No. 13-1032

In The
Supreme Court of the United States

DIRECT MARKETING ASSOCIATION,
Petitioner,
v.
BARBARA BROHL
IN HER CAPACITY AS EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF REVENUE,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Tax Injunction Act, 28 U.S.C. § 1341, bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation,

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

representing more than 300,000 direct members and an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files *amicus curiae* briefs in cases before this Court that raise issues of national concern to American business, including several cases involving the scope of federal court jurisdiction. *See, e.g.*, *Ford Motor Co. v. United States*, No. 13-113; *Sprint Communications, Inc. v. Jacobs*, No. 12-815; *Walden v. Fiore*, No. 12-574; *Daimler AG v. Bauman*, No. 11-965.

This is one such case. The Chamber and its members are concerned that the Tenth Circuit's decision, if upheld, will allow parties (including state regulators) to use the Tax Injunction Act (28 U.S.C. § 1341) to avoid federal jurisdiction in favor of a state forum in cases far afield from the text or purpose of that Act. The Tenth Circuit's interpretation requires a court to make predictions regarding the indirect effect a plaintiff's claims might have on state tax revenues, and precludes federal court jurisdiction whenever that prediction suggests even an attenuated effect on state coffers—even when the suit does not implicate the plaintiff's own tax liability or seek to change anyone's tax liability. That expansive and indeterminate interpretation risks substantially undermining the ability of the Chamber's members to vindicate federal rights in a federal forum.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the Tenth Circuit's rule, the Tax Injunction Act (TIA or Act) bars federal courts from exercising jurisdiction over any suit that, if successful, would in any way "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue," Pet. App. A-17—even in cases, such as this one, where (i) the plaintiff is not a state taxpayer and does not seek to challenge its own tax liability in the State; (ii) the suit does not call into question the State's authority to assess or collect taxes; and (iii) the relief sought would have no effect on any taxpayer's liability to the State, or itself decrease state revenue.

Neither congressional intent nor this Court's precedents can support the Tenth Circuit's expansive interpretation of the Act. Both Congress and this Court have made clear that although the Act may be "grounded in the need of States to administer their fiscal affairs without undue influence from federal courts," *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 832 (1997), respect for state taxing authority does not per force insulate "all aspects of state tax administration" from federal-court review. *Hibbs v. Winn*, 542 U.S. 88, 105 (2004) (internal quotation marks omitted). Instead, "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Id.* at 104-105. Accordingly, as this Court has made clear, the Act's jurisdictional bar is triggered only (i) when "state

taxpayers seek federal-court orders enabling them to avoid paying state taxes" *and* (ii) when the direct legal result would be a decrease in state tax revenue. *Id.* at 107.

Neither jurisdiction-barring criterion is present here. Petitioner is not a Colorado taxpayer, and as the Tenth Circuit acknowledged, "[e]ven if DMA's constitutional attack on the notice and reporting obligations were successful, Colorado consumers would still owe use taxes by law." Pet. App. A-18. Colorado's use-tax notice and reporting requirements do not themselves reap any tax revenue for the State. *See id.* at A-5-7. Instead, they function simply as a mechanism for forcing out-of-state businesses, like Petitioner's and the Chamber's members, to "notify consumers of their duty to pay [use] tax and to garner information on consumer purchases to ensure tax compliance through audits." *Id.* at A-23.

This Court has never held that the TIA protects such a "general use of coercive power" from federal-court review, *Hibbs*, 542 U.S. at 109 (quoting *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975) (Friendly, J.)), just because a State has "determined [it] to be a likely method of securing [tax] payment[s]," *Wells,* 510 F.2d at 77. There is no good reason to make that unprecedented leap based on the Tenth Circuit's expansive and indeterminate view of the TIA—a view that is untethered from the TIA's text, Congress's intent, and this Court's precedent. Rather, the Court should reaffirm that the TIA's jurisdictional bar is limited to cases in which taxpayers seek to sidestep state procedures for challenging state tax liability by seeking *ex ante* relief in federal court.

