is truly implicated. Otherwise, states will be able to manipulate application of the TIA by placing regulations and requirements into the tax code, or by labeling such provisions as "tax compliance" measures, even if the laws in question are not directly correlated to the assessment of any taxpayer's tax liability or to the levy or collection of any taxpayer's taxes (rather, the only requirement, according to the Tenth Circuit, is that the challenged law be the state's "chosen means" of increasing its tax collections). *See Direct Marketing*, 735 F.3d at 917; *cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 284 (1977) (citations omitted) (discussing the *Spector* rule, which had come to operate "only as a rule of draftsmanship," resulting in situations where "'the use of magic words or labels' could 'disable an otherwise constitutional levy.'")

In summary, according to the Tenth Circuit's holding—which applies to laws that "restrain the collection" of sales/use taxes as well as *all other* tax types—a state's citizens have no ability to challenge a state law in federal court, so long as the law is a tax "compliance" measure

intended to increase the state's tax collections. As described herein, a vast array of state regulations or laws could be written in such a way that they help the state to determine a taxpayer's tax liability or increase the state's tax collections. That does not mean, however, that Congress intended to bar federal jurisdiction for challenges to *any* law that might theoretically increase tax collections, no matter how onerous or intrusive. Such a result would be an absurd perversion of the language of the TIA and would give that statute a scope far beyond its plain language—and far beyond *any* prior interpretation of that statute. Given the non-existent basis from which the Tenth Circuit's broad new interpretation was drawn and the potentially absurd consequences that might follow if that interpretation is upheld, this Court must reverse the Tenth Circuit and clarify that the TIA does not bar any suit in which the outcome will not affect the tax liability of even a single taxpayer.

B. The Tenth Circuit's Holding Undermines the Important Principle of Permitting Federal Courts to Vindicate Federal Rights.

Finally, the Tenth Circuit's overbroad reading of the TIA conflicts with an important principle, which is the professed interest in allowing "federal courts to vindicate federal rights." *See, e.g., Va. Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). That principle has been interpreted as being inapplicable to cases in which the "judgment sought would expend itself on the public treasury" (*id.*)—a limitation that matches up neatly with this Court's interpretation of the scope of the TIA in *Hibbs*. *See Hibbs v. Winn*, 542 U.S. at 107 ("In sum, this Court has interpreted and applied the TIA 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."). Thus, the TIA (as properly interpreted in *Hibbs*) actually comports with the principle of having "federal courts vindicate federal rights," as both would permit federal courts to hear a case involving a federal constitutional challenge, so long as the case—like this one—would not affect any taxpayer's state tax liability (and therefore would not "exert itself on the public treasury").

The Tenth Circuit's broad interpretation of the TIA, on the other hand, would bar federal courts from reviewing cases involving fundamental federal rights any time the law at issue might somehow lead to increased tax revenue, no matter how attenuated the connection. That holding undermines the important interest under our federalist system in having federal courts review and decide cases involving fundamental federal rights, which in turn would foreclose citizens' access to federal courts and would lead to a less robust body of federal courts interpreting federal law. *See, e.g., GenOn Mid-Atlantic, LLC v. Montgomery County*, 650 F.3d 1021, 1026 (4th Cir. 2011) ("We cannot overlook the fact that the absence of federal jurisdiction in this case would turn what are truly interstate issues over to local authorities. . . . The implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound, and we decline to foreclose those federal claims with a jurisdictional bar.").

IPT's examples illustrating how states might manipulate their laws to bar their citizens' access to federal courts bring this important principle into stark

relief, as those examples provide a glimpse into the range of sensitive constitutional issues that might be blocked from federal court if the Tenth Circuit's broad interpretation of the TIA were upheld. Thus, the Tenth Circuit's interpretation regarding the scope of the TIA must be reversed, and the Court should clarify that the TIA does not bar federal jurisdiction over a case that will not affect the state tax liability of any taxpayer—a holding that would be consistent with the language of the TIA and would preserve the important federal interest in having federal courts review cases involving federal rights. Otherwise, all of the careful work done by federal courts and this Court over the years in interpreting the scope of the TIA will have been swept away by the Tenth Circuit's simplistic reading.[2]

2. Though IPT does not have the space to discuss the principle of comity in any depth, it notes that that principle does not bar jurisdiction over DMA's action, because—unlike in *Levin* and other cases applying the principle—a ruling in this case will in no way legally affect any taxpayer's liability for any tax or prevent the state from taking action against the taxpayers who owe use tax, nor will a ruling in the plaintiff's favor occasion the opportunity for the state to fashion any specific or unique relief to remedy the unconstitutional provision. *See, e.g., Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 425-27 (2010) (holding that comity prevented the exercise of jurisdiction in a case where the plaintiff requested relief that would "increase a competitor's tax burden" and noting the importance of allowing the state the opportunity to fashion the necessary relief). Rather, if the Colorado Act's notice and reporting obligations violate the Commerce Clause, the only remedy will be to invalidate them.

CONCLUSION

For all of the reasons described in this *amicus curiae* brief, IPT urges the Court to reverse the holding of the Tenth Circuit and to clarify the scope of the TIA in accordance with the position espoused by the DMA and by IPT in this brief. The Tenth Circuit's broad interpretation of the TIA would effectively foreclose citizens from access to the federal courts any time a state law might theoretically be related to state tax "compliance" or whenever a state law has been manipulated so as to have the effect of increasing tax revenues. Because that interpretation contravenes the language of the statute and conflicts with the federal courts' interest in vindicating federal rights, the Tenth Circuit's holding should be reversed, and the Court should clarify that the TIA does not bar access to federal courts when a citizen challenges a secondary aspect of state tax administration that will not affect a state's legal ability to assess or collect taxes from any taxpayer.

Respectfully submitted,

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