No. 16-267

In the Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.

BARBARA J. BROHL, in her capacity as Executive Director of the Colorado Department of Revenue,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

By enacting a law to enforce the existing and constitutional use tax within the limitations of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), does a State run afoul of the anti-discrimination principles of the dormant Commerce Clause?

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INTRODUCTION

The Tenth Circuit below held that an information reporting law enacted by Colorado to counter the market-distorting and tax-draining effects of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), does not (1) unlawfully discriminate against interstate commerce or (2) run afoul of *Quill*'s rule that prevents States from requiring retailers to collect owed sales and use taxes when they lack a physical presence in the State. Petitioner the Direct Marketing Association ("DMA") asks this Court to review only the court of appeals' former holding on the discrimination issue. DMA does not seek review of the latter holding under *Quill*, DMA Pet., p. 14 n.1, apparently fearing that doing so may present this Court with an opportunity to revisit *Quill* and, if it can no longer be justified by *stare decisis*, overturn it. *See* Conditional Cross-Pet. in No. 16-458.

Because members of this Court, including in this very case, have expressed grave concerns about the continuing viability of *Quill*'s physical presence rule, *see Direct Mktg. Ass'n v. Brohl* ("*Brohl II*"), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring); *Quill*, 504 U.S. at 327–29 (White, J., concurring in part and dissenting in part), Respondent Barbara J. Brohl, in her capacity as Executive Director of the Colorado Department of Revenue ("the Department"), filed a Conditional Cross-Petition in No. 16-458 asking that *Quill* be overturned in the event this Court agrees to hear DMA's Petition.

But while the continuing wisdom of *Quill* in today's e-commerce age presents a question worthy of this Court's review, DMA's Petition, by itself, falls short.

Standing alone, DMA's Petition seeks mere error correction in a well-settled area of law and identifies no circuit split or other disagreement among the lower courts. And, in any event, the Tenth Circuit's conclusion that Colorado's law does not discriminate against interstate commerce is correct.

Accordingly, this Court should deny DMA's Petition for a Writ of Certiorari. In the event that this Court grants review, however, it should reframe DMA's three questions presented into the single question in the Counterstatement of Questions Presented above. Reframing DMA's three questions is appropriate because each is fairly included within, and more succinctly stated by, the question presented above by the Department. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (stating that the Court has "on occasion rephrased the question presented by a petitioner" and noting that, under Supreme Court Rule 14.1(a), "the statement of any question presented will be deemed to comprise every subsidiary question fairly included therein"). And the reframed question is of significant national importance. *See* Conditional Cross-Pet. in No. 16-458 at 11–16. If review is granted, this Court should also grant the *Quill* issue presented in the Department's Conditional Cross-Petition in No. 16-458.

COUNTERSTATEMENT

This Court is already familiar with the factual and procedural history of this case, having previously resolved a threshold jurisdictional question under the Tax Injunction Act in *Brohl II*, 135 S. Ct. at 1134. As well, the Department elaborated on additional key facts in the Statement contained in its Conditional Cross-Petition, filed in No. 16-458. The Department adopts by

reference the Statement contained in the Conditional Cross-Petition in No. 16-458.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari in No. 16-267 for two reasons.

First, DMA's Petition seeks only error correction and identifies no circuit split or other disagreement among the lower courts that merits this Court's review. At most, DMA identifies an issue that should await further development. It remains to be seen whether, in the context of state sales and use tax reporting laws, other courts will adopt what DMA characterizes as a "novel" approach to discrimination claims under the dormant Commerce Clause. DMA Pet., p. 2.

Second, DMA's Petition should be denied because the Tenth Circuit correctly held that Colorado's law does not discriminate against interstate commerce. Following this Court's precedents under the dormant Commerce Clause and analogizing to similar forms of purported economic discrimination, the Tenth Circuit appropriately determined that Colorado's law does not discriminate on its face or in its direct effects. The Tenth Circuit properly rejected DMA's suggested mode of analysis, which would transform discrimination claims under the dormant Commerce Clause into their own unique category, divorced from all other comparable forms of discrimination analysis.

