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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Direct Marketing Association's Rule 29.6 Statement was set forth at p. iii of the petition for a writ of certiorari, and there are no amendments to that statement.

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The Tenth Circuit's ruling below is at odds both with the intent of Congress in enacting the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), and with the decisions of at least two other circuits interpreting and applying its jurisdictional bar. Those conflicting circuit court decisions are not "outdated," as the Respondent contends, and have not been overruled or superseded, but rather have continuing vitality with regard to the exercise of federal court jurisdiction over state regulatory requirements that are, at most, indirect measures for promoting compliance with state tax laws. Nor is the doctrine of comity applicable in this case to eliminate the need for further review by the Court.

ARGUMENT

I. THERE IS A SPLIT AMONG THE CIRCUITS REGARDING THE APPLICATION OF THE TAX INJUNCTION ACT TO SECONDARY ASPECTS OF STATE TAX ADMINISTRATION.

In the proceedings below, neither the parties, nor the District Court perceived the TIA to bar the lower court's exercise of jurisdiction over DMA's constitutional challenge to Colo. Rev. Stat. §§ 39–21–112(3.5)(c) & (d) ("the Colorado Act") and 1 Colo. Code Regs. §§ 201–1:39–21–112.3.5(2), (3), & (4) ("the Regulations").[1] The Tenth Circuit Court of Appeals,

[1] The Respondent's explanation that she elected not to raise the TIA before the District Court in order to seek an expedited ruling on the constitutionality of the law is a curious, after-the-fact justification of her failure to assert the TIA in the lower court. *See* Respondent's Brief in Opposition ("Opp.") at 5–6 n.1. On its face, this explanation would suggest that the Respondent,

however, construed the reach of the TIA differently, disregarding the teachings of this Court's definitive ruling on the purpose and scope of the TIA in *Hibbs v. Winn*, 542 U.S. 88 (2004) and adopting an approach in acknowledged conflict with the First Circuit's decision in *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003) ("UPS"). The Tenth Circuit's ruling is also demonstrably at odds with the Second Circuit's authoritative decision in *Wells v. Malloy*, 510 F.2d 74 (2nd Cir. 1975). *See generally* App. A-1 – A-33. (Tenth Circuit ruling).

The Respondent asserts, however, that there is no conflict among the Circuit Courts of Appeals because *UPS* and *Wells* are purportedly "outdated" authorities on which the DMA relies solely to manufacture an apparent split among the circuits. Opp. at 9, 16. In arguing that the Court should therefore decline to issue a writ of certiorari, the Respondent fails to acknowledge the Tenth Circuit's own treatment of *UPS* and *Wells*. Moreover, the Respondent's contention that *UPS* and *Wells* have been superseded by later cases is contradicted by numerous decisions—including, with regard to *Wells,* this Court's opinion in *Hibbs*—which demonstrate that *UPS* and *Wells*

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aware of what she believed to be a fundamental limitation on the District Court's jurisdiction, nevertheless chose not to bring the matter before the court for decision, and instead sought a ruling from a court that she believed had no jurisdiction to act. Notwithstanding the Respondent's newly-presented explanation for her failure to seek dismissal on TIA grounds below, the Respondent's actions in the lower courts demonstrate that, like the DMA and the District Court, the Respondent simply did not perceive the TIA to be a bar against the exercise of federal court jurisdiction in this case, prior to the entry of the Tenth Circuit's decision.

each remain controlling authority in their respective circuits regarding the proper application of the TIA as it applies to secondary aspects of state tax administration.

A. The Tenth Circuit Declined To Follow The First Circuit's Decision In *UPS* Precisely Because *UPS* Conflicts With Tenth Circuit Authority.

Although the Respondent asserts that there is no conflict between the decision below and the First Circuit's decision in *UPS*, the Tenth Circuit in its ruling expressly disagreed with the reasoning of *UPS* and declined to follow it. App. at A-22. The circuit conflict is manifest, as even the Tenth Circuit acknowledges.