To do otherwise would only invite confusion, which this Court has recognized is particularly troubling in the context of jurisdictional rules. It would also divest federal courts of jurisdiction over important federal questions in cases that have no impact on the amount of tax owed under state law. Requiring federal courts to oust parties based on uncertain predictions of how taxpayers might respond to particular procedures or incentives would only embolden those seeking a more hospitable forum to posit evermore attenuated chains of possible effect on state tax revenue. This Court can avoid the inevitable proliferation of TIA litigation—turning on the predictions of dueling behavioral economists—by adhering to the clear rule its precedents already establish: the Act applies only when a state taxpayer seeks a federal-court order that would decrease the amount of taxes the taxpayer owes the State.

ARGUMENT

I. THE TENTH CIRCUIT'S EXPANSIVE READING OF THE TAX INJUNCTION ACT CONTRAVENES THE ACT'S TEXT, CONGRESSIONAL INTENT, AND THIS COURT'S PRECEDENT.

A. The TIA Applies Only To Actions By Taxpayers Contesting State Tax Liability.

The text of the TIA, the context in which the law was enacted, and the Act's legislative history all make clear that "[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax

imposed on plaintiffs" are simply "outside Congress' purview." *Hibbs*, 542 U.S. at 104.

1. The TIA's text bars only actions that would directly thwart state tax "collection."

The text of the TIA, on its face, indicates that the statute applies only to judicial remedies that would directly bar States from assessing or collecting taxes. The Act withholds federal court jurisdiction over suits that seek to "enjoin, suspend or restrain the assessment, levy, or collection of any tax." 28 U.S.C. § 1341. There is no argument in this case that Petitioner's suit would "enjoin," "suspend," or "restrain" in any way the "assessment" or "levy" of a tax. That is because the terms "assessment" and "levy" refer to specific legal methods used by a State to record and obtain the amount of taxes owed. *See Hibbs*, 542 U.S. at 100-101. The State of Colorado would remain free to employ those methods with respect to the same tax liability regardless of the outcome of this suit.

Under the canon of *noscitur a sociis*, "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (internal quotation marks omitted). As this Court has recognized, the term "collection" refers to "methods similar to assessment and levy, *e.g.*, distress or execution * * * that would produce money or other property directly, rather than indirectly through a more general use of coercive power." *Hibbs*, 542 U.S. at 109 (quoting *Wells*, 510 F.2d at 77). Here, of course, a victory for Petitioner would not prevent the State of Colorado from employing direct collection methods such as distress or

execution any more than it would prevent assessments or levies.

Reading the term "collection" as limited to direct legal methods employed by the State, rather than as encompassing any practical effect on ultimate tax receipts, also comports with the Act's history, the broader statutory context, and this Court's precedents.

2. The Tenth Circuit's approach ignores the statutory history of the TIA.

Prior to the TIA's enactment, it was "common practice" for state statutes to "forbid actions in State courts to enjoin the collection of State and county taxes" unless the affected taxpayer did so "in [a] refund action[] after payment under protest." S. Rep. No. 1035, 75th Cong., 1st Sess., at 1 (1937). The purpose of those statutes was largely prophylactic: by requiring taxpayers to first pay outstanding tax debts before challenging their tax liability in state courts, state legislatures "ma[de] it possible for the States and their various agencies to survive while long-drawn-out tax litigation [was] in progress." *Id.*; *see also* 81 CONG. REC. 1415, 1416 (1937) (statement of Sen. Bone).

That "state-revenue-protective" scheme, however, did little to prevent out-of-state taxpayers from invoking diversity jurisdiction to challenge their state tax liability *ex ante* in federal court. *Hibbs*, 542 U.S. at 104. Such attempts to "secure injunctive relief against the collection of taxes" without first paying into a State's coffers allowed "foreign [taxpayers] doing business in such States to withhold * * * taxes

in such vast amounts and for such long periods of time as to seriously disrupt State and county finances." S. Rep. No. 75-1035, at 1-2. That painted the "highly unfair picture * * * of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation." *Id.*[2]

Congress fashioned the TIA to eliminate the ability of out-of-state taxpayers to sue first and pay later. Specifically, Congress sought to (i) "eliminate disparities between taxpayers who could seek injunctive relief in federal court * * * and taxpayers with recourse only to state courts"; and (ii) "stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Hibbs*, 542 U.S. at 104; *see* S. Rep. No. 75-1035, at 2; *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 435 (1999) ("Congress, it appears, sought particularly to stop out-of-state corporations from using diversity jurisdiction to gain

