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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state law that discriminates on its face, or in its effect, against interstate commerce is subject to the "strictest scrutiny," and can only survive review under the dormant Commerce Clause if the State can show that there are no reasonable, nondiscriminatory alternatives to achieve a legitimate local purpose. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100-01 (1994). It is undisputed that Colo. Rev. Stat. § 39-21-112(3.5), which imposes notice and reporting obligations on retailers that "do not collect Colorado sales tax," applies solely to out-of-state retailers. The Tenth Circuit held that the Colorado law does not discriminate against interstate commerce on its face, or in its effect, relieving the State of any burden of justification for the law. The questions presented are:

1. Whether a state statute that imposes regulatory obligations that apply, as a matter of law, solely to out-of-state companies, but does not use "language explicitly identifying geographical distinctions" in its text, discriminates against interstate commerce?

2. Whether the Tenth Circuit erred in adopting a "comparative burdens" test for discrimination, under which the burden of regulatory requirements imposed solely on out-of-state retailers may be offset by different obligations imposed on in-state retailers?

3. Whether the Tenth Circuit erred in concluding that out-of-state retailers that do not collect Colorado sales tax are "not similarly situated" to their direct in-state competitors who collect Colorado sales tax?

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.

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.

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Petitioner Direct Marketing Association ("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 was previously before the Supreme Court in 2014 for review of a ruling by the Tenth Circuit dismissing the DMA's Commerce Clause claims on the grounds that federal court jurisdiction was barred by the Tax Injunction Act, 28 U.S.C. § 1341. The Court reversed and remanded. *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1134 (2015). The DMA now petitions for review of the Tenth Circuit's ruling reversing a grant of summary judgment in favor of the DMA and ordering a dismissal of its suit on the merits.

This Court has long recognized that the anti-discrimination doctrine of the dormant Commerce Clause is "essential to the foundations of the Union." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). For purposes of the Commerce Clause, it is established beyond peradventure that a state law discriminates against interstate commerce when it imposes burdens upon out-of-state businesses that in-state businesses are not required to bear. *Oregon Waste Sys.*, 511 U.S. at 99.

In its decision below, the Tenth Circuit reached the conclusion that a state law that imposes burdens solely on out-of-state companies – and whose targeting of out-of-state retailers is announced in the Act's title –

does not discriminate against interstate commerce on its face, or in its effect. App. A-23 – A-26 (finding that the title of the Colorado law, "An Act Concerning The Collection Of Sales And Use Taxes *On Sales Made By Out-Of-State Retailers*" does not influence the meaning of its text) (italics added); *see* Colo. Rev. Stat. §§ 39-21-112(3.5)(c) & (d) ("Colorado Act"). Although it is undisputed that the Colorado Act by its plain terms applies solely to out-of-state retailers, the Tenth Circuit concluded that it does not discriminate on its face against interstate commerce because it does not use "language explicitly identifying geographical distinctions" in its text. App. A-24 – A-25. In so doing, the Tenth Circuit calls into question decades of Commerce Clause jurisprudence, exposing interstate commerce to thinly-veiled discrimination that is shielded from the "strictest scrutiny" by a mere ploy of artful legislative drafting.

The Court of Appeals further embraced a novel "comparative burdens" analysis for determining whether a state law discriminates in its effect, under which burdens imposed solely on out-of-state companies may be offset by completely different obligations imposed on in-state companies. App. A-31 – A-33. The Tenth Circuit's unprecedented test effectively applies the principles of the extremely narrow "compensatory tax" doctrine, *see Oregon Waste Sys.*, 511 U.S. at 102-05, as a universal test for determining whether state laws discriminate against interstate commerce.

Finally, the Tenth Circuit concluded that out-of-state retailers subject to the Colorado Act are "not similarly situated" with their direct in-state competitors, solely because in-state retailers are required to collect Colorado sales tax. App. A-29. This Court and lower courts have previously found that companies competing in the same market, for the same customers, selling the same products, are "similarly situated" for Commerce Clause purposes. *See, e.g.*, *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 648-49 (1994) (treating interstate retailers as similarly situated to in-state retailers and finding the State's use tax scheme impermissibly discriminatory); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1088 (9th Cir. 2013) (entities are similarly situated if they sell competing products in the same market); *cf. Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299-303 (1987) (entities are *not* similarly situated when they sell different products, in different markets, to different customers).

Given the Tenth Circuit's divergence from established Commerce Clause precedent, a writ of certiorari is necessary to prevent the Court of Appeals' decision from undermining the fundamental Commerce Clause principle of nondiscrimination and from causing confusion among lower courts regarding this well-settled constitutional doctrine.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A-1 – A-47) is reported at 814 F.3d 1129. 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 February 22, 2016. On March 22, 2016, the DMA filed a petition for rehearing en banc with the Tenth Circuit. On April 1, 2016, the Tenth Circuit denied the petition for rehearing. On June 14, 2016, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including August 29, 2016. *See* No. 15A1259. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Colorado Revised Statutes are reproduced in the Appendix at App. E-1 – E-4.

STATEMENT

1. The DMA 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 obligated 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, the Colorado Act imposes 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 State does not dispute that the Colorado Act applies solely to out-of-state retailers who do not collect Colorado sales tax in reliance on *Quill* (*i.e*., so-called "non-collecting" retailers), because by law *only* out-of-state retailers are permitted not to collect Colorado sales tax. *See* Case No. 13-1032, Respondent's Brief (Oct. 17, 2014) at 3-4 (in-state retailers must collect and remit sales tax, or face liability and criminal sanction) and 33 (in-state retailers do not have the "choice" to not collect Colorado sales tax). In June 2010, the Colorado Department of Revenue ("Department") adopted regulations to implement the Colorado Act. 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) ("Regulations").

The Colorado Act and Regulations establish three separate obligations for out-of-state 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 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 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 and shipping addresses, and total amount of purchases of each of its Colorado purchasers ("Customer Information Report"). *See Brohl*, 135 S.Ct. at 1128; 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)-(4).

The Colorado Act and Regulations also impose substantial penalties on non-collecting retailers who fail to comply with the notice and reporting requirements. *Brohl*, 135 S.Ct. at 1128; 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, as even the Tenth Circuit acknowledged. *See* App. A-22 ("The district court recognized that, although the Colorado Law refers only to 'any retailer that does not collect Colorado sales tax,' [. . .] the combination of state law and *Quill* guarantees that this provision applies only to out-of-state retailers.") (ellipsis added) (internal citation omitted). 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).

4. 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 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 based on its Commerce Clause claims (Counts I and II). C.A. Appx. at 84-114. On January 26, 2011, the District Court concluded that the DMA was likely to succeed on both claims. *See* App. C-1 – C-17. It entered an Order granting the Motion for Preliminary Injunction and enjoining the Executive Director from enforcing the Colorado Act and Regulations. *Id.* C-15.

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. The parties filed and briefed their dispositive motions in May and June 2011. C.A. Appx. 1695-2141.

In March 2012, the District Court granted summary judgment in favor of the DMA on its Commerce Clause claims and entered a permanent injunction enjoining the enforcement of the Act. *See* App. B-1 – B-25. With regard to the DMA's claim that the Colorado Act discriminates against interstate commerce, the District Court evaluated the plain terms of the Colorado Act and Colorado sales tax law in light of *Quill*. Because Colorado law requires in-state retailers to collect sales tax, while *Quill* prohibits the imposition of such an obligation on retailers with no physical presence in the state, the District Court concluded that only out-of-state retailers are subject to the notice and reporting requirements of the Colorado Act. *Id.* B-11.

Based on its review of applicable law, the District Court found that "the Act and the Regulations impose a notice and reporting burden on out-of-state retailers and that burden is not imposed on in-state retailers." *Id.* As a result, the District Court determined that "the veil provided by the words of the Act and the Regulations [which specify application to non-collecting retailers] is too thin to support the conclusion that the Act and the Regulations regulate in-state and out-of-state retailers even-handedly." *Id.* B-10 (brackets added). The District Court concluded that the "enactment of a statutory scheme and concomitant regulations that produce, in effect, *a geographic distinction*

between in-state and out-of-state retailers discriminates patently against interstate commerce." *Id.* B-13 (italics added).

The District Court went on to apply strict scrutiny to determine whether the State could carry its burden of justification for the Colorado Act. *Id.* B-13 – B-15. After finding that the Act served legitimate objectives, the District Court observed that "[t]he record contains essentially no evidence to show that the legitimate interests advanced by the defendant cannot be served adequately by reasonable nondiscriminatory alternatives." *Id.* B-15. The District Court noted that the DMA had offered evidence of three alternative measures the State could take to improve use tax compliance, including taxpayer education, increased audits of business taxpayers, and promoting use tax reporting by consumers through the Colorado individual income tax return. *Id.* B-14 – B-15. Given the lack of justification proffered by the State, the District Court found that the State had "not met its very high burden of proof" to show that there were no reasonable nondiscriminatory alternatives to the Colorado Act. *Id.* B-15.

5. The Executive Director appealed the District Court's entry of the permanent injunction to the Tenth Circuit. C.A. Appx. 2164-66. On August 20, 2013, the Court of Appeals, on its own initiative, ruled that the TIA divested the District Court of jurisdiction and remanded the case with directions that the DMA's claims be dismissed. *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904, 906, 920-21 (10th Cir. 2013). The Court,

therefore, did not reach the merits of the DMA's claims. *Id.* at 920.

6. On November 5, 2013, the DMA filed suit in Colorado state court in an effort to re-establish the injunction against the Colorado Act, asserting claims that paralleled its complaint in federal court. On February 18, 2014, the state court granted the DMA's motion for a preliminary injunction based on its Commerce Clause claims and entered an order enjoining enforcement of the Colorado Act. With regard to the DMA's claim for discrimination against interstate commerce, the state court found that "each of the Act's three notification and reporting requirements are facially discriminatory [. . .] the Act imposes these notification and reporting requirements on non-resident retailers but not on resident retailers." *See Direct Mktg. Ass'n v. Brohl*, District Court, City and County of Denver, Case No. 13CV34855, Order (Feb. 18, 2014) at 22-23 (ellipsis added).

The state court subsequently stayed the action, pending resolution of the DMA's federal court proceedings. The case in state court remains stayed.

7. On February 25, 2013, the DMA filed a petition for a writ of certiorari seeking review of the Tenth Circuit's ruling on the TIA. Case No. 13-1032, Petition for a Writ of Certiorari and Appendix (Feb. 25, 2013). The Supreme Court granted certiorari on July 1, 2014, and conducted oral argument on December 8, 2014.

On March 3, 2015, the Supreme Court unanimously held that the TIA did not bar jurisdiction over

the DMA's Commerce Clause claims. *Brohl*, 135 S.Ct. at 1134. The Court reversed the Tenth Circuit's August 2013 Order and remanded the case for further proceedings. *Id.*

8. After supplemental briefing and argument on remand, the Tenth Circuit on February 22, 2016, issued an opinion reversing the District Court's grant of summary judgment. App. A-1 – A-47. With regard to Count I, the Court of Appeals held the Colorado Act does not discriminate on its face against interstate commerce. App. A-23. The Tenth Circuit concluded that the language of the Colorado Act "makes no . . . geographical distinction" between in-state and out-of-state retailers but instead "imposes differential treatment based on whether the retailer collects Colorado sales or use taxes." App. A-24 – A-25 (ellipsis added). Despite the express reference in the statute's title to "Sales Made by Out-of-State Retailers," the Tenth Circuit found that the plain language of the statute could not be read as applying solely to out-of-state retailers. App. A-24.

The Court of Appeals went on to find that the DMA had not demonstrated that the Colorado Act discriminates in its effect against interstate commerce, despite the law's evident application solely to non-Colorado retailers. The Court concluded that the DMA had not shown that the Colorado law imposes a discriminatory burden on out of-state retailers "*when viewed against the backdrop of the collecting retailers' tax collection and reporting obligations*." App. A-30 (italics added). The Court of Appeals acknowledged

that it was adopting a "comparative analysis" for determining discrimination that required a showing "that the notice and reporting requirements for non-collecting out-of-state retailers are more burdensome than the regulatory requirements [of sales tax compliance that] in-state retailers already face." App. A-33. In support of its "comparative analysis," the Tenth Circuit relied on three non-Commerce Clause cases, *Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S.Ct. 1136 (2015) ("*CSX II*") (Railroad Revitalization and Regulatory Reform ("4-R") Act), *North Dakota v. United States*, 495 U.S. 423 (1990) (governmental immunity doctrine), *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (Privileges and Immunities Clause), and one of the Court's earliest cases to endorse the "compensatory tax" doctrine as a means of justifying a discriminatory use tax, *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932). App. A-27 – A-29, A-31 – A-33.

By reading out of the Colorado Act its evident – and undisputed – application solely to out-of-state retailers, and then requiring the DMA to show that the notice and reporting requirements on out-of-state retailers are "more burdensome" than the different, state sales tax obligations imposed on in-state retailers, the Tenth Circuit relieved the State of any burden of justification for a discriminatory state law. App. A-33; *cf. Oregon Waste Sys.*, 511 U.S. at 100-01 (when a state law discriminates, "the virtually *per se* rule of invalidity provides the proper legal standard" and the law "must be invalidated unless respondents can 'sho[w] that it

advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'") (citation omitted); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("facial discrimination invokes the strictest scrutiny"). The Court of Appeals concluded that the Colorado Act "need not survive strict scrutiny." *Id*.

In the course of reviewing whether the Colorado Act and Regulations have a discriminatory effect against out-of-state retailers, the Tenth Circuit recited the familiar principle that "disparate treatment is not unequal treatment or discrimination if the subjects of the treatment are not similarly situated." App. A-28. The Court of Appeals concluded that the different obligations of out-of-state and in-state retailers showed that their disparate situations were not comparable, asserting that "the non-collecting out-of-state retailers are not similarly situated to the in-state retailers, who must comply with tax collection and reporting requirements that are not imposed on the out-of-state non-collecting retailers." App. A-29.[1]

REASONS FOR GRANTING THE PETITION

Discrimination doctrine under the dormant Commerce Clause has been settled law for decades. State

[1] With regard to Count II for undue burden on interstate commerce, the Tenth Circuit ruled only that *Quill* does not apply to a regulatory provision such as the Colorado Act. App. A-36. The DMA does not seek review of the decision as to Count II.

regulatory requirements that apply, by their terms, solely to out-of-state companies are virtually "per se" unlawful and cannot withstand challenge under the Commerce Clause unless the State can justify such disparate treatment of out-of-state interests under the "strictest scrutiny." *Granholm*, 544 U.S. at 476; *Oregon Waste Sys.*, 511 U.S. at 100-01; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (discrimination is forbidden unless the state shows the absence of reasonable nondiscriminatory alternatives); *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious.").

The meaning of "discrimination" differs depending upon its context. *See CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 298 (2011) ("*CSX I*") ("Even though 'discriminate' has a general legal meaning relating to differential treatment, its precise contours still depend on its context.") (Thomas, J., concurring). However, in regard to the dormant Commerce Clause, imposing obligations on out-of-state companies that in-state companies are not required to bear constitutes discrimination. *Oregon Waste Sys.*, 511 U.S. at 99 ("discrimination" simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) (state statutes that impose increased costs on out-of-state businesses, while leaving the costs of in-state business unaffected, impose the "most obvious" form of discrimination).

The analysis then shifts to justification. A state may show that a law that is otherwise impermissibly discriminatory is consistent with the dormant Commerce Clause (*i.e.*, is constitutionally permissible, *despite* being discriminatory) if the State can demonstrate, under the strictest scrutiny, that it has no reasonable nondiscriminatory alternatives for achieving a legitimate state purpose. *Oregon Waste Sys.*, 511 U.S. at 100-01.

The Tenth Circuit's decision adopts a different approach. First, it demands "statutory language explicitly identifying geographical distinctions" in the text of a state law in order to establish facial discrimination, even where it is undisputed that the statute's requirements apply, as a matter of law, solely to out-of-state retailers. App. A-24. Next, it draws upon the "compensatory tax" doctrine and on discrimination analysis in other contexts, outside of the Commerce Clause, including an interpretation of a federal statutory definition of "discriminates" (*CSX II*), a claim of governmental immunity to state liquor regulations (*North Dakota v. U.S.*), and *dicta* from a case concerning the Privileges and Immunities Clause (*Travis*), as support for a so-called "comparative analysis" of discrimination, as to which the Court of Appeals assigns *the plaintiff* the burden of proof. *See* App. A-27 – A-29, A-31 – A-33. At the same time, the Tenth Circuit concludes that out-of-state retailers that are shielded from sales tax collection under *Quill* are, as a result, "not similarly situated" with competing in-state retailers that must collect Colorado sales tax. *Id.* A-29. The

Tenth Circuit reaches this conclusion despite the fact that the two groups of retailers compete in the same market, for the same customers, selling the same kinds of products. The Court of Appeals' conclusion that such direct competitors are not similarly situated conflicts with this Court's rulings and the prevailing understanding among lower courts that in-state and out-of-state sellers of competing products offered in the same market are similarly situated. *E.g.*, *Associated Indus.*, 511 U.S. at 648-49; *Rocky Mountain Farmers Union*, 730 F.3d at 1088.

The Tenth Circuit's analysis thus departs from existing dormant Commerce Clause precedent regarding discrimination against interstate commerce in three fundamental ways. Certiorari is warranted to determine whether such dramatic modifications to constitutional doctrine are acceptable. Issuance of a writ of certiorari will allow the Court to provide proper guidance to lower courts in this important area of law and ensure that the objective of preventing discrimination against interstate commerce is safeguarded in accordance with this Court's long-standing principles.

I. THE TENTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS CONCERNING DISCRIMINATION AGAINST INTERSTATE COMMERCE.

The Commerce Clause provides that Congress shall have the power "to regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. As a

corollary to this grant of authority to Congress, the "dormant" Commerce Clause places distinct restrictions on the power of States to enact laws regulating interstate commerce. *Comptroller of the Treasury v. Wynne*, 135 S.Ct. 1787, 1806 (2015); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (dormant Commerce Clause "directly limits the power of the States to discriminate against interstate commerce."). For nearly 200 years, the Court has emphasized that "the imposition of a differential burden placed on any part of the stream of commerce – from wholesaler to retailer to consumer – is invalid." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994).

Constitutional analysis of a state law imposing regulatory obligations on interstate commerce is a two-step process. First, the Court must determine whether the law regulates even-handedly or, instead, discriminates against interstate commerce. *Oregon Waste Sys.*, 511 U.S. at 99; *Hughes*, 441 U.S. at 336. So strong is the constitutional prohibition on discrimination against interstate commerce that even a state law which is *not* facially discriminatory, but rather discriminates in its effect, is nevertheless subject to the "strictest scrutiny" and is "virtually *per se*" invalid. *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 344 n.6 (1992). Moreover, a state law that has a discriminatory effect need not discriminate uniformly against all interstate commerce in order to run afoul of the Commerce Clause. *See Hunt*, 432 U.S. at 349-54 (regulatory scheme which applied to apples originating in all apple-producing states had the effect of discriminating against sales of Washington

apples, triggering strictest scrutiny). In addition, "the degree of a differential burden or charge on interstate commerce . . . 'is of no relevance to the determination whether a State has discriminated against interstate commerce.'" *Oregon Waste Sys.*, 511 U.S. at 100 n.4 (ellipsis added).

The outcome of the first step in Commerce Clause analysis dictates the second step: if the law discriminates, either on its face or in its effect, then the burden shifts *to the State* to show that there are no reasonable, nondiscriminatory alternatives to achieve a legitimate local purpose. *Id.* at 101. The State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Hughes*, 441 U.S. at 337. By contrast, if the law regulates even-handedly, then the plaintiff has the burden to show that the law unduly burdens interstate commerce. *Oregon Waste Sys.*, 511 U.S. at 99.