UPS concerned a challenge by a non-taxpayer (the common carrier UPS) to a notice and reporting regime similar in many respects to the Colorado Act. *See UPS,* 318 F.3d at 326–27 (describing reporting obligations imposed on carriers). The Puerto Rico Secretary of Treasury sought dismissal of the suit filed by UPS under the Butler Act, 48 U.S.C. § 872, the Puerto Rico analog to the TIA. *Id.* at 330. The First Circuit held that the Butler Act did not apply. *Id.* at 330–31. The Court found that in challenging the notice and reporting obligations, UPS did not contest either the validity of the underlying tax due from consumers receiving packages delivered by UPS, or the Secretary's authority to collect the tax. *Id.*

In declining to follow the *UPS* decision, despite the close similarities between it and the DMA's chal-

lenge in this case, the Tenth Circuit explained that "[m]uch of *UPS*'s reasoning *conflicts with our own binding case law*." *Id.* (italics added). Thus, according to the Tenth Circuit, and contrary to the Respondent's contention, the decision below not only conflicts with *UPS*, it serves to reinforce a deep and demonstrable split in authority between the Tenth Circuit's understanding of the TIA and the First Circuit's interpretation of the proper exercise of jurisdiction under a parallel federal statute restricting jurisdiction in tax cases.

The Respondent further asserts that *UPS* is not at odds with the Tenth Circuit's ruling in this case because *UPS* has supposedly been "superseded" by subsequent decisions of the First Circuit. Opp. at 18. No First Circuit case, however, including none of those cited by the Respondent, has overruled, abrogated, or even distinguished *UPS*. To the contrary, the later First Circuit decisions referenced by the Respondent each cited *UPS* in explaining the proper application of the TIA.

For example, in *Pleasures of San Patricio, Inc. v. Mendez-Torres*, 596 F.3d 1 (1st Cir. 2010) the First Circuit relies upon *UPS* for the proposition that "[n]ot every statutory or regulatory obligation that may aid the Secretary [of the Treasury]'s ability to collect a tax is immune from attack in federal court by virtue of the Butler Act's jurisdictional bar." 596 F.3d at 5–6 (quoting *UPS* 318 F.3d at 331). The Court next reproduces a passage from *UPS* that in turn quotes the Second Circuit's opinion in *Wells v. Malloy*, discussed *infra*, for the proposition that federal court jurisdiction is not foreclosed by the TIA in suits challenging state regulations that are only indi-

rectly related to the payment of state taxes. *See id.* (quoting *Wells*, 510 F.2d at 77).

Likewise, in *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3 (1st Cir. 2009), *abrogated in part by Levin v. Commerce Energy*, 560 U.S. 413 (2010), the First Circuit cited *UPS* and made no reference to limiting or superseding it. 562 F.3d at 13. Moreover, the *Coors* Court held that the TIA did not apply in that case based on *Hibbs* finding that the TIA applies "only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 14. Therefore, nothing in either *San Patricio* or *Coors*, or any other First Circuit decision, suggests that *UPS* is no longer good law.

B. The Second Circuit's Decision In *Wells* Is Not Outdated, Although It Is Fundamentally At Odds With The Decision Below.

The Respondent likewise fails to explain away the conflict between the Tenth Circuit's decision below and the Second Circuit's ruling in *Wells v. Malloy*. Emphasizing that *Wells* was decided in 1975, the Respondent asserts that other courts have criticized *Wells* as "outdated." Opp. at 18. As support for this assertion, the Respondent cites a Third Circuit decision from 1982. *Id.* (*citing Sipe v. Ameranda Hess Corp.*, 689 F.2d 396, 403 (3d Cir. 1982)).

The Respondent, however, fails to explain that both this Court in *Hibbs*, 542 U.S. at 109, and the Second Circuit in its more recent ruling in *Luessenhop v. Clinton County, N.Y.,* 466 F.3d 259, 268 (2nd Cir. 2006), cite *Wells* as an authoritative source re-

garding proper interpretation of the TIA. Indeed, as the Second Circuit noted in *Luessenhop*, Judge Friendly in *Wells* examined the same legislative history that this Court later reviewed in *Hibbs*, and reached a similar conclusion regarding its meaning, *i.e.*, that Congress' central purpose in enacting the TIA was to restrict jurisdiction over suits brought by taxpayers challenging their liability for state taxes. *Luessenhop*, 466 F.3d at 265.[2]

