No. 12-1175

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE DIRECT MARKETING ASSOCIATION,

Plaintiff-Appellee,

v.

BARBARA BROHL, IN HER CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE,

Defendant-Appellant.

On Appeal from the United States District Court
For the District of Colorado

The Honorable Judge Robert E. Blackburn
D.C. No. 10-cv-01546-REB-CBS

CORRECTED BRIEF AMICUS CURIAE OF MULTISTATE TAX COMMISSION IN SUPPORT OF

BARBARA BROHL, IN HER CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE, IN FAVOR OF REVERSAL

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## INTEREST OF THE AMICUS[1]

*Amicus Curiae* Multistate Tax Commission (Commission) respectfully submits this brief in support of Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue (Colorado). The Commission agrees with Colorado that its use tax notice and reporting statute, §39-21-112(3.5) C.R.S. (2010), is neither discriminatory nor unduly burdensome within the meaning of the dormant commerce clause. The District Court erred by failing to afford Colorado the presumption of constitutionality to which all state statutes are entitled, and its decision should be reversed.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum of seven states had enacted it. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq*., (2005). The U.S. Supreme Court upheld the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), and today forty-seven states and the District of Columbia

[1] No counsel for any party authored this brief in whole or in part. Only *Amicus Curiae* Multistate Tax Commission and its member states through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state other than Colorado.

participate in the Commission. Nineteen of those jurisdictions have adopted the Compact by statute.[2]

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. *Multistate Tax Compact*, Art. I. These purposes are central to the Compact which was the states' answer to the need for reform in state taxation of interstate commerce. *See, H.R. Rep.* No. 89-952, Pt. VI, at 1143 (1965) *and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966). If the states failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate important aspects of state taxation.

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2 *Compact Members*: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, New Jersey, South Carolina and West Virginia. *Associate Members*: Arizona, California, Connecticut, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming.

Preservation of state tax sovereignty under our vibrant federalism remains a key purpose of the Compact and the Commission. The importance the Commission attaches to the present case, and our motivation in filing this brief, lies in this goal of preserving states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that clearly required by the Constitution or mandated by Congress.

Our interest is particularly acute in this case because it questions states' authority to address one of today's most significant challenges in state sales and use tax administration: that sellers who do not have a physical presence in a state, other than through the U.S. mail or common carrier, cannot be required to collect that state's sales or use tax on their in-state sales. *National Bellas Hess, Inc. v Department of Revenue of Ill.,* 386 U.S. 753 (1967). As a result, sales or use tax is uncollected on a little more than 4 percent of e-commerce sales. Donald Bruce, William F. Fox & Le Ann Luna, *State and Local Sales Tax Revenue Losses from E-Commerce,* 52 ST. TAX NOTES 537, 542 (2009). The amount of uncollected sales and use tax for states and local governments related to e-commerce sales is "expected to grow from \$8.6 billion in 2010 … to \$11.4 billion in 2012." Bruce, Fox, and Luna at 540. Given that 23% of state and local revenue in fiscal 2008 consisted of sales and use taxes, this is not a revenue loss that the states can afford to ignore. Joel Griffiths, *Use It or Lose It: State Approaches to Increasing Use-Tax Revenue,* 60 KANSAS L. REV. 649, 650 (2012).

Tax administrators have recommended states consider addressing this problem, in part, by adopting use tax notice and reporting requirements similar to Colorado's. Robert

Plattner, Daniel Smirlock, and Mary Ellen Ladouceur, *A New Way Forward for Remote Vendor Sales Tax Collection*, Tax Analysts Special Report, January 18, 2010, p. 187, 194. Since 2010, when Colorado introduced its legislation, "use tax notice" legislation has been introduced in at least ten states and enacted in five.[3] And the Commission has now undertaken a project to develop a model uniform use tax notice and reporting statute. If adopted, the Commission's model would assist states that wish to consider this concept in adopting more uniform legislation, which would help to minimize any administrative burdens on interstate sellers.

Colorado's legislation is entitled to a presumption of constitutionality. And when that presumption is properly applied, it is clear that the legislation does not discriminate against or unduly burden interstate commerce. The expansive interpretation of the dormant Commerce Clause suggested by DMA would preempt this reasonable state

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[3] Introduced:

*Alabama* – HB 365 (2011); *Arizona* – HB 2341(2011); *California* – AB 155 (2010); *Colorado* – HB 1193 (2010); *Hawaii* – HB 1183 (2010); *Maine* – LD 469 (2011) ; *Oklahoma* – HB 2359 (2010); *South Carolina* – SB 36 (2011); *South Dakota* – SB 146 (2011); *Vermont* H 436 (2011, sec. 36b)

Enacted:

*Colorado* – §39-21-112(3.5), C.R.S. (2010) (notice and annual reports to purchaser and Department); *Oklahoma* –Ok. Stat. **§**710:65-21-8 (notice requirement only); *South Carolina* – S.C. code ann. § 12-36-2691(E)(1) (requires notice by an entity that qualifies for a "distribution facility" nexus safe-harbor); *South Dakota* – SB 146 (2011) (notice required); *Vermont* – 32 V.S.A. § 9783 (authorizes associate nexus after 15 states have adopted such approach; in the meantime, requires remote sellers to notify customers of possible use tax responsibility) response to a significant administrative problem faced by every one of the forty-five states with a sales and use tax.

