No. 16-267

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 United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF COUNCIL ON STATE TAXATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Council On State Taxation ("COST") is a nonprofit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 multistate businesses in the United States. COST members represent the part of the nation's business sector that is most directly affected by state taxation of interstate and international business operations. COST is vitally interested in this case because it addresses a state's attempt to impose different and discriminatory burdens on businesses not subject to the state's taxing powers from those that are subject to the state's taxing powers. If left to stand, this could open the floodgates for the states to impose burdensome regulations on businesses not subject to their taxing powers by coercing those businesses to surrender constitutional protections or face onerous regulations.[1]

COST has a history of submitting *amicus* briefs to this Court when it is considering state and local tax issues. During the Court's 2014 term, COST submitted amicus briefs in all three significant state tax cases decided by the Court: *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015); *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015); and *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015). As a long-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amici's* intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

standing representative of large multijurisdictional taxpayers, COST is uniquely positioned to provide this Court with background information and reasons why Colorado's notification and reporting law, which is only imposed on remote sellers not subject to the State's taxing jurisdiction, is discriminatory and, therefore, unconstitutional. All of COST's members are directly engaged in interstate commerce, with most also engaged in international commerce. They would be negatively impacted by the states subjecting them to onerous regulatory burdens where the states are otherwise precluded from imposing their taxes on such businesses pursuant to the U.S. Constitution.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[2] The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small

[2] The NFIB Legal Center also filed in the *Wynne* and the *Direct Marketing Association* cases.

business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year.

STATEMENT OF THE CASE

Forty-five states impose a sales tax and a compensatory use tax (hereinafter referred to collectively as "Sales Tax States").[3] The Sales Tax States have a long history of enforcing laws to require remote sellers without a direct physical presence in a state to collect that state's sales tax because the presence of an agent or third party is "attributed" to the seller. *See Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) (explaining that the status of an agent as an employee or independent contractor does not matter for determining physical presence) and *Tyler Pipe Industries v. Wash. Dep't of Revenue*, 483 U.S. 232, 250-251 (1987) (establishing that the use of an independent contractor to establish or maintain the marketplace constitutes physical presence). The requirement that a seller must have some form of physical presence in a state either by means of the seller's actual presence or through one of its agents is well grounded in law. This was reaffirmed by this Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).[4]

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[3] The states which do not impose a statewide sales tax are Alaska (some localities impose a sales tax), Delaware, Montana, New Hampshire, and Oregon.

[4] This Court in *Quill* confirmed one of its earlier decisions affirming that a seller must have a physical presence in the state for the state to require the seller to collect and remit its sales tax. *Nat'l Bellas Hess v. Dep't of Revenue*, 386 U.S. 753 (1967). Note *Nat'l Geographic Soc. v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977), decided four weeks after *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), held a seller's actual activity in state

In February 2010, Colorado took a different approach to pressure remote sellers lacking a physical presence in the State to collect its sales tax.[5] Under Colorado's 2010 law change, if a remote seller did not collect and remit Colorado sales tax, it would be subject to onerous regulatory provisions which could be significantly more burdensome than the collection of the sales tax faced by sellers with a physical presence. With the passage of the 2010 law (H.B. 10-1193 (Colo. 2010)), the Colorado Legislature imposed a notification and reporting law that only applies to out-of-state remote sellers without a physical presence in the State. Complementing that legislation, the Colorado Department of Revenue ("DOR") adopted regulations to assist it in administering the law, 1 Colo. Code of Regs. § 201-1:39-21-112.3.5 (2010). Pursuant to Colorado's statute and regulation, out-of-state remote sellers not collecting Colorado sales tax on Colorado purchases must: (1) at the time of each sale, notify the purchaser that the purchaser is obligated to remit the tax to the DOR; (2) annually, send a report via first class mail (even though the underlying transaction may have been placed over the internet) to purchasers that made over $500 in purchases, again notifying the purchaser that it may owe sales tax on its purchases; and (3) annually, send a similar summary report to the DOR listing, for each purchaser, the purchaser's name, billing and shipping address, and the total amount spent on the purchases.

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was not relevant; just having a physical presence in the state was sufficient to require the seller to collect and remit California's sales tax.

[5] Unless indicated otherwise, as used hereinafter, "sales tax" refers to both a state's sales tax and compensatory "use tax."

Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1128 (2015).

The Direct Marketing Association ("DMA") promptly initiated a lawsuit in the federal District Court ("District Court") against the State of Colorado challenging its law and regulation. Seeking a quick decision, the DOR did not directly challenge the District Court's jurisdiction under the federal Tax Injunction Act ("TIA").[6] On January 26, 2011, the District Court issued a preliminary injunction enjoining the DOR from enforcing the law and regulations. On March 30, 2012, the District Court issued a permanent injunction holding Colorado's notification and reporting law discriminated against interstate commerce, finding "[t]he record contains essentially no evidence to show that the legitimate interests advanced by the [Department] cannot be served adequately by reasonable nondiscriminatory alternatives." *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904, 909 (10th Cir. 2013) (quoting *Direct Mktg. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 2012 U.S. Dist. LEXIS 44468, 2012 WL 1079175, at *6 (D. Colo. Mar. 30, 2012)).

The DOR subsequently appealed the District Court's decision to the Tenth Circuit Court of Appeals ("Tenth Circuit"), which acting on its own accord, held that pursuant to the TIA the District Court lacked jurisdiction to rule in this case. *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013). As a result of that decision, on November 5, 2013, DMA filed suit in Colorado state district court ("State Court"). Similar to the District Court, the State Court determined that the notification and reporting requirements,

[6] 28 U.S.C. § 1341.

which applied only to remote sellers not required to remit Colorado's sales tax, were unconstitutional and issued a preliminary injunction again enjoining the law and its regulation. *Direct Mktg. Ass'n v. Brohl*, District Court, City and County of Denver, Case No. 13CV34855, Order (Feb. 18, 2014).

Soon after that decision was issued, on February 25, 2013, DMA filed a petition for *writ of certiorari* to this Court, Docket No. 13-1032. On March 31, 2014, COST submitted an *amicus curiae* brief supporting this Court's review of the Tenth Circuit's decision. This Court granted review on July 1, 2014. COST and the NFIB Legal Center also filed *amicus curiae* briefs on the merits.[7] On March 3, 2015, this Court unanimously determined that this case did not deal with an assessment of tax: "the enforcement of the notice and reporting requirements is not an act of the assessment, levy or collection of tax." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1131 (2015) (internal quotations omitted). Thus, this Court held the TIA did not bar the Tenth Circuit from reviewing the District Court's decision.

On February 22, 2016, after supplemental briefing and argument, the Tenth Circuit reversed the District Court's decision, holding Colorado's law (and regulation) was *not* facially discriminatory and was, therefore, constitutional. Shifting the burden of proof from the State to DMA to establish "that the notice and reporting requirements for non-collecting out-of-state retailers are more burdensome than the regula-

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[7] COST's *amicus* briefs are available at: http://www.cost.org/StateTaxLibrary.aspx?id=3386; *see also* Br. of NFIB Small Business Legal Cntr. available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1032_pet_amcu_ncib.authcheckdam.pdf.

tory requirements in-state retailers already face," the Tenth Circuit held that DMA failed to "identif[y] significant probative evidence of discrimination . . . [and] establish[] that the Colorado Law discriminate[d] in its direct effects." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1145 (10th Cir. 2016) (citing *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009)). This is the central question DMA and *amici* ask this Court to review: whether the Tenth Circuit erred in holding Colorado's notification and reporting law was not facially discriminatory and unconstitutional because it imposed burdensome regulatory requirements solely on out-of-state sellers not required to collect Colorado's sales tax.

SUMMARY OF THE ARGUMENT

This case warrants review for several reasons. First, Colorado's notification and reporting law should be reviewed by this Court to determine if it facially discriminates against interstate commerce.[8] The Tenth Circuit clearly erred by suggesting that a law that applies only to out-of-state businesses was not subject to strict scrutiny review merely because the law does *not expressly* utilize geographical distinctions. Countenancing such artful legislation elevates "form" over "substance" in a manner not supported by this Court's precedent. Second, the Tenth Circuit's use of a comparative analysis test, *i.e.*, comparing and attempting to balance the burdens on businesses

[8] "The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (citing *Geer v. Connecticut*, 161 U.S. 519, 532 (1896)).

collecting and remitting Colorado's sales tax with those on out-of-state businesses not required to collect sales tax has no basis or support in this Court's precedent. It is unworkable and unnecessary to apply such a comparable analysis test to determine the validity of a regulatory scheme that is imposed solely on out-of-state businesses immune from a state's taxing powers.