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[2] *See* S. Rep. No. 75-1035, at 2; H.R. Rep. No. 1503, 75th Cong., 1st Sess., at 2 (1937) (both noting that "[t]he pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy"); *see also* David Fautsch, Note, *The Tax Injunction Act and Federal Jurisdiction: Reasoning from the Underlying Goals of Federalism and Comity*, 108 MICH. L. REV. 795, 801-802 (2010) (noting the increased prevalence of such suits after this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908)).

injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law."); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943) (similar).

Thus, far from "announc[ing] a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration," *Hibbs*, 542 U.S. at 105 (internal quotation marks omitted), Congress took aim at a specific problem then facing state taxing authorities: out-of-state taxpayers invoking federal courts' jurisdiction to obtain *ex ante* relief from state tax liability in a way that directly decreased state tax revenue. *See* Frederick C. Lowinger, Comment, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 746 (1979) (TIA's legislative history suggests congressional intent to bar "only those [suits] that permitted the taxpayer to adjudicate the lawfulness of a levy prior to payment"). Contrary to the Tenth Circuit's suggestion, *see* Pet. App. A-13, nothing in the TIA's history indicates that Congress envisioned the Act's jurisdictional bar extending to suits that did not involve a taxpayer attempting to sue first and pay later. *See* Lowinger, 46 U. CHI. L. REV. at 746 ("The legislative history of the [Act] does not * * * demonstrate a congressional intention to remove from the federal courts all suits *involving* state or local tax administration, but only those that permitted the taxpayer to adjudicate the lawfulness of a levy prior to payment.").

3. The Tenth Circuit's approach is inconsistent with this Court's interpretation of analogous statutes.

Congress's focus on preventing taxpayers' direct assaults on state treasuries is confirmed by the purpose and language of similar statutes upon which the Act was based. *See Hibbs*, 542 U.S. at 104. In particular, Congress modeled the TIA after the federal Anti-Injunction Act, 26 U.S.C. § 7421, which generally deprives courts of jurisdiction over suits brought "for the purpose of restraining the assessment or collection" of any federal tax. *Id.* § 7421(a); *see* Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475.

This Court has long recognized that the Act's "manifest purpose" is to "permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962). In other words, like the TIA, the Anti-Injunction Act was originally designed to "preclude[] only suits brought by taxpayers to restrain the United States from assessing or collecting * * * taxes." *Jefferson County*, 527 U.S. at 434-435; *see also Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 509 (1932) (noting that Anti-Injunction Act is "declaratory of the principle" that "a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality," because "such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden").

Adopting the Tenth Circuit's expansive view of the TIA's scope would thus decouple the Act from its federal-tax-law counterpart, and contravene the well-settled principle that statutes with similar language that "share a common raison d'etre" "should be interpreted *pari passu*." *Northcross v. Board of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973); *cf. also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Moreover, the Anti-Injunction Act has since been amended expressly to bar suits for injunctive relief not just by taxpayers, but "by any person, whether or not such person is the person against whom such tax was assessed," 26 U.S.C. § 7421(a); *see* Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 110(c), 80 Stat. 1125, 1144. The very existence of that amendment draws into sharper relief the notion that in both statutes, "Congress had in mind challenges to assessments triggering collections, *i.e.*, attempts to prevent the collection of revenue" through direct challenges to the imposition of tax liability, *Hibbs*, 542 U.S. at 103-104 & n.5. And the fact that Congress has not similarly expanded the TIA's proscriptive reach to encompass third-party claims—particularly after this Court's decision in *Hibbs*—only reinforces the idea that Congress chose to focus its "state-revenue protective" efforts in the TIA on taxpayers' attempts to use federal courts to skirt or delay their state tax obligations. *See id.* at 104; *see also id.* at 112 (Stevens, J., concurring) ("[P]rolonged

congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo.").