## ARGUMENT

### I. Colorado's Legislation is Entitled to a Presumption of Constitutionality

The District Court erred by failing to afford Colorado's use tax notice and reporting legislation the presumption of constitutionality to which all state statutes are entitled. *McDonald v. Board of Elections Comm'rs.,* 394 U.S. 802, 809 (1969); *Eaton v. Jarvis Products Corporation,* 965 F. 2d 922, 929 (CA 10 1992); *Hopkins v. Oklahoma Public Employees Retirement System,* 150 F. 3d 1155, 1160 (CA 10 1998). The United States Supreme Court has long defined the high bar that challenges to state legislation must exceed in order to establish that the legislation is unconstitutional:

> We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.

*N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

Further, the Supreme Court has made clear that the courts are to view constitutional challenges to a state tax legislation, whether based on the commerce clause or on the equal protection clause, "with the skepticism due respect for legislative choices demands." *Levin v. Commerce Energy, Inc.,* 130 S. Ct. 2323, 2333 (2010). This is a corollary of the firmly embedded principle that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky,* 309 U.S. 83, 88 (1940). The U.S. Supreme Court has consistently recognized that the states' taxing powers, including tax administrative powers, provide a crucial component of sovereignty necessary to support our federal system:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the *modes adopted to enforce the taxes levied should be interfered with as little as possible*.

*National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995), quoting *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871) (emphasis added)

There are three traditional justifications for presuming a statute to be constitutional. F. Andrew Hessick, *Rethinking the Presumption of Constitutionality,* 85 NOTRE DAME L. REV. 1447, 1461 (2010). First, the presumption shows due respect to legislators, who are as bound to support the Constitution as are judges. *Id.* Second, the presumption promotes republican principles by preventing courts from interfering with decisions rendered by the legislature. *Id.* Third, the presumption recognizes the reality that the legislature is better equipped than the courts to resolve facts. *Id.*

The District Court ignored this most basic principle of constitutional adjudication. The Court did not even mention the presumption of constitutionality in its discussion of the applicable standard of review. Instead, the Court proceeded to analyze the legislation wholly unmoored from the relevant body of jurisprudence that is required for that analysis. As a result, no attempt was made to compare the Colorado collection burden against the Colorado notice and reporting burden. Such a comparison is essential as the foundation of a discrimination analysis. Nor was any attempt made to compare the

Colorado notice and reporting burden to the 1992 North Dakota use tax collection burdens, which is the only way to determine whether the Colorado notice and reporting burdens rise to the level of the undue burdens that were prohibited under *Quill.*

The District Court should have given great weight to the Colorado legislature's assessment of these relative burdens imposed by its state's laws. But not only was no deference provided, virtually no attempt was made to weigh these burdens at all. To assess discrimination, the District Court made no comparison at all to the relative burdens imposed on in-state and out-of-state retailers. To assess undue burden, the District Court merely looked to *Quill* – a twenty year old case that considered the burden imposed on interstate commerce in 1992 by North Dakota's use tax collection requirements– and summarily found that the Colorado notice and reporting burdens must also be unduly burdensome because they are "inextricably related in kind and purpose" to those condemned in *Quill."* Slip Op. at 8 and 17.

The Court's reasoning demonstrates a failure to recognize any of the three rationales behind the presumption of constitutionality. First, the opinion does not even purport to give deference to the legislature's judgment; the legislation is conclusively presumed to be unconstitutional because retailers that are not required to collect the tax (out-of-state retailers with no physical presence) are required to report, while retailers that are required to collect the tax (out-of-state retailers with a physical presence and in-state retailers) are not required to report. No effort is made to balance these requirements. Second, the court interfered with the decision of the legislature by substituting its own judgment that the legislation was unnecessary, and did so by enjoining the entire statute before it even went into effect. Third, the court failed to recognize that it was in an inferior position to evaluate the respective burdens imposed under Colorado law. The Colorado legislature was in the better position to make that factual determination, and enacted a statute that imposes very minimal notice and reporting requirements on non-collecting retailers, in comparison to the more extensive obligations imposed on collecting retailers.

The court's failure to appreciate the rationales behind the presumption of constitutionality is not a mere intellectual error. As the Commission demonstrates in section II, below, the Colorado legislation is a reasonable approach to the significant use tax compliance gap associated with sales transaction by sellers that do not collect the tax. The compliance gap is a national problem that adversely affects all forty-five states (and the District of Columbia) with a sales and use tax. The problem is extensive and the lost revenue, significant. Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Sales Tax Revenue Losses from E-Commerce,* 52 ST. TAX NOTES 537, 542 (2009).