In *Luessenhop*, the Second Circuit relied on both *Wells* and *Hibbs* to guide its understanding of the language and purpose of the TIA. *Luessenhop*, 466 F.3d at 264–66. The Court noted that *Wells* found "persuasive evidence" in the Act's legislative history that Congress sought to limit jurisdiction over suits by taxpayers "going to the validity of the particular taxes imposed upon [them]." *Id.* at 266 (citing *Wells,* 510 F.2d at 77) (brackets added). *Hibbs*, it found, reached a similar conclusion. *Id.* Although the suit before the Court in *Luessenhop* was not directly analogous to *Wells* on its facts, the Second Circuit nonetheless found *Wells* to be instructive on the purpose and scope of the TIA. *Id.* at 268.

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[2] The Respondent, in arguing that the Tenth Circuit's decision below is consistent with *Hibbs* and with prevailing authority from other circuits, fails to discuss this Court's comprehensive review of legislative history of the TIA in *Hibbs.* The Court's definitive ruling in *Hibbs* concerning the intent of the TIA, largely disregarded by both the Respondent and the Tenth Circuit, remains the proper foundation for lower court decisions regarding the scope of the Act. *See, e.g., Laborde v. City of Gahanna*, -- Fed.Appx. --, 2014 WL 1282546, at*3 (6th Cir. Apr.1, 2014) ("The TIA does not bar all federal court challenges to state and local tax policies, but only those in which the taxpayer seeks to avoid a tax obligation") (citing *Hibbs*, 542 U.S. at 99–100).

Other courts also continue to cite *Wells* as an authoritative source regarding the proper interpretation of the TIA, including with regard to the appropriate limits on the scope of the Act's jurisdictional bar. *See, e.g., Berjikian v. Franchise Tax Bd.*, 2014 WL 690211, at * 2 (C.D. Cal. Feb. 20, 2014) (the TIA does not bar suit brought by taxpayer who does not challenge the validity of the tax imposed but challenges the sanction of state license revocation for non-payment of the tax); *Pickell v. Sands*, 2012 WL 6047286, at *5–6 (E.D. Cal. Dec. 5, 2012) (same); *Four K. Group, Inc. v. NYCTL 2008-A Trust*, 2013 WL 1562227, at *5 (E.D.N.Y. Apr. 15, 2013) ("[In enacting the TIA], Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of particular taxes imposed upon them.") (quoting *Wells,* 510 F.2d at 77) (brackets in original).

Not even the Tenth Circuit itself, in its decision below, agrees with the Respondent's contention that *Wells* is outdated. To the contrary, the Tenth Circuit purports to endorse *Wells'* conclusion that the TIA does not bar "any action challenging a state law that could possibly secure tax payment." *See* App. at A-23. The Court then seeks to distinguish *Wells*, but as the DMA demonstrated in its petition, the Tenth Circuit's decision is at odds with the reasoning of *Wells*. *See* Pet. at 21–22.

In sum, the Respondent's assertion that *Wells* is not in conflict with the Tenth Circuit's ruling because

it is "outdated" and no longer properly represents controlling Second Circuit authority is incorrect.[3]

II. THE COMITY FACTORS OF *LEVIN V. COMMERCE ENERGY* ARE NOT PRESENT IN THIS CASE.

The Respondent also urges the Court to deny the DMA's petition based on the doctrine of comity, as recently discussed by the Court in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). As demonstrated by the DMA in its petition (at 24–27), however, the principles of comity do not foreclose federal court jurisdiction over the DMA's claims. The Respondent's counter-arguments fail to demonstrate that comity applies.

In order for comity to dictate dismissal of the DMA's suit, no single *Levin* factor alone is sufficient; rather, it is the "confluence" of all the factors, taken together, that "demand[s] deference to the state adjudicative process." *Levin*, 560 U.S. at 431–32 (brackets added). Of "key importance" is the third factor, *i.e.,* whether the claims in question afford al-

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[3] The Respondent's citation to other circuit court rulings that it contends are consistent with the Tenth Circuit's decision below, *see* Opp. at 20–22, even assuming they are on point, serves only to highlight the existence of a conflict among the circuits. *See also I.L. v. Alabama*, 739 F.3d 1273, 1283 (11th Cir. 2014) (noting that the scope of the TIA remains "somewhat unsettled" even after *Hibbs*). To the extent that there are other courts that share the Tenth Circuit's view, and conflict with prevailing authority in the First and Second Circuits, the need for this Court to clarify the proper application of the TIA to suits challenging secondary aspects of state tax administration that neither impose a tax, nor require the collection of a tax, is that much more acute.

ternative forms of possible relief by a reviewing court. *Id.* at 426–28. The Respondent argues that there are multiple possible remedies because a Colorado state court could "sever any discrete portion of Colorado's law that is held constitutionally infirm." Opp. at 24–25.