This is a case of national importance that raises issues that need to be addressed by the Court. Colorado's onerous notification and reporting law has generated interest and legislative action in other states with the subsequent enactment of similar statutes in five states: Kentucky, Louisiana, Oklahoma, South Dakota, and Vermont.[9] In addition, the Multistate Tax Commission ("MTC") has drafted model legislation, which includes a Colorado-styled notification and reporting provision.[10] Thus, this case has implications that reach beyond Colorado, and it is important and timely for this Court to review the constitutional infirmity associated with imposing severe regulatory notice and reporting requirements solely on out-of-state sellers not otherwise legally required to collect a state's sales tax. This Court must review this case to prevent remote sellers, not

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[9] *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).

[10] Hecht, Helen, Multistate Tax Commission, *Status Report on Model Sales and Use Tax Notice and Reporting Statute* (2014). The draft model act is available at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Committees/Executive_Committee/Scheduled_Events/47th_Annual_Meetings/UTR%20EC%20Memo%20(07-31-2014).pdf.

otherwise required to collect and remit sales tax, from being forced into an onerous regulatory regime—a substantial administrative burden for both large and small businesses. Many remote sellers will struggle to comply with these requirements, impeding the free flow of commerce among the states; and, as a result, many remote sellers will likely be subject to significant penalties.[11]

ARGUMENT

I. COLORADO'S NOTIFICATION AND REPORTING LAW FACIALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

This Court must review the Tenth Circuit's holding that Colorado's notification and reporting law was not facially unconstitutional because the Colorado law is, in fact, facially unconstitutional. The Tenth Circuit applied an erroneous test to determine whether a Commerce Clause violation contravenes this Court's precedent. This Court should grant the Petitioner's Petition for *Writ of Certiorari* for the reasons provided below.

A. The Tenth Circuit Erred In Its Determination Of What Constitutes A Facially Discriminatory Law.

Both the District Court and the State Court held that Colorado's notification and reporting law was unconstitutional because the law facially discriminated against interstate commerce. By contrast, the Tenth Circuit held that because the law itself does *not* expressly indicate it applies only to out-of-state

[11] *See* Colo. Rev. Stat. § 39-21-112(3.5).

businesses, it was not facially discriminatory against interstate commerce. Thus, the Tenth Circuit impermissibly shifted the burden from the State (to show no other reasonable means could sustain the enforcement of a discriminatory law) to DMA (to prove Colorado's notification and reporting law was unconstitutionally burdensome).

At a minimum, *Quill* stands for the proposition that a remote seller lacking a physical presence in a state cannot be required to collect and remit that state's sales tax. Conversely, a seller located in Colorado, or that otherwise has a physical presence in the State, can be, and is, compelled to collect and remit Colorado's sales tax. Because Colorado's law applies only to businesses not remitting Colorado's sales tax (*i.e.*, out-of-state remote sellers with no physical presence in Colorado), it has the same effect as explicitly stating that in-state businesses, which are all required to collect Colorado's sales tax, are *not* subject to Colorado's notification and reporting law. Therefore, the imposition of Colorado's notification and reporting law solely on out-of-state sellers and not on in-state sellers makes the law facially discriminatory.

This point is important because this Court has noted that a facially discriminatory law invokes strict scrutiny review, with the burden placed on the state to justify there are no other reasonable and nondiscriminatory means to accomplish its goals. In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), an Oklahoma law that prohibited a person from transporting minnows obtained within the natural waters of the State to out-of-state destinations was held to be unconstitutionally discriminatory. *Id.* at 338. The Oklahoma statute was found to be

discriminatory despite the fact that the statute made no explicit mention of in-state considerations. The geographic descriptor the Tenth Circuit claims is central to its jurisprudence was simply not a factor in *Hughes*. "[W]hen considering the purpose of a challenged statute, this Court is not bound by the name, description or characterization given it by the legislature or the courts of the State, but will determine for itself the practical impact of the law." *Id.* at 336 (internal quotes omitted). The Court expressly overruled *Geer v. Connecticut*, 161 U.S. 519 (1896), which gave a special exception for state regulations of wild animals and held "[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.* at 335-37.

