No. 12-1175

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

AMICUS CURIAE BRIEF OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF BARBARA BROHL, IN HER CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION

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INTEREST OF THE *AMICI*[1]

Amicus Curiae the Multistate Tax Commission (the Commission) respectfully submits this brief in support of Barbara Brohl, Executive Director of the Colorado Department of Revenue (Colorado). The Commission urges this court to overturn the holding of the federal district court that the information-reporting requirements imposed by the state and challenged by the Direct Marketing Association (the DMA) are discriminatory and unduly burdensome. The Commission previously filed brief in this case as *amicus curiae*, explaining why we believe the district court's holding was incorrect. We file this additional brief to provide context for why the questions presented are of growing importance to state tax enforcement officials and to assert that the challenge raised by the DMA fundamentally relies on U.S. Supreme Court precedent that is incapable of supporting that challenge.

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[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 the State of Colorado. As required under FED. R. APP. P. RULE 29(a), the Commission requested the consent of the parties to file the accompanying brief. The State of Colorado consented, but Plaintiff-Appellee Direct Marketing Association did not.

The Commission was formed by the Multistate Tax Compact in 1967. The Commission is made up of the heads of the revenue agencies of the states that have adopted the Compact by statutory enactment.[2] The United States Supreme Court upheld the validity of the Compact in *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Today, forty-seven states and the District of Columbia participate in some capacity in the Commission's activities.[3] The stated purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, (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.[4]

The Commission has long supported state sovereign authority to impose and fairly administer taxes, free from unwarranted federal

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[2] Multistate Tax Compact, Art. VI(1)(a).

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

[4] Multistate Tax Compact, Art. I.

constraints. In 1992, the U.S. Supreme Court in *Quill* upheld a limit on the ability of states to use sellers to collect the sales and use tax. Under *Quill,* a seller must have physical presence in the state before the state has jurisdiction to enforce a tax collection duty. That limitation has significantly affected tax enforcement in every jurisdiction that imposes a sales and use tax.[5] It has also significantly affected countless tax-collecting businesses that regularly lose sales to unfairly advantaged competitors. These adverse consequences are growing. Colorado imposed the information-reporting requirements at issue to enable tax compliance by and collection from its residents, in an attempt to partially mitigate these consequences.

The Commission also has a vital interest in this case because tax agencies regularly rely on information gathered from third parties without physical presence in the state. In the corporate income tax area, for example, many states require corporations lacking physical presence to provide information necessary for determining the tax liability of affiliated entities or groups. This is the basis for combined reporting statutes in 24 states,

[5] Forty-five states and the District of Columbia currently impose a general sales tax. Only Alaska, Delaware, Montana, New Hampshire and Oregon have no state-level general retail sales and use tax, although several Alaska municipalities rely on local sales taxes. Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶ 12.02 (3rd ed. 2001 & Supp. 2014-2).

including Colorado.[6] It is also the basis for certain "add-back" statutes applicable to intercompany transactions in other jurisdictions.[7] In the sales and use tax area, the Commission has been developing a proposed model uniform law for states that wish to follow Colorado's lead in attempting to address the problem of sales and use tax enforcement using similar information-reporting requirements.

The states' ability to rely on third-party reporting mechanisms for tax enforcement purposes is of paramount importance to the Commission's member states. The Commission believes that *Quill*'s physical presence limitation on state jurisdiction to impose a sales and use tax collection duty should be overturned. There is no need, however, for *Quill* to be overturned in order for this court to hold in favor of Colorado. This court need only conclude that *Quill*'s "bright-line" *jurisdictional* limit on use tax collection does not support the claim of unconstitutional *discrimination* asserted by the DMA.

SUMMARY OF ARGUMENT

The issue in this case is whether the dormant Commerce Clause prevents Colorado from imposing information-reporting requirements necessary for tax compliance and enforcement on certain businesses that

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[6] COLO. REV. STAT. 39-22-301.
[7] *See, e.g.*, ALA. CODE 1975, § 40–18–35(b).

lack the requisite physical presence to be required to collect sales and use tax ("remote" sellers). Specifically, Colorado requires certain sellers to provide: (1) a notice to Colorado customers that they may owe use tax on each purchase; (2) an annual summary of purchases made by each Colorado customer; and (3) an annual report to the state of the total purchases made by each Colorado customer. The state also imposes civil penalties for failure to comply. COLO. REV. STAT. § 39–21–112(3.5); 1 COLO. CODE REGS. § 201–1:39–21–112.3.5(2).