A. The Tenth Circuit's Analysis Makes Artful Legislative Drafting The Touchstone Of Facial Discrimination Analysis.

This Court has repeatedly made clear that discrimination against interstate commerce cannot be concealed by clever legislative draftsmanship. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best*, 311 U.S. at 455-56 (finding discriminatory a law that nominally applied to all "regular retail merchants in [the state] regardless of

whether they were residents or nonresidents"); *see also Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 281-82 (1987) (finding discriminatory a law that "deemed" in-state truckers to have paid a fee that was directly imposed on out-of-state truckers); *Cont'l Ill. Corp. v. Lewis*, 827 F.2d 1517, 1522 (11th Cir. 1987) ("The Supreme Court has emphasized that careful scrutiny is required, for Commerce Clause purposes, in order to uncover 'ingenious' state statutes which appear neutral but whose practical operation discriminates against interstate commerce."), *vacated as superseded by statute sub nom. Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990).

According to the Tenth Circuit, however, the determination of whether a statute facially discriminates against interstate commerce depends entirely upon whether the state legislature uses "statutory language explicitly identifying geographical distinctions." App. A-24. Applying this standard, the Tenth Circuit determined that the Colorado Act, which imposes its notice and reporting obligations upon "[e]ach retailer that does not collect Colorado sales tax," does not draw a geographic distinction. *Id.* A-24.

In support of its conclusion that the text of a law must include words of "geographical distinction" to be facially discriminatory, the Tenth Circuit relied on a footnote in *General Motors v. Tracy.* App. A-24 (citing *General Motors*, 519 U.S. at 307 n.15). But a review of the footnote reveals that the Court in *General Motors* was explaining an entirely different point. Far from establishing the principle that only laws drawing

express "geographic distinctions" in their text could be facially discriminatory, the Court was emphasizing that even when a State seeks to legislate in a traditionally protected area, such as health and safety, laws drawing "geographical distinctions" will, nevertheless, be subject to strict scrutiny as facially discriminatory. 519 U.S. at 307 n.15. The Tenth Circuit's contrary conclusion from *General Motors*, that a state law must draw express "geographical distinctions" in its text in order to discriminate on its face, would eviscerate facial discrimination analysis and encourage a State to accomplish "by indirection, what the State could not accomplish [directly]," namely, discrimination against interstate commerce. *Guy v. City of Baltimore*, 100 U.S. 434, 443 (1879).

By demanding words of overt geographic distinction, the Tenth Circuit fundamentally alters constitutional analysis, inviting artful legislative drafting as a means to avoid discrimination. The Court of Appeals' approach would elevate form over substance in a manner abhorrent to the constitutional restriction on discriminatory state laws. In this case, had the Colorado Act been written using "geographical" terms to apply to "all retailers lacking a physical presence in Colorado, except those that collect Colorado sales tax," rather than to "each retailer that does not collect Colorado sales tax," the Act's scope, applicability, and meaning would be *identical*. The Tenth Circuit's ruling, therefore, would distinguish between statutes of identical import based solely on whether they are crafted in geographical terms.

It is worth noting that each of the lower courts that examined the Colorado Act before the Tenth Circuit readily concluded that the law discriminates against out-of-state retailers. The federal District Court found that the Colorado Act drapes no more than a "thin veil" of language over its disparate treatment of non-Colorado retailers. It determined that the Act's classification of each "retailer that does not collect Colorado sales tax" *is* a geographic distinction, because the law distinguishes between collecting and non-collecting retailers based on the legal standard from *Quill* that makes the obligation to collect Colorado sales tax a function of whether a retailer *has a physical presence in Colorado*. Thus, although the District Court described the discrimination as being the "effect" of the statutory and constitutional principles at play, it deemed the Act's discrimination to be "patent." App. B-13. After a similar analysis, the state district court reached the conclusion that the Colorado Act is "facially discriminatory."[2]

In fact, the Colorado legislature made no effort to conceal the Act's targeted application to out-of-state retailers. The title of the law refers to the collection of sales and use taxes "On Sales Made By Out-of-State Retailers." The Tenth Circuit, however, ascribed no significance to the legislature's indication that the Colorado Act is meant to apply solely to non-Colorado

[2] It is at most a matter of semantics whether one views a law that results, by operation of its plain terms, in disparate treatment of in-state and out-of-state interests as being either "facially discriminatory" or "patently discriminatory in its effect."

retailers, asserting that words in the title cannot "limit the plain meaning of the text." App. A-24. While titles cannot override statutory text, this Court has made clear that they are useful tools of interpretation where there is any doubt as to the meaning of a statute. *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). Here, the conclusion that the Colorado Act applies solely to out-of-state retailers follows inexorably from the plain meaning of the text. The title of the Colorado Act does not "limit" its scope, as the Tenth Circuit claims, it *confirms* it. *Si Min Cen v. Attorney General*, 825 F.3d 177 (3d Cir. 2016) ("[w]e find confirmation of [the legislature's] intent" in the title of the statute) (brackets added).

The Tenth Circuit also fails to acknowledge that the State does not contest that the Colorado Act applies solely to out-of-state retailers. Indeed, most of the State's arguments in defense of the Colorado Act depend upon it. For example, the State asserted before this Court that out-of-state retailers have a choice – *i.e.*, to collect Colorado sales tax voluntarily, or to comply with the notice and reporting provisions of the Act – that in-state retailers *do not have* because the in-state retailers must collect Colorado sales tax. Case No. 13-1032, Respondent's Brief (Oct. 17, 2014) at 33 (unlike out-of-state retailers, in-state retailers do not have the "choice" to not collect Colorado sales tax). The Tenth Circuit's conclusion that the Colorado Act does not apply solely to out-of-state retailers is not even endorsed by the Appellant.

Under established Commerce Clause jurisprudence, the Colorado Act's patent discrimination shifts the burden to the State to justify the law under the strictest scrutiny. *Oregon Waste Sys.*, 511 U.S. 100-01. However, because the Tenth Circuit found the statute to be "evenhanded on its face," it proceeded to examine instead whether the Colorado law had the effect of discriminating against interstate commerce. App. A-26. In conducting that analysis, the Tenth Circuit again diverged from this Court's Commerce Clause precedents, while borrowing from, and misconstruing, decisions concerning discrimination under different doctrines and laws.

B. The Tenth Circuit's "Comparative Burdens" Analysis Has No Basis In Commerce Clause Jurisprudence.

The Tenth Circuit began its analysis of discriminatory effect by asserting certain broad principles which, taken together, prompted the Court of Appeals to adopt a "comparative analysis" in which it evaluated the notice and reporting burdens imposed on out-of-state retailers under the Colorado Act "against the backdrop of the [in-state] collecting retailers' tax collection and reporting obligations." App. A-30. But such a "different in kind, like in degree" analysis of non-tax state regulatory burdens finds no support in Commerce Clause jurisprudence.

To begin with, when joined with the Tenth Circuit's approach regarding facial discrimination, requiring a "comparative analysis" with reference to different burdens imposed on competing in-state businesses in order to prove discrimination would undermine the very foundations of the dormant Commerce Clause. A state would be free to adopt patently one-sided regulations imposing obligations solely on out-of-state companies, so long as it avoided geographical distinctions in the language of the law itself, and then challenge the disadvantaged companies to show that the burdens to which they are subject are not in some manner offset by different burdens imposed on in-state businesses. The Court's Commerce Clause jurisprudence simply does not permit a state to avoid a finding of discrimination (let alone to justify differential treatment), by shifting the burden of proof and requiring out-of-state parties to prove that patently disparate treatment is not offset by different obligations borne by in-state retailers.

The Tenth Circuit's novel "comparative burdens" analysis is fundamentally different from a court undertaking to determine whether *a facially neutral provision* may, nevertheless, if scrutinized in conjunction with other aspects of state law or in relation to its effects in the marketplace, discriminate against interstate commerce. *See, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390-91 (1994) (facially neutral waste flow ordinance held discriminatory in effect); *Hunt*, 432 U.S. at 350-52 (labeling

statute, although even-handed on its face, had the effect of discriminating against interstate commerce). For that reason, the Tenth Circuit's unprecedented test derives no support from its citation to *West Lynn Creamery*, App. A-29, where the Supreme Court examined both parts of a tax-and-subsidy scheme and concluded that, despite the fact that the tax was levied even-handedly on in-state and out-of-state interests alike, the separate allowance of a subsidy for in-state companies caused the scheme to be discriminatory. 512 U.S. at 199-202. Such a law represents precisely the kind of "ingenious" discrimination the Commerce Clause prohibits. The Court's precedents searching out and barring such insidious discrimination do not support the reverse analysis contrived by the Tenth Circuit – that a state law which, by its plain terms, imposes requirements solely on out-of-state companies can somehow be converted from discriminatory to nondiscriminatory by an elaborate "comparative burdens" approach.

1. The Tenth Circuit Improperly Co-Opts The Principles Of The "Compensatory Tax" Doctrine.

That there is no basis in Commerce Clause doctrine for the Tenth Circuit's "different in kind, like in degree" comparative analysis is revealed by the authorities on which it chiefly relies, including three non-Commerce Clause cases (*CSX II, North Dakota*, and *Travis*) and the Court's decision in *Gregg Dyeing*, an

early pre-cursor to the narrow "compensatory tax" doctrine. App. A-29 – A-30; *see Gregg Dyeing*, 286 U.S. at 479-80 (comparing parallel state sales and use taxes on gasoline). The Supreme Court relied upon *Gregg Dyeing* in recognizing the "compensatory tax" doctrine in 1937. S*ee Henneford v. Silas Mason Co.*, 300 U.S. 577, 584-85 (1937). The Court has also frequently cited *Gregg Dyeing* in its compensatory tax cases for the principle that two truly complementary taxes may be considered together in assessing discrimination. *E.g.*, *Associated Indus.*, 511 U.S. at 655; *Fulton Corp. v. Faulkner*, 516 U.S. 325, 332 (1996).

The Tenth Circuit's effort to co-opt the principles of the "compensatory tax" doctrine as support for its unprecedented "comparative burdens" test is misplaced. The "compensatory tax" doctrine provides that a "discriminatory tax may still survive Commerce Clause scrutiny if it is a truly 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 516 U.S. 331 (citation omitted). But that limited principle, and its origin in the earlier case of *Gregg Dyeing*, has no application to this case. The "compensatory tax" doctrine is expressly limited to state tax impositions, and has never been applied, as the Tenth Circuit uses it here, to non-tax regulatory requirements. The reason is evident. There is no cogent basis on which a court could undertake a comparison of dissimilar burdens, like those imposed on out-of-state and in-state retailers in this case. *See General Motors*, 519

U.S. at 309 (courts should decline to "engage in elaborate analysis of real-world economic effects . . . or to consider subtle compensatory tax defenses.") (internal citation omitted); *see also Am. Trucking Ass'n*, 483 U.S. at 289 (declining to "plunge . . . into the morass of weighing comparative tax burdens") (citation omitted).

Furthermore, even by analogy, the "compensatory tax" doctrine simply steers the analysis back into the standard Commerce Clause framework for discriminatory state laws. The concept of a "compensatory tax" is "merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means." *Oregon Waste Sys.*, 511 U.S. at 102.

The "compensatory tax" doctrine thus shows that burdens imposed by a State solely on out-of-state interests, *even those that are matched by a parallel burden on in-state sellers*, nevertheless discriminate against interstate commerce. The paradigm example of such a discriminatory measure is the state use tax. Although directly comparable to the state sales tax, the state use tax is *facially discriminatory* for purposes of the Commerce Clause – but saved from invalidity by the "compensatory tax" doctrine. *See Fulton Corp.*, 516 U.S. at 332 (use tax itself is facially discriminatory); *Associated Indus.*, 511 U.S. at 647 (state use tax scheme "violate[s] the Commerce Clause's cardinal rule of nondiscrimination, for it exempts from its scope all sales of goods occurring within the State" and is *not* saved where tax rates are unequal) (brackets added). The example of the use tax reinforces the conclusion

that the Colorado Act is discriminatory because – like the state use tax – the Act imposes obligations solely on sales made by out-of-state retailers. Unlike the use tax, however, the Colorado Act – a non-tax, regulatory measure – is not saved from invalidity by the "compensatory tax" doctrine.

2. The Tenth Circuit Incorrectly Relies On Three Non-Commerce Clause Cases.

Lacking support for a "comparative burdens" test for discrimination in dormant Commerce Clause jurisprudence, the Tenth Circuit draws upon cases interpreting and applying other laws and doctrines.

a. *CSX II*

The Tenth Circuit relies chiefly on this Court's recent decision in *CSX II*, but it fails to recognize two crucial distinctions between *CSX II* and this case. First, *CSX II* is itself a tax case – effectively, a "compensatory tax" case – and so has no application here. Furthermore, *CSX II* did not involve a claim under the dormant Commerce Clause, but instead called upon the Court to interpret the statutory term "discriminates" as used in the 4-R Act. The Tenth Circuit, however, misses the essential difference between statutory interpretation and Commerce Clause analysis.

The question in *CSX II* was whether Alabama, by imposing its general use tax on fuel purchased by rail carriers, but subjecting motor and water carriers to a

different excise tax on fuel, had discriminated against rail carriers in violation of the 4-R Act. *CSX II*, 135 S.Ct. at 1139-40. The 4-R Act does not, however, define the term "discriminates" (or "discrimination") and contains no express provision permitting a State to justify a tax applicable solely to rail carriers.

In construing the 4-R Act, the Court concluded that "discrimination" under the Act arises "only where the State *cannot sufficiently justify differences in treatment* between similarly situated taxpayers." *Id.* at 1143 (italics added).[3] As a possible justification for the State's facially differential tax treatment of rail carriers, the Court noted that "[o]ur negative Commerce Clause cases endorse the proposition that an additional tax on third parties may *justify an otherwise discriminatory tax*." *Id.* (citing *Gregg Dyeing*, 286 U.S. at 479-80 (italics added)). The Court determined that, in interpreting the 4-R Act, the State's ability to offer a valid justification for a disparate tax on rail carriers was inherent to the meaning of the statutory term "discriminates." *Id.*

For purposes of the dormant Commerce Clause, however, a court must first determine if a state law discriminates, before reaching the separate issue of possible justification. The distinction is vital. Under the dormant Commerce Clause, once a court finds that a law discriminates (*i.e.*, imposes differential treatment

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[3] The standard of "sufficient justification" as described in *CSX II* would appear to differ from "strictest scrutiny" justification required under the Commerce Clause.

on out-of-state interests), the burden shifts *to the State* to show an adequate justification for the law under the strictest scrutiny. If the State carries its burden, the challenged law is shown to be *permissibly* discriminatory – but still discriminatory. Thus, by importing the 4-R Act's definition of "discriminates" into the different framework of dormant Commerce Clause analysis, the Tenth Circuit's novel "comparative burdens" approach fundamentally alters well-established Commerce Clause doctrine by preventing the shift in burden to the State and requiring the plaintiff to disprove the State's proposed justification before it is even proffered. This Court should grant certiorari to ensure that such a significant change in constitutional doctrine is not vindicated *sub silentio* without this Court's review.

b. *North Dakota v. United States*

The Tenth Circuit also relies on *North Dakota v. United States*, another non-Commerce Clause case. App. A-27. In *North Dakota*, a plurality of the Court reviewed a claim for discrimination arising at the intersection of the governmental immunity doctrine and the Twenty-First Amendment. The Court held that North Dakota did not impermissibly discriminate against the United States by imposing a labelling requirement on alcohol sold on U.S. military bases in the state. 495 U.S. at 439.

The constitutional considerations at play in *North Dakota* are fundamentally different than in this case.

While the dormant Commerce Clause *limits* a state's ability to regulate interstate commerce, the Twenty-First Amendment expressly *authorizes* the States to regulate the importation of alcohol. U.S. Const., amend. XXI, § 2 (importation or transportation of alcohol in violation of state law is prohibited). In balancing the competing legal doctrines and interests, the plurality found, over a vigorous dissent, that the system of alcohol regulation adopted by North Dakota ultimately favored the U.S. government, and was not discriminatory. *Id.* at 438-39. The plurality's decision, however, has never been cited by the Court to support a finding of nondiscrimination, in any context, and has no relevance here.

c. *Travis v. Yale & Towne Mfg. Co.*

The Tenth Circuit also favorably cites *Travis*, a case decided by the Court under the Privileges and Immunities Clause. App. A-33; *see* 252 U.S. at 77-78. Significantly, the Court in *Travis upheld* the lower court's ruling that the New York statute in question discriminated against out-of-state workers by denying them certain exemptions from income tax that workers residing in New York enjoyed. *Id.* The holding in *Travis* thus provides no support for the Tenth Circuit's conclusion that the Colorado Act does not discriminate in violation of the Commerce Clause.

Nor was the plaintiffs' secondary, Commerce Clause-based claim, addressed by the *Travis* Court in *dicta*, analogous to the DMA's claim. The plaintiff

companies in *Travis* did not assert that they suffered discrimination due to their obligation to withhold New York income tax from wages paid to non-residents. *Id.* at 76. (In fact, the withholding obligation applied to all employers, both in-state and out-of-state. *See id.* at 74.) Instead, the companies complained that the withholding requirement discriminated against their non-resident employees, a claim the Court summarily dismissed because withholding at the source had no effect on the non-resident employees' tax liability. *Id.* at 76. In this case, the DMA raises an entirely different claim. The DMA asserts that the notice and reporting obligations of the Colorado Act, which apply solely to out-of-state retailers, violate the Commerce Clause by discriminating against the retailers themselves, not against the third-parties who are ultimately responsible for the tax. Once again, *Travis* is inapplicable.

In sum, neither Commerce Clause doctrine nor the authorities relied upon by the Tenth Circuit support the Court of Appeals' unprecedented approach of offsetting the state sales tax obligations of in-state retailers against the non-tax, regulatory burdens imposed on out-of-state retailers when determining discrimination.

C. The Tenth Circuit Relieved The State Of Its Heavy Burden Of Justification For The Colorado Act Under The "Strictest Scrutiny."

Both the Tenth Circuit's requirement that the text of a state law must include words of "geographical distinction" in order to establish facial discrimination, and the Court's novel "comparative burdens" test for discrimination in effect, fundamentally disrupt analysis under the dormant Commerce Clause. A state law that discriminates on its face, or in its effect, can only survive if the State can show that there are no reasonable nondiscriminatory alternatives to achieve a legitimate state objective. *Oregon Waste Sys.*, 511 U.S. at 100-01. Decades of Commerce Clause jurisprudence and dozens of Supreme Court cases make this analysis clear. *E.g.*, *Granholm*, 544 U.S. at 493 (discrimination requires the State to prove, through "concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable"); *Hughes*, 441 U.S. at 337 (State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect.").

The State, however, did nothing to carry its burden of justification for the Colorado Act. As the District Court found, "[t]he record contains essentially no evidence to show that the legitimate interests advanced by the defendant cannot be served adequately by reasonable nondiscriminatory alternatives." App. B-15. By misreading the Act and misapplying the law, the Tenth Circuit relieved the State of the heavy burden of

justification for the Act's patent discrimination – a burden the State did nothing to meet.

D. The Tenth Circuit's Finding That Out-Of-State Retailers Are "Not Similarly Situated" With Their Direct In-State Competitors Is Not Supported By Commerce Clause Precedent.

For purposes of the Commerce Clause, in-state and out-of-state entities that compete with one another in the same market selling competing products are similarly situated. *Rocky Mountain Farmers Union*, 730 F.3d at 1088 ("Entities are similarly situated for constitutional purposes if their products compete against each other in a single market."); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 10 (1st Cir. 2010) (analyzing whether law discriminated against "similarly situated firms in a market"); *see also Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 268, 272-73 (1984) (rejecting State's argument that there could be no discrimination where in-state products allegedly did not compete with out-of-state products sold in the same market).

Here, the very premise of the Colorado Act is that the out-of-state retailers that are not required to collect sales tax directly compete with the in-state retailers who must collect the tax. The State purports to have adopted the Colorado Act to "level the playing field" in response to *Quill*. The only difference between in-state and out-of-state retailers is the nature of the

state regulatory requirements to which they are subject. The Court of Appeals concluded, on that basis, that out-of-state retailers that are protected from the obligation to collect Colorado sales tax under *Quill* are, as a result, not "similarly situated" to in-state retailers who must collect the sales tax. App. A-29.[4]

No decision of this Court supports that conclusion. *General Motors*, cited by the Tenth Circuit, is plainly distinguishable, and its logic instead supports a finding that competing Colorado and non-Colorado retailers are "similarly situated." *Gen. Motors*, 519 U.S. at 299-303 (whether entities are similarly situated is a function of whether they serve the same customers selling similar products in the same market). Indeed, the Supreme Court has previously treated competing in-state and out-of-state retailers with disparate state tax obligations as similarly situated. *Associated Indus.*, 511 U.S. at 648-49.