I. Seeking only error correction, DMA identifies no circuit split or other disagreement among the lower courts.

DMA's Petition, as framed, raises no question that is subject to ambiguity or a circuit split. Rather, DMA requests mere error correction in an area that even it admits has been "settled law for decades." DMA Pet., p. 14. That DMA seeks only error correction is clear from the face of its Petition, which describes the decision below as both unique and legally incorrect.

DMA repeatedly characterizes the Tenth Circuit's analysis as "novel," *id.* at 2, 25, 31, 34, 39, 40, and "unprecedented," *id.* at 27, 33, 40, suggesting that no other lower court has endorsed its analytical framework. If true, this Court's intervention is not justified. At most, the issue merits additional "percolation" to determine whether other lower courts will adopt what DMA paints as a "novel" mode of analysis. *See Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from denial of certiorari) (noting that that Court "postpone[d] consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem."); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 484–89 (Feb. 2012) (discussing "Percolation's Constitutional Benefits").

In addition to characterizing the decision below as "novel," DMA asserts that the Tenth Circuit "misappl[ied]" this Court's dormant Commerce Clause precedents. DMA Pet., p. 34. Specifically, it critiques the Tenth Circuit's application of *General Motors Corp.*

v. Tracy, 519 U.S. 278 (1987), and *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), as well as its reliance on three other Supreme Court cases involving alleged discrimination in analogous contexts. DMA Pet., pp. 20–21, 26–33. But merely pointing to a perceived misapplication of this Court's existing precedents does not automatically render a case worthy of certiorari review. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … misapplication of a properly stated rule of law."). A Petition for Writ of Certiorari must instead present "compelling reasons" for the Court's review. *Id.* Because DMA identifies none, this Court should deny certiorari.

If this Court disagrees, however, and believes DMA's Petition is worthy of review, it should reframe DMA's three questions presented into the single question proposed above. *See Jones v. United States*, 527 U.S. 373, 396 (1999) (noting that the Court "granted certiorari on the Government's rephrasing of petitioner's questions"). If that approach is followed, the Court should also grant the additional issue presented in the Conditional Cross-Petition in No. 16-458, regarding *Quill*'s continuing viability.

II. The Tenth Circuit's discrimination analysis is correct.

This Court should also deny certiorari because, contrary to DMA's view, the Tenth Circuit's discrimination analysis adheres to this Court's dormant Commerce Clause jurisprudence. DMA criticizes the Tenth Circuit's conclusion that Colorado's law both does not facially discriminate and does not

discriminate in its direct effects. The Tenth Circuit's decision is correct on both counts.

On the issue of facial discrimination, the Tenth Circuit correctly observed that Colorado's law does not make improper geographical distinctions of the type that the Commerce Clause abhors. DMA Pet. App. A-24 (citing *General Motors*, 519 U.S. at 307). Instead, Colorado's law "distinguishes between those retailers that collect Colorado sales and use tax and those that do not." DMA Pet. App. A-25. That distinction is permissible because it is not a proxy for state geographic boundaries. Countless large nonresident retailers with both online and brick-and-mortar operations (e.g., Home Depot and Target) collect Colorado sales and use taxes. Dep't C.A. Supp. Op. Br., pp. 12, 56–57. Similarly, many out-of-state retailers lacking physical presence in Colorado choose to voluntarily collect and remit the State's sales and use tax despite the protection that *Quill* affords them. C.A. App. Vol. VII, p. 1932–33. Thus, Colorado's reporting law does not apply to these categories of interstate firms, even though they are nonresident companies and, in many cases, lack physical presence in Colorado.

That the burdens of Colorado's reporting law fall primarily, or even exclusively, on a subset of interstate companies does not require a different result. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125 (1978). In *Exxon Corp.*, a Maryland statute regulated the conduct of petroleum producers and refiners; because no petroleum was produced or refined by *intra*state businesses, the statute had the effect of applying to only interstate companies that happened to do business in Maryland. *Id.* at 123. This Court upheld

the statute, explaining that a state law may "fall[ ] solely on interstate companies" and nonetheless be free of any unlawful discrimination. *Id.* The Tenth Circuit correctly recognized this important principle when ruling that Colorado's law does not facially discriminate against interstate commerce. *See* DMA Pet. App. A-25 (citing *Exxon Corp.* and *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352 (1977)).