Clearly, state legislatures have a right, indeed an obligation, to preserve their tax base through whatever reasonable enforcement and education measures that it – not the District Court – deems most effective and least burdensome. "While 'revenue generation is not a local interest that can justify *discrimination* against interstate commerce,' …it is a cognizable benefit for purposes of the *Pike* test [determining whether the requirement is unduly burdensome.]" *United Haulers Assoc., Inc. et al. v. Oneida-Herkimer Solid Waste*

*Management Authority et. al.,* 550 U.S. 330, 346 (2007) (emphasis in original) *quoting from C & A Carbone, Inc. v. Clarkstown,* 511 U.S. 383, 393 (1994).

This is the context within which the District Court's failure to afford a presumption of constitutionality must be measured. As the Commission will develop in the remainder of the brief, the District Court's failure to afford a presumption of constitutionality caused it to neglect the relevant comparisons, to substitute its judgment for that of the Colorado legislature, and to analyze the Colorado legislation under an excessively restrictive standard contrary to the well-developed and clearly articulated commerce clause principles enunciated by the United States Supreme Court.

## II. Colorado's Legislation Is Not Unconstitutional Under the Dormant Commerce Clause

The purpose of the commerce clause is to effectuat[e] the Framers' purpose to 'prevent a State from retreating into [ ] economic isolation.'" *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330 (1996) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* 514 U.S. 175, 180 (1995). This purpose informs the application of the dormant commerce clause, which is focused on structural concerns about the effects of the challenged state regulation on the national economy. *Quill Corp. v. North Dakota,* 504 U.S. 298, 312 (1992). Accordingly, the role of the dormant commerce clause is to "prohibit[ ] discrimination against interstate commerce and bar[ ] state regulations that unduly burden interstate commerce." *Quill Corp. v. North Dakota,* 504 U.S. 298, 312 (1992)(citations omitted) . The Colorado legislation neither discriminates against nor unduly burdens interstate commerce, and if anything, it was intended to, and would "promote[ ] free private trade in the national market place." *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-274 (1988).

**A. The Legislation Does Not Discriminate**

**1. The District Court's Analysis was Incomplete**

The District Court found Colorado's legislation to be discriminatory in violation of the dormant commerce clause because it imposes "a notice and reporting burden on out-of-state [non-collecting] retailers and that burden is not imposed on in-state [collecting] retailers." Slip Op., at 10. The court ignored the fact that Colorado law imposes numerous alternate requirements on the "in-state retailers," including notice and reporting requirements that are analogous to, and more burdensome than, those imposed on "out-of-state retailers."[4] These alternate burdens must be compared in order to determine whether the measure is "designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 273-274 (1988). When the obligations imposed on out-of-state retailers are properly

[4] Not all collecting retailers are "in-state retailers." Likewise, not all "out-of-state retailers" are non-collecting retailers. Many "out-of-state retailers" have a physical presence, and thus have a nexus with the state sufficient for the state to require collection of its use tax. The Colorado legislation differentiates between collecting retailers and non-collecting retailers. Nonetheless, for simplicity sake we will generally use the terminology adopted by the District Court, and refer to "non-collecting" retailers synonymously with "out-of-state retailers" and "collecting retailers" synonymously with "in-state retailers."

compared to those imposed on in-state retailers, it is clear that the legislation is not discriminatory within the meaning of the dormant commerce clause.

### 2. A Complete Analysis Shows the Legislation Is Not Discriminatory

The United States Supreme Court has made clear that differential treatment between in-state and out-of-state economic interests is not in and of itself discriminatory. Rather, discrimination under the dormant commerce clause requires "differential treatment of in-state and out-of-state economic interests that *benefits the former and burdens the latter*." *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786, 1793 (2007) (emphasis added)*; Oregon Waste Sys. v. Department of Environmental Quality, 511 U.S. 93, 99 (1994); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988).* The District Court notes that differential treatment alone is not discriminatory under the dormant commerce clause. Slip Op., at 10. But the Court then misstates the applicable law by saying that this is true "only when analyzing a statute that regulates evenhandedly and has only indirect effects on interstate commerce." *Id.*

In this case, there is no discrimination between in-state and out-of-state interests, despite differential requirements, because Colorado laws do not "benefit[] the former and burden[] the latter." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 338 (2007). Colorado laws require in-state retailers to *collect* the tax. Collection entails many complicated obligations; including, but not limited to, various notices and reporting obligations. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.* 386

U.S. 753, 759-760 (1967)*See also* Table 1. Colorado law does not require out-of-state retailers to collect the tax and these retailers do not face those complicated collection obligations. The requirements imposed on out-of-state retailers as an alternative to collection – notice and reporting - may not be identical to the collection requirements that are imposed on in-state retailers, but when the two sets of requirements are examined in their entirety, it is clear that the statutory scheme as a whole confers no net benefit on in-state retailers at the expense of out-of-state retailers.