The real issue is that the State of Colorado is trying to offset, or compensate for, a constitutional limitation on its taxing authority. The State seeks to substitute for a tax collection obligation that it cannot impose on out-of-state retailers under *Quill* a set of notice and reporting obligations that discriminates

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[4] The Tenth Circuit's conclusion is circular and would give a state *carte blanche* to discriminate. On every occasion that a state chose to burden out-of-state companies with requirements that in-state companies are not required to bear, the very distinction in underlying regulatory treatment would render the out-of-state sellers subject to the discriminatory measure adopted by the State to "compensate" for the difference.

against them. It should go without saying that enjoyment of a constitutional right by a protected group cannot serve as the basis for the State to impose discriminatory treatment upon that group, on the theory that the constitutional protection they enjoy renders them "not similarly situated" with their commercial counterparts.

II. THIS CASE HAS BROAD SIGNIFICANCE FOR THE REGULATION OF INTERSTATE COMMERCE AND AFFORDS THE COURT THE OPPORTUNITY TO CLARIFY AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. If Upheld, The Notice And Reporting Burdens Of The Colorado Act Are Likely To Be Widely Adopted By Other States And Localities.

When this case was before the Court on the jurisdictional issue in 2014, the Court recognized the potential significance of a ruling ultimately upholding the Colorado Act. At oral argument, two Justices noted that a ruling in favor of the State would fundamentally alter the regulatory landscape for companies doing business in interstate commerce, not just in Colorado, but nationwide. In an exchange with the State's counsel, Justice Scalia stated: "This is certainly a – a very important case because I have no doubt that if we come out agreeing with you, every one of the States is going to pass a law like this." Case No. 13-1032, Transcript of oral argument (Dec. 8, 2014) ("Tr.") at 24:25 –

25:2, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1032_8m59.pdf.

Justice Alito echoed that conclusion, commenting:

> [If the Colorado law is upheld, as a small Internet business,] I will have to submit potentially 50 different forms to all of these States reporting that somebody in South Carolina purchased something from me that cost $23.99. [. . .] [T]hat's where this all could lead, couldn't it?

Tr. 32:14-21 (brackets and ellipsis added). In fact, it is not merely other states that may follow Colorado's lead, but also the thousands of local jurisdictions in the United States that impose sales and use taxes. *See* "State Sales Tax Jurisdictions Approach 10,000," Tax Foundation (Mar. 24, 2014), available at http://taxfoundation.org/blog/state-sales-tax-jurisdictions-approach-10000. Indeed, other states have already enacted similar laws with their own particular notice and reporting requirements.[5]

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[5] To date, laws with provisions similar to Colorado's notice and reporting obligations have been enacted in five states – three of which were newly adopted or expanded in the weeks immediately following the Tenth Circuit's decision. *See* Ky. Rev. Stat. Ann. § 139.450 (2013); La. Act No. 569, § 1 (2016); Okla. Stat., tit. 68, § 1406 (2010); Okla. HB 2531, § 4 (2016) (amending § 1406); S.D. Codified Laws § 10-63-1 *et seq.* (2011); Vt. Stat. Ann., tit. 32, § 9712(a) (2016).

B. The Tenth Circuit's Reasoning Would Dramatically Expand The Authority Of States To Discriminate Against Interstate Commerce In Other Areas.

Although adopted in the context of the notice and reporting obligations imposed on non-collecting retailers under the Colorado Act, the reasoning of the Tenth Circuit would have broad application to interstate commerce generally. According to the Court of Appeals, a State can target out-of-state interests with disparate regulatory requirements, so long as it does not use words of "geographical distinction" in the law and can point to some set of purported "comparative burdens" to which in-state interests are subject. Under this novel approach, state legislatures and regulators would be given new tools, and new incentives, for adopting the kinds of parochial and protectionist measures the Commerce Clause is designed to prevent. Such a fundamental reversal of discrimination analysis under the dormant Commerce Clause could have far reaching implications.

C. The Tenth Circuit Ruling May Cause Significant Confusion Among Lower Courts If Left Uncorrected.

A ruling by a federal Court of Appeals that departs from this Court's established precedents presents an inherent risk of confusing established doctrine. While that interest is alone sufficient basis for this Court to grant review, the Tenth Circuit's ruling also rejected the careful analysis of two different lower courts

applying those precedents, both of which found the Colorado Act to be blatantly discriminatory. At a minimum, all lower federal and state courts within the Tenth Circuit can be expected to read the Tenth Circuit's decision as a direct rebuke to traditional Commerce Clause doctrine, in favor of a novel and unprecedented approach to evaluating discrimination against interstate commerce. Moreover, in light of the authority with which federal Courts of Appeals speak on federal constitutional issues, lower courts around the country may look to the decision as signaling a fundamental change in how discrimination doctrine is to be applied under the dormant Commerce Clause.

As this Court has recently emphasized, "[b]y prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Wynne*, 135 S.Ct. at 1794 (brackets added). A writ of certiorari is warranted in this case so that the Court may safeguard this fundamental constitutional interest and avoid confusion among lower courts regarding proper Commerce Clause analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 29, 2016

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DIRECT MARKETING ASSOCIATION,
Plaintiff – Appellee,

v. No. 12-1175

BARBARA BROHL, in her capacity as Executive Director, Colorado Department of Revenue,
Defendant – Appellant,

and

MULTISTATE TAX COMMISSION; INTERESTED LAW PROFESSORS; THE RETAIL INDUSTRY LEADERS ASSOCIATION; RETAIL LITIGATION CENTER, INC.; COLORADO RETAIL COUNCIL; NATIONAL GOVERNORS ASSOCIATION; NATIONAL CONFERENCE OF STATE LEGISLATURES; COUNCIL OF STATE GOVERNMENTS; NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; UNITED STATES CONFERENCE OF MAYORS; INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; INTERNATIONAL LAWYERS ASSOCIATION; GOVERNMENT FINANCE OFFICERS ASSOCIATION; TAX FOUNDATION,
Amicus Curiae.

February 22, 2016

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 1:10-CV-01546-REB-CBS)

Frederick R. Yarger, Solicitor General (Cynthia H. Coffman, Attorney General, Stephanie Lindquist Scoville, Senior Assistant Attorney General, Grant T. Sullivan, Assistant Solicitor General, Claudia Brett Goldin, First Assistant Attorney General, Daniel D. Domenico, Solicitor General, and Melanie J. Snyder, Chief of Staff, with him on the briefs), Office of the Attorney General for the State of Colorado, Denver, Colorado, appearing for Defendant–Appellant.

George S. Isaacson (Matthew P. Schaefer with him on the briefs), Brann & Isaacson, Lewiston, Maine, appearing for Plaintiff–Appellee.

Darien Shanske, University of California, Davis School of Law, Davis, California, Kirk J. Stark, University of California, Los Angeles, School of Law, Los Angeles, California, and Alan B. Morrison, George Washington University School of Law, Washington, DC, for *Amicus Curiae* Interested Law Professors.

Lisa Soronen, Executive Director, State & Local Legal Center, Washington, DC, and Ronald A. Parsons, Jr., Johnson, Abdallah, Bollweg & Parsons, LLP, Sioux Falls, South Dakota, for *Amicus Curiae* National Governors Association, National Conference

of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, United States Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, and Government Finance Officers Association.

Helen Hecht, Lila Disque, and Sheldon Laskin, Multistate Tax Commission, Washington, DC, for *Amicus Curiae* Multistate Tax Commission.

Deborah White, Retail Industry Leaders Association and Retail Litigation Center, Arlington, Virginia; Tom Goldstein and Eric Citron, Goldstein & Russell, P.C., Bethesda, Maryland, for *Amicus Curiae* Retail Industry Leaders Association, Retail Litigation Center, Inc. and Colorado Retail Council.

Joseph D. Henchman, Tax Foundation, Washington, DC, and Joseph P. Kennedy, Kennedy Kennedy & Ives, LLC, Albuquerque, New Mexico, for *Amicus Curiae* Tax Foundation.

Before **BRISCOE**, **GORSUCH** and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

I. INTRODUCTION

When a neighborhood bookstore in Denver sells a book, it must collect sales tax from the buyer

and remit that payment to the Colorado Department of Revenue ("Department"). When Barnes & Noble sells a book over the Internet to a Colorado buyer, it must collect sales tax from the buyer and remit. But when Amazon sells a book over the Internet to a Colorado buyer, it has no obligation to collect sales tax. This situation is largely the product of the Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which held that, under the dormant Commerce Clause doctrine, a state may not require a retailer having no physical presence in the state—e.g., Amazon as opposed to Barnes & Noble—to collect and remit sales tax on the sales it makes there.

Faced with *Quill*, many states, including Colorado, rely on purchasers themselves to calculate and pay a use tax on their purchases from out-of-state retailers that do not collect sales tax. But few in Colorado or elsewhere pay the use tax despite their legal obligation to do so.[1] With the explosive growth of e-commerce, the states' inability to compel

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[1] The parties dispute the precise rate of non-compliance. As the Department points out, the 75% compliance rate that DMA cites encompasses both sales and use taxes on all Internet sales, including those by retailers with a physical presence that must collect taxes. It reports the compliance rate on remote retail sales with no collection obligation is, as Justice Kennedy recently pointed out, only 4%. *See Direct Mktg. Ass'n v. Brohl ("Brohl II")*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring); *see also* Brief of National Governors Ass'n et al. as Amici Curiae in Support of Defendant-Appellant Supporting Reversal at 10, *Direct Mktg. Ass'n v. Brohl*, No. 12-1175 (10th Cir. argued Sept. 29, 2015) (estimating household use-tax compliance at 0-5%, excluding motor vehicle purchases). As the Department notes, any figure in the record would be significantly lower than the 98.3% compliance rate for sales taxes.

out-of-state retailers to collect sales tax has cost state and local governments significant revenue and disadvantaged in-state retailers, who must collect sales tax at the point of sale. Justice Kennedy recently said this "may well be a serious, continuing injustice faced by Colorado and many other States." *Direct Mktg. Ass'n v. Brohl ("Brohl II")*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

In 2010, Colorado attempted to address use tax non-compliance by enacting a law ("Colorado Law") that imposes notice and reporting obligations on retailers that do not collect sales tax. Plaintiff-Appellee Direct Marketing Association ("DMA")—a group of businesses and organizations that market products via catalogs, advertisements, broadcast media, and the Internet—has challenged this law as violating the dormant Commerce Clause.

DMA argues the Colorado Law unconstitutionally discriminates against and unduly burdens interstate commerce. The district court agreed with both arguments, granted summary judgment to DMA, and permanently enjoined the Department from enforcing the Colorado Law. *See Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175, at *10-11 (D. Colo. Mar. 30, 2012). Defendant-Appellant Barbara Brohl, Executive Director of the Department, appeals.[2]

We have jurisdiction under 28 U.S.C. § 1291. We reverse because the Colorado Law does not discriminate against nor does it unduly burden interstate commerce.

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[2] When this lawsuit was filed in district court, the executive director was Roxy Huber. Ms. Brohl was later substituted as the defendant.

II. BACKGROUND

A. *Factual History*

Colorado has imposed a sales tax since 1935 and a use tax since 1937. The taxes are complementary. The sales tax is paid at the point of sale and the use tax is paid when property is stored, used, or consumed within Colorado but sales tax was not paid to a retailer. *See* Colo. Rev. Stat. §§ 39-26-104, -202, -204(1). In approving the sales-use tax system under the dormant Commerce Clause, the Supreme Court described it as follows:

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

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

The methods for collecting sales and use taxes vary. In-state retailers subject to sales tax collection are tasked with assorted requirements—for example, obtaining a license, calculating state and local taxes, accounting for exemptions, collecting the tax, filing a return, remitting the tax to the state, and keeping

certain records. In-state retailers are also liable for any sales taxes they do not collect and may be subject to fines or criminal penalties for non-compliance.

Because Colorado cannot compel out-of-state retailers without a physical presence in the state to collect taxes, the state requires purchasers themselves to calculate and remit use taxes on their purchases from out-of-state retailers. The regimes differ greatly in effectiveness—compliance with the sales tax is extremely high, and compliance with the use tax is extremely low.

To assist the state in collecting use tax from in-state purchasers, most seemingly unaware of their tax responsibility,[3] the Colorado legislature passed a law in 2010 that imposes three obligations on retailers that do not collect sales taxes—"non-collecting retailers"[4]: (1) to send a "transactional notice" to purchasers informing them that they may be subject to Colorado's use tax, *see* Colo. Rev. Stat. § 39-21-112(3.5)(c)(I); 1 Colo. Code Regs. § 201-1:39-21-

[3] *See* David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. Rev. 483, 489 (2012).

[4] A "non-collecting retailer" is defined as "a retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax." 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(a)(i). Retailers who made less than $100,000 in total gross sales in Colorado in the previous calendar year, and who reasonably expect gross sales in the current calendar year to be less than $100,000, are exempt from the notice and reporting obligations. *Id.* § 201-1:39-21-112.3.5(1)(a)(iii).

112.3.5(2);[5] (2) to send Colorado purchasers who buy goods from the retailer totaling more than $500 an "annual purchase summary" with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes on those purchases, Colo. Rev. Stat. § 39-21-112(3.5)(d)(I); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(3); and (3) to send the Department an annual "customer information report" listing their customers' names, addresses, and total amounts spent, Colo. Rev. Stat. § 39-21-112(3.5)(d)(II); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(4). DMA objected to these requirements and brought suit against the Executive Director of the Department.

B. *Procedural History*

DMA filed a facial challenge to the Colorado law in federal district court in 2010. Among other claims,[6] it contended that the Colorado Law violates the dormant Commerce Clause because it discriminates against and unduly burdens interstate commerce.

On March 30, 2012, the district court granted summary judgment to DMA on both grounds. *Huber*, 2012 WL 1079175, at *10-11. The court permanently enjoined the Department from enforcing the Colorado Law. *Id.*

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[5] The transactional notice requirement can be satisfied in various ways, including an online pop-up window, a packing slip, or other methods.

[6] DMA originally brought eight claims for relief, including First and Fourteenth Amendment challenges, but its motion for summary judgment included only the two dormant Commerce Clause challenges. We are presented only with those challenges on this appeal.

On August 20, 2013, this panel held that the district court lacked jurisdiction to hear DMA's challenge under the Tax Injunction Act ("TIA"). *See Direct Mktg. Ass'n v. Brohl* ("*Brohl I*"), 735 F.3d 904, 906 (10th Cir. 2013); 28 U.S.C. § 1341. We remanded the case to the district court to dismiss DMA's claims and dissolve the permanent injunction. *Brohl I*, 735 F.3d at 921. The Tenth Circuit rejected a request for en banc review. *Direct Mtg. Ass'n v. Brohl*, No. 12-1175 (10th Cir. Oct. 1, 2013) (unpublished).

On December 10, 2013, the district court dismissed DMA's claims and dissolved the permanent injunction. Shortly thereafter, it dismissed the remainder of DMA's eight claims without prejudice.

DMA then sued the Department in state court. It also petitioned for certiorari to the Supreme Court, seeking review of the Tenth Circuit's dismissal of its claims based on the TIA.

On February 18, 2014, the state district court preliminarily enjoined enforcement of the Colorado Law based on DMA's argument that it facially discriminated against interstate commerce in violation of the dormant Commerce Clause. *Direct Mktg. Ass'n v. Colo. Dep't of Revenue*, No. 13CV34855, at 1, 22-23 (Dist. Ct. Colo. Feb. 18, 2014) (unpublished). It rejected DMA's argument that the Colorado Law placed an undue burden on interstate commerce, declining to extend *Quill's* holding regarding tax collection to regulatory measures. *Id.* at 24-30.

On July 1, 2014, the Supreme Court granted DMA's petition for certiorari. In response to this development, the Colorado state court stayed its

proceedings and did not resolve the parties' cross-motions for summary judgment. On March 3, 2015, the Supreme Court held the TIA did not strip the federal courts of jurisdiction to hear DMA's challenge and reversed *Brohl I*. *Brohl II*, 135 S. Ct. at 1131. It remanded the case for further proceedings.

In the wake of *Brohl II*'s determination that the TIA's jurisdictional bar is inapplicable, we are now squarely presented with the two dormant Commerce Clause challenges decided by the federal district court before our decision in *Brohl I*. The parties have submitted supplemental briefs, and we heard oral argument on September 29, 2015.

III. DISCUSSION

Our discussion proceeds in three parts. First, we present an overview of the dormant Commerce Clause doctrine. Second, we analyze the bright-line rule recognized in *Quill* and determine it is limited to tax collection. Third, we review DMA's dormant Commerce Clause claims and conclude the Colorado law does not discriminate against or unduly burden interstate commerce.[7]

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[7] In *Brohl II*, the Supreme Court noted this court's discussion of the "comity doctrine" in *Brohl I* and left "it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado." 135 S. Ct. at 1134. The Department argues "this Court should not dismiss this case based on comity. Consistent with U.S. Supreme Court precedent, the Department has affirmatively waived reliance on the comity doctrine." Aplt. Supp. Br. at 23. DMA agrees. Aplee. Supp. Br. at 59. On this non-jurisdictional prudential matter, we do not dismiss this case on comity grounds.

A. *Dormant Commerce Clause*

The Constitution does not contain a provision called the dormant Commerce Clause.[8] The doctrine derives from Article I, Section 8, Clause 3—the Commerce Clause itself—which provides that "Congress shall have [the] power . . . [t]o regulate commerce . . . among the several States." As to matters within the scope of the Commerce Clause power, Congress may choose to regulate, thereby preempting the states from doing so, *see Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96-98 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or to authorize the states to regulate, *see In re Raher*, 140 U.S. 545, 555-56 (1891); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-31 (1946).

If Congress is silent—neither preempting nor consenting to state regulation—and a state attempts to regulate in the face of that silence, the Supreme Court, going back to *Gibbons v. Ogden*, 22 (9 Wheat) U.S. 1, 231-32, 238-39 (1824) (Johnson, J. concurring), and *Cooley v. Bd. of Port Wardens*, 53 U.S. (12 How.) 299, 318-19 (1851), has interpreted the Commerce Clause to limit state regulation of interstate commerce by applying the negative implications of the Commerce Clause—"these great silences of the Constitution," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *see White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 213 (1983). Accordingly, the Commerce Clause is both an express grant of power to Congress and an

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[8] Nowhere does the Constitution explicitly limit state interference with interstate commerce except very specific limitations in Article I, Section 10, which prevent states from coining money or imposing duties on exports and imports.

implicit limit on the power of state and local government. *See Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1039 (10th Cir. 2009).

The focus of a dormant Commerce Clause challenge is whether a state law improperly interferes with interstate commerce. The primary concern is economic protectionism. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (quotations omitted) ("Th[e] 'negative' aspect of the Commerce Clause prohibits economic protectionism––that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("The crucial inquiry, therefore, must be directed to determining whether [a state law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."); *Kleinsmith*, 571 F.3d at 1039 ("The Supreme Court's jurisprudence under the dormant Commerce Clause 'is driven by concern about economic protectionism.'" (quoting "*Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008)).

As to the state regulation at issue in this case, up to now Congress has been silent—it has not preempted or consented to the Colorado Law.[9] The question then is whether the Constitution's affirmative grant of the commerce power to Congress

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[9] As DMA has noted in its supplemental brief, "since the parties first filed their briefs in this case in 2012, Congress has increased its already active scrutiny of the issue." Aplee. Supp. Br. at 50.

should be interpreted to circumscribe the Colorado Law. The judiciary's answer to this question need not be final. If we uphold the law, Congress can pass its own law and preempt the Colorado Law. Or if we decide the law is unconstitutional under the dormant Commerce Clause doctrine, Congress can enact legislation authorizing Colorado to do what we have struck down. In that sense, the judicial decision determines which party would need to go to Congress to seek a different result.