After *Hughes*, this Court also invalidated a discriminatory law in Ohio which favored in-state ethanol producers over out-of-state ethanol producers—even though the law did not expressly deny a credit to all out-of-state producers.[12] *New Energy Co. v. Limbach*, 486 U.S. 269 (1988). And, in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), this Court noted, "the imposition of a differential burden placed on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid." *Id.* at 202. This was so regardless of whether the discrimination was "forthright or ingenious." *Id.* at 201. The results from *Hughes*, *New Energy Co.*, and *West Lynn Creamery* all flow from the long-standing and

[12] Ohio's tax credit had a reciprocity provision under which the credit was also granted to out-of-state ethanol dealers from other states if those states offered similar tax advantages to Ohio ethanol dealers. *Limbach*, 486 U.S. at 271.

uncontroversial tenet that a state is not permitted to accomplish indirectly what it cannot directly. *See e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958); *Heiner v. Donnan*, 285 U.S. 312 (1932). Simply put, the Tenth Circuit's emphasis on overt geographic distinctions in the text is misplaced, and is in conflict with this Court's precedent.

Whether direct or indirect, ingenious or in plain sight, this Court has made clear that when a state's law discriminates, a virtually *per se* rule of invalidity applies. Such a law can only be sustained if a state can show that it advances a legitimate local purpose which cannot be adequately served by reasonable nondiscriminatory means. *Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (citing *Hughes*, 441 U.S. at 337). In this case, the *per se* rule plainly applies because Colorado's notification and reporting law, though cleverly worded, plainly discriminates. To boot, Colorado possesses several non-discriminatory methods to achieve its goal of increasing tax compliance.

Colorado cannot complain that these alternative methods are inconvenient as long as they are *reasonable* and *nondiscriminatory*. Continuing its policy of requiring Colorado purchasers to directly remit the use tax to the State undoubtedly satisfies both conditions. As difficult as it may be, Colorado can also increase its tax audits—a commonplace and uncontroversial measure—to increase compliance with its use tax laws. Colorado's sales and use tax is Colorado's creation. It is for Colorado, not a legion of remote sellers, to defend. Colorado benefits from a robust national economy made possible by the Commerce Clause and which inures to its benefit. It is not Colorado's prerogative to pick and choose the

Commerce Clause burdens that make these benefits possible. Colorado cannot single out only those out-of-state sellers that are exercising their constitutional rights to not collect and remit Colorado's sales tax for this would be to impose an unconstitutional condition. *See Frost v. R.R. Com'n of State of Cal.*, 271 U.S. 583, 590, 593-94 (1926) (a state may not enact regulations imposing conditions to accomplish indirectly what the Constitution forbids them from doing directly).

The Tenth Circuit's failure to find Colorado's notification and reporting law facially unconstitutional, alone, merits this Court's review. If left unchecked, states' lawmakers will be encouraged to let "form" prevail over "substance" by wordsmithing otherwise unconstitutional laws. The Tenth Circuit opinion will provide the proverbial roadmap for state seizure of Congressional regulatory power over interstate and international commerce. It is unfathomable to change the level of review and shift the burden of proof accorded to these facially discriminatory laws merely because the states' legislatures used artful verbiage that does not expressly indicate the state is treating out-of-state companies differently than in-state companies. This Court must act to prevent this distinction without a difference from occurring (and likely spreading).

Finally, this Court should also review this case to correct the Tenth Circuit's misunderstanding of *General Motors v. Tracy*, 519 U.S. 278 (1997). *General Motors* dealt with an Ohio tax structure that imposed a different excise tax on regulated natural gas distribution companies as compared to unregulated gas marketers that were not required to serve everyone in a distribution area. The taxpayer, an unregulated gas marketer, complained that it was

unconstitutionally being denied a tax exemption available to in-state "local [natural gas] distribution companies." The Court denied this claim for the unremarkable reason that Ohio's tax regime taxed (and exempted) different objects of taxation differently.

> [O]f course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

Id. at 298-299.