The Colorado legislation imposes three "burdens" on non-collecting, out-of-state retailers that sell tangible personal property to Colorado customers. First, the non-collecting, out-of-state retailer must provide its Colorado customer with a "Transactional Notice" at the time of sale, informing the customer that the retailer does not collect Colorado sales or use tax and that, as a result, the purchaser may be obligated to self-report and pay use tax to the Colorado Department of Revenue.[5] Second, the non-collecting, out-of-state retailer must provide each Colorado customer an annual purchase summary if those purchases totaled more than $500.[6] The Annual Purchase Summary summarizes the customer's previous calendar year purchases, and informs the customer that the retailer is required by Colorado law to report the customer's name and the total amount of the customer's purchases to the Colorado DOR. Third, the non-collecting, out-of-state retailer is to provide the DOR with an annual report (the "Customer

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[5] Colo. Rev. Stat. §39-21-112 (3.5).
[6] *Id.*

Information Report"), that states the purchaser's name, billing address, shipping address and the total amount of purchases from the retailer for the previous calendar year.[7]

Notably, nothing in the Colorado legislation in any way obligates the non-collecting, out-of-state retailer to determine whether tax is in fact due or the amount of such tax. Nor does any provision of the legislation require the non-collecting, out-of-state retailer to determine whether local use tax should be reported to any locality in Colorado. All tax calculations remain the obligation of the Colorado consumer. Furthermore, the obligations imposed by the legislation for the Annual Purchase Summary and the Customer Information Report are essentially the same; the former is provided the customer and the latter is provided to the state, but in substance they are virtually identical. The content required for these two reports consists of information that the retailer already has; the legislation in no way requires the retailer to gather any information that it would not already have within its possession.

The legislation does impose some costs on out-of-state, non-collecting retailers that these retailers would not incur in its absence. But the District Court failed to consider that in-state retailers bear greater burdens in meeting their obligations to calculate, charge, collect, report and remit sales tax. When these collection-related burdens are compared to the burdens imposed on non-collecting, out-of-state retailers, it is clear that in-state retailers incur burdens in excess of those imposed on non-collecting, out-of-state retailers.

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[7] *Id.*

First and foremost, unlike non-collecting, out-of-state retailers, Colorado in-state retailers are required to determine whether each sale is subject to state *and* Colorado local option sales tax, at the time of sale.[8] If so, the retailer must determine the applicable state and local tax rates, calculate the tax, collect the tax at the time of sale, and report the tax collected to the consumer.[9] For local option sales tax, the retailer must source the sale to the applicable taxing jurisdiction. The retailer must determine whether the sale, or the customer making the purchase, is exempt from sales tax. If so, the retailer must request an exemption certificate and document the basis for not charging and collecting tax. The collecting retailer must then file a monthly return for the previous month in which the tax was accrued, unless it receives approval from the DOR to file less frequently. In preparing its return, an in-state retailer must account for any credits, discounts or rebates that would reduce the tax base, provided it has documented the relevant transactions. Finally, the in-state retailer must keep and maintain all sales and use tax records for at least three years. The records must be maintained on a monthly basis and include all sales in books or accounts that determine tax liability. Colorado in-state retailers are then subject to audit to determine any tax deficiency. The collecting retailer is liable for any deficiency determined on audit (after protest and litigation, if any), including penalty and interest.

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[8] Again, the legislation imposes no requirements whatsoever on non-collecting, out-of-state retailers regarding local option sales taxes.

[9] The attached Table 1 – DUTIES OF COLLECTING, IN-STATE RETAILERS VS. DUTIES OF NON-COLLECTING, OUT-OF-STATE RETAILER – summarizes the relative duties imposed, with statutory citations.

Clearly, the collection burdens imposed on Colorado in-state retailers by the Colorado sales tax law outweigh the burdens imposed on non-collecting, out-of-state retailers by the legislation.[10] In fact, *Quill* referred to the collection burden as an "undue" burden on out-of-state retailers, so much so that the court would allow these collection related burdens to be imposed only if those out-of-state retailers had a physical presence. As we show below, the notice and reporting burdens imposed on non-collecting, out-of-state retailers are minimal in comparison to the undue collection burdens considered by the Court in *Quill.*

The Supreme Court has long held that it is appropriate to weigh the benefits and burdens of sales and use taxes together, because the use tax is a complementary or compensatory tax designed to reduce or eliminate the incentive for local residents to make their purchases out-of-state so as to avoid the sales tax at the expense of both the state treasury and local merchants. In explaining why a state may constitutionally impose a use tax on the use of property that was previously purchased out of state without offending the commerce clause, the Court made clear that it appropriate for a state to impose a companion use tax, compensating for sales tax, as long as the burdens of the