Congress was also aware of the broader terms of the Johnson Act, 28 U.S.C. § 1342, which prohibits federal district courts from entertaining actions to "enjoin, suspend or restrain *the operation of, or compliance with*" public-utility rate orders made by state regulatory bodies. *Id.* (emphasis added); *see* S. Rep. No. 75-1035, at 2 (discussion of Johnson Act in TIA legislative history). If Congress had similarly prohibited federal courts from hearing challenges to "the operation of, or compliance with" state tax laws, the TIA's proscriptive scope would encompass a wider swath of lawsuits. Congress's failure to use similar language in the TIA further refutes the Tenth Circuit's notion that the TIA reaches both "lawsuit[s] that would directly enjoin a tax" and lawsuits that "would enjoin a procedure [that] * * * aims to enforce and increase tax collection" more generally. Pet. App. A-19.

Congress eschewed such language in favor of a narrow proscription against direct "interference only with those aspects of state tax regimes that are needed to produce revenue—*i.e.*, assessment, levy, and collection." *Hibbs* 542 U.S. at 105 n.7; *see also id.* at 104 ("Third-party suits not seeking to stop the collection * * * of a tax *imposed on plaintiffs* * * * were outside Congress' purview."). The Tenth Circuit opined that the phrase "restrain the * * * collection of any tax under State law" (*see* Pet. App. A-26) can be stretched to include suits, like Petitioner's, that seek to challenge only "the operation of" a particular

procedural facet of a State's tax scheme. But to accept the Tenth Circuit's overly broad conception of the TIA's scope would elide the words Congress chose with those that it rejected. *See Hibbs*, 542 U.S. at 105 n.7 (noting linguistic divide between Johnson Act and TIA).[3]

B. The Tenth Circuit's Expansive View Cannot Be Squared With This Court's Precedents.

The Tenth Circuit acknowledged that Petitioner's "lawsuit differs from the prototypical TIA case," Pet. App. A-18, because Petitioner is not a Colorado taxpayer and "Colorado consumers would still owe use taxes by law" "[e]ven if [Petitioner's] constitutional attack on the notice and reporting obligations were successful," *id.* Yet the court still held that the suit's "potential to restrain tax collection trigger[ed] the [TIA's] jurisdictional bar" because the suit might compromise "the state-chosen method to secure those taxes" from Colorado residents. *Id.* That broad conception of the TIA's scope runs headlong into this Court's decision in *Hibbs*, which made clear that the TIA applies "only in

[3] The Tenth Circuit's interpretation of the TIA's scope may extend beyond even the limits of a broader jurisdictional bar like that in the Johnson Act. The "Johnson Act * * * does not deprive the federal courts of jurisdiction to consider challenges to a state administrative agency's order that does not affect rates," *Evans v. New York State Public Serv. Comm'n*,, 287 F.3d 43, 46 (2d Cir. 2002), or bar federal courts from adjudicating federal statutory claims in cases implicating a public utility company's rate-making authority, *see GTE North, Inc. v. Strand*, 209 F.3d 909, 921-922 (6th Cir. 2000).

cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." 542 U.S. at 107.[4]

By minimizing this Court's considered guidance on the limits of the TIA's jurisdictional bar, the Tenth Circuit missed the mark in two respects. *First*, it dismissed this Court's pronouncement that the TIA does not apply outside of *taxpayer* suits seeking to reduce their *own* tax liability. *See* Pet. App. A-13-16. *Second*, it blurred the line between "tax collection" and general tax administration, thereby suggesting that the TIA bars federal-court review of any suit that would in any way "limit, restrict, or hold back the state's chosen method of enforcing its tax laws" rather than only suits seeking to decrease the amount of taxes owed. Pet. App. A-17-20. Both aspects of the Tenth Circuit's opinion conflict with this Court's precedents.

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[4] *See also, e.g., Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 425 (2010) ("The Act * * * 'restrain[ed] state taxpayers from instituting federal actions to contest their [own] liability for state taxes,' suits that, if successful, would deplete state coffers.") (second and third alterations in original) (citation omitted); Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 YALE L.J. 727, 730-731 (2005) ("*Hibbs* thus affirms a commonsense and longstanding exception to TIA preemption: The TIA does not preempt federal jurisdiction when the taxpayer is a third party who is not attempting to avoid payment of taxes.").