Colorado does not impose these information-reporting requirements on remote sellers because they are out-of-state sellers. It imposes the requirements because, while these sellers make significant sales into the state, the state is prohibited from imposing a duty to collect the use tax on those sales as a consequence of a judicially imposed limitation, originally set out in 1967 in *National Bellas Hess v. Illinois*, 386 U.S. 753 (1967). There, the Court held that states may not impose a duty to collect tax on sellers that lack physical presence in the state. In 1992, in *Quill*, the Court recognized that *Bellas Hess* was based on an outdated doctrine, but it upheld the physical presence limit as a useful bright-line rule for use tax collection on the grounds of *stare decisis*. *Quill v. North Dakota*, 504 U.S. 298 (1992).

By no means is the problem presented by *Bellas Hess* and *Quill* limited to Colorado. The other 45 state jurisdictions that impose a general sales and use tax face the same enforcement dilemma. Nor is Colorado's proposed approach to mitigating the problem unusual. Information-reporting requirements are commonplace in the tax arena. These requirements are used on a widespread basis in most tax systems to support voluntary compliance and enforcement. In recognition of the problem and that Colorado's approach presented a possible partial solution, the Commission, through its uniformity process, has developed a draft model information reporting statute based on similar requirements.

There is increasing urgency to resolve this enforcement problem given recent changes in how interstate retail commerce is conducted. Technology now allows remote sellers to obtain and use information about potential customers in a state so as to out-compete local sellers and market goods and services without any need for physical presence. The physical presence limit imposed in *Bellas Hess*, and upheld in *Quill* no longer bears any relationship to whether a seller can reasonably be asked to bear the responsibility for tax collection, let alone information reporting. The information which the state seeks in order to support its use tax compliance and enforcement efforts with

its residents is readily available to the remote sellers subject to those reporting requirements.

While the Supreme Court's decisions in *Bellas Hess* and *Quill* gave rise to the issue in this case, those decisions do not provide the necessary support for the DMA to succeed in its challenge. *Quill*'s physical presence limit bars a state from imposing on remote sellers a requirement to collect the tax. Colorado imposes no such requirement. *Quill* does not create a separate sub-class of out-of-state businesses under the Commerce Clause entitled to allege discrimination on the basis of any differential treatment vis-à-vis other out-of-state businesses. *Quill* certainly does not create a Commerce Clause-based prohibition against differential information-reporting requirements imposed on out-of-state sellers who cannot be made to collect the tax as compared to those imposed on out-of-state sellers who can be made to collect.

ARGUMENT

I. States cannot allow use taxes on remote sales to go unenforced, and Colorado's information-reporting requirements are a partial solution to this problem.

The issue in this case arose, in part, because of the general nature of all consumption taxes. Virtually every government today imposes some

form of consumption tax.[8] These taxes make up a substantial amount of the funding for government programs here and around the world.[9] In this country, the general consumption tax—the sales and use tax—is not imposed by the federal government, but by the states, and is administered by state tax agencies.

All consumption taxes rely on seller collection.[10] No consumption tax would function if the tax had to be collected directly from individual consumers.[11] Cross-border sales therefore pose a particular problem for enforcement. If sellers who operate outside the jurisdiction cannot be made to collect the tax, then enforcement is a near impossibility.[12]

Because conspicuous, systematic tax avoidance will undermine any voluntary tax system, tax administrators must prevent such avoidance and

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[8] Organization for Economic Co-operation and Development, *Consumption Tax Trends 2014: VAT/GST and excise rates, trends and policy issues*, December 10, 2014, http://www.oecd.org/tax/consumption/consumption-tax-trends-19990979.htm, at 14.

[9] *Id.*

[10] Organization for Economic Co-operation and Development, *Facilitating Collection of Consumption Taxes on Business-to-Consumer Cross-Border E-Commerce Transactions*, http://www.oecd.org/tax/consumption/34422641.pdf, at 6.