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[10] Colorado does allow a vendor collection discount for retailers that are fully compliant with their tax collection and reporting obligations. Colo. Rev. Stat. §39-26-105(1)(g). However, this case was decided on cross motions for summary judgment. The record is devoid of any evidence of the extent to which this amount compensates Colorado collecting retailers for their collection costs. The burden of proof necessary to overcome the presumption of constitutionality is on DMA and DMA has not attempted to show that its costs of compliance exceed those of collecting retailers.

sales tax and the use tax are equal. There is no requirement that the burdens be identical, and the burdens imposed by the sales and use tax clearly are not identical. The requirement is that the resulting burdens on interstate commerce are not greater than those imposed on instate sellers.

The Supreme Court explained that the use tax is constitutional, even though it only applies to interstate sales, because the burdens it imposes are comparable to, even though not the same as, those imposed on instate sales:

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates… 'There is no demand in (the) Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.'
> *Henneford v. Silas Mason Co.,* 300 U.S. 577, 584 (1937). (emphasis added)

As the District Court notes, the obligation to pay either the sales or use tax is on the consumer. Slip Op., at 5. It is clear that the purposes of the Colorado legislation are to educate the consumer as to his or her obligation to pay use tax directly to the Department if it is not collected by the retailer, to provide him or her with the information necessary to calculate any use tax that is due, and to inform the state as to the amount of purchases that may be subject to use tax. These purposes directly further the policies undergirding a compensatory use tax, as recognized in *Henneford,* "to avoid the likelihood of a drain upon the revenues of the state." *Henneford,* 300 U.S. 577, 581.

*Quill* allows non-collecting retailers a competitive *advantage* in avoiding the administrative costs of collecting the use tax and a further perceived competitive advantage in not being required to include the tax in the price of the item at the time of sale. But *Quill* should not be expanded to allow non-collecting retailers a further competitive advantage by denying the state a lawful means of enforcing the collection of use tax from a Colorado customer. In protecting out-of-state retailers from an undue collection burden, the Supreme Court did not mean to further skew the playing field in their favor by preventing a state from requiring *any* other, reasonable and limited, steps toward its use tax administration. As long as the burden imposed by those steps doesn't exceed the burden imposed on in-state retailers, the imposition does not create discrimination.

In holding that the burden imposed by the Colorado legislation on non-collecting out-of-state retailers is discriminatory under the dormant commerce clause, the District Court made none of these necessary comparisons with the burdens imposed on collecting in-state retailers. The implication of this failure is that *any* burden imposed on a non-collecting retailer to assist the state in administering the compensating use tax is discriminatory no matter how slight the burden either in absolute terms or in comparison to in-state collection burdens. When the necessary comparisons are made, it is clear that the limited burdens imposed on non-collecting retailers by the Colorado legislation are not discriminatory under the dormant commerce clause.

### B. The Legislation Is Not Unduly Burdensome

#### 1. The District Court's Analysis was Incomplete

As an additional ground for its decision, the District Court ruled that Colorado's notice and reporting requirements impose an undue burden on interstate commerce. Slip Op., 14 – 17. In so doing, the Court relied on the Supreme Court's conclusions in *Quill* with respect to the burdens imposed on interstate commerce in *1992* by North Dakota's use tax *collection* requirements. The District Court summarily found that Colorado's *2010* use tax *notice and reporting* requirements unduly burden interstate commerce because they are "inextricably related in kind and purpose" to the burdens condemned in *Quill.* Slip Op. at 8 and 17. The "kind and purpose" of the Colorado and North Dakota requirements may be the same; but the "kind and purpose" of a burden is not what created a violation of the dormant commerce clause in *Quill.* The constitutional violation in *Quill* was a result of the *level* of burden created by the North Dakota requirement in 1992 – an undue burden – not the "kind or purpose" of the requirement.

The Colorado requirements themselves, the technological environment in which they would be imposed, and thus their resulting burdens, would be vastly different from those of the North Dakota requirements that the Supreme Court considered "undue" in *Quill*. Yet the District Court made no attempt to determine whether the level of burden created by Colorado's notice and reporting requirement amounts to an "undue" burden on par with that prohibited in *Quill.*

"Undue" means "exceeding what is appropriate or normal; excessive." The American Heritage College Dictionary, 3d Edition. By twice limiting the proscribed dormant commerce clause burdens to those that are "undue," the Supreme Court in *Quill* clearly recognized that states may impose appropriate or normal burdens on commerce without offending the dormant commerce clause. 504 U.S. 305, 315-16. *Quill*'s creation of a limited safe harbor from use tax collection responsibilities simply cannot be read to create such a shield from *any* burden whatsoever in assisting with the collection of state sales or use tax from the purchaser.