The Supreme Court has produced an extensive body of dormant Commerce Clause case law.[10] As a general matter, state regulation that discriminates against interstate commerce will survive constitutional challenge only if the state shows "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997) (quotations omitted). The Court has "required that justifications for discriminatory restrictions on commerce pass 'the strictest scrutiny.'" *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 101 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

Nondiscriminatory state laws also can be invalidated when they impose an undue burden on interstate commerce. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on

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[10] A WestLawNext search of "Dormant Commerce Clause" on February 9, 2016 produced a list of 56 United States Supreme Court decisions.

interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "State laws frequently survive this *Pike* scrutiny . . . ." *Davis*, 553 U.S. at 339.[11]

Finally, the Supreme Court has adapted its dormant Commerce Clause jurisprudence to review state taxes on interstate commerce. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court stated that a tax on interstate commercial activity is constitutional if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279. As discussed more fully below, *Complete Auto* does not apply here because this case involves a reporting requirement and not a tax.

B. *Scope of Quill*

The outcome of this case turns largely on the scope of *Quill*. We conclude it applies narrowly to sales and use tax collection. The following discussion explains how we arrive at this conclusion, which affects both DMA's claim for discrimination and for undue burden.

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), the Supreme Court

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[11] In *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 595 (2015), this court recently acknowledged a third type of dormant Commerce Clause cases: those involving "certain price control and price affirmation laws that control 'extraterritorial' conduct." This category does not apply to this appeal.

addressed whether Illinois could require a Delaware-based mail-order business with no physical address in Illinois to pay use taxes on sales to Illinois customers. *Id.* at 753-54. The seller's only connection with Illinois was through common carrier and U.S. mail. *Id.* at 754. The court concluded that such a requirement violated the Commerce Clause.

In *Quill*, the Supreme Court revisited the holding of *Bellas Hess*. The Court addressed whether North Dakota could "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." 504 U.S. at 301. Quill sold office supplies "through catalogs and flyers, advertisements in national periodicals, and telephone calls." *Id.* at 302. The Supreme Court of North Dakota had determined that this requirement was constitutional because "the tremendous social, economic, commercial, and legal innovations of the past quarter-century have rendered" the holding of *Bellas Hess* "obsolete." *Id.* (quotations omitted). The Supreme Court disagreed.[12]

In *Quill*, the Supreme Court applied the four-part test from *Complete Auto Transit*, 430 U.S. at 279. The test focuses on a statute's "practical effect" rather than its "formal language," and, as noted

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[12] The Court did overrule *Bellas Hess* on a separate issue. *Bellas Hess* had held that the Illinois use tax requirement had violated due process principles. The *Quill* court held that, "to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process." 504 U.S. at 308.

above, sustains a tax under the dormant Commerce Clause when the tax: (1) "is applied to an activity with a substantial nexus with the taxing State," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State." *Id.* The Court decided *Quill* based on the first step of the *Complete Auto* test. 504 U.S. at 311-15.[13] It determined the dormant Commerce Clause and *Bellas Hess* create a safe harbor wherein "vendors whose only connection with customers in the taxing State is by common carrier or the United States mail . . . are free from state-imposed duties to collect sales and use taxes." *Id.* at 315 (quotations and brackets omitted). The *Quill* Court relied on *Bellas Hess* to make a stare decisis decision that recognized the physical presence rule as a "bright-line" test. *Id.* at 314-18.

In *Brohl II*, the Supreme Court characterized *Quill* as establishing the principle that a state "may not require retailers who lack a physical presence in the state to *collect* these taxes on behalf of the [state]." 135 S. Ct. at 1127 (emphasis added). Justice Kennedy's concurrence in *Brohl II*, 135 S. Ct. at 1135, echoed the numerous commentators who have criticized *Quill's* bright-line physical presence test.[14] Even though the Supreme Court has not

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[13] The Court did not address whether the North Dakota use tax violated the third step of the *Complete Auto* test, which asks whether a state tax discriminates against interstate commerce.

[14] *See, e.g.,* H. Beau Baez III, *The Rush to the Goblin Market: The Blurring of* Quill's *Two Nexus Tests*, 29 Seattle U. L. Rev. 581, 581-82 (2006); Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 Harv. J.L. & Tech. 549, 549-50 (2000).

overruled *Quill*, it has not extended the physical presence rule beyond the realm of sales and use tax collection.

This court's discussion in *American Target Advertising, Inc. v. Giani* is instructive on this point:

> Both *Bellas Hess* and *Quill* concern the level of *taxes* upon out-of-state entities. The Supreme Court in *Quill* repeatedly stressed that it was preserving *Bellas Hess*' bright-line rule 'in the area of sales and use taxes.' The Utah Act imposes licensing and registration requirements, not tax burdens. The *Bellas Hess/Quill* bright-line rule is therefore inapposite.

199 F.3d 1241, 1255 (10th Cir. 2000) (quoting *Quill*, 504 U.S. at 316) (citations omitted).[15]

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[15] Other circuits have recognized that *Quill* is limited to state taxes. *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015); *Ferndale Labs., Inc. v. Cavendish*, 79 F.3d 488, 490, 494 (6th Cir. 1996).

Moreover, the weight of state authority limits *Quill's* physical presence requirement to sales and use taxes, as opposed to other kinds of taxes. *See, e.g., Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788, 794 (Wash. 2011) (en banc) (stating in dicta "[t]here is also extensive language in *Quill* that suggests the physical presence requirement should be restricted to sales and use taxes" as opposed to business and occupation taxes); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 328 (Iowa 2010) ("[W]e hold that a physical presence is not required under the dormant Commerce Clause of the United States Constitution in order for the Iowa legislature to impose an income tax on revenue earned by an out-of-state corporation arising from the use of its intangibles by franchisees located within the State of Iowa."); *Geoffrey, Inc. v. Comm'r of Revenue*,

DMA argues the Supreme Court has cited *Quill* in three cases reviewing state laws that did not impose a tax collection obligation, but these decisions merely described points of law in *Quill* and do not actually extend its holding to other contexts. *See Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009) (invoking *Quill's* due process analysis in a Tonnage Clause case to support the assertion that "a

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899 N.E.2d 87, 94-95 (Mass. 2009) (explaining "[t]he Supreme Court's decision in *Quill* discussed a 'physical-presence' requirement under the commerce clause only in the context of sales and use taxes," not taxes on royalty income); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232 (W. Va. 2006) ("[W]e conclude that *Quill's* physical-presence requirement for showing a substantial Commerce Clause nexus applies only to use and sales taxes and not to business franchise and corporation net income taxes."); *Lanco, Inc. v. Dir., Div. of Taxation*, 908 A.2d 176, 176-77 (N.J. 2006) (concluding *Quill* does not prohibit a state from imposing a corporation business tax on physically non-present businesses); *Geoffrey, Inc. v. S.C. Tax Comm'n*, 437 S.E.2d 13, 18 & n.4 (S.C. 1993) (concluding the physical-presence requirement of *Bellas Hess* and *Quill* applies only to sales and use taxes). *But see J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999) ("Any constitutional distinctions between the franchise and excise taxes presented here and the use taxes contemplated in *Bellas Hess* and *Quill* are not within the purview of this court to discern.").

These cases generally interpret *Quill* to apply exclusively to sales and use taxes for two reasons relevant here. First, they emphasize the language in *Quill* itself, which stated "we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes." 504 U.S. at 314. Second, they highlight *Quill's* stare decisis rationale rooted in the mail order industry's reliance on *Bellas Hess*—a reliance interest absent in the context of other taxes. *See KFC Corp.*, 792 N.W.2d at 324.

nondomiciliary jurisdiction may constitutionally tax property when that property has a substantial nexus with that jurisdiction, and such nexus is established when the taxpayer avails itself of the substantial privilege of carrying on business in that jurisdiction" (quotations omitted)); *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24-25 (2008) (invoking *Quill* to support the proposition that "[t]he Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities," then relying on *Quill's* due process holding); *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 572 n.8 (citing *Quill* in a string-cite for the proposition that Congress may "repudiate or substantially modify" Commerce Clause jurisprudence).

None of the foregoing cases actually invokes *Quill*'s dormant Commerce Clause analysis—only its due process analysis and discussion of congressional authority—and they do not demonstrate that *Quill* extends beyond the actual collection of taxes by out-of-state retailers. Indeed, the cases cited by DMA suggest that *Quill* has not been extended beyond that context.

In sum, we conclude *Quill* applies narrowly to and has not been extended beyond tax collection. The district court erred in holding otherwise. In the following section, we address how this conclusion affects DMA's claims.

C. *DMA's Claims*

The district court granted summary judgment on two grounds: the Colorado Law (1) impermissibly discriminates against and (2) unduly burdens interstate commerce. As to both grounds, we review

a district court's grant of summary judgment de novo, evaluating the evidence "in the light most favorable to the non-moving party." *Sabourin v. Univ. of Utah*, 676 F.3d 950, 957 (10th Cir. 2012) (quotations omitted). We also review challenges to the constitutionality of a statute de novo. *Shivwits Band of Pauite Indians v. Utah*, 428 F.3d 966, 972 (10th Cir. 2005).

When, as here, the target of state regulation alleges discrimination and undue burden, the analysis proceeds as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. . . . In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citations omitted).

1. **Discrimination**

We turn first to DMA's discrimination claim. A state law generally violates the dormant Commerce Clause if it discriminates—either on its

face or in its practical effects—against interstate commerce. *Hughes*, 441 U.S. at 336.

a. *District court order*

The District court determined the Colorado Law discriminates against interstate commerce in violation of the Commerce Clause. It determined that "the Act and the Regulations directly regulate and discriminate against out-of-state retailers and, therefore, interstate commerce." *Huber*, 2012 WL 1079175, at *4.[16] It noted that under state law, "all retailers doing business in Colorado and selling to Colorado purchasers must obtain a sales tax license and must collect and remit the sales tax applicable to each sale," *id.* (citing Colo. Rev. State §§ 39-26-103, -104, -106, -204), and face civil and criminal penalties for non-compliance, *id.* (citing Colo. Rev. Stat. §§ 39-21-118(2), 39-26-103(1)(a),(4)). It further noted that *Quill* precludes the state from imposing these requirements and penalties on out-of-state retailers without a physical presence in Colorado. *Id.* (citing *Quill*, 504 U.S. at 315).

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[16] The district court stopped short of saying the law was facially discriminatory, noting:

> On their face the Act and the Regulations do not distinguish between in-state retailers (those with a physical presence—a brick and mortar presence—in the state) and out-of-state retailers (those with no physical presence in the state who make sales to customers in the state). Rather, the Act focuses on the distinction between retailers who collect Colorado sales tax and those who do not collect Colorado sales tax.

Id.

The district court recognized that, although the Colorado Law refers only to "any retailer that does not collect Colorado sales tax" Colo. Rev. Stat. § 39-21-112, the combination of state law and *Quill* guarantees that this provision applies only to out-of-state retailers. *Huber*, 2012 WL 1079175, at *4-5. The court concluded, "the veil provided by the words of the Act and the Regulations is too thin to support the conclusion that the Act and the Regulations regulate in-state and out-of-state retailers even-handedly." *Id.* at *4.

Although the Department pointed out that some out-of-state retailers voluntarily collect and remit Colorado sales tax and therefore are not subject to the Colorado Law, the district court determined the Department "may not condition an out-of-state retailer's reliance on its rights on a requirement that the retailer accept a different burden, particularly when that burden is unique to out-of-state retailers." *Id.* (citing *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988)).

The district court therefore subject the law to strict scrutiny, at which stage "the burden falls on the State to justify [the statute] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at *6 (quoting *Hughes*, 441 U.S. 336). The court briefly canvassed the interests identified by the Department and the proposed non-discriminatory alternatives identified by DMA, and ultimately concluded "[t]he record contains essentially no evidence to show that the legitimate interests advanced by the defendant cannot be served

adequately by reasonable nondiscriminatory alternatives." *Id.* The court concluded the Department failed to carry its burden on the discrimination analysis and granted summary judgment to DMA. *Id.* at *7.

b. *Analysis*

A statute may discriminate against interstate commerce on its face or in practical effect. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 402 (1994). "The burden to show discrimination rests on the party challenging the validity of the statute . . . ." *Hughes*, 441 U.S. at 336. If the party challenging the state law meets its burden to show that the statute is discriminatory, the law "is virtually *per se* invalid." *Or. Waste*, 511 U.S. at 99. When the Colorado law is properly viewed in its factual and legal context, DMA has not carried its burden of showing discrimination against interstate commerce.

We consider: (1) whether the Colorado law facially discriminates against interstate commerce, and (2) whether the Colorado Law's direct effect is to favor in-state economic interests over out-of-state interests.

i. <u>The Colorado Law Does Not Facially Discriminate Against Interstate Commerce</u>

The Colorado Law is not facially discriminatory. It applies to certain retailers that sell goods to Colorado purchasers but do not collect Colorado sales or use taxes. Colo. Rev. Stat. § 39-21-112(3.5)(c)(I); 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(a)(i). On its face, the law does not distinguish between in-state and out-of-state

economic interests. It instead imposes differential treatment based on whether the retailer collects Colorado sales or use taxes. Some out-of-state retailers are collecting retailers, some are not.

Although the title of the statute—An Act Concerning the Collection of Sales and Use Taxes on Sales Made by Out-Of-State Retailers—mentions out-of-state retailers, the Supreme Court has cautioned that "[t]he title of a statute cannot limit the plain meaning of the text. For interpretative purposes, it is of use only when it sheds light on some ambiguous word or phrase." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quotations and alterations omitted). Here, the words of the statute are not ambiguous. The text refers to"[e]ach retailer that does not collect Colorado sales tax," which distinguishes between those entities that collect Colorado sales tax and those that do not. *See* Colo. Rev. Stat. §§ 39-21-112(c)(I), (d)(I)(A), (II)(A). We will not rely on the statute's title to limit the plain meaning of the text.

Moreover, when the Supreme Court has concluded a law facially discriminates against interstate commerce, it has done so based on statutory language explicitly identifying geographical distinctions. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 307 n.15 (1997) ("[I]f a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal."). For example, the Court said the statute at issue in *Oregon Waste* was facially discriminatory because it imposed a

higher surcharge on disposal of solid waste "generated out-of-state" than solid waste generated in-state. 511 U.S. at 96, 99-100. The Colorado Law makes no such geographic distinction. *See, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (concluding a statute did not facially discriminate by prohibiting producers or refiners of petroleum products from operating retail service stations in Maryland, even though no producers or refiners were located in the state); *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 352 (1977) (finding facially neutral a law requiring "all closed containers of apples sold, offered for sale, or shipped into the State bear no grade other than the applicable U.S. grade or standard" (quotations omitted)). As explained above, the Colorado Law distinguishes between those retailers that collect Colorado sales and use tax and those that do not.[17]

In the absence of facial discrimination, a state law may nonetheless discriminate against interstate commerce in its direct effects. *See Kleinsmith*, 571 F.3d at 1040 (noting a law "may be neutral in its terms and still discriminate against interstate commerce"); *Hunt*, 432 U.S. at 350-52. We therefore next consider the direct effects of the Colorado Law.

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[17] DMA contends the Colorado Law fails the internal consistency test. The test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1802 (2015) (quotations omitted). The test has been confined to dormant Commerce Clause review of state taxes. It is therefore inapplicable here because, again, the Colorado Law imposes a reporting requirement, not a tax.

ii. The Colorado Law Is Not Discriminatory In Its Direct Effects

A state law may violate the dormant Commerce Clause "when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman*, 476 U.S. at 579. In this inquiry, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* We conclude the Colorado Law does not favor in-state economic interests and is not discriminatory in its effects.

We have previously said, "The Supreme Court has not directly spoken to the question of what showing is required to prove discriminatory effect where, as here, a statute is evenhanded on its face," *Kleinsmith*, 571 F.3d at 1040 (quoting *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007)). But, we have held "the party claiming discrimination has the burden to put on evidence of a discriminatory effect on commerce that is 'significantly probative, not merely colorable.'" *Id.* at 1040-41 (quoting *All. of Auto Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005)). The party claiming discrimination must show that the state law benefits local actors and burdens out-of-state actors, and the result must "alter[ ] the competitive balance between in-state and out-of-state firms." *Id.* at 1041 (quotations omitted).[18]

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[18] In *Kleinsmith*, we determined that the plaintiff had not presented evidence sufficient to establish a discriminatory effect because he had failed to show how the state law at issue "alters the competitive balance between resident and nonresident attorneys." *Id.* at 1042. "In light of *Exxon*, Mr. Kleinsmith should at least have produced evidence that the

1) DMA's arguments on differential treatment

As a preliminary matter, DMA is incorrect that (a) "any differential treatment" between in-state and out-of-state entities establishes a violation of the dormant Commerce Clause, and (b) the Colorado Law should be viewed in isolation. Three principles are instructive.

First, the Supreme Court has repeatedly indicated that differential treatment must adversely affect interstate commerce to the benefit of intrastate commerce to trigger dormant Commerce Clause concerns. In that regard, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste*, 511 U.S. at 99; *Kleinsmith*, 571 F.3d at 1040 ("Discriminatory laws are those that 'mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). For that reason, differential treatment that benefits or does not affect out-of-state interests is not a violation of the dormant Commerce Clause. *North Dakota v. United States*, 495 U.S. 423, 439 (1990) ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it.").

In light of the Colorado consumers' preexisting obligations to pay sales or use taxes whether they purchase goods from a collecting or non-collecting

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work he had performed was now being done by attorneys who are residents of Utah." *Id.* at 1043. DMA bears a similar burden here.

retailer, the reporting obligation itself does not give in-state retailers a competitive advantage. We further note the Supreme Court has upheld differential tax reporting obligations and apportionment formulas for non-resident corporations, *see, e.g., Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 118-20 (1920); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983), and administrative mechanisms to facilitate tax collection, *see, e.g., Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).[19]

Second, equal treatment requires that those similarly situated be treated alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating that under the Equal Protection Clause, "all persons similarly situated should be treated alike"). Conversely, disparate treatment is not unequal treatment or discrimination if the subjects of the treatment are not similarly situated. This basic principle of equal protection law applies to whether a state law discriminates against out-of-state actors relative to in-state actors. In *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), the Supreme Court upheld an Ohio statute that exempted local natural gas distribution companies ("LDCs") from sales and use tax while out-of-state producers and marketers had to collect it. *Id.* at 281-82. The Court said the in-state and out-of-state companies were not similarly situated and did not have to be treated the same. *Id.* at 298-99, 310.

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[19] Although *Travis* involved a claim under the Privileges and Immunities Clause, the Supreme Court in *Wynne* recently relied on *Travis* to resolve a claim under the Commerce Clause. *See Wynne*, 135 S. Ct. at 1799-1800 (citing *Travis*, 252 U.S. at 75, 79-80).

Here, the non-collecting out-of-state retailers are not similarly situated to the in-state retailers, who must comply with tax collection and reporting requirements that are not imposed on the out-of-state non-collecting retailers.

Third, despite DMA's myopic view to the contrary, the Supreme Court has repeatedly stressed that laws are not to be understood in isolation, but in their broader context. In *West Lynn Creamery*, the Court expressly declined to "analyze separately two parts of an integrated regulation," and said it is "the entire program . . . that simultaneously burdens interstate commerce and discriminates in favor of local producers." 512 U.S. at 201; *see also Ala. Dep't of Revenue v. CSX Transp., Inc.* ("*CSX II*"), 135 S. Ct. 1136, 1143 (2015) ("It is undoubtedly correct that the 'tax' (singular) must discriminate—but it does not discriminate unless it treats railroads differently from other *similarly situated* taxpayers *without sufficient justification*.");[20] *North Dakota*, 495 U.S. at 435 ("[T]he question whether a state regulation discriminates against the Federal Government cannot be viewed in isolation. Rather, the entire regulatory system should be analyzed to determine whether it is discriminatory with regard to the economic burdens that result." (quotations omitted)); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932) ("What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent

[20] *CSX II* was not a dormant Commerce Clause case, but in analyzing the 4-R Act, the Court borrowed from dormant Commerce Clause precedent to explain a law should be assessed in context to determine whether it discriminates. *Id.* at 1143 (citing *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932)).

with the restrictions of the Federal Constitution. There is no demand in that Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.").