While acknowledging this principle in passing, the Tenth Circuit's decision reduces *General Motors* into an absurdist case of circular logic. The Tenth Circuit claims that the Colorado notification and reporting law comports with *General Motors*, and, therefore is non-discriminatory, because the very same law that creates the unconstitutional distinctions between in-state and out-of-state sellers purportedly creates the constitutional basis for treating them differently. The Tenth Circuit clearly misreads *General Motors* because the Tenth Circuit has overlooked the notion that the Colorado notification and reporting law has not changed the market protected by the Commerce Clause. In this case, remote sellers directly compete with their in-state counterparts in the same market, and nothing about the Colorado notification and reporting law changes that. What the Colorado

notification and reporting law changes is how these competitors are treated. Therefore, the similarities between the *General Motors* case and this case addressing Colorado's notification and reporting law are close to nil.

B. The Tenth Circuit's "Comparable Analysis" Balancing Test For Regulating Remote Sellers Not Collecting A State's Sales Tax Would Undermine This Court's Precedent That Prevents States From Imposing Discriminatory Laws.

In many ways this case is similar to *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), where this Court struck down a regulatory fee Pennsylvania imposed on motor carriers. In that case, the Court held that a flat tax imposed on in-state and out-of-state motor carriers discriminated against interstate commerce because the impact of a regulatory fee on trucks traveling occasionally in the state as compared to those motor carriers only traveling within Pennsylvania could be much greater. The law did not expressly target in-state or out-of-state businesses. Based on the Tenth Circuit's comparable analysis, how would a tax tribunal or a court be able to objectively determine whether out-of-state motor carriers always had a greater tax burden than in-state motor carriers? The Court must have known that such an inquiry would be unrealistic and did not attempt to apply a "comparable analysis" balancing test in that case.

The same holds true for out-of-state remote sellers not collecting Colorado's sales tax versus sellers who must collect and remit the State's sales tax. How is a court to objectively measure whether a taxing regime or a regulatory regime is more burdensome? What is the test: 1) comparing the burden a remote seller

would have to collect the tax against the burden of complying with Colorado's notification and reporting law; or 2) comparing the burden of a remote seller not required to collect Colorado's sales tax with the burden of in-state sellers?[13] An in-state seller with a store in only one location that only makes over-the-counter sales would have to know the sales tax rules of only its local government and its State. Is that comparable to the burden a remote seller has to comply with Colorado's notification and reporting law? Moreover, remote sellers have the obligation to notify their purchasers at the time of sale that the purchaser has an obligation to remit sales tax, followed up by mailing reports via first class mail. Additionally, remote sellers also must determine what negative effects sending reports to the DOR will have on their purchasers' decisions on whether to make purchases from such remote sellers. Clearly the burden is going to differ based on each remote seller's circumstances, making a "comparable analysis" balancing test unworkable to apply and to administer.

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[13] Making collection more burdensome, Colorado is not a member of the Streamlined Sales and Use Tax Agreement, an initiative by the member states to assist sellers in collecting their sales taxes. Twenty-three states are full members of the Streamlined Sales and Use Tax Agreement: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. More information is available at: http://www.streamlinedsalestax.org. Additionally, Colorado has a home rule provision and approx.-imately 180 local tax jurisdictions, some of which administer their own sales taxes independent from the State, including the use of different definitions to determine taxability, different taxability of the same products, and different filing guidelines.

Adding to the confusion, the Tenth Circuit cited *Ala. Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136 (2015) in support of its comparable burdens analysis. *CSX* is inapposite. The Court's opinion in *CSX* is limited to the *sui generis* discrimination provisions of the 4-R Act, which are not at issue here. Rather, in *CSX*, this Court addressed a specific provision in the 4-R Act which prohibits the states from discriminating against rail carriers. *Id.* at 1139-40. While this Court discussed some analogies to an additional tax that could justify the tax differences for motor fuel in Alabama, such analysis was still based on a specific federal law. Additionally, the dormant Commerce Clause's strict scrutiny test for a facially discriminatory state law, which places the burden of justifying a discriminatory tax on the state, was not at issue in *CSX*. That strict scrutiny test *is* at issue here.

The uncertainty created by the Tenth Circuit's misapplication of these cases needs to be addressed by the Court to prevent the erosion of this Court's precedents relating to the dormant Commerce Clause's anti-discrimination requirements.