### 2. A Complete Analysis Shows the Legislation Is Not Unduly Burdensome

The source of the Supreme Court's "undue burdens" test is *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). *Quill Corp. v. North Dakota* 504 U.S. 298 (1992), *citing to Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981); in turn citing to Raymond Motor Transp., Inc. v. Rice,* 434 U. S. 429, 441 (1978) *and Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). The *Pike* test was developed in the context of challenges to state regulatory regimes and has not been applied explicitly in a state tax or tax administration related cases. Recently, the Court has explicitly questioned the validity of *Pike* in the tax context. *Dep't of Revenue of Kentucky v. Davis,* 553 U.S. 328, 353-54 (2008) (Court is not institutionally suited to perform a *Pike* analysis of the relative benefits and burdens of a state tax provision allowing an income tax deduction for interest on government bonds issued by Kentucky and its localities while taxing interest on all other government bonds). Justice Scalia would go further, rejecting the *Pike* balancing test "in every case." *Kentucky v. Davis,* 553 U.S. 360 (Scalia, J., concurring in part.)

But under *Pike*, to the extent it may apply here, a non-discriminatory regulatory statute will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. The Colorado legislation can be expected to produce substantial state and local government benefits.

First, it would assist the state in its legitimate efforts to increase consumer compliance with the use tax law, thereby increasing the state's revenues. The Supreme Court has made clear that, while revenue generation is not a state interest that can justify discrimination against interest commerce, it is a cognizable benefit for purposes of the *Pike* test. *United Haulers,* 127 S. Ct. at 1798. Second, the Act is more than a compliance tool. It also serves a consumer education function in that the Transactional Notice and the Annual Purchase Summary serve to inform the consumer that his or her use of the property in Colorado may be subject to tax notwithstanding that the retailer had no obligation to collect the tax and did not in fact do so. Further, the Act serves a public informational purpose, in that the Transactional Notice and Annual Purchase Summary provide the consumer with the basic information he or she will need to calculate any tax due. Finally, the Customer Information Report serves the public purpose of educating consumers regarding a perceived, but mistaken, price advantage for purchases from out-of-state retailers.

These substantial state benefits exceed whatever minimal burdens the legislation may impose on non-collecting retailers. In *United Haulers,* there was no evidence of *any* disparate impact on out-of-state businesses as opposed to local businesses. 127 S.Ct. 1797. However, the Court was prepared to accept the state benefits of the non-discriminatory regulatory scheme in that case as exceeding "any arguable burden" on commerce. *Id.* Such a deferential standard suggests that the *Pike* test imposes few if any limitations on a state's authority to enact a non-discriminatory regulatory scheme notwithstanding burdens that the scheme imposes on commerce, as long as the scheme is calculated to produce legitimate state interests.

In holding that "the burdens imposed by the Act … are inextricably related in kind and purpose to the burdens condemned in *Quill",* Slip Op., at 17, and void under the dormant commerce clause, the Court adopted an undue burdens test that effectively precludes a state from imposing *any* level of burden, no matter how trivial, on a non-collecting out-of-state retailer if that burden is of a similar kind, with a similar purpose, to that which would result from a collection responsibility. Such a limitation is unprecedented and contrary to applicable Supreme Court jurisprudence.

By its terms, the *Quill* safe harbor bars a state from imposing a use tax *collection* obligation on out-of-state retailers with no physical presence; it does nothing more. The *Quill* Court did not craft a rule that bars the states from imposing a notice and reporting requirement. A close reading of *Quill* makes clear that the Court's concern with the collection burden was largely motivated by *stare decisis* concerns that the mail order industry had grown in reliance on the Court's previous holding in *National Bellas Hess, Inc. v Department of Revenue of Ill.,* 386 U.S. 753 (1967), creating a use tax collection safe harbor for out-of state retailers whose only connection with the taxing state is the solicitation of orders from outside the state when the orders were filled by U.S. Mail or common carrier. "[A] bright-line [physical presence] rule in the area of sales and use tax [collection] also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. … [I]t is not unlikely that the mail-order industry's dramatic growth [since *Bellas Hess*] is due in part to the bright-line exemption from state taxation created in *Bellas Hess*". Quill, 504 U.S. at 316.

If not for those settled expectations, the Court noted that "contemporary Commerce Claus jurisprudence might not dictate the same result [as in *Bellas Hess*] were the issue to arise for the first time today." Quill, 504 U.S. at 311. There are no "settled expectations" regarding a statute that imposes notice and reporting requirements. The controversy over Colorado's notice and reporting requirement – distinct from a collection requirement – is indeed "arising for the first time today."

The District Court's "no burdens whatsoever" standard ignores that the *Quill* test prohibits "undue" burdens, not all burdens. Even with respect to a direct tax burden, the Supreme Court has repeatedly made clear that "[t]he [Commerce] Clause does not shield interstate (or foreign) commerce from its 'fair share of the state tax burden.'" *Barclay's Bank PLC v. Franchise Tax Bd. Of Cal.,* 512 U.S. 298, 310 (1994). *See also, Dep't of Revenue of Wash. V. Ass'n. of Wash. Stevedoring Cos.,* 435 U.S. 734, 75 0(1978); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623 – 24 (1981).