The broader context helps determine whether a law "alters the competitive balance between in-state and out-of-state firms." *Kleinsmith*, 571 F.3d at 1041 (quotations omitted). Here, the reporting requirements are designed to increase compliance with preexisting tax obligations, and apply only to retailers that are not otherwise required to comply with the greater burden of tax collection and reporting. DMA has not shown the Colorado Law imposes a discriminatory economic burden on out-of-state vendors when viewed against the backdrop of the collecting retailers' tax collection and reporting obligations. And as discussed more fully below, even if we limit our comparative analysis to the notice and reporting obligations imposed on collecting and non-collecting vendors, DMA has failed to show the Colorado Law unconstitutionally discriminates against interstate commerce.

2) *Quill* and discriminatory effect

Whether the Colorado law works a discriminatory effect on interstate commerce turns on the reach of *Quill*. The Department contends the law is not discriminatory because out-of-state retailers can either (a) comply with the notice and reporting requirements or (b) collect and remit taxes like in-state retailers. DMA contends this argument fails because *Quill* protects out-of-state retailers from having to collect and remit taxes, making the

Colorado Law's only function to impose new notice and reporting responsibilities on out-of-state retailers that in-state retailers need not perform.

As an initial matter, we disagree with the Department that out-of-state retailers' having the option to collect and remit sales taxes makes the Colorado Law non-discriminatory. *Quill* unequivocally holds that out-of-state retailers without a physical presence in the state need not collect sales tax. *See Quill*, 504 U.S. at 301-02. *Quill* privileges out-of-state retailers in that regard, and the possibility that they might choose to give up that privilege rather than comply with the challenged Colorado Law does not make the Colorado Law constitutional. *Bendix*, 486 U.S. at 893.

But *Quill* applies only to the collection of sales and use taxes, and the Colorado Law does not require the collection or remittance of sales and use taxes. Instead, it imposes notice and reporting obligations. Those notice and reporting obligations are discriminatory only if they constitute "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Or. Waste*, 511 U.S. at 99, and thereby "alter[ ] the competitive balance between in-state and out-of-state firms," *Kleinsmith*, 571 F.3d at 1041 (quotations omitted). DMA has not produced significant probative evidence establishing such discriminatory treatment.

3) Comparative regulation and DMA's burden

Even if we limit our comparative analysis to the regulatory requirements imposed on in-state retailers and out-of-state retailers, DMA has not

demonstrated the Colorado Law unconstitutionally discriminates against interstate commerce.

In addition to collecting sales taxes, holding them in trust, and remaining liable for any sales and use tax due on a transaction, *see* Colo. Rev. Stat. §§ 39-26-105, -118(1), in-state retailers must comply with numerous requirements, including obtaining a license; calculating the state and local tax due while accounting for any tax exemptions; filing a return; remitting the tax to the State; and maintaining various records. *See* Colo. Rev. Stat. §§ 39-26-101 to -129.

Of these notice and reporting requirements, in-state retailers can be compelled to collect and remit sales taxes while non-collecting out-of-state retailers cannot. *Quill*, 504 U.S. at 301-02. But *Quill* does not establish that out-of-state retailers are free from all regulatory requirements—only tax collection and liability. *See id.* at 315 ("Under *Bellas Hess*, . . . vendors [without a physical presence in the state] are free from state-imposed duties to *collect* sales and use taxes." (emphasis added)).

As the Supreme Court recently explained in *CSX II*:

> It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt. If that were true, *both* competitors could claim to be disfavored—discriminated against—relative to each other. Our negative Commerce Clause cases endorse the

> proposition that an additional tax on third parties may justify an otherwise discriminatory tax. We think that an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory.

135 S. Ct. at 1143 (citations omitted)); *see also Travis*, 252 U.S. at 76 ("The contention that an unconstitutional discrimination against noncitizens arises out of the provision of section 366 confining the withholding at source to the income of nonresidents is unsubstantial. That provision does not in any wise increase the burden of the tax upon nonresidents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it.").

DMA does not point to any evidence establishing that the notice and reporting requirements for non-collecting out-of-state retailers are more burdensome than the regulatory requirements in-state retailers already face. Because DMA has not carried its burden and identified significant probative evidence of discrimination, *see Kleinsmith*, 571 F.3d at 1040, it has not established that the Colorado Law discriminates in its direct effects.

* * *

Because we can conclude the Colorado Law is not discriminatory, "it is [not] virtually per se invalid," and it need not survive strict scrutiny. *Or. Waste*, 511 U.S. at 99. State laws that are not discriminatory must nevertheless not unduly burden interstate commerce. *See Davis*, 553 U.S. at 353.

D. *Undue Burden*

Whether a state law unduly burdens interstate commerce is a separate inquiry from whether a state discriminates against interstate commerce. In *Quill*, the Supreme Court explained that the first step of the *Complete Auto* test—whether a tax "is applied to an activity with a substantial nexus with the taxing State"—the step on which the *Quill* decision was based, "limit[s] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." 504 U.S. at 311, 313.

The district court decided the undue burden issue on the basis that *Quill's* bright-line rule applied. DMA limits its undue burden argument to *Quill* and also states that "[b]ecause the Act is discriminatory, the test generally applied to even-handed regulations plainly does not apply in this case," Aplee. Supp. Br. at 23 n.8 (citing *Pike*, 397 U.S. at 142).[21] We therefore address undue burden

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[21] In the same footnote, DMA argues Colorado's expert testimony shows the burdens imposed on non-collecting retailers—"an estimated $25 million to $60 million in the first year, and $10 million annually thereafter"—are "grossly excessive" compared to the initial annual revenue of $12.5 million estimated to result from the Colorado Law. Aplee. Supp. Br. at 23 n.8. The district court did not analyze DMA's claims under the *Pike* balancing test, and DMA's single sentence is inadequate to present a *Pike* balancing argument on appeal. DMA also "refers the Court" to DMA's argument section of its brief filed in 2012, *id.* at 2 n.1, but when we granted DMA's motion to file supplemental briefs after the case was remanded by the Supreme Court, we "directet[ed] the parties to provide *full briefing* on the Commerce Clause claims . . . and any other issues the parties consider pertinent to this appeal on remand." *Direct Mktg. Ass'n v. Brohl*, No. 12-1173, at *1 (10th Cir. Apr. 13, 2015) (unpublished) (emphasis added).

based on *Quill* and do not reach a balancing analysis under *Pike*, 397 U.S. at 142.

1. **District Court Order**

The district court determined the Colorado Law unduly burdens interstate commerce in violation of the dormant Commerce Clause. It noted *Quill* counsels looking beyond the formal language of a statute and considering its practical effect. *See Quill*, 504 U.S. at 310. Although *Quill* itself narrowly focused on sales and use taxes, the district court noted that the Colorado Law "require[s] out-of-state retailers to gather, maintain, and report information, and to provide notices to their Colorado customers and to the [Department]," and "[t]he sole purpose of these requirements is to enhance the collection of use taxes by the State of Colorado." *Huber*, 2012 WL 1079175, at *8. As a result, the district court concluded "that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*." *Id.* On that basis, the court determined the Colorado Law imposed an undue burden on interstate commerce. *Id.* at *9.

2. **Analysis**

DMA relies solely on *Quill* for its undue burden claim, and the district court limited its analysis of undue burden to *Quill*. We conclude that the Colorado Law does not impose an undue burden on interstate commerce.[22] *Quill* is not binding in

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[22] We note that the Colorado state district court that addressed whether the Colorado Law imposes an undue burden under *Quill* came to the same conclusion. *Direct Mktg. Ass'n*, No. 13CV34855, at 28-30.

light of Supreme Court and Tenth Circuit decisions construing it narrowly to apply only to the duty to collect and remit taxes.

As explained earlier, *Quill* is limited to the narrow context of tax collection. In *Brohl II*, the Supreme Court not only characterized *Quill* as establishing the principle that a state "may not require retailers who lack a physical presence in the State to *collect* these taxes on behalf of the Department," 135 S. Ct. at 1127 (emphasis added), it also concluded that the notice and reporting requirements of the Colorado Law do not constitute a form of tax collection, *id.* at 1130-31. As the Court repeatedly stated in its TIA analysis, the Colorado Law does not require out-of-state retailers to assess, levy, or collect use tax on behalf of Colorado. *Id.* at 1131 ("The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these."). The Court determined "the notice and reporting requirements precede the steps of 'assessment' and 'collection,'" in part because "[a]fter each of these notices or reports is filed, the State still needs to take further action to assess the taxpayer's use-tax liability and to collect payment from him." *Id.*[23]

As a result, *Quill*—confined to the sphere of sales and use tax collection—is not controlling. The *Brohl II* Court's logic for reversing *Brohl I* precludes any other result. It reversed the panel's TIA determination precisely because it determined the relief sought in this litigation—invalidating the

[23] The Department did not "seriously contend" the notice and reporting requirements constituted a levy. *Id.*

Colorado Law—would not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." *Id.* at 1127 (quoting 28 U.S.C. § 1341). The holding in *Brohl II* cannot be squared with the district court's determination that the Colorado Law functionally compels the collection of taxes, *see Huber*, 2012 WL 1079175, at *8. The Court's conclusion in *Brohl II* controls. DMA's success in *Brohl II* leads to the demise of its undue burden argument here.

Having determined *Quill* is not controlling in the instant case, we cannot identify any good reason to sua sponte extend the bright-line rule of *Quill* to the notice and reporting requirements of the Colorado Law. Because the Colorado Law's notice and reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*, this ends the undue burden inquiry.[24]

IV. **CONCLUSION**

Applying the law to the record, we hold the Colorado Law does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce. We therefore reverse the district court's order granting summary judgment and remand for further proceedings consistent with this opinion. We conclude by noting the Supreme Court's observation in *Quill* that Congress holds the "ultimate power" and is "better qualified to resolve" the issue of

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[24] At this point, the regulatory requirements must only satisfy due process requirements, and DMA has not made a due process challenge in its motion for summary judgment or its arguments on appeal.

"whether, when, and to what extent the States may burden interstate [retailers] with a duty to collect [sales and] use taxes." 504 U.S. at 318.[25]

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[25] We grant the motions for leave to file amici briefs and the motion for leave to file a joint reply in support of the motions for leave to file amici briefs.

No. 12-1175, *Direct Marketing Association v. Brohl*

GORSUCH, Circuit Judge, concurring.

I agree with everything the court has said and write only to acknowledge a few additional points that have influenced my thinking in this case.

In our legal order past decisions often control the outcome of present disputes. Some criticize this feature of our law, suggesting that respect for judicial precedent invests dead judges with too much authority over living citizens. They contend, too, that it invites current judges to avoid thinking for themselves and to succumb instead in "judicial somnambulism." Jerome Frank, Law and the Modern Mind 171 (1930). But in our legal order judges distinguish themselves from politicians by the oath they take to apply the law as it is, not to reshape the law as they wish it to be. And in taking the judicial oath judges do not necessarily profess a conviction that every precedent is rightly decided, but they must and do profess a conviction that a justice system that failed to attach power to precedent, one that surrendered similarly situated persons to wildly different fates at the hands of unconstrained judges, would hardly be worthy of the name.

At the center of this appeal is a claim about the power of precedent. In fact, the whole field in which we are asked to operate today—dormant commerce clause doctrine—might be said to be an artifact of judicial precedent. After all, the Commerce Clause is found in Article I of the Constitution and it grants Congress the authority to adopt laws regulating interstate commerce. Meanwhile, in dormant commerce clause cases

Article III courts have claimed the (anything but dormant) power to strike down some state laws even in the absence of congressional direction. *See, e.g., Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614-17 (1997) (Thomas, J. dissenting). And the plaintiffs' attempt in this case to topple Colorado's statutory scheme depends almost entirely on a claim about the power of a single dormant commerce clause decision: *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Everyone before us acknowledges that *Quill* is among the most contentious of all dormant commerce clause cases. Everyone before us acknowledges that it's been the target of criticism over many years from many quarters, including from many members of the Supreme Court. *See* Maj. Op. at 15 n.14 (citing scholarly literature); *Quill*, 504 U.S. at 319-20 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 321-33 (White, J., concurring in part and dissenting in part); *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1123, 1134-35 (2015) (Kennedy, J., concurring). But, the plaintiffs remind us, *Quill* remains on the books and we are duty-bound to follow it. And about that much the plaintiffs are surely right: we are obliged to follow *Quill* out of fidelity to our system of precedent whether or not we profess confidence in the decision itself. For while a court may in rare circumstances overrule a decision of its own devise, or one of a lower court, this court may of course never usurp the power to overrule a decision of the Supreme Court.

With that much plain enough, the question remains what exactly *Quill* requires of us. Later

(reading) courts faced with guidance from earlier (writing) courts sometimes face questions how best to interpret that guidance. And the parties before us today offer wildly different accounts of *Quill*. Most narrowly, everyone agrees that *Quill*'s holding forbids states from imposing sales and use tax collection duties on firms that lack a physical presence in-state. And everyone agrees that Colorado's law doesn't quite go that far. While Colorado requires in-state brick-and-mortar firms to collect sales and use taxes, it asks out-of-state mail order and internet firms only to supply reports designed to enable the state itself to collect the taxes in question. Indeed, Colorado suggests that its statutory scheme carefully and consciously stops (just) short of doing what *Quill*'s holding forbids.

But as the plaintiffs note, that is hardly the end of it. Our obligation to precedent obliges us to abide not only a prior case's holding but also to afford careful consideration to the reasoning (the "ratio decidendi") on which it rests. And surely our respect for a prior decision's reasoning must be at its zenith when the decision emanates from the Supreme Court. Indeed, our court has said that is will usually defer even to the dicta (not just the ratio) found in Supreme Court decisions. *See, e.g., Tokoph v. United States*, 774 F.3d 1300, 1303-04 (10th Cir. 2014). And building on this insight the plaintiffs argue that respect for *Quill*'s ratio, if not its holding, requires us to strike down Colorado's law. After all, the plaintiffs note, Colorado's regulatory scheme seeks to facilitate the collection of sales and use taxes by requiring out-of-state firms to satisfy various notice and reporting obligations—burdens comparable in

their severity to those associated with collecting the underlying taxes themselves.

It's a reasonable argument, but like my colleagues I believe there's a reason it's wrong. The reason lies in the exceptional narrowness of *Quill*'s ratio. If the Court in *Quill* had suggested that state laws commanding out-of-state firms to collect sales and use taxes violated dormant commerce clause doctrine because they are too burdensome, then I would agree that we would be obliged to ask whether Colorado's law imposes a comparable burden. But *Quill's* ratio doesn't sound in the comparability of burdens—it is instead and itself all about the respect due precedent, about the doctrine of *stare decisis* and the respect due a still earlier decision. *See Quill*, 504 U.S. at 317; *id.* at 320 (Scalia, J., concurring in part and concurring in the judgment); *Brohl*, 135 S. Ct. at 1134 (Kennedy, J., concurring).

This distinction proves decisive. Some years before *Quill*, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court held that states could not impose use tax collection duties on out-of-state firms. In *Quill*, the Court openly reconsidered that decision and ultimately chose to retain its rule—but did so only to protect the reliance interests that had grown up around it. Indeed, the Court expressly acknowledged that *Bellas Hess* very well might have been decided differently under "contemporary Commerce Clause jurisprudence" and cases like *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Quill*, 504 U.S. at 311; *cf.* Billy Hamilton, *Remembrance of Things Not So Past: The Story Behind the Quill Decision*, 59 St. Tax Notes Mag. 807 (2011). The Court also expressly acknowledged that

states can constitutionally impose tax and regulatory burdens on out-of-state firms that are more or less comparable to sales and use tax collection duties. *See Quill*, 504 U.S. at 311-12, 314-15. And the Court expressly acknowledged that this dichotomy—between (impermissible) sales and use tax collection obligations and (permissible) comparable tax and regulatory burdens—is pretty "artificial" and "formalistic." *Id.* Given all this, respect for *Quill*'s reasoning surely means we must respect the *Bellas Hess* rule it retained. But just as surely it means we are under no obligation to extend that rule to comparable tax and regulatory obligations.

In fact, this much is itself a matter of precedent for this court and many others have already held *Quill* does nothing to forbid states from imposing regulatory and tax duties of comparable severity to sales and use tax collection duties. *See, e.g., Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (2000); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 324-28 (Iowa 2010), *cert. denied*, 132 S. Ct. 97 (2011) (mem.); *Capital One Bank v. Comm'r of Revenue*, 899 N.E. 2d 76, 84-86 (Mass. 2009), *cert denied*, 557 U.S. 919 (2009); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232-34 (W. Va. 2006), *cert. denied sub nom FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007).

It may be rare for Supreme Court precedents to suffer as highly a "distinguished" fate as *Bellas Hess*—but it isn't unprecedented. Take baseball. Years ago and speaking through Justice Holmes, the Supreme court held baseball effectively immune from the federal antitrust laws and did so reasoning that the "exhibition[ ] of baseball" by professional teams

crossing state lines didn't involve "commerce among the States." *Federal Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09 (1922). Since then the Supreme Court has recognized that other organizations offering "exhibitions" in various states *do* engage in interstate commerce and *are* subject to antitrust scrutiny. *E.g., United States v. Shubert*, 348 U.S. 222, 230-31 (1955). But though it has long since rejected the reasoning of *Federal Baseball*, the Supreme Court has still chosen to retain the holding itself—continuing to rule baseball effectively immune from antitrust laws, if now only out of respect for the reliance interests the *Federal Baseball* decision engendered in that particular industry. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam). And, of course, Congress has since codified baseball's special exemption. *See* 15 U.S.C. § 26b. So it is that the baseball rule now applies only to baseball itself, having lost every away game it has played.

Accepting at this point that *Quill* doesn't require us to declare Colorado's law unconstitutional, the question remains whether some other principle in dormant commerce clause doctrine might. For their part the plaintiffs identify (only) one other potential candidate, suggesting that Colorado's law runs afoul of the principle that states may not discriminate against out-of-state firms, a principle often associated with *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). And to the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle, for even critics of dormant commerce clause doctrine often endorse it

even as they suggest it might find a more textually comfortable home in other constitutional provisions. *E.g., Camps Newfound*, 520 U.S. at 610 (Thomas, J., dissenting).

But any claim of discrimination in this case is easily rejected. The plaintiffs haven't come close to showing that the notice and reporting burdens Colorado places on out-of-state mail order and internet retailers compare unfavorably to the administrative burdens the state imposes on in-state brick-and-mortar retailers who must collect sales and use taxes. If anything, by asking us to strike down Colorado's law, out-of-state mail order and internet retailers don't seek comparable treatment to their in-state brick-and-mortar rivals, they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or "tax shelter." *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part).

Of course, the mail order and internet retailer plaintiffs might respond that, whatever its propriety, they are entitled to a competitive advantage over their brick-and-mortar competitors thanks to *Bellas Hess* and *Quill*. And about that much (again) I cannot disagree. It is a fact—if an analytical oddity—that the *Bellas Hess* branch of dormant commerce clause jurisprudence guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume while the mainstream of dormant commerce clause jurisprudence associated with *West Lynn Creamery* is all about preventing discrimination between

firms.[1] And the plaintiffs might well complain that the competitive advantage they enjoy will be diluted by our decision in this case. Indeed, if my colleagues and I are correct that states may impose notice and reporting burdens on mail order and internet retailers comparable to the sales and use tax collection obligations they impose on brick-and-mortar firms, many (all?) states can be expected to follow Colorado's lead and enact statutes like the one now before us.

But this result too seems to me, as it does to my colleagues, entirely consistent with the demands of precedent. After all, by reinforcing an admittedly "formalistic" and "artificial" distinction between sales and use tax collection obligations and other comparable regulatory and tax duties, *Quill* invited states to impose comparable duties. In this way, *Quill* might be said to have attached a sort of expiration date for mail order and internet vendors' reliance interests on *Bellas Hess*'s rule by perpetuating its rule for the time being while also encouraging states over time to find ways of achieving comparable results through different

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[1] An oddity that, if anything, seems to grow by the day, for if it were ever thought that mail-order retailers were small businesses meriting (constitutionalized, no less) protection from behemoth brick-and-mortar enterprises, that thought must have evaporated long ago. Anecdotal evidence to be sure but consider: today's e-commerce retail leader, Amazon, recorded nearly ninety billion dollars in sales in 2014 while the vast majority of small businesses recorded no online sales at all. *See* Amazon.com, Inc., Annual Report on SEC Form 10-K at 17 (2014); Ryan Lunka, *Retail Data: 100 Stats About Retail, eCommerce & Digital Marketing* (July 9, 2015), https://www.nchannel.com/blog/retail-data-ecommerce-statistics/.

means. In this way too *Quill* is perhaps unusual but hardly unprecedented, for while some precedential islands manage to survive indefinitely even when surround by a sea of contrary law (*e.g., Federal Baseball*), a good many others disappear when reliance interests never form around them or erode over time (*e.g., Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009)). And *Quill*'s very reasoning—its *ration decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time.