[11] Nelson U. Alino & Gary P. Schneider, *Consumption Taxes on Digital Products in the European Union*. 15 J. Legal, Ethical & Reg. Issues 1, 3 (2012), retrieved from http://search.proquest.com/docview/1037808872?accountid=11091 May 14, 2015.

[12] *Id.*

simplify voluntary compliance. State and federal tax systems regularly use third parties for this purpose. Third parties may collect the tax imposed on others and provide essential information reporting for tax enforcement. For example, employers are routinely subject to withholding and reporting obligations on wage income under federal income tax laws. 26 U.S.C. § 3401(a). Nor is a tax collection obligation ever imposed without some kind of corresponding information reporting requirement. Employers not only withhold and pay over tax for employees but they also file an IRS Form 940 return and give employees a Form W-2.

In the typical sales and use tax system, where tax incidence is on the customer, a seller that collects the tax will also report information related to that tax. The seller will file a report with the state tax agency and also provide a bill of sale or invoice to the customer showing tax charged and collected as part of the sale. *See* COLO. REV. STAT. § 39-26-106. This provides the customer with documentation that the use tax obligation has been discharged.

The IRS requires a wide variety of third-parties to report information without the obligation to collect or withhold.[13] Depending on the nature of

[13] *See* Internal Revenue Service Publication: *General Instructions for Certain Information Returns – 2015*, *available at* http://www.irs.gov/pub/irs-pdf/i1099gi.pdf (last visited May 18, 2015).

the income and the payee and whether withholding of the tax is required, the information reported and the timing may differ.[14] Regardless of particular differences, it is clear that the purpose of information-reporting requirements generally is to facilitate voluntary compliance by taxpayers and enforcement of taxes by tax agencies.

States may reasonably conclude that having sellers report certain information, even without collection of the tax, will increase compliance. It has been demonstrated that where imposing a withholding or collection obligation is not feasible, imposing an information-reporting obligation by itself will still increase tax compliance by the party required to pay the tax. *See* Internal Revenue Service: *Tax Gap for Tax Year 2006 – Overview*, Jan. 6, 2012[15] and IR-2012-4 (2012)(estimating the net misreporting percentage, or NMP, defined as the net misreported amount as a ratio of the true amount, is 8% for amounts subject to substantial information reporting alone, as opposed to 56% for income where no withholding or information reporting is required).[16] And, where the taxpayer must rely on the third-party

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[14] *See, e.g.*, Internal Revenue Service Publication: *Instructions for Forms W-2G and 5754*, *available at* http://www.irs.gov/pub/irs-pdf/iw2g.pdf (last visited May 18, 2015).

[15] http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf (last visited May 18, 2015).

[16] http://www.irs.gov/uac/The-Tax-Gap (last visited Oct. 22, 2014).

information to voluntarily comply (that is, to self-assess), this information-reporting obligation is not merely helpful, but is *essential* for tax collection.

Information reporting is no less essential to sales and use tax compliance. Such taxes, by their nature, are imposed on the day-to-day purchases of individuals, virtually none of whom maintain detailed records of those purchases, and a number of whom (*e.g.*, minors, those with disabilities, transients, etc.) could hardly be required to do so. But unlike purchasers, sellers do maintain detailed records of sales for all sorts of reasons, including for financing and marketing purposes, financial accounting, and federal income tax compliance. That the states generally impose information reporting obligations on sellers is, therefore, unremarkable.

Under Colorado law, sellers who are "retailers" and are "doing business" in the state have a statutory tax collection and reporting duty. COLO. REV. STAT. §§ 39-26-102, 39-26-105 and 39-26-204(2). But under *Bellas Hess* and *Quill*, Colorado may not apply this tax collection duty to out-of-state vendors that lack physical presence. *See Quill*, at 313. Retailers that do not collect the tax are instead required to comply with the information-reporting requirements. COLO. REV. STAT. § 39-21-112(3.5)(c). As this court has recognized, the information-reporting requirements at issue

here are an integral part of the tax collection system. *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904, 912-914 (10th Cir. 2013).