Ignoring this rich body of case law, the District Court seized on the *Quill* use tax collection undue burdens analysis and interpreted it to cover a context where the non-collecting, out-of-state retailers would bear *none* of the burdens that so troubled the Court in *Quill*. The Court cited its prior *Bellas Hess* decision in enumerating the burdens with which it was concerned, including "the many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping could entangle [a mail order house] in a virtual welter of complicated obligations." 504 U.S. 313, n. 6.[11] These either apply to a much lesser extent (administration and record-keeping) or not at all (rates of tax and allowable exemptions) in the case of Colorado's legislation. The Colorado legislation does not require non-collecting, out-of-state retailers to perform any tax analysis or calculations. And it does not require those retailers to generate or maintain any information that they do not already have. The Court in *Quill* did not speak of burden in the abstract; the relevant burden was that associated with collecting the use tax under 1992 technology.

The Transactional Notice imposes virtually no cost on non-collecting retailers that they do not already incur. All the Notice requires is that one sentence be added to any invoice or web site the retailer already uses to make sales. The Notice requires the retailer to maintain no records, file no reports with the state, make no tax calculations or collections or to in any way follow up with the customer.

It is indicative of the District Court's failure to afford the legislation a presumption of constitutionality that the court made no attempt whatsoever to determine whether at the very least, any unconstitutional portions of the Act could be severed from constitutional portions of the Act. "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from

[11] The Court also noted that some 6,000-plus local taxing jurisdictions imposed use tax in 1992. 504 U.S. 313, n. 6. Local use tax considerations are irrelevant in this case, because the Act imposes *no* obligations whatsoever on non-collecting out-of-state retailers regarding local option use taxes.

invalidating more of the statute than is necessary. As this Court has observed, 'whenever an act … contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984) *citing El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909).

This Colorado legislation was an exercise of Colorado's police power. In *United Haulers,* the Court made clear that Pike burdens on commerce are insufficient to overcome a state's exercise of the police power in enacting non-discriminatory regulatory statutes. The Court characterized such an assertion as an invitation "to rigorously scrutinize economic legislation passed under the auspices of the police power." 127 S. Ct. 1798. The Court declined the invitation in *United Haulers,* stating that "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of the Due Process Clause" and that the Court "should not seek to reclaim that ground under the banner of the dormant Commerce Clause." Whatever may be left of *Pike* after *United Haulers,* it is clear that the minimal burdens imposed by the Colorado legislation meet the *Pike* test as currently limited by the Court.

## CONCLUSION

The District Court decided the case on cross motion for summary judgment. Although the DMA maintains that the legislation imposes burdens on its members, the DMA failed to introduce any evidence that would quantify the extent of those burdens. Since it is the DMA's burden of proof to overcome the presumption of constitutionality, the District Court erred in granting summary judgment for the DMA notwithstanding that failure of proof. The Colorado legislation neither discriminates nor burdens interstate commerce. There is no facial violation of the commerce clause. We respectfully request the decision of the District Court granting judgment in DMA's favor and enjoining Colorado Law be reversed, and that the Court direct that summary judgment be entered in Colorado's favor on DMA's commerce clause claims.

Respectfully submitted,

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## ADDENDUM

### Table 1: Duties of Collecting In-State Retailers vs. Duties of Non-Collecting Out-of-State Retailers

### DUTIES OF COLLECTING, IN-STATE RETAILERS

| DUTY | SUMMARY | STATUTE |
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| **Obtain License** | All Colorado retailers, including out-of-state retailers who collect use tax, are required to obtain a license for each separate place of business. | Colo. Rev. Stat. §39-26-103(1)(a) |
| **Calculate Tax:** ***Discounts and Rebates*** | Colorado imposes a state sales tax upon the purchase price of tangible personal property at the rate of 2.9 percent.<br><br>In general, tax is based on the original purchase price without regard to any credit, discount or rebate applied to a sale at a later date. However, credits, discounts and rebates will reduce the taxable base if a retailer makes an adjustment to the price, before filing a return for the period in which the sale took place. | Colo. Rev. Stat. §39-26-106(1)(a)(II).<br><br>Colo. Rev. Stat. §39-26-104(1)(c), Colo. Rev. Stat. §39-26-104(1)(d.1); A.D. Store Co. v. Executive Director, 19 P.3d 680 (Colo.2001)<br><br>Colo. Rev. Stat. §39-26-111 |
| **Calculate Tax:** ***Refund Claims*** | When property is returned to a retailer, and the customer receives a full refund, the retailer is entitled to a credit. The credit may be taken in the retailer's report equal to the sales price of the property that is refunded. | Colo. Rev. Stat. §39-26-102(5); 39 Colo. Code Regs. §26-102.5 |