I respectfully concur.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 10-cv-01546-REB-CBS

THE DIRECT MARKETING ASSOCIATION,

Plaintiff,

v.

ROXY HUBER, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

March 30, 2012

ORDER CONCERNING CROSS MOTIONS FOR SUMMARY JUDGMENT

Blackburn, J.

This matter is before me on the parties' cross motions for summary judgment: (1) Plaintiff's Motion for Summary Judgment as to Counts I and II Alleging Violations of the Commerce Clause [#98][1]; and (2) Defendant's Motion for Partial Summary Judgment – Counts I and II (Commerce Clause) [#99], both filed May 6, 2011. The parties both filed

[1]"[#98]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

responses [#100 & #101] and replies [#102 & 103].[2] I grant the plaintiff's motion, and I deny the defendant's motion.

I. JURISDICTION & STANDING

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question). Although the defendant challenges the plaintiff's standing to pursue certain of its claims, the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause. I conclude that the plaintiff has standing on these claims. The parties seek summary judgment only on the claims under the Commerce Clause. Therefore, I need not and do not address standing further.

II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 47 5 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Farthing v. City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir. 1994). A fact is "material" if it might

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[2]The issues raised by and inherent to the cross-motions for summary judgment are fully briefed, obviating the necessity for evidentiary hearing or oral argument. Thus, the motions stand submitted on the briefs. *Cf.* Fed. R. Civ. P. 56(c) and (d) *Geear v. Boulder Cmty. Hosp.*, 844 F.2d 764, 766 (10th Cir. 1988) (holding that hearing requirement for summary judgment motions is satisfied by court's review of documents submitted by parties).

reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Farthing,* 39 F.3d at 1134.

A movant who bears the burden of proof at trial must submit evidence to establish every essential element of its claim. *See In re Ribozyme Pharmaceuticals, Inc. Securities Litigation,* 209 F.Supp.2d 1106, 1111 (D. Colo. 2002). Once the motion has been supported properly, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1315 (1995). All the evidence must be viewed in the light most favorable to the party opposing the motion. *Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, 120 S.Ct. 53 (1999).

III. BACKGROUND

The plaintiff, The Direct Marketing Association (DMA), asks the court to enter a permanent injunction enjoining the defendant from enforcing the notice and reporting obligations imposed on many out-of-state retailers under a Colorado law, now codified at § 39-21-112(3.5), C.R.S. (2010) (the Act), and under the concomitant regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations).[3] In general, the Act

[3]Copies of the Act and the Regulations are attached to the DMA's motion for preliminary injunction [#15] as Exhibits 1 and 2.

and Regulations require retailers that sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions, to report certain information about the customers' purchases from the retailer to each customer and to the Colorado Department of Revenue.

The DMA is an association of businesses and organizations that market products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the internet. The Act and the Regulations will affect many members of the DMA. The defendant, Roxy Huber, is the Executive Director of the Colorado Department of Revenue, the state agency charged with enforcing the Act and the Regulations. The DMA alleges that certain requirements of the Act and the enabling Regulations violate the constitutional rights of many members of the DMA. The present motions concern the contention of the DMA that the Act and the Regulations violate the rights of many of its members under the Commerce Clause of the United States Constitution. *U.S. Const.* art. I, § 8.

The Act and the Regulations establish three new obligations for retailers who sell products to customers in Colorado, but who do not collect and remit Colorado sales tax on those transactions. First, such retailers must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the DOR (Transactional Notice).

Second, such retailers must provide each of their Colorado customers an annual reporting detailing that customer's purchases from the retailer in the

previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and total amount of the customer's purchases from that retailer to the DOR (Annual Purchase Summary). The Annual Purchase Summary must be provided only to customers who spend more than 500 dollars in the calendar year with the particular reporting retailer.

Third, such retailers must provide the DOR with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report). The Law exempts retailers with less than 100,000 dollars in gross annual sales in Colorado.

The Act and the Regulations are tools for DOR to enforce and collect the long-existing Colorado sales and use tax. Colorado enacted a sales tax in 1935 and a complementary use tax in 1937. Use tax is due on the storage, usage, or consumption of tangible property within Colorado when sales tax has not been paid. § 39-26-202, C.R.S. Of course, the use tax is designed to capture sales tax revenue that is lost when sales are diverted out of state or are accomplished remotely, as through catalog purchases or via the Internet. The obligation to pay the sales or use tax is on the consumer. *J.A. Tobin Construction Co. v. Weed,* 407 P.2d 350, 353 (Colo. 1965).

Ultimately, the DMA seeks a declaration that the Act and the Regulations are unconstitutional because they violate the Commerce Clause. On the same

basis, the DMA seeks a permanent injunction enjoining enforcement of the Act and the Regulations.

IV. THE DORMANT COMMERCE CLAUSE

The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." *U.S. Const.* art. I, § 8. The Commerce Clause long has been read as having a negative or dormant sweep as well. The clause, "'by its own force' prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) (quoting *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.,* 303 U.S. 177, 185 (1938)). The negative Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.,* 511 U.S. 93, 98 (1994).

The DMA asserts two claims under the dormant Commerce Clause. First, the DMA contends that the Act and the Regulations discriminate impermissibly against interstate commerce. I will refer to this claim as the discrimination claim. Second, the DMA contends that the Act and the Regulations impermissibly impose undue burdens on interstate commerce. I will refer to this claim as the undue burden claim.

V. DISCRIMINATION CLAIM

A state law violates the discrimination aspect of the dormant Commerce Clause if it discriminates against interstate commerce either facially or in

practical effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The United States Supreme Court has adopted a two tier approach to analyzing discrimination claims. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-579 (1986). At the first tier, "(w)hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Id.* at 579. When "a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id. (citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The second tier of the analysis is the balancing of a state's legitimate interests with the burden on interstate commerce under the *Pike* analysis.

> We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Id.; see also Kleinsmith v. Shurtleff, 571 F.3d 1033, 1039-1044 (10th Cir. 2009) (describing and applying the two tier analysis).

Under the dormant Commerce Clause, a law discriminates against interstate commerce if it imposes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 99 (1994). In *Oregon Waste Systems,* for example, the Supreme Court concluded that Oregon's two dollar and twenty-five cent per ton surcharge on out-of-state solid waste brought into Oregon for disposal when compared to the eighty-five cents per ton surcharge imposed on in-state solid waste was discriminatory in violation of the dormant Commerce Clause. *Id.* at 100. The *Oregon Waste Systems* Court noted that the degree of a differential burden or charge on interstate commerce "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Id.* at 100 n.4 (internal quotation and citation omitted). "If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Id.* at 99 (citations omitted). In *Oregon Waste Systems*, the court found the statute in question to be facially discriminatory and "virtually *per se*" invalid. *Id.* at 100. Facing that conclusion, the Court determined that the statute must be invalidated unless the state can show that the statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Id.* at 101 (citation and internal quotation omitted). Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Id.* Strict scrutiny leaves few survivors. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. §§. 425, 455 (2002).

On their face the Act and the Regulations do not distinguish between in-state retailers (those with a physical presence – a brick and mortar presence – in the state) and out-of-state retailers (those with no physical presence in the state who make sales to customers in the state). Rather, the Act focuses on the distinction between retailers who collect Colorado sales tax and those who do not collect Colorado sales tax. See, e.g., § 39-21-112, C.R.S. As the defendant notes, this distinction between collecting and non-collecting retailers is driven by the Commerce Clause established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) and related cases. *Defendant's motion* [#99], p. 14.

Quill concerned an undue burden claim under the dormant Commerce Clause, but its holding drives the analysis of the Act and the Regulations in relation to the plaintiff's discrimination claim. Under the law established in *Quill* and related cases, Colorado may not impose any duty to collect sales and use taxes on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. *Quill*, 504 U.S. at 315. Rather, a duty to collect such taxes may be imposed only on retailers who have a physical presence in the state. *Id.* at 317-318. Thus, out-of-state retailers that do not have a physical presence in Colorado are not obligated to collect and remit sales tax on their sales to customers in Colorado. According to the plaintiff, the Act and the Regulations discriminate impermissibly against this group of out-of-state retailers by imposing on those retailers burdens that are not be borne by in-state retailers.

A. FIRST TIER ANALYSIS

According to the defendant, the Act and Regulations do not discriminate against out-of-state retailers and interstate commerce because, reading the plain language of the Act and the Regulations, they both apply to all retailers, in-state and out-of-state, that sell to Colorado purchasers but do not collect Colorado sales tax. Applying the law established by the Supreme Court, I conclude that the veil provided by the words of the Act and the Regulations is too thin to support the conclusion that the Act and the Regulations regulate in-state and out-of-state retailers even-handedly. This is true because, viewed in the context of *Quill* and provisions of Colorado law that require all in-state retailers to collect sales tax, I am constrained to conclude that the Act and the Regulations directly regulate and discriminate against out-of-state retailers and, therefore, interstate commerce.

Under Colorado law, all retailers doing business in Colorado and selling to Colorado purchasers must obtain a sales tax license and must collect and remit the sales tax applicable to each sale. §§ 39-26-103, 104, 106, 204, C.R.S. Civil and criminal penalties may be imposed on a retailer who fails to comply. §§ 39-21-118(2), 39-26-103(1)(a), (4), C.R.S. Under *Quill* and related law, these duties and penalties cannot be imposed on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. 504 U.S. at 315. Thus, under Colorado law, the obligation to collect and remit sales tax is imposed only on in-state retailers, retailers with a physical presence in the state. Under the Act and the Regulations, retailers who collect and remit Colorado sales tax are not obligated to provide the

Transactional Notice, the Annual Purchase Summary, and the Customer Information Report otherwise required by the Act and the Regulations. § 39-21-112, C.R.S. Assuming they comply with the mandates of Colorado law, in-state retailers are not subject to the Act and the Regulations.[4]

Explicitly, the Act defines those who are subject to its reporting requirements as "any retailer that does not collect Colorado sales tax." § 39-21-112, C.R.S. Given the circumstances described above, only out-of-state retailers must provide the Transaction Notice and the Annual Purchase Summary to their customers. Only out-of-state retailers must provide the Customer Information Report to the state.[5] The Act and the Regulations impose a notice and reporting burden on out-of-state retailers and that burden is not imposed on in-state retailers. It is undisputed that compliance with the Act and the Regulations would impose some burdens,

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[4]Evidence submitted by the defendant indicates that the Tax Compliance Section of the Colorado Department of Revenue discovers each year only a very small number of Colorado retailers who are not complying with their legal obligation to collect and remit sales tax. *Response to motion for preliminary injunction* [#50], Exhibit 16 (Reiser Affidavit). The existence of this inconsequential number of non-compliant in-state retailers does not change the Commerce Clause analysis.

[5] As noted in the background section above, these requirements do not apply to retailers whose sales to a particular customer are below a certain level, or whose gross sales in Colorado during a calendar year are below a certain level. Even with these limitations, the Act and the Regulations will be applicable to many out-of-state retailers. These limitations of the Act and the Regulations are not relevant to the first tier discrimination analysis.

including costs of compliance and possibly lost sales, on out-of-state retailers.

The defendant argues that demonstrating differential treatment alone is not sufficient to prove that the Act and the Regulations are discriminatory. *Defendant's response* [#101], pp. 14-15. That is true, but only when analyzing a statute that regulates evenhandedly and has only indirect effects on interstate commerce. For example, in *Kleinsmith* the court determined that the statute in question did not discriminate on its face and, therefore, proceeded to determine if the evidence established that the statute discriminated in its practical effect. *Kleinsmith*, 571 F.3d 1033, 1040-1041. In that context, the court concluded that "(n)ot every benefit or burden will suffice [to show discriminatory effect] – only one that alters the competitive balance between in-state and out-of-state firms." *Id.* at 1041. However, when considering a regulatory scheme that does not regulate evenhandedly between in-state and out-of-state retailers, like the Act and the Regulations, the degree of a differential burden or charge on interstate commerce "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Oregon Waste Systems*, 511 U.S. at 100 n. 4 (internal quotation and citation omitted).

The defendant argues also that the Act and the Regulations do not discriminate because retailers subject to the Act and the Regulations, by definition out-of-state retailers, may choose between two alternatives: comply with the Act and the Regulations or voluntarily collect and remit Colorado sales tax. *Defendant's motion* [#99], pp. 15-16. Of course, the choice to collect and remit imposes the

same burden faced by in-state retailers. According to the defendant, "there can be no discrimination against non-collecting out-of-state retailers who have a choice to be subject to precisely the same burdens as in-state retailers who do not enjoy the same choice." *Defendant's response* [#101], p. 17.

The state's creation of this option does not resolve the problem. Under *Quill* Colorado may not condition an out-of-state retailer's reliance on its rights on a requirement that the retailer accept a different burden, particularly when that burden is unique to out-of-state retailers. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 893 (1988). Stated differently, without the Act and the Regulations, out-of-state retailers did not have the burden of making this choice. The Act and the Regulations impose the burden of this choice on out-of-state retailers but do not on in-state retailers. The choice does not eliminate, but instead, highlights the discrimination.

Regardless of the state's salutary local purposes, its enactment of a statutory scheme and concomitant regulations that produce, in effect, a geographic distinction between in-state and out-of-state retailers discriminates patently against interstate commerce. Given that patent discrimination, the Act and the Regulations violate the Commerce Clause, unless the defendant can satisfy the requirements of the second tier of the discrimination analysis.

B. SECOND TIER ANALYSIS

Under *Oregon Waste*, the second tier of the analysis requires a determination of whether the Act and the Regulations advance a legitimate local purpose that cannot be served adequately by

reasonable nondiscriminatory alternatives. *Oregon Waste*, 511 U.S. at 101. When discrimination against commerce is demonstrated, "the burden falls on the State to justify it both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The *Oregon Waste* Court undertook this analysis, despite its discussion of *per se* invalidity when a law is facially discriminatory. *Id.* Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Id.*

The defendant argues that the State of Colorado has three important interests at stake. First, the Act and the Regulations enhance the DOR's ability to recover sales and use tax revenue due to the state.[6] Second, enforcement of sales and use taxes promotes the fair distribution of the cost of government. Third, promoting the enforcement of tax law promotes respect for and compliance with the tax laws. Without question, these are legitimate state interests and purposes.

According to the plaintiff, there are at least three reasonable nondiscriminatory alternatives to serve these purposes. First, some states include a line on their resident income tax returns on which residents report use tax due. Second, the DOR could increase

[6] The defendant argues that the Law and the Regulations also enhances DOR's ability to recover sales taxes. The notice and reporting obligations at issue all relay information about the use tax liability of a Colorado resident who buys something from an affected out-of-state retailer. Collection of sales tax is enhanced only to the extent that regulatory scheme encourages out-of-state retailers to collect and remit sales tax rather than comply with the Law and the Regulations.

audits of business consumers. Third, consumer education and notification programs may increase compliance with use tax obligations. *Plaintiff's motion* [#98], p. 9.

Relying on its contention that the Act and the Regulations are not discriminatory, the defendant spends little time addressing reasonable nondiscriminatory alternatives. *Defendant's response* [#101], p. 12 n. 4. According to the defendant, Colorado has not previously included a line on its income tax returns for reporting use tax. *Defendant's response* [#101], pp. 4-5. However, between 1966 and 1974, the DOR included a consumer use tax return with income tax return forms. *Id.* That practice was discontinued because the amount of tax collected did not justify the printing expense. *Id.*

The record contains essentially no evidence to show that the legitimate interests advanced by the defendant cannot be served adequately by reasonable nondiscriminatory alternatives. Therefore, the defendant has not met its very high burden of proof under the strict scrutiny standard applicable in the second tier of the Commerce Clause discrimination analysis.

C. CONCLUSION

Quill puts states like Colorado in a difficult position. The state cannot require out-of-state retailers, retailers with no physical presence in the state, to collect and remit sales tax on sales those retailers make to residents of Colorado. Residents who make purchases from those retailers are obligated to pay use tax on those purchases, but enforcing the use tax is significantly more difficult

than enforcing the sales tax. Seeking to enhance enforcement of the use tax on those who make purchases from out-of-state retailers, a state understandably looks to the out-of-state retailers for key information that can enhance enforcement. However, if the state has a mandatory sales tax system, as does Colorado, enforcing a reporting requirement on out-of-state retailers will, by definition, discriminate against the out-of-state retailers by imposing unique burdens on those retailers. Such a system imposes a differential burden on out-of-state retailers because the different burden is imposed precisely because the retailer is an out-of-state retailer entitled to the protection of *Quill*. *Quill* creates the in-state versus out-of-state distinction, and the dormant Commerce Clause prohibits differential treatment based on that distinction. Only a change in the law by the Supreme Court or action by Congress can change this situation. *Quill*, 504 U.S. at 318 ("Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.")

Viewing the undisputed facts in the record in the light most favorable to the defendant, I conclude that the Act, codified at § 39-21-112(3.5), C.R.S. (2010), and the concomitant Regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010), are unconstitutional under the dormant Commerce Clause. That is true because the Act and the Regulations directly regulate and discriminate against out-of-state retailers and, therefore, interstate commerce. That discrimination triggers the virtually per se rule of facial invalidity.

The defendant has not surmounted that facial invalidity by showing that the Act and the Regulations serve legitimate state purposes that cannot be served adequately by reasonable nondiscriminatory alternatives. Thus, the plaintiff is entitled to summary judgment on its first claim for relief for discrimination under the Commerce clause. Obversely, the defendant's motion for summary judgment on this claim must be denied.

VI. UNDUE BURDEN CLAIM

In its second claim for relief, the DMA alleges that the Act and the Regulations impose improper and burdensome regulations on interstate commerce. The DMA relies heavily on the law established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) to support its undue burden claim. To rehearse, in *Quill,* the Court concluded that undue burdens on interstate commerce sometimes may be avoided by the application of a bright line rule. According to *Quill*, the dormant Commerce Clause and the Court's earlier holding in *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 758 (1967) create a bright line rule with regard to the collection of sales and use tax. This law creates a "safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail. Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 315 (internal quotation omitted). Many members of the DMA are vendors that have no physical presence in Colorado and whose only connection with Colorado customers is by common carrier, the United States mail, and/or the internet.

The *Quill* Court examined and applied the quadripartite test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Under *Complete Auto*, a state tax will survive a Commerce Clause challenge as long as the tax (1) is applied to an activity with a substantial nexus in the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. *Complete Auto* rejected the previously applied distinction between direct and indirect taxes on interstate commerce "because that formalism allowed the validity of statutes to hinge on legal terminology, draftsmanship and phraseology." *Quill*, 430 U.S. at 310 (internal quotation, citation, and brackets omitted). The *Complete Auto* test emphasizes the importance of looking past the formal language of a tax statute to its practical effect. *Quill*, 504 U.S. at 310. The first and fourth prongs of the *Complete Auto* test "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313. The safe harbor established in *Quill* is a meant to delineate and define the limits of the substantial nexus requirement of the *Complete Auto* test to ensure that a state tax law does not impose an undue burden on interstate commerce. *Id.*

As the defendant notes, the Act and the Regulations do not require out-of-state retailers to collect sales and use taxes. However, they do require out-of-state retailers to gather, maintain, and report information, and to provide notices to their Colorado customers and to the DOR. Those notices are required to provide information about the out-of-

state retailers and their Colorado customers. The sole purpose of these requirements is to enhance the collection of use taxes by the State of Colorado. The defendant asserts no other reason to require such reporting.