Because the Tenth Circuit appropriately held that Colorado's law is not facially discriminatory, it also appropriately declined to apply the "strictest scrutiny" standard that DMA requests. DMA Pet., pp. 2, 15. This Court has made clear that the "strictest scrutiny" standard is invoked only if the challenged statute exhibits facial discrimination—a situation not present here. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

Regarding whether Colorado's law discriminates in its direct effects, the Tenth Circuit correctly rejected DMA's assertion that "any differential treatment" of in-state and out-of-state entities constitutes discrimination.[1] DMA Pet. App. A-26–A-30. The panel

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[1] Were DMA's "any differential treatment" approach correct, countless state statutes imposing differential treatment on out-of-state actors relative to their in-state counterparts in Colorado and elsewhere would be in danger of being struck down. Of course, those statutes are, and always have been, perfectly constitutional. *See, e.g.*, COLO. REV. STAT. §§ 7-90-801 (2016) (requiring only foreign entities to file a statement of authority to transact business in Colorado), 39-22-109(1) (2016) (requiring nonresidents, but not residents, to apportion their Colorado source income for state income tax purposes), 39-22-303.5(3)(b) & (4)(a) (2016) (requiring taxpayers earning business income both within and outside Colorado to apportion and allocate net taxable income pursuant to

explained that discrimination "assumes a comparison of substantially similar entities" that are similarly situated. *General Motors*, 519 U.S. at 299; *see* DMA Pet. App. A-28–A-29. Although DMA argued that its remote members who do not collect the owed tax are similarly situated to collecting retailers, the Tenth Circuit disagreed, stating that the latter "must comply with tax collection and reporting requirements that are not imposed [on DMA's members]." *Id.* at A-29. The Tenth Circuit's conclusion on this point is unassailable. After all, *Quill* itself created the relevant distinction between these two categories of retailers by holding that their disparate marketplaces—mail order sales versus brick-and-mortar stores—justify different regulatory treatment. *See General Motors*, 519 U.S. at 300 (stating that no discrimination exists absent "supposedly favored and disfavored entities *in a single market*" (emphasis added)). The States therefore must be allowed to treat differently the category of retailers that this Court in *Quill* exempted from tax collection duties. *See Nippert v. Richmond*, 327 U.S. 416, 432 (1946) (stating in a Commerce Clause challenge that

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a formula not applicable to taxpayers earning income from purely in-state sources), 24-102-206 (2016) (requiring state contractors who wish to perform contracts outside of Colorado to provide written notice to the state agency procuring the contract), 10-2-502 (2016) (imposing requirements on nonresidents seeking insurance producer licenses that are not also applicable to residents), 6-1-1103(4)(b)(I) (2016) (Colorado Foreclosure Protection Act, which exempts in-state attorneys from requirements otherwise imposed on out-of-state attorneys practicing here temporarily under *pro hac vice* status), 12-14.1-102(9)(b)(III) (2016) (same regarding Colorado Child Support Collection Consumer Protection Act), 12-14.5-103(2)(b) (same regarding Colorado Credit Services Organization Act), 12-61-904(1)(d) (2016) (same regarding Mortgage Loan Originator Licensing and Mortgage Company Registration Act).

"the very difference between interstate and local trade . . . makes equality of application as between those two classes of commerce, generally speaking, impossible.").

That DMA prefers *no* regulation over *different* regulation does not render Colorado's law discriminatory. *See W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("Even interstate business must pay its way." (internal quotations omitted)). DMA simply seeks to perpetuate and worsen the central irony that arose from *Quill*—States are "effectively force[d] to discriminate *against* local commerce" because of the de facto exemption from sales and use taxes that *Quill* afforded to remote transactions. John A. Swain & Walter Hellerstein, *The Questionable Constitutionality of Amazon's Distribution Center Deals*, 62 ST. TAX NOTES 667, 667 (Dec. 5, 2011) (emphasis in original). But even putting *Quill*'s proper scope aside, DMA identifies no compelling reason why this Court's precedents approving of different but comparable burdens in Commerce Clause challenges were misapplied by the Tenth Circuit. *See Gregg Dyeing Co.*, 286 U.S. at 479–80.