II. THIS IS A CASE OF NATIONAL IMPORTANCE BECAUSE THE IMPOSITION OF REPORTING AND NOTICE REQUIREMENTS BY MULTIPLE TAXING JURISDICTIONS WOULD CREATE SIGNIFICANT BURDENS FOR MULTISTATE TAXPAYERS.

As advocates for both large multijurisdictional businesses and for small businesses in all states and many local jurisdictions, *amici* have a unique perspective regarding the consequences of the Tenth Circuit's decision. *Amici* work continually on behalf of their members to advocate for fair and efficient state

taxation. *Amici's* goals are for states to strike a balance between states' interests in their revenue and unnecessary and undue administrative burdens being imposed on business. And, smaller remote sellers have fewer resources to either internally handle or outsource these onerous notification and reporting requirements.[14]

Since the passage of Colorado's notice and reporting law, five states (Kentucky, Louisiana, Oklahoma, South Dakota, and Vermont) have passed similar legislation. Although each of these states has imposed a notice and reporting obligation that is comparable to that imposed by Colorado, the specific language and requirements of each statute passed to date differs significantly. *See* Ky. Rev. Stat. Ann. § 139.450 (provides a similar small-business exemption, but does not provide the per-customer-reporting exemption; specific reporting requirements substantially different); La. Act. No. 569 § 1 (provides a similar small-business exemption albeit lower than Colorado's exemption level, but does not provide the per-

[14] The issue of the states being granted remote seller sales tax collection authority as indicated by this Court in *Quill* is one best left for Congress. *Quill*, 504 U.S. at 318. Congress has heeded this advice. This session of Congress alone, there are three acts pending before Congress: Marketplace Fairness Act (S. 698, 114th Congress (2015-2016)), Remote Transactions Parity Act (H.R. 2775, 114th Congress (2015-2016)), and No Regulation Without Representation Act (H.R. 5893, 114th Congress (2015-2016)). Representative Bob Goodlatte (R-VA) also has a discussion document, the Online Sales Simplification Act, that has yet to be introduced. Paige Jones, *Goodlatte Releases New Draft of Online Sales Tax Legislation*, Tax Notes Today, August 26, 2016. *Amici* supports Congress granting states that have made their sales tax laws simpler and more uniform, *e.g.*, the Streamlined Sales and Use Tax Agreement full member states, collection authority over remote vendors.

customer-reporting exemption; specific reporting requirements substantially differ); Okla. Stat., tit. 68, § 1406; Okla. HB 2531 § 4 (amending § 1406) (only customer reporting is required; however, there is no per-customer-reporting exemption and the specific reporting requirements substantially differ); S.D. Codified Laws § 10-63-1 *et seq.* (only customer reporting is required; however, there is no per-customer-reporting exemption and the specific reporting requirements substantially differ); Vt. Stat. Ann., tit. 32, § 9712(a) (only customer reporting is required; small-business exemption provided but per-customer-reporting exemption applies only if purchases are less than $50 a year).

Further, the MTC has drafted a model notice and reporting statute. The MTC model statute, while loosely based on Colorado's concept, is still significantly different. The MTC statute provides two different seller exemptions, yet does not provide any per-customer-reporting exemption. Thus, any state that adopts the MTC model (once it is finalized by the MTC) would be creating yet another compliance regime with which remote sellers not required to collect a state's sales tax would have to comply. This sort of hodge-podge proliferation of state regulation is the precise ill targeted by the Commerce Clause and remedied by cases like *Quill* and *Hughes*.

If this Court fails to accept this case for review and the Tenth Circuit's decision is left unchecked, remote sellers that are not otherwise required to collect and remit sales tax because they are constitutionally protected from doing so could easily be subjected to multiple (and inconsistent) notification and reporting statutes in multiple states. The lack of uniformity that prevails elsewhere in state corporate income

taxes and state sales and use taxes is likely to take hold here as well—significantly complicating the compliance burden for remote sellers. This alone will create a significant burden on interstate commerce in violation of the Commerce Clause.