1. The TIA does not apply outside of suits by taxpayers seeking to reduce their own tax liability.

The Tenth Circuit acknowledged this Court's declaration in *Hibbs* that, in enacting the TIA, Congress intended to foreclose suits in federal courts by "taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority," Pet. App. A-12. The Tenth Circuit further recognized that this Court has interpreted and applied the TIA only in those cases Congress wrote the Act to address, *i.e.*, "cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *See id.* at A-13 (internal quotation marks omitted). But the Tenth Circuit nevertheless held that this Court's considered discussion of Congress's intent and the Court's practice of barring only tax-collection-impeding suits by taxpayers did not limit the scope of the TIA. Rather, it treated that discussion as an extended sidebar to the "key question" of "whether the plaintiff's lawsuit seeks to prevent the State from exercising its sovereign power to collect * * * revenues." *Id.* at A-15 (internal quotation marks omitted).

The Tenth Circuit's analysis of and attempt to distinguish *Hibbs* are inapt. The "upshot of *Hibbs*," Pet. App. A-15, is in fact precisely what the court of appeals determined it was not: "Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*" are not subject to the TIA's jurisdictional bar. 542 U.S. at 104. The pertinent lesson from *Hibbs*—confirmed by

the TIA's legislative history (*see* pp. 7-9, *supra*)—is that the "relationship between the body that imposed the tax * * * and the bodies that owe the tax" is a vital aspect of the analysis. *See BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 502 (6th Cir. 2008) (citing *Hibbs* in finding TIA inapplicable where plaintiff was not trying to avoid tax liability and suit did not interfere with relationship between taxpayer and State).

To be sure, *Hibbs* also made plain that for purposes of the TIA, "'giving away a tax credit is a very different thing than assessing, levying or collecting a tax,'" Pet. App. A-15 (quoting *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007)). But it did so through an overarching exposition on the limitations of the TIA that is at least as applicable here. *See Hibbs*, 542 U.S. at 101-110; *see also Lynch ex rel. Lynch v. Alabama*, 568 F. Supp. 2d 1329, 1344 (N.D. Ala. 2008), *aff'd in part sub nom. I.L. v. Alabama*, 739 F.3d 1273 (11th Cir. 2014) ("[T]he Court's intent [in *Hibbs*] appears to have been to use the unique circumstances of the case—a third-party challenge to a state tax credit—as a vehicle for limiting the application of the Act itself" to taxpayers.). Indeed, the case for application of the TIA was arguably stronger in *Hibbs* than it is in this case: the plaintiffs in *Hibbs* were at least Arizona taxpayers seeking to upend a facet of Arizona tax law; not, like Petitioner here, third-parties with no skin in the state tax game. 542 U.S. at 92.

2. The Tenth Circuit improperly conflated "tax collection" and general tax administration.

By asking whether Petitioner's suit had the potential to "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue," Pet. App. A-17, the Tenth Circuit also impermissibly expanded what it means for a lawsuit to "restrain the * * * collection" of state taxes, 28 U.S.C. § 1341. *See* Pet. App. A-17-20. The Tenth Circuit read tax "collection" under the TIA to sweep in any procedure that might encourage a State's taxpayers to pay the tax they owe or assist the State with undertaking potential enforcement measures, even if the procedure is only tangential to the tax-collection scheme and does not itself collect a tax or alter tax liability. *See id.* at A-19 ("The purposes of the TIA apply both to a lawsuit that would directly enjoin a tax and one that would enjoin a procedure required by the state's tax statutes and regulations that aims to enforce and increase tax collection. Either action interferes with state revenue collection and falls within the 'traditional heartland of TIA cases' that dismiss federal lawsuits to protect state coffers.").

This Court, however, has declined to read the TIA so broadly. As noted above (p. 6, *supra*), the Court in *Hibbs* made clear that "in speaking of 'collection,' Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution * * * that would produce money or other property directly, rather than indirectly through a more general use of coercive power." 542 U.S. at 109 (quoting *Wells*, 510 F.2d at 77) (alteration in original). In other words,

"Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them," *id.*, not challenges to more generalized aspects of a State's tax plan that might indirectly assist the State in collecting tax revenue. *See Wells*, 510 F.2d at 77 (rejecting as overbroad an interpretation of "tax collection" that would include "anything that a state has determined to be a likely method of securing payment."); *cf. United Parcel Service Inc. v. Flores-Galarza*, 318 F.3d 323, 331 (1st Cir. 2003) ("Not every statutory or regulatory obligation that may aid the Secretary's ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar."). In distinguishing prior suits barred by the TIA, the Court explained: "All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)"; none held that the TIA barred taxpayers (let alone anyone else) from using federal courts to challenge other "aspects of state tax administration" that did not directly impede a State's ability to collect tax revenue from its residents. *Hibbs*, 542 U.S. at 105, 106 (internal quotation marks omitted).