In its previous brief before this court, the Commission compared the Colorado requirements imposed on collecting sellers with those on remote sellers. This comparison served to demonstrate that the burdens imposed on remote sellers were less than those imposed on collecting sellers. But it also served to demonstrate that the requirements imposed on remote sellers are entirely derivative of the kinds of requirements imposed on collecting sellers. Any differences in timing, the nature of the information required to be reported, or to whom, are driven entirely by the fact that remote sellers are not collecting and paying over the tax.

States may currently impose other reporting requirements for tax enforcement that differ where some party or activity is outside the state. For example, states may impose on out-of-state businesses a requirement to provide information to establish that they do not have sufficient presence in the state to be subject to tax. States may require partnerships with activities in the state to withhold and report tax for nonresident partners. *See Panhandle Producers and Royalty Owners Association v. Oklahoma Tax Commission*, 162 P.3d 960 (Okla. Civ. App. 2007). With respect to out-of-state corporations, states regularly require those corporations, even those

without physical presence or any other substantial nexus, to provide information necessary for determining the income tax liability of affiliated corporations.

While Colorado is currently taking the lead in implementing this type of information reporting approach to mitigate the enforcement problems created by *Bellas Hess* and *Quill*, other states may well decide to follow that lead. For several years, the Multistate Tax Commission's Executive and Uniformity Committees have been engaged in working on a model statute using this approach.[17] As of May 10, 2012, approval of the model has been tabled pending a final decision on the merits in this case.[18]

II. Information technology has enabled the growth of electronic commerce, making *Quill*'s physical presence limit increasingly problematic, but that same technology also enables a partial solution to the problem.

In 1992, when *Quill* upheld the bright-line physical presence rule of *Bellas Hess*, no one had ever made an online retail purchase. The first World Wide Web server and browser, created by Tim Berners-Lee in 1990, opened for commercial use in 1991, the year litigation began in *Quill*.[19] That year,

[17] *Id*.
[18] *Id*.
[19] Dave Roos, *The History of E-commerce*, April 15, 2008. HowStuffWorks.com.

the National Science Foundation lifted a ban on commercial businesses operating over the Internet, paving the way for Web-based e-commerce.[20] The first secured online purchase did not take place until 1994.[21] From there, internet sales skyrocketed, largely due to the development of security protocols and high speed internet connections such as DSL, allowing for much faster connection speeds and faster online transaction capability.[22]

In 2010, the Boston Consulting Group determined that the Internet accounted for 4.7 percent of *all* United States economic activity, exceeding the contributions of the federal government (4.3 percent).[23] If it was considered its own separate industry, the Internet would also be larger than America's education, construction, or agricultural sectors.[24] According to a 2014 online retail sales forecast from Forrester Research Inc., United States

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http://money.howstuffworks.com/history-e-commerce.htm (last visited May 13, 2015).

[20] *Id.*

[21] The item purchased was a pepperoni pizza with mushrooms and extra cheese from Pizza Hut. Kayla Webley, *A Brief History of Online Shopping*, TIME.COM, July 16, 2010, http://content.time.com/time/business/article/0,8599,2004089,00.html (last visited May 15, 2015).

[22] Bill Hazelton, *History of E-Commerce*, August 19, 2009, http://www.spirecast.com/history-of-e-commerce/ (last visited May 15, 2015).

[23] Annalyn Censky, *Internet accounts for 4.7% of U.S. economy*, March 19, 2012, CNN.COM, http://money.cnn.com/2012/03/19/news/economy/internet_economy/ (last visited May 12, 2015).

[24] *Id.*

e-retail sales (that is, consumer sales) are expected to grow from $263 billion in 2013 to $414 billion in 2018, a compound annual growth rate of 9.5 percent.[25] The study predicts that e-retail's share of total retail sales will continue to increase, from 8 percent in 2013 to 11 percent in 2018. The dollar growth from the actual 2013 figure of $263 billion to the forecast $414 billion for 2018 is 57.4 percent.[26] Contrast these online sales with 1992's $180 billion per year in remote (mail-order) sales,[27] and it becomes clear that commerce has evolved via an entirely different platform than physical storefronts.