Severance, however, is not an option unique to state courts, but is equally an approach that a federal court would have an obligation to examine, if it concluded that only a portion of the notice and reporting obligations of the Colorado Act was unconstitutional. *See Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 330–31 (2006) (in finding that a portion of a state law is unconstitutional, court must ask whether severance is appropriate). In any event, the Respondent's severance argument fails to address the fundamental point made by the DMA that if any of the notice and reporting requirements is held to be unconstitutional, they must be suspended. *See* Pet. at 25–26. Since the third, and most important, *Levin* factor is absent, comity does not apply.

The Respondent's arguments regarding the other two *Levin* factors are equally unavailing. Respondent claims, with regard to the second factor, that the DMA's suit seeks to enlist "federal-court aid in an endeavor to improve [its members'] competitive position." Opp. at 24 (citing *Levin*, 560 U.S. at 431). To the contrary, the DMA seeks the assistance of the federal court to prevent the State of Colorado from imposing unconstitutional regulatory requirements upon its affected members, not to shield them from competition from retailers that collect Colorado sales tax (a category which includes both in-state retailers

and those remote sellers that are required or elect to collect Colorado sales tax).

Finally, the Respondent claims that deference to the state courts is due because the DMA's suit concerns commercial matters, as to which the state has wide latitude, and not any fundamental right. Opp. at 23–24. The Court in *Levin*, however, noted that retention of federal court jurisdiction is appropriate in cases involving "economic rights that employ classifications subject to heightened scrutiny *or* impinge on fundamental rights." 560 U.S. at 426 (italics added). The Colorado Act, on its face, imposes different obligations on out-of-state retailers than it imposes on in-state, Colorado retailers, thus triggering "strict scrutiny" under established Commerce Clause jurisprudence. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) (facially discriminatory laws are subject to scrutiny so stringent that facial discrimination may itself be a "fatal defect").[4] Federal courts need not give deference to state courts when reviewing state laws that discriminate against interstate commerce on their face. For all these reasons, the doctrine of comity is not applicable in this case.

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[4] It is also worth noting that the DMA's Complaint alleged causes of action under multiple constitutional provisions, including violation of the First Amendment's right to freedom of speech, although the parties agreed to litigate the DMA's Commerce Clause claims to their conclusion before addressing other claims. *See* C.A. Appx. 46-82 (Amended Complaint), 1677–79 (parties agreement to proceed to judgment on Commerce Clause claims). Thus, the DMA's complaint against the Colorado Act did include allegations that the fundamental rights of both its members and their customers were violated by the Act.

IV. THE PROCEDURAL HISTORY AND POSTURE OF THIS CASE EMPHASIZE THE NEED FOR THE COURT TO ACCEPT REVIEW.

Finally, the Respondent suggests that the Court should decline review because the parties are now litigating the Commerce Clause claims before a state court in Colorado, which has preliminarily enjoined enforcement of the Colorado Act. Opp. at 7–8, 26. Rather than counselling non-involvement by the Court, the continuing proceedings in state court only emphasize the need for the Court to provide further guidance regarding federal court jurisdiction over claims, such as the DMA's, challenging secondary aspects of state tax administration. Although neither party, nor the federal District Court, perceived the TIA as imposing a jurisdictional barrier, both the parties and the courts have now invested substantial and duplicative resources for over three years without reaching a definitive ruling on the important constitutional questions at the heart of the case. Issuance of a writ of certiorari will allow the Court to provide increased clarity regarding the proper application on the TIA in future suits so that jurisdictional uncertainties do not unduly interfere with reaching a prompt and efficient resolution on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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