Correctly, the defendant notes that the holding in *Quill* has a very "narrow focus on sales and use taxes." *Capital One Bank v. Commissioner of Revenue*, 899 N.E.2d 76, 84 (Mass. 2009). When addressing taxes and regulations outside of that narrow focus, many cases hold that *Quill's* narrow focus should not be expanded into other areas. *See, e.g., Capital One* 899 N.E.2d at 86 (*Quill* dormant Commerce Clause standard is not applicable to financial institution excise taxes); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000) (narrow analysis of *Quill* not applicable to law requiring all professional fund raising consultants to register).

In this case, the burden of the notice and reporting obligations imposed by the Act and the Regulations is somewhat different than the burden of collecting and remitting sales and use taxes. However, the sole purpose of the burdens imposed by the Act and the Regulations is the ultimate collection of use taxes when sales taxes cannot be collected. Looking to the practical effect of the Act and the Regulations, as *Quill* instructs, I conclude that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. The Act and the Regulations impose these burdens on out-of-state retailers who have no physical presence in Colorado and no connection with Colorado customers other than by common carrier, the United States mail, and

the internet. Those retailers are protected from such burdens on interstate commerce by the safe-harbor established in *Quill*.

Viewing the undisputed facts in the record in the light most favorable to the defendant, I conclude that the Act, codified at § 39-21-112(3.5), C.R.S. (2010), and the concomitant Regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010), are unconstitutional under the dormant Commerce Clause. That is true because, under the standard established in *Quill*, a state law that imposes a use tax collection burden on a retailer with no physical presence in the state causes an undue burden on interstate commerce. The burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. Thus, the Act and the Regulations impose an undue burden on interstate commerce. The plaintiff is entitled to summary judgment on their second claim for relief, asserting an undue burden claim under the Commerce Clause. Thus, the defendant's motion for summary judgment on this claim must be denied.

VII. DECLARATORY & INJUNCTIVE RELIEF

A. DECLARATORY RELIEF

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the court may enter a judgment declaring "the rights and other legal relations of any interested party seeking such declaration . . ." 28 U.S.C. § 2201. Such a judgment or decree is reviewable as a final judgment. *Id.* The DMA seeks a declaration that the Act and the Regulations are

unconstitutional. The DMA has established that the Act and the Regulations are unconstitutional and, therefore, the DMA is entitled to a declaratory judgment to that effect.

B. INJUNCTIVE RELIEF

A party may obtain a permanent injunction if it proves: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003); *see also Prairie Band Potawatomi National v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007). The DMA has established each of these elements.

1. Success on the Merits. In this order, the court grants summary judgment to DMA on its two claims asserting that the Act and the Regulations violate the Commerce Clause. With that, the DMA has achieved success on the merits of these two claims.

2. Irreparable Harm. When the impairment of a constitutional right is at issue, no further showing of irreparable harm is necessary. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). In a recent case, the United States Court of Appeals for the Tenth Circuit indicated that violation of Commerce Clause rights constitutes irreparable injury. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 2010) (citing *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 168-183 (S.D.N.Y. 1997)). Although the Tenth Circuit's statement in *Johnson* is dicta, I conclude that violation of the constitutional rights of the members of DMA under the Commerce

Clause constitutes irreparable injury. Thus, the DMA has established irreparable harm.

3. Balance of Harms & Public Interest. When considering an injunction against a law that has been found to be unconstitutional, the balance of harms and public interest considerations largely collapse into each other. The Colorado Department of Revenue does not have a legitimate interest in enforcing a law that is unconstitutional. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Moreover, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law." *Id.* Both of these factors have been established.

4. Conclusion. The DMA has established the four elements necessary to support the entry of a permanent injunction. The court will enter an order permanently enjoining enforcement of the Act and the Regulations against retailers who have no physical presence in the state of Colorado.

VII. CONCLUSION & ORDERS

The Act and the Regulations violate the Commerce Clause and, therefore, are unconstitutional. This is true for two reasons. First, the Act and the Regulations directly regulate and discriminate against out-of-state retailers and interstate commerce. That discrimination triggers the virtually per se rule of facial invalidity. The defendant has not overcome this facial invalidity by showing that the Act and the Regulations serve legitimate state purposes that cannot be served adequately by reasonable nondiscriminatory alternatives. Second, the Act and the Regulations impose an undue burden on interstate commerce

under the standard established in *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992).

THEREFORE, IT IS ORDERED as follows:

1. That the Plaintiff's Motion for Summary judgment as to Counts I and II Alleging Violations of the Commerce Clause [#98] filed May 6, 2011, is **GRANTED**;

2. That the Defendant's Motion for Partial Summary Judgment – Counts I and II (Commerce Clause) [#99] filed May 6, 2011, is **DENIED**;

3. That under 28 U.S.C. § 2201, the plaintiff, The Direct Marketing Association, is entitled to a judgment declaring that the provisions of § 39-21-112(3.5), C.R.S. (2010) (the Act), and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1-1:39-21-112.3.5 (2010) (the Regulations), are unconstitutional to the extent that the Act and the Regulations require

A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the Colorado Department of Revenue (Transactional Notice); and

B. that a retailer must provide to each of its Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount

of the customer's purchases from the retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report);

4. That effective forthwith defendant Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, together with her agents, servants, employees, attorneys-in-fact, or anyone act on their behalf, are **PERMANENTLY ENJOINED AND RESTRAINED** from enforcing the provisions of § 39-21-112(3.5), C.R.S. (2010) (the Act) and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations), to the extent that the Act and the Regulations require

A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the Colorado Department of Revenue (Transactional Notice); and

B. that a retailer must provide to each of its Colorado customers an annual reporting detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the

customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report);

5. That this injunction **SHALL LIMIT** the enforcement of the Act and the Regulations against retailers who sell to customers in Colorado, but who have no physical presence in the State of Colorado and whose only connection to the State of Colorado is by common carrier or the United States Mail; and

6. That the court will address in a separate order the parties' request that the court certify this order as a final judgment under FED. R. Civ. P. 54(b)

Dated March 30, 2012, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 10-cv-01546-REB-CBS

THE DIRECT MARKETING ASSOCIATION,

Plaintiff,

v.

ROXY HUBER, in her capacity as Executive Director, Colorado Department of Revenue,

Defendant.

January 26, 2011

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Blackburn, J.

This matter is before me on the Plaintiff's Motion for a Preliminary Injunction and Incorporated Memorandum of Law [#15][1] filed August 13, 2010. The defendant filed a response [#50], and the plaintiff filed a reply [#56]. Having considered the evidence, the parties' written arguments, the relevant law, and the oral arguments presented by

[1] "[#15]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention through this order.

counsel for the parties at a hearing held on January 13, 2011, I find and conclude that the motion for preliminary injunction should be granted.

I. JURISDICTION & STANDING

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question). Although the defendant challenges the plaintiff's standing to pursue certain of its claims in this case, the defendant does not challenge the plaintiff's standing to present its claims under the Commerce Clause. The plaintiff seeks a preliminary injunction based on its Commerce Clause claims. Therefore, I need not and do not address standing.

II. BACKGROUND

The plaintiff, The Direct Marketing Association (DMA), asks the court to enjoin the defendant from enforcing the notice and reporting obligations imposed on many out-of-state retailers under a new Colorado law, now codified at § 39-21-112(3.5), C.R.S. (2010) (the Act), and under the concomitant regulations promulgated by the Colorado Department of Revenue (DOR) to implement the Act, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations). A copy of the Regulations is attached to the DMA's motion [#15 as Exhibit 2. In general, the Act and Regulations require retailers that sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions, to report certain information about the customers' purchases from the retailer to each customer and to the Colorado Department of Revenue. DMA is an association of businesses and organizations that market products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast

media, and the internet. The Act and the Regulations will affect many members of the DMA. The defendant, Roxy Huber, is the Executive Director of the Colorado Department of Revenue, the state agency charged with enforcing the Act and the Regulations. The DMA alleges that certain requirements of the Act and the Regulations violate the constitutional rights of many members of the DMA. In its motion for preliminary injunction, the DMA relies on its allegation that the Act and the Regulations violate the rights of many of its members under the Commerce Clause of the United States Constitution. *U.S. Const.* art. I, § 8. The DMA asserts other claims in its complaint, but the DMA does not rely on those claims as bases for its motion for preliminary injunction.

The Act and the Regulations establish three new obligations for retailers who sell products to customers in Colorado, but do not collect and remit Colorado sales tax on those transactions. First, such retailers must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the purchaser is obligated to self-report and pay use tax to the DOR (Transactional Notice). Second, such retailers must provide to each of their Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the DOR (Annual Purchase Summary). The Annual Purchase Summary must be provided only the customers who

spend more than 500 dollars in the calendar year with a particular retailer. Third, such retailers must provide the DOR with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report). The Law exempts retailers with less than 100,000 dollars in gross annual sales in Colorado. In its motion for preliminary injunction, the DMA asks the court preliminarily to enjoin Huber from enforcing those provisions of the Act and the Regulations that require retailers to provide Transactional Notices, Purchase Summaries, and Customer Information Reports.

III. STANDARD OF REVIEW

Fed. R. Civ. P. 65 authorizes federal courts to issue preliminary injunctions. Because a preliminary injunction is an extraordinary remedy, the plaintiff's right to such relief must be clear and unequivocal. *See Federal Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). The plaintiff is entitled to a preliminary injunction only if it proves (1) that there is a substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury to the plaintiff outweighs the harm the preliminary injunction might cause defendant; and (4) that the preliminary injunction is in the public interest. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001).

IV. ANALYSIS

A. LIKELIHOOD OF SUCCESS

To secure a preliminary injunction, the plaintiff first must establish a substantial likelihood that it is likely to prevail on the merits of the substantive claims that are the basis for its motion. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). "The determination of a motion for a preliminary injunction and a decision on the merits are different." *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980). "It is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted." *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Rather, plaintiff need only establish "a reasonable probability of success, . . . not an 'overwhelming' likelihood of success[.]" *Id.*

The plaintiff asserts two claims under the Commerce Clause of the United States Constitution and argues that it has demonstrated a substantial likelihood of success on both of these claims. The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." *U.S. Const.* art. I, § 8. The Commerce Clause long has been read as having a negative or dormant sweep as well. The clause, " 'by its own force' prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 309 (1992) (quoting *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 (1938)). The negative Commerce Clause "denies the States the power unjustifiably to

discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.,* 511 U.S. 93, 98 (1994). A state law violates the discrimination aspect of the dormant Commerce Clause if it discriminates against interstate commerce either facially or in practical effect. *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979). If a law discriminates against interstate commerce, then the state has the burden to demonstrate a legitimate local purpose served by the law which cannot be achieved through reasonable nondiscriminatory alternatives. *Id.* at 336 – 337. If the law in question regulates evenhandedly among in-state and out-of-state interests, "and its effects on interstate commerce are only incidental, [the law] will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

i. Discrimination Claim

In its first claim for relief, the DMA alleges that the Act and the Regulations discriminate against out-of-state retailers who do not collect Colorado sales tax, because the Act and the Regulations impose on those retailers notice and reporting obligations that are not imposed on Colorado retailers. Under Colorado law, all retailers doing business in Colorado and selling to Colorado purchasers must obtain a sales tax license and must collect and remit the sales tax applicable to each sale. §§ 39-26-103, 104 C.R.S. Under the Act and the Regulations, retailers who collect and remit Colorado sales tax are not obligated to provide the Transactional Notice, the Annual Purchase

Summary, and the Customer Information Report otherwise required by the Act and the Regulations. Under the law established in *Quill* and related cases, Colorado may not impose any duty to collect sales and use taxes on out-of-state retailers whose only connection to Colorado is by common carrier or the U.S. mail. *Quill*, 504 U.S. at 315. Thus, out-of-state retailers that do not have a physical presence in Colorado generally are not obligated to collect and remit sales tax on their sales in Colorado. The plaintiff contends that the Act and the Regulations discriminate against this group of out-of-state retailers by imposing on those retailers burdens that need not be borne by in-state retailers.

In the context of the dormant Commerce Clause, a law discriminates against interstate commerce if it imposes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 99 (1994). In *Oregon Waste Systems*, for example, the Supreme Court concluded that Oregon's two dollar and twenty-five cent per ton surcharge on out-of-state solid waste brought into Oregon for disposal was discriminatory in violation of the dormant Commerce Clause, when compared to the eighty-five cents per ton surcharge imposed on in-state solid waste. *Id.* at 100. The *Oregon Waste Systems* Court noted that the degree of a differential burden or charge on interstate commerce "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Id.* at n. 4 (internal quotation and citation omitted).

The text of the Act and the Regulations does not explicitly target out-of-state retailers as opposed to

in-state retailers. The defendant argues that the plain language of the Act and the Regulations applies to all retailers, in-state and out-of-state, that Sell to Colorado purchasers but do not collect Colorado sales tax. Accordingly, the defendant contends that the Act and the Regulations are not discriminatory. I note, however, that under Colorado law, in-state retailers long have been required to collect and remit Colorado sales tax and are subject to civil and criminal penalties if they fail to do so. §§ 39-26-103(4); 39-21-118(2), C.R.S. Unless they defy these legal requirements, these retailers are not subject to the notice and reporting requirements of the Act and the Regulations. Evidence submitted by the defendant indicates that the Tax Compliance Section of the Colorado Department of Revenue discovers each year only a very small number of Colorado retailers who are not complying with their legal obligation to collect and remit sales tax. *Response* [#50], Exhibit 16 (Reiser Affidavit).

Under Colorado law, any retailer who is not subject to the statutory obligation to collect and remit Colorado sales tax necessarily is an out-of-state retailer. The Act and the Regulations impose a notice and reporting burden on these out-of-state retailers and that burden is not imposed on in-state retailers, except for the very few in-state retailers who defy their statutory sales tax obligations. Given these circumstances, I conclude that the plaintiff has shown a substantial likelihood that it will succeed in showing that the Act and the Regulations are discriminatory because, in practical effect, they impose a burden on interstate commerce that is not imposed on in-state commerce.

If the DMA succeeds in showing that the Act and the Regulations are discriminatory, then "the burden falls on the State to justify [them] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). However, it is exceedingly difficult to meet this standard. "If a restriction on commerce is discriminatory, it is virtually per se invalid." *Oregon Waste Systems*, 511 U.S. at 99. In this case, the defendant asserts Colorado's need to collect tax revenue as the local benefit that justifies the Act and the Regulations. Without question, this is a legitimate local interest. However, the DMA has noted the availability of non-discriminatory alternatives. For example, like other states, Colorado might collect use tax from Colorado taxpayers via the Colorado income tax form. Given this and other alternatives, I conclude that it is unlikely that the defendant will be able to show a lack of nondiscriminatory alternatives to the Act and the Regulations.

Regardless of the state's salutary local purposes, its enactment of a statutory scheme and concomitant regulations that produce, in effect, a geographic distinction between in-state and out-of-state discriminates patently against interstate commerce, *id.* at 100, which triggers the virtually per se rule of facial invalidity that has not been surmounted by a demonstration by the state of a legitimate local purpose that can not be served adequately by reasonable nondiscriminatory alternatives. *Id.* (internal quotation and citations omitted). Thus, on the current record, I conclude

that the DMA has demonstrated a substantial likelihood of success on its discrimination claim under the dormant Commerce Clause.

ii. Undue Burden Claim

In its second claim for relief, the DMA alleges that the Act and the Regulations impose improper and burdensome regulation of interstate commerce. The DMA relies heavily on the law established in *Quill Corp. v. North Dakota By and Through Heitkamp,* 504 U.S. 298, 309 (1992) to support its undue burden claim. In *Quill*, the Court concluded that undue burdens on interstate commerce sometimes may be avoided by the application of a bright line rule. The *Quill* court concluded that the dormant Commerce Clause and the Court's earlier holding in *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 758 (1967) create a bright line rule with regard to the collection of sales and use tax. This law creates a "safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail. Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 315 (internal quotation omitted).

The *Quill* Court examined and applied the quadripartite test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Under *Complete Auto*, a state tax will be sustained against a Commerce Clause challenge as long as the tax (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services

provided by the state. *Complete Auto*, 430 U.S. at 279. *Complete Auto* rejected the previously applied distinction between direct and indirect taxes on interstate commerce "because that formalism allowed the validity of statutes to hinge on legal terminology, draftsmanship and phraseology." *Quill,* 430 U.S. at 310 (internal quotation, citation, and brackets omitted). The *Complete Auto* test emphasizes the importance of looking past the formal language of a tax statute to its practical effect. *Quill*, 504 U.S. at 310. The first and fourth prongs of the *Complete Auto* test "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313. The safe harbor established in *Quill* is a meant to delineate and define the limits of the substantial nexus requirement of the *Complete Auto* test to ensure that a state tax law does not impose an undue burden on interstate commerce. *Id.*

The Act and the Regulations do not require out-of-state retailers to collect sales and use taxes. However, they do require out-of-state retailers to gather, maintain, and report information, and to provide notices to their Colorado customers and to the defendant about their Colorado customers. The sole purpose of these requirements is to enhance the collection of use taxes by the State of Colorado. I conclude that these requirements likely impose on out-of-state retailers use tax-related responsibilities that trigger the safe-harbor provisions of *Quill*. Although the burden of the notice and reporting obligations imposed by the Act and the Regulations may be somewhat different than the burden of collecting and remitting sales and use taxes, the sole purpose of the burdens imposed by the Act and the

Regulations may be somewhat different than the burden of collecting and remitting sales and use taxes, the sole purpose of the burdens imposed by the Act and the Regulations is the ultimate collection of use taxes when sales taxes cannot be collected. Looking to the practical effect of the Act and the Regulations, I conclude that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*. The Act and the Regulations impose these burdens on out-of-state retailers who have no connection with Colorado customers other than by common carrier or the United States mail. Those retailers likely are protected from such burdens on interstate commerce by the safe-harbor established in *Quill*.

iii. Conclusion

I find and conclude that the DMA has demonstrated a substantial likelihood of success on both its discrimination claims and its undue burden claim under the dormant Commerce Clause. Thus, consideration of this first factor weighs in favor of the issuance of a preliminary injunction.

B. IRREPARABLE INJURY

The parties dispute whether or not a deprivation of the Commerce Clause rights at issue here, without more, constitutes irreparable injury. In a recent case, the United States Court of Appeals for the Tenth Circuit indicated that violation of Commerce Clause rights constitutes irreparable injury. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 2010) (citing *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 168 – 183 (S.D.N.Y. 1997)). Although the Tenth Circuit's

statement in *Johnson* is dicta, I conclude that the constitutional Commerce Clause rights of DMA's members constitutes irreparable injury.

In addition, it is undisputed that many DMA members will face compliance costs if they are required to comply with the Act and the Regulations in the future. The amount of those costs is disputed. Huber's expert concludes that the smallest retailers affected by the Act and the Regulations will incur first-year compliance costs ranging from about 3,100 dollars to 7,000 dollars. *Response* [#50], Exhibit 6 (Report of Dieter G. Gable), p.2. If, in the end, the Act and the Regulations are found to be unconstitutional because they violate the Commerce Clause, the affected retailers would be unable to recover these compliance costs from the State of Colorado. Under the Eleventh Amendment, Colorado is immune from suit for such damages. Under these circumstances, the compliance costs faced by retailers subject to the Act and the Regulations constitute irreparable injury. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770 – 771 (10th Cir. 2010) (compliance costs of more than a thousand dollars per year per business constitute irreparable injury if such costs cannot later be recovered because of sovereign immunity). Thus, consideration of this second factor weighs also in favor of the issuance of a preliminary injunction.

C. BALANCE OF HARMS

When considering the balance of harms, a court must balance "the competing claims of injury and must consider the effect on each part of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Gambill*, 480 U.S. 531, 542 (1987). The DMA

argues that the need to protect the constitutional rights of certain of its members outweighs the interest of the State of Colorado in enforcing a law that likely is constitutionally infirm. In addition, absent an injunction, some DMA members will incur compliance costs that cannot later be recovered. Huber argues that these considerations do not outweigh Colorado's interest in enforcing a state law that will provide revenue to its strapped coffers.

If, ultimately, the Act and the Regulations are upheld against the DMA's challenge, the reports and notices required by the Act and the Regulations can be prepared and delivered. This might delay the state's collection of some use taxes, but it will not prevent the ultimate collection of those taxes. On the other hand, preserving the status quo with a preliminary injunction will prevent the irreparable injuries discussed above while the issues raised by the DMA are resolved completely. Given these circumstances and considerations, I find and conclude that the balance of harms favors the DMA, and thus, the issuance of a preliminary injunction.