Internet retailers have some distinct competitive advantages over brick-and-mortar stores. Internet stores require minimal downtime, and can remain open 24 hours a day, year-round, largely unaffected by real-world issues like weather. Retail websites are a natural extension of the social networking community, since large online retailers generally offer customers the opportunity to post comments and see reviews on every aspect of a

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[25] Allison Enright, *U.S. online retail sales will grow 57% by 2018*, May 12, 2014, https://www.internetretailer.com/2014/05/12/us-online-retail-sales-will-grow-57-2018> (last visited May 13, 2015).
[26] *Id.*
[27] *Quill* at 329 (White, J., concurring in part and dissenting in part).

product.[28] Online shopping also offers easy price comparison—an ability that has overlapped into the real world: Amazon now offers a price-checking app that allows shoppers to scan a product at the mall and purchase it online.[29] Faced with the option to buy nearly anything without leaving home, shoppers have changed their habits: brick-and-mortar stores now suffer from a lack of foot traffic.[30]

That a seller's physical presence might not be a useful proxy in determining a seller's capacity to make sales into a state was recognized by Justice White in his dissent in *Quill*. He noted that: "in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax.... [P]urchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business." *Quill* at 328

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[28] Matthew Townsend, *Millennials Shunning Malls Speeds Web Shopping Revolution*, June 25, 2014, http://www.bloomberg.com/news/articles/2014-06-25/millennials-shunning-malls-speeds-web-shopping-revolution (last visited May 15, 2015).

[29] *About the Amazon Price Check App*, http://www.amazon.com/gp/help/customer/display.html?nodeId=200777320 (last visited May 15, 2015).

[30] *See., e.g.,* Shelly Banjo and Drew Fitzgerald, *Stores Confront New World of Reduced Shopper Traffic*, WALL STREET JOURNAL, Jan. 16, 2014, http://www.wsj.com/articles/SB10001424052702304419104579325100372435802 ("Online sales accounted for just 5.9 percent of overall retail sales in the third quarter, according to the Commerce Department, but they have an outsize impact on how shoppers use stores and what they will pay.")(last visited May 14, 2015).

(White, J., concurring in part and dissenting in part). Since then, computer technology has further minimized the importance of physical presence, while allowing remote sellers to maximize their sales via data collection used for customer targeting.

When it comes to their ability to collect information, online sellers have an advantage over state tax administrators. In the world of online sales, information is currency; online sellers habitually track purchasers' activities in order to target their marketing. Internet retailers collect and purchase an incredible range of information:

> [Stores collect] demographic information like your age, whether you are married and have kids, which part of town you live in, how long it takes you to drive to the store, your estimated salary, whether you've moved recently, what credit cards you carry in your wallet and what Web sites you visit…data about your ethnicity, job history, the magazines you read, if you've ever declared bankruptcy or got divorced, the year you bought (or lost) your house, where you went to college, what kinds of topics you talk about online, whether you prefer certain brands of coffee, paper towels, cereal or applesauce, your political leanings, reading habits, charitable giving and the number of cars you own.[31]

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[31] Charles Duhigg, *How Companies Learn Your Secrets*, The New York Times Magazine, Feb. 16, 2012, http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html.

It is estimated that Walmart collects more than 2.5 petabytes of data every hour from its customer transactions.[32] A petabyte is one quadrillion bytes, or the equivalent of about 20 million filing cabinets' worth of text.[33] Online sellers use this data with great success to prompt online purchases. Through its data collection, Target may infer that a woman is pregnant—and start targeting her with ads—before anyone else knows.[34] Amazon, meanwhile, has patented what it calls "anticipatory shipping," a method to start delivering packages even before customers click "buy."[35]

By contrast, state tax administrators have typically relied on self-reporting in order to collect information on individuals' remote purchases. Compliance is low under these circumstances. It remains low even when the states have attempted to raise awareness by distributing use tax returns; Colorado attempted this between 1966 and 1975, and the amount of tax

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[32] Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, Harvard Business Review, Oct. 2012, https://hbr.org/2012/10/big-data-the-management-revolution/ar.

[33] *Id.*

[34] Charles Duhigg, *How Companies Learn Your Secrets*; *See also* Kashmir Hill, *How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did*, Forbes.com, Feb.16, 2012, http://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/.