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| **Calculate Tax:** ***Bad Debts*** | Colorado retailers who pay tax on gross sales may take a deduction for accounts that are found worthless for federal income tax purposes. However, if any account is collected subsequent to the deduction, the retailer must pay tax to the Department. | Colo. Rev. Stat. §39-26-102(5)<br><br>39 Colo. Code Regs. §26-102.5 |
| **Calculate Tax:** ***Local Option Sales Tax*** | Generally, local sales tax applies to the purchase or sale if the transaction is subject to state sales tax and consummated within a county, or incorporated city and town borders that imposes a local sales tax. The state requires vendors to collect and remit the local sales taxes in the same manner as the state sales and use tax. | Colo. Rev. Stat. §29-2-105(1)(d)(I)<br><br>Colo. Rev. Stat. §29-2-106(3)(c)(I) |
| **Notice**<br><br>**Collect Tax** | Vendors are required to charge consumers or users the applicable sales or use tax on purchases made at retail. | Colo. Rev. Stat. §39-26-106(2)(a) |
| **Remit Tax**<br><br>**File Report**<br><br>**(Monthly)** | Generally, retailers are responsible for the remittance of tax on the gross taxable sales made to purchasers during a tax year.<br><br>The Colorado Department of Revenue generally requires taxpayers to file a monthly return for the previous month in which the tax was accrued. Retailers may file a written request for quarterly, seasonal, annual, or 13 four-week reporting periods if the Executive Director determines a monthly return imposes an unnecessary hardship on a | Colo. Rev. Stat. §39-26-106(2)(a), §39-26-105(1), §39-26-105(5)<br><br>Colo. Rev. Stat. §39-26-105(1); Colo. Rev. Stat. §39-26-204(3); 39 Colo. Code Regs. §26-105.1(a); Colo. Rev. Stat. §39-26-109 |

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| | retailer. | |
| **Mandatory Electronic Payment** | Any vendor with a state sales tax liability exceeding $75,000 during the previous year must remit all state and local sales tax required to be remitted to the Executive Director of the Department of Revenue via electronic funds transfer. | Colo. Rev. Stat. §39-26-105.5 |
| **Recordkeeping**<br><br>**Subject to Audit** | Every person liable for sales or use tax is required to keep proper records for at least a three-year period. The records should be maintained monthly and include all sales made in books or accounts that determine tax liability. The records must be made available for audit. | Colo. Rev. Stat. §39-26-116; 39 Colo. Code Regs. §26-116<br><br>Colo. Rev. Stat. §39-26-204 |
| **Documentation of Exempt Sales** | Sales for resale of tangible personal property are excluded from Colorado sales and use tax when the purchase is intended to be resold to another in the ordinary course of business. Colorado sellers are responsible for establishing that a sale is tax exempt. The seller must maintain satisfactory proof that establishes that a purchase was for resale because Colorado does not provide resale certificates | Colo. Rev. Stat. §39-26-102(9); Colo. Rev. Stat. §39-26-102(19); 39 Colo. Code Regs. §26-102.19; 39 Colo. Code Regs. §26-713.2(b)<br><br>Colo. Rev. Stat. §39-26-105(1)(c); 39 Colo. Code Regs. §26-105.1(c) |
| **Vendor Collection Discount** | Colorado law provides for a vendors fee or allowance to vendors who timely file complete reports and remit the full tax, which may be retained from sales tax due for a filing period. The vendor's fee is intended to cover the vendor's | Colo. Rev. Stat. §39-26-105(1); 39 Colo. Code Regs. §26-105.1(a)(10) |

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| | expense of tax collection, and is conditioned on a timely filing of a complete tax return, all required schedules, and the full remittance of tax due. | |

## DUTIES OF NON-COLLECTING, OUT-OF-STATE RETAILERS

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|---|---|---|
| **Notification** | Out-of-state retailers that do not collect sales tax on their sales to Colorado customers must notify their Colorado customers of their sales and use tax filing and payment obligations. | Colo. Rev. Stat. §39-21-112(3.5) |
| **Report to Customer**<br><br>**(Annual)** | Out-of-state retailers that do not collect sales tax on their sales to Colorado customers must annually furnish to Colorado customers, in a form prescribed by the Department of Revenue, information regarding the customers' purchases from the retailer during the prior year. | Colo. Rev. Stat. §39-21-112(3.5) |
| **Report to DOR**<br><br>**(Annual)** | Each retailer that does not collect Colorado Sales Tax must file an annual statement for each purchaser to the department of revenue showing the total amount paid for Colorado purchases of such purchasers during the preceding calendar year. | Colo. Rev. Stat. §39-21-112(3.5) |

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 13-point font.

Date: July 17, 2012

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**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

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_/s/Sheldon Laskin___________

## CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2012I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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