D. PUBLIC INTEREST

Generally, the public interest is served by enjoining the enforcement of a law that likely violates the Constitution. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). Huber argues that it is not in the public interest to enjoin the enforcement of a law which has the primary goal of raising revenue to ensure the fiscal well-being of the state. As Huber notes, a court of equity must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Resources Defense*

Council, Inc., 555 U.S. 7, ___, 129 S.Ct. 365, 376 – 377 (U.S. 2008). I find and conclude that the public's interest in revenue raising by the state will not be impaired substantially by the issuance of a preliminary injunction. At most, the state may suffer some delay in implementing its new technique for enforcing its use tax laws, if the Act and the Regulations are upheld against the DMA's challenge. On the other hand, the enforcement of a law that likely is unconstitutional, even if the goal of the law is important and legitimate, does not serve the public interest. Thus, the public interest factor weighs in favor of the issuance of a preliminary injunction.

V. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That the Plaintiff's Motion for a Preliminary Injunction and Incorporated Memorandum of Law [#15] filed August 13, 2010, is **GRANTED** on the following terms;

2. That effective forthwith defendant Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue, together with her agents, servants, employees, attorneys-in-fact, or anyone acting on their behalf, are **ENJOINED AND RESTRAINED** from enforcing the provisions of § 39-21-112(3.5), C.R.S. (2010) (the Act) and the regulations promulgated thereunder, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010) (the Regulations), to the extent that the Act and the Regulations require

A. that a retailer must notify their Colorado customers that the retailer does not collect Colorado sales tax and, as a result, the

purchaser is obligated to self-report and pay use tax to the Colorado Department of Revenue (Transactional Notice); and

B. that a retailer must provide to each of its Colorado customers an annual report detailing that customer's purchases from the retailer in the previous calendar year, informing the customer that he or she is obligated to report and pay use tax on such purchases, and informing the customer that the retailer is required by law to report the customer's name and the total amount of the customer's purchases from that retailer to the Colorado Department of Revenue (Annual Purchase Summary); and

C. that a retailer must provide the Colorado Department of Revenue with an annual report concerning each of the retailer's Colorado customers stating the name, billing address, shipping addresses, and the total amount of purchases from the retailer by each of the retailer's Colorado customers (Customer Information Report;

3. That this preliminary injunction **SHALL LIMIT** the enforcement of the Act and the Regulations against retailers who sell to customers in Colorado, but whose only connection to the State of Colorado is by common carrier or the United States Mail;

4. That this preliminary injunction **SHALL NOT LIMIT** the enforcement of the Act and the Regulations against retailers who do not fall into the class of retailers defined in paragraph three (3), above;

5. That under Fed. R. Civ. P. 65(c), the plaintiff, the Direct Marketing Association, **SHALL POST** with the Clerk of the Court a bond in the amount of five thousand (5,000) dollars on or before Friday, January 28, 2011, at 12:00 p.m. (mountain standard time); and

6. That this preliminary injunction **SHALL REMAIN IN EFFECT** until modified or rescinded by further order of the court.

Dated January 26, 2011, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DIRECT MARKETING ASSOCIATION,
Plaintiff – Appellee,

v. No. 12-1175

BARBARA BROHL, in her capacity as Executive Director, Colorado Department of Revenue,
Defendant – Appellant,

and

MULTISTATE TAX COMMISSION,
Amicus Curiae.

INTERESTED LAW PROFESSORS, et al.,
Movants.

April 1, 2016

ORDER

Before **BRISCOE**, **GORSUCH** and **MATHESON**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

COLO. REV. STAT. § 39-21-112 provides in relevant part:

§ 39-21-112. Duties and powers of executive director

*   *   *

(3.5)(a) If any retailer that does not collect Colorado sales tax refuses voluntarily to furnish any of the information specified in subsection (1) of this section when requested by the executive director of the department of revenue or his or her employee, agent, or representative, the executive director, by subpoena issued under the executive director's hand, may require the attendance of the retailer and the production by him or her of any of the foregoing information in the retailer's possession and may administer an oath to him or her and take his or her testimony. If the retailer fails or refuses to respond to said subpoena and give testimony, the executive director may apply to any judge of the district court of the state of Colorado to enforce such subpoena by any appropriate order, including, if appropriate, an attachment against the retailer as for contempt, and upon hearing, said judge has, for the purpose of enforcing obedience to the requirements of said subpoena, power to make such order as, in his or her discretion, he or she deems consistent with the law for punishment of contempts.

(b) For purposes of this subsection (3.5), "retailer" shall have the same meaning as set forth in section

39-26-102(8).

(c)(I) Each retailer that does not collect Colorado sales tax shall notify Colorado purchasers that sales or use tax is due on certain purchases made from the retailer and that the state of Colorado requires the purchaser to file a sales or use tax return.

(II) Failure to provide the notice required in subparagraph (I) of this paragraph (c) shall subject the retailer to a penalty of five dollars for each such failure, unless the retailer shows reasonable cause for such failure.

(d)(I)(A) Each retailer that does not collect Colorado sales tax shall send notification to all Colorado purchasers by January 31 of each year showing such information as the Colorado department of revenue shall require by rule and the total amount paid by the purchaser for Colorado purchases made from the retailer in the previous calendar year. Such notification shall include, if available, the dates of purchases, the amounts of each purchase, and the category of the purchase, including, if known by the retailer, whether the purchase is exempt or not exempt from taxation. The notification shall state that the state of Colorado requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer.

(B) The notification specified in sub-subparagraph (A) of this subparagraph (I) shall be sent separately

to all Colorado purchasers by first-class mail and shall not be included with any other shipments. The notification shall include the words "Important Tax Document Enclosed" on the exterior of the mailing. The notification shall include the name of the retailer.

(II)(A) Each retailer that does not collect Colorado sales tax shall file an annual statement for each purchaser to the department of revenue on such forms as are provided or approved by the department showing the total amount paid for Colorado purchases of such purchasers during the preceding calendar year or any portion thereof, and such annual statement shall be filed on or before March 1 of each year.

(B) The executive director of the department of revenue may require any retailer that does not collect Colorado sales tax that makes total Colorado sales of more than one hundred thousand dollars in a year to file the annual statement described in sub-subparagraph (A) of this subparagraph (II) by magnetic media or another machine-readable form for that year.

(III)(A) Failure to send the notification required in subparagraph (I) of this paragraph (d) shall subject the retailer to a penalty of ten dollars for each such failure, unless the retailer shows reasonable cause for such failure.

(B) Failure to file the annual statement required in sub-subparagraph (A) of subparagraph (II) of this

paragraph (d) shall subject the retailer to a penalty of ten dollars for each purchaser that should have been included in such annual statement, unless the retailer shows reasonable cause for such failure.

*　*　*

1 COLO. CODE REGS. § 201-1:39-21-112.3.5 provides:

201-1:39-21-112.3.5

1) Definitions

a) "Retailer that does not collect Colorado sales tax"

i) A retailer that does not collect Colorado sales tax is a retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax. Such retailers are also referred to in this regulation as "non-collecting retailers".

ii) A "retailer that does not collect Colorado sales tax" does not include a retailer that makes sales in Colorado solely by means of download of digital goods or software. A "retailer that does not collect Colorado sales tax" does include a retailer that makes sales in Colorado both by means of download of digital goods or software and by means of shipping or otherwise physically delivering goods to a Colorado purchaser.

iii) A "retailer that does not collect Colorado sales tax" does not include a retailer whose sales in Colorado are de minimis. For purposes of this regulation, the Department will presume that a retailer that makes less than $100,000 in total gross

sales in Colorado in the prior calendar year and reasonably expects total gross sales in Colorado in the current calendar year will be less than $100,000 is a retailer whose sales in Colorado are de minimis.

b) “Colorado purchaser”

i) With respect to sales of goods that are shipped, a Colorado purchaser is a purchaser that requests the goods be shipped to Colorado. In the case of a purchase that is purchased by one party, who may be inside or outside of Colorado, and shipped to a party in Colorado, the Colorado purchaser is the purchaser of the goods, not the recipient of the goods.

ii) With respect to sales of goods that are downloaded or otherwise delivered electronically

(1) If the purchaser provides a “bill to” address, then a Colorado purchaser is a purchaser whose “bill to” address is in Colorado;

(2) If the purchaser does not provide a “bill to” address, then the non-collecting retailer shall make a determination as to whether a purchaser is in Colorado, and is therefore a Colorado purchaser, using any other commercially reasonable method based on the business's existing billing, customer-tracking, or other systems.

c) “Colorado purchase”

i) With respect to sales of goods that are shipped, a Colorado purchase is one that is shipped to Colorado.

ii) With respect to sales of goods that are downloaded or otherwise delivered electronically

(1) If the purchaser provides a "bill to" address, then a Colorado purchase is one for which the "bill to" address is in Colorado;

(2) If the purchaser does not provide a "bill to" address, then the non-collecting retailer shall make a determination as to whether a purchase is a Colorado purchase using any other commercially reasonable method based on the business's existing billing, customer-tracking, or other systems.

iii) A Colorado purchase shall not include any purchases or rentals of VHS tapes, DVDs, Blu-Ray disks, or other video materials to the extent that disclosure of the purchasers of such items would violate 18 U.S.C. 2710.

d) "Department" -- the term Department refers to the Colorado Department of Revenue.

e) "Total gross sales" -- As used in this regulation, the term total gross sales means the total sales of goods. The term shall not include sales of services. The term shall include all sales of goods made by all entities controlled by or under common control with the non-collecting retailer.

2) Obligation to give notice with each purchase

a) A non-collecting retailer must give notice to all Colorado purchasers that Colorado sales or use tax is due on all purchases that are not exempt from sales

tax. This notice must be provided with respect to each transaction.

i) A non-collecting retailer may not display or imply that no tax is due on any Colorado purchase, unless such a display is accompanied by the notice required by this paragraph 2) each time the display appears.

(1) Example: A summary of the transaction including a line designated “Sales tax” and showing the amount of sales tax as “zero” or “0.00” would constitute a “display” implying that no tax is due on the purchase. Such a display must be accompanied by the notice required by this paragraph 2) every time it appears.

(2) Notwithstanding the limitation in this paragraph i), if a non-collecting retailer knows that a purchase is exempt from Colorado tax pursuant to Colorado law, the non-collecting retailer may display or indicate that no sales tax is due even if such display is not accompanied by the notice required by this paragraph 2).

ii) In calculating the total price due to the retailer, a non-collecting retailer may display a designation that no tax is being collected by the retailer or may entirely omit any reference to sales tax. In this case, the notice required by this paragraph 2) shall be sufficient if it appears on each invoice or, if no invoice is provided, if it is otherwise given to the purchaser as part of the sale, either immediately before, as part of, or immediately after the sale.

(1) Example: A non-collecting retailer may display a summary of the transaction with a line designated

"Sales tax collected by [name of retailer]" and showing the amount collected as "zero" or "0.00" or any other designation indicating that no sales tax is being collected. In this case, the non-collecting retailer may provide the required notice only on the invoice or immediately before, as part of, or immediately after the sale.

b) The notice required by this paragraph 2) shall contain the following information:

i) The non-collecting retailer does not collect Colorado sales or use tax;

ii) The purchase is not exempt from Colorado sales or use tax merely because it is made over the Internet or by other remote means;

iii) The State of Colorado requires that a Colorado purchaser (A) file a sales or use tax return at the end of the year reporting all of the taxable Colorado purchases that were not taxed and (B) pay tax on those purchases;

c) The notice required by this paragraph 2) may contain the following additional information:

i) The retailer will provide an end-of-year summary of Colorado purchases to the customer in order to assist purchasers in filing their tax report;

ii) Details of how and when to file this return may be found at the Colorado Department of Revenue's website, www.taxcolorado.com. The notice may substitute a more specific url when such more specific url is published by the Department;

iii) The retailer is required by law to provide the Colorado Department of Revenue with an annual report of the total dollar amount of all of a Colorado purchaser's Colorado purchases at the end of the year. The retailer will not provide any other details of the transaction to the Department other than the amount of the purchase.

d) This notice must be clearly legible, reasonably prominent, and located in close proximity to the total price. It shall be sufficient if the non-collecting retailer provides a prominent linking notice that reads as follows: "See important sales tax information regarding the tax you may owe directly to your state", if such linking notice directs the Colorado purchaser to the principal notice required by this paragraph 2).

e) If the retailer is required to provide a similar notice for another state in addition to Colorado, and the retailer provides a single such notice to all purchasers with respect to items purchased for delivery in all states, the notice required by this paragraph 2) shall be sufficient if it contains substantially the information required in a form that is generalized to any state.

f) Penalties --

i) The non-collecting retailer shall pay a penalty of $5 for each sale to a Colorado purchaser with respect to which the notice required by this paragraph 2) does not appear.

ii) The penalty assessed against a single non-collecting retailer in a single year pursuant to this section shall not exceed the following amounts:

(1) For a non-collecting retailer that had no actual knowledge of the requirement and began to provide the required notices within 60 days of demand by the Department, $5,000;

(2) For a non-collecting retailer that failed to provide the notices for the first calendar year for which the non-collecting retailer was obligated to provide the notices, $50,000;

(3) For a non-collecting retailer that sells only goods that are not taxable in Colorado or sells goods only to purchasers that are not subject to sales or use tax, no penalty shall be collected.

iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

3) Obligation to give Colorado purchasers notice of Colorado purchases

a) A non-collecting retailer must give an annual notice to all Colorado purchasers summarizing the Colorado purchaser's Colorado purchases for the preceding calendar year. The notice shall meet the following requirements:

i) The notice must be sent by first class mail to the last known address of the purchaser as described in paragraph vii) of this paragraph a). The envelope

containing the notice must be prominently marked with the words "Important tax document enclosed";

ii) The notice must summarize the date(s) of purchase(s), a description of the type of item(s) purchased (e.g., books, food, consumer electronics, household appliances), and the dollar amount(s) of the purchase(s);

iii) The notice must also state that the State of Colorado requires that the consumer file a sales or use tax return at the end of every year and pay tax on all taxable Colorado purchases for which no tax has been collected by the retailer. The notice may state that details of these requirements, including how to file, may be found at the Colorado Department of Revenue's website, www.taxcolorado.com. The notice may substitute a more specific url when such more specific url is published by the Department;

iv) The notice must also indicate that the non-collecting retailer is required by law to provide the Colorado Department of Revenue with the total dollar amount of purchases made by the Colorado purchaser, however no information about the purchase other than the dollar amount of the purchase will be provided to the Department;

v) If known to the non-collecting retailer, the notice may also indicate whether an item is exempt from Colorado sales tax; however no non-collecting retailer is required to include such information;

vi) The notice must be sent by January 31st of each year summarizing purchases made for the prior calendar year.

vii) Last known address of the purchaser:

(1) The non-collecting retailer may maintain a notice address for the purchaser, in which case, the non-collecting retailer may send the notice required by this paragraph 3) to such notice address if the following conditions are met:

(a) The non-collecting retailer informs the purchaser that the non-collecting retailer will be providing an end of year notice to the taxpayer as described in this paragraph 3);

(b) The non-collecting retailer informs the purchaser that the purchaser may choose to have the notice required by this paragraph 3) sent to a different address than the billing address (a "notice address");

(c) The purchaser acknowledges that he or she understands the tax obligation described in the notice and wishes to have the notice sent to a different address than the billing address and provides such a notice address.

(2) If the above conditions have not been met and no billing address for the customer has been provided, then the non-collecting retailer shall send the notice required by this paragraph 3) to the purchaser's shipping address.

(3) If no billing address and no shipping address for the customer has been provided and no other

physical address for the purchaser is known using any other commercially reasonable method based on the business's existing billing, customer-tracking or other systems, then the non-collecting retailer shall send the notice required by this paragraph 3) to the most recent e-mail address the non-collecting retailer has for the purchaser.

b) If the retailer is required by another state to provide a similar notice, and the retailer provides a single such notice to all purchasers with respect to items purchased for delivery in all states, the notice required in subparagraph a) shall be sufficient if it contains substantially the information required in a form that is generalized to any state.

c) De minimis Colorado purchaser --

i) Any non-collecting retailer that is required to send the notice required by this paragraph 3) to Colorado purchasers and that has complied with paragraph iii) of this paragraph c), is not required to send the notice required by this paragraph 3) to any Colorado purchaser whose total Colorado purchases for the prior calendar year are less than $500;

ii) If the goods purchased are not subject to Colorado use tax, a non-collecting retailer may choose to exclude such purchases from the calculation in paragraph i) of this paragraph c), however, no non-collecting retailer is obligated to do so;

iii) Any non-collecting retailer wishing to take advantage of the limitation in paragraph i) of this paragraph c) must make commercially reasonable business efforts, based on the business's existing

billing, customer-tracking, or other systems, to identify multiple purchases made by a single Colorado purchaser.

d) Penalties

i) The non-collecting retailer shall pay a penalty of $10 for each notice required by this paragraph 3) that is not sent by the non-collecting retailer to the Colorado purchaser.

ii) The penalty assessed against a single non-collecting retailer pursuant to this section shall not exceed the following amounts:

(1) For a non-collecting retailer that sent the notices within 30 days after the due date, $1,000;

(2) For a non-collecting retailer that had no actual knowledge of the requirement and sent the notices within 60 days after demand by the Department of Revenue to issue such notices, $10,000;

(3) For a non-collecting retailer that failed to send the notices for the first calendar year for which the non-collecting retailer was obligated to send the notices, $100,000;

(4) For a non-collecting retailer that sells only goods that are not taxable in Colorado or sells goods only to purchasers that are not subject to sales or use tax, no penalty shall be collected.

iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.

4) Obligation to give the Department notice of purchases made by Colorado purchasers

a) Any non-collecting retailer who is required to provide a notice described in paragraph 3) must file a report with the Department containing the following information:

i) The name of each Colorado purchaser;

ii) The billing address of each Colorado purchaser, if the information was provided to the non-collecting retailer;

iii) The shipping address of each Colorado purchaser, if the information was provided to the non-collecting retailer;

iv) The total dollar amount of Colorado purchases made by each Colorado purchaser during the prior calendar year. No other information about the purchase shall be provided.

b) If the non-collecting retailer has more than one Colorado billing address or more than one Colorado shipping address for a Colorado purchaser, then the non-collecting retailer shall provide all such addresses of the Colorado purchaser.

c) If the non-collecting retailer made more than $100,000 worth of total gross sales in Colorado during the prior calendar year, the non-collecting retailer shall electronically send the data required by this paragraph 4). If the non-collecting retailer made less than $100,000 worth of sales in Colorado during

the prior calendar year, the non-collecting retailer may electronically send the data required by this paragraph 4). The Department of Revenue shall publish on its website by November 1st of each year the required format and data elements of the report and shall publish details of how the report file is to be transmitted to the Department.

d) Any non-collecting retailer that is not required to send any notices pursuant to paragraph 3) of this rule is also exempt from the requirements to send the report described in this paragraph 4).

e) If a non-collecting retailer is required to provide any notices pursuant to paragraph 3) of this rule, then such non-collecting retailer must include all the purchases made by all Colorado purchasers in its report, including any purchases made by de minimis Colorado purchasers.

f) Penalties

i) If a non-collecting retailer fails to file the report required by this paragraph (4), the non-collecting retailer shall pay a penalty equal to $10 times the number of Colorado purchasers that should have been included in the report.

ii) The penalty assessed against a single non-collecting retailer in a single year pursuant to this section shall not exceed the following amounts:

(1) For a non-collecting retailer that filed the report within 30 days of the due date, $1,000;

(2) For a non-collecting retailer that had no actual knowledge of the requirement and filed the report within 60 days of demand by the Department that the report be filed, $10,000;

(3) For a non-collecting retailer that failed to file the report for the first calendar year for which the non-collecting retailer was obligated to file the report, $100,000;

(4) For a non-collecting retailer that sells only goods that are not taxable in Colorado or sells goods only to purchasers that are not subject to sales or use tax, no penalty shall be collected.

iii) The Executive Director of the Department may waive all or any portion of the penalty for other reasonable cause shown.