The Tenth Circuit acknowledged that Petitioner's challenge to Colorado's notice and reporting requirements would not directly prevent Colorado from collecting use taxes from its residents. Pet. App. A-18. It nevertheless held that the TIA barred the suit because, if successful, the "state-chosen method" of securing information that might facilitate collection of "those taxes would be compromised." *Id.*; *see also id.* at A-23 (noting that the "challenge[d] laws

[were] enacted to notify consumers of their duty to pay [use] tax and to garner information on consumer purchases to ensure tax compliance through audits"). The TIA, however, does not bar suits seeking to enjoin such "general use[s] of coercive power" just because they are bound up in a State's tax code. *See Hibbs*, 542 U.S. at 109; *cf. United Parcel Service*, 318 F.3d at 331. Instead, the challenged act of "collection" must be one that "would produce money or other property directly." *Hibbs*, 542 U.S. at 109. In other words, the lawsuit must be an attempt to sue first and pay later. As both the Tenth Circuit and Respondent confess, Petitioner's suit does not fit that bill. *See* Pet. App. A-18-19; Br. in Opp. 14.

That practical restriction on the TIA's scope, moreover, provides a crucial limiting principle that is otherwise lacking from the Tenth Circuit's interpretation of the Act's scope. All suits challenging a facet of a State's tax scheme necessarily "limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue" (Pet. App. A-17) to some extent. That is because all such suits call into question a State's considered judgment concerning from whom, and under what circumstances, tax revenue should be exacted. But this Court has made clear that notwithstanding "its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981) (internal quotation marks omitted), the TIA was never intended to insulate "all aspects of state tax administration" from federal court review, *Hibbs*, 542 U.S. at 105-106 (internal

quotation marks omitted). Tying the concept of "tax collection" to laws that directly result in tax liability and increased state revenue thus prevents the exception from swallowing the rule, and ensures that the TIA restricts federal-court review of cases involving a State's tax scheme only to the extent that Congress intended.

II. THE TENTH CIRCUIT'S UNPRECEDENTED RULE WOULD ENCOURAGE MORE JURISDICTIONAL TIA LITIGATION IN MULTIPLE CONTEXTS.

The Tenth Circuit's test for application of the TIA boils down to this: can a party (taxpayer or not) articulate some chain of effects that links federal equitable relief to a reduction in the amount of tax revenue a State collects, no matter how attenuated and irrespective of any legal effect on total tax liability. That test impairs important interests in easy-to-administer jurisdictional rules and fidelity to congressional intent to preserve the federal forum except as provided by the TIA's limited exception.

A. The Tenth Circuit's Indeterminate Approach Is Inconsistent With The Need For Clear Jurisdictional Rules.

As this Court has recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* They encourage forum shopping and

"gamesmanship," as well as impair the predictability that is critical to "corporations making business and investment decisions." *Id.*

The line drawn by the TIA, as interpreted by this Court in *Hibbs*, is simple and predictable: taxpayer suits seeking to avoid payment of state taxes through judicial relief that would reduce taxpayer liability must be brought in state court. *Hibbs*, 542 U.S. at 107. For other suits seeking to vindicate federal claims—even those touching upon "aspects of state tax administration"—the federal forum remains available. *Id.* at 105.

The Tenth Circuit's test, on the other hand, is neither simple nor predictable. The Tenth Circuit would have federal courts adjudicate whether federal judicial relief—that concededly does not change taxes due to the state treasury *at all*—might cause (non-party) taxpayers to pay less than what they owe or would otherwise pay. That would turn federal judges into armchair behavioral economists, wading into factual disputes about the likely behavior of taxpayer populations in response to the elimination of this or that incentive or ancillary tax-related procedure.