DMA also attacks what it calls the Tenth Circuit's "comparative burdens" analysis, preferring instead a binary analysis that would strike down any state law that treats in-state and out-of-state entities differently in the slightest degree. DMA Pet., pp. 24–33. In doing so, DMA attempts to divorce the discrimination analysis that applies under the Commerce Clause from the logic of "discrimination" that applies in other areas of the law, including the Privilege and Immunities Clause, the 4-R Act, 49 U.S.C. § 11501, and state-tax discrimination challenges involving the federal

government. *See id.* at 29–33. Even the discrimination analysis that applies to sales and use tax burdens under the Commerce Clause—sometimes referred to as the compensatory tax doctrine—does not fit DMA's desired mold. *See id.* at 26–29. To DMA, discrimination scrutiny of *non*-tax regulatory burdens under the Commerce Clause deserves its own special mode of analysis.

But this Court has never endorsed DMA's peculiar analytical framework. Quite the opposite. Just two terms ago, the Court approved a "roughly equivalent" standard as "one possible justification that renders a tax disparity nondiscriminatory." *Ala. Dep't of Revenue v. CSX Transp., Inc. ("CSX II")*, 135 S. Ct. 1136, 1143 (2015). Although *CSX II* was a 4-R Act case,[2] its holding was grounded in dormant Commerce Clause jurisprudence, which endorses a comparative-burdens analysis. *Id.* Indeed, "[i]t does not accord with ordinary English usage" to say that a law "discriminates" against out-of-state businesses when in-state businesses must comply with "*another* comparable [burden]." *Id*. at 1143 (emphasis in original).

The Court's holding in *CSX II* was not confined to 4-R Act cases or cases arising under the compensatory tax doctrine. Rather, it was a re-articulation of the well-accepted principle that mere differential treatment does not necessarily amount to unlawful discrimination under the 4-R Act, the dormant Commerce Clause, or otherwise. *See Underwood*

[2] The "4-R Act" is the Railroad Revitalization and Regulatory Reform Act of 1976. The Court often relies on dormant Commerce Clause principles when applying the 4-R Act. *E.g.*, *CSX II*, 135 S. Ct. at 1143 (analogizing to "our negative Commerce Clause cases").

Typewriter Co. v. Chamberlain, 254 U.S. 113, 118–20 (1920) (upholding against a Commerce Clause challenge Connecticut's differential state tax reporting obligations for nonresident corporations); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013) (stating in a Commerce Clause challenge that a law "is not facially discriminatory simply because it affects in-state and out-of-state interests unequally"); *cf. First Family Mortg. Corp. v. Durham*, 528 A.2d 1288, 1292–94 (N.J. 1987) (upholding against a Commerce Clause challenge an information gathering law akin to Colorado's reporting law).

Other cases similarly establish that the proper discrimination analysis under the dormant Commerce Clause is analogous to the discrimination inquiry in other areas of the law; it is not a unique offshoot requiring its own idiosyncratic mode of analysis. *See CSX Transp., Inc. v. Ala. Dep't of Revenue* ("*CSX I*"), 562 U.S. 277, 287–88 (2011) (citing multiple discrimination cases under the dormant Commerce Clause in a 4-R Act analysis); *W. Lynn Creamery v. Healy*, 512 U.S. 186, 200 n.17 (1994) (stating that state tax discrimination jurisprudence involving the federal government is a "conceptually similar field" to dormant Commerce Clause jurisprudence). Leading commentators likewise agree that DMA's urged approach distorts the proper discrimination analysis under the dormant Commerce Clause. *See* 2 Jerome R. & Walter Hellerstein, STATE TAXATION ¶ 19.02[7][b], at 19-75 (3d ed. 2013) (stating that the district court's ruling in DMA's favor below "proves too much, suggesting 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"). Were DMA's approach correct, States could not enact laws to promote *equal* treatment of in-state and out-of-state businesses, a result that would violate the fundamental objective of the dormant Commerce Clause. *See General Motors*, 519 U.S. at 299 (stating that the "fundamental objective" of the Clause is to preserve a nationally competitive market undisturbed by preferential advantages).

CONCLUSION

DMA's Petition for a Writ of Certiorari should be denied. Alternatively, if this Court grants review of DMA's Petition, it should reframe DMA's questions presented and grant the Conditional Cross-Petition in No. 16-458.

Respectfully submitted,

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