Further, this Court should review this case because the Tenth Circuit failed to properly consider the full ramifications of the burden of Colorado's notice and reporting law on remote sellers not required to collect a state's sales tax. Pursuant to Colorado's notice and reporting law, a remote seller that is not otherwise required to collect and remit sales tax is required to adhere to the following: (1) at the time of each sale, notify the purchaser that the purchaser is obligated to remit the tax to the DOR; (2) annually, send a report via first class mail (even though the underlying transaction may have been via the internet) to purchasers that made over $500 in purchases, again notifying the purchaser that he or she may owe sales tax on their purchases; and (3) annually, send a similar summary report to the DOR providing for each purchaser the purchaser's name, billing and shipping address, and the total amount spent on the purchases. *Direct Mkgt. Ass'n v. Brohl*, 135 S. Ct. 1124, 1128 (2015).

A seller filing returns in a Sales Tax State is required to file monthly or quarterly sales tax returns with a state's tax agency. Under Colorado's regime, however, a remote seller with no physical presence in Colorado that is subject to the notice and reporting law could be required to send hundreds, if not thousands, of reports to its customers and a summary report to the DOR. This is in addition to the individual transaction notifications that are also required. To illustrate the significance of this administrative

burden, consider the following example. As of July 2015, Colorado had a population of approximately 5.4 million.[15] For purposes of our example we will use a large remote seller that sells to approximately one percent of Colorado's population. Such a business would have 54,000 Colorado purchasers, and assuming a quarter of those purchasers made purchases from this remote seller in excess of $500, the remote seller would be required to send (i.e., via first class mail) annual reports to approximately 13,500 purchasers. In addition, the remote seller would be required to submit a summary report to the DOR of all its purchasers (name, address, and total annual purchases). This is an expensive and onerous information collection and mailing requirement. If this remote seller fails to comply with Colorado's notification and reporting law for the first year it was obligated to provide such notices and reports, it could likely face a penalty of approximately $250,000; and the penalties after that first year would likely be higher because they would not be capped.[16]

With the rapid spread of sales tax notification and reporting laws (five states have already enacted such laws and more will follow), the remote seller discussed above could be required to send out several hundred thousand (or even millions of) mailings (by first class

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[15] *See Population Estimates*, Colorado QuickFacts from the U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/08.

[16] *See* 1 Colo. Code of Regs. § 201-1:39-21-112.3.5. For the first year a remote seller is obligated to comply with the law the penalties are: (1) $5 per transaction, up to $50,000, for not providing adequate notification to purchasers that sales tax is due; $10 per purchaser, up to $100,000, for not providing purchasers with an annual report; and (3) $10 per purchaser, up to $100,000, for not providing the DOR with an annual report.

mail) to consumers while also filing summary reports with each state's taxing authority. Many businesses, especially small businesses, will also struggle to understand these laws. Imagine the burden if all 45 states that impose sales and use tax obligations followed suit, which could exponentially increase if home rule local sales tax jurisdictions also impose their own notification and reporting requirements.

Finally, allowing states to impose discriminatory laws applicable only to out-of-state businesses not constitutionally required to collect sales taxes or file sales tax returns in a state sets a disturbing precedent. What will prevent states from imposing onerous reporting requirements on businesses for other matters? Should a state be allowed to require all businesses not subject to the State's corporate income tax to file their federal income tax return and other states' income tax returns with a state's tax agency?[17] A state could also require those businesses to submit a list of all their customers each year—with stiff penalties imposed for failure to comply. While states often have confidentiality laws for taxpayer information, it is unknown whether such protections would apply to these types of informational reports because they would not be directly related to a state subjecting businesses to taxation. Thus, such businesses could have their federal and other state income tax returns exposed along with their customer lists, which many businesses seek to protect both from disclosure for competitive reasons.

[17] Or, more problematic, it could be another agency that does not provide any protection for confidential records.

The potential for abusive retaliation, interstate infighting, crass protectionism, and "economic balkanization" of commerce would simply be breathtaking. *Hughes*, 441 U.S. at 325. This balkanization is already at work. The proverbial ink is not dry in this case and yet, as previously noted, five states (Kentucky, Louisiana, Oklahoma, South Dakota, and Vermont) have already leapt into the fray. If the Court does not step in, more of these ills are sure to follow.

These requirements create a substantial burden on interstate commerce, which only this Court has the power to remedy.

CONCLUSION

For the reasons stated above and for the reasons identified by the Petitioner, *amici* respectfully request this Court grant the Petitioner's Petition for *Writ of Certiorari*.

Respectfully submitted,

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