The Tenth Circuit elsewhere has recognized that when a suit would enjoin a particular tax, the TIA bars federal jurisdiction notwithstanding a party's predictive judgment that the injunction would actually *increase* state tax revenues overall. *See Hill*, 478 F.3d at 1250 (rejecting interpretation of TIA that would require "judges * * * to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections"). The

inverse is also true. When a suit challenges no state tax, and undisputedly would not alter any taxpayer's liability or obligation to pay (or even the required manner and timing of payment), it simply does not "restrain the * * * collection of any tax" within the meaning of the TIA.

B. The Tenth Circuit's Approach Would Encourage Unjustified Attempts To Avoid A Federal Forum.

Such unpredictability and complexity in applying the TIA is in no way required by the Act or its purpose. On the contrary, as this case demonstrates, the Tenth Circuit's rule encourages invocation of the TIA in cases that do not further Congress's desire to ensure that taxpayers do not seek federal-court intervention to nullify their state tax liability.

In so doing, the Tenth Circuit's rule could deprive businesses of a federal forum to hear federal-question disputes regarding state regulations, merely on the basis of some connection to state measures that encourage residents to pay their taxes. Suppose that a State imposed any number of burdensome regulations on commercial transactions with a State's consumers—for example, precluding businesses from completing sales, providing services, or delivering packages—unless the consumer provided evidence that he is up-to-date on his state taxes. *Cf. United Parcel Service*, 318 F.3d at 331-332 (holding that the Butler Act did not bar federal court review of a Puerto Rico law precluding common carriers from delivering packages unless customer provided evidence that excise taxes had been paid). That would likely incentivize consumers to pay their taxes,

but Congress did not intend the TIA so broadly to oust federal court review of such general business regulation. *See Hibbs*, 542 U.S. at 109. Under the Tenth Circuit's rule, however, States and private litigants would have every incentive to employ the TIA as a means of doing so.

Litigants have sought to stretch the TIA beyond its intended scope in other contexts as well. For example:

- Companies have faced TIA objections in First Amendment suits challenging state laws precluding them from informing customers of the amount of taxes included in the price of a given service, even though they did not dispute the obligation to collect or pay the tax. *See, e.g.*, *BellSouth*, 542 F.3d at 501-502; *Mobil Oil Corp. v. Dubno*, 639 F.2d 919, 922 (2d Cir. 1981). Defendants in such cases have sought to rely on their predictive judgments that informing consumers of the tax amount would somehow reduce state revenues. *See BellSouth*, 542 F.3d at 503.

- Private plaintiffs challenging an employer's tax-withholding practice have contended—relying in part on the Tenth Circuit's decision in this case—that the TIA bars removal to federal court despite conceding that the practice had no effect on the amount of state tax they owed or ultimately paid. Indeed, on appeal in that case, plaintiffs seek to undo a final federal court merits judgment on such tenuous TIA grounds. *See Fredrickson v. Starbucks Corp.*, 980 F. Supp. 2d 1227, 1233

(D. Or. 2013), *appeal docketed*, No. 13-36067 (9th Cir. Nov. 13, 2013).

Courts (other than the outlier Tenth Circuit), remaining faithful to the clear line drawn in *Hibbs*, have rejected such claims thus far. As the Sixth Circuit has explained, the TIA "does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have *some* negative impact on local revenues." *BellSouth*, 542 F.3d at 503-504. Were this court to adopt the Tenth Circuit's expansive approach, however, such invocations of the TIA would surely gain traction—at least with litigants eager to avoid a federal forum. Because much state business regulation has some revenue-raising aspect, adopting the Tenth Circuit's test would invite extensive and wasteful litigation over the indirect tax effects of lawsuits and risk allowing the TIA exception to swallow the general rule that a federal court should be available for federal claims.

* * * * *

The Tenth Circuit's interpretation of the TIA finds no support in the Act or its purposes, and if accepted, would expand the Act's scope in a way that conflicts with this Court's precedents and increases jurisdictional uncertainty across a variety of contexts. That is not a cost that businesses—particularly out-of-state businesses like Petitioner's or the Chamber's members—should have to bear.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted.

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