[35] Greg Bensinger, *Amazon Wants to Ship Your Package Before You Buy It*, Wall Street Journal Blogs, Jan. 17, 2014, http://blogs.wsj.com/digits/2014/01/17/amazon-wants-to-ship-your-package-before-you-buy-it/.

collected did not justify the expense of printing the returns. *Direct Mktg. Ass'n v. Huber*, 2012 WL 1079175, at *6 (D. Colo. Mar. 30, 2012). California recorded increased compliance when it included a line for use tax on its returns in 2010, but noted that even then "personal income tax returns reporting use tax represent only about 0.36 percent of all personal income tax returns."[36]

It is fitting that Colorado has sought to address a problem that was partly created by (and certainly exacerbated by) advances in information technology with a solution that is facilitated by that same technology. This modest and appropriate adaptation of the state's sales and use tax enforcement systems to the modern world; it cannot be viewed as posing an undue or discriminatory burden on remote sellers just because the solution is addressed to those sellers.

III. Out-of-state businesses that sell into Colorado but cannot be required to collect tax under *Quill* cannot rely on *Quill* to bring this claim of discrimination under the Commerce Clause simply because they are required to provide information that

[36] *See* California State Board of Equalization, "Discussion of Recent Economic Developments," Publication 329, Vol. XVII, No. 1, Feb. 2011, at 3. The state suspected the majority of use taxes went uncollected: "This percentage seems low in view of likely numbers of Californians who have made remote purchases from vendors without a California presence. … According to the Media Audit, about 65 percent of U.S. consumers have made at least one electronic commerce transaction within the past year, and 24 percent have made at least one remote purchase per month."

may differ from information that collecting sellers must provide.

In the field of state taxation, lawmakers have great latitude in adopting policies that differentiate between groups of taxpayers. In the absence of any Constitutional protection, the default standard for evaluating any differences in state tax treatment is rational basis. *Madden v. Kentucky,* 309 U.S. 83, 88 (1940). Under the Commerce Clause, however, state laws may not discriminate against interstate commerce. In general, the Supreme Court's modern dormant Commerce Clause doctrine focuses on preventing economic protectionism. *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978) represented by barriers to entry imposed on out-of-state businesses, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), or state laws that burden out-of-state business interests and benefit instate interests. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or*., 511 U.S. 93 (1994).

The issue in this case is unusual in that it may fall between two recognized lines of Supreme Court precedent. One line of cases involves state tax laws as applied to out-of-state businesses and to interstate commerce generally. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The other line of cases involves state regulatory rules that may impact interstate commerce or apply to out-of-state businesses. *See Pike v.*

Bruce Church, Inc., 397 U.S. 137 (1970). How the alleged discrimination is evaluated may vary depending upon which line of cases applies. But regardless of the mode of analysis used, a claim of impermissible discrimination against interstate commerce must ultimately contain two fundamental elements—differential treatment that actually disfavors the challengers vis-à-vis another group, and some basis for asserting that the Commerce Clause entitles the challengers, as a class, to a more exacting review of this differential treatment.

As Colorado amply explains in its brief, the DMA's remote sellers cannot succeed in alleging treatment that disfavors them unless this court applies an "any-differential-treatment" standard. While there are other reasons to reject the DMA's challenge, only under that "any-differential-treatment" standard can this court possibly reach the question of whether the information-reporting requirements discriminate against interstate commerce. And only under that standard is it possible for the court to conclude that the requirements, in fact, discriminate. As Colorado has shown throughout this litigation, this "any-differential-treatment" standard ignores the nature of the requirements imposed on remote sellers and the relationship of those requirements to the tax information provided by collecting sellers. It also ignores the burden of comparable requirements imposed on the class of

collecting sellers, the reason for differences in requirements, and the ability of the state to justify that differential treatment. The record is clear. The information-reporting requirements imposed on remote sellers are a merely a less burdensome derivative set of the same kinds of requirements imposed on all sellers—including other out-of-state sellers. Viewed in this light, the differential treatment cannot possibly be discriminatory.

The "any-differential-treatment" standard should be rejected under well-established Supreme Court precedent. In *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994), the Court rejected claims by out-of-state businesses subject to higher use tax rates that they were entitled to refunds of the entire amount of a tax, rather than just the difference in rates, writing, "discrimination is measured in dollars and cents." 511 U.S. at 654. More recently, in *Alabama Dep't of Revenue v. CSX Transp., Inc.*,135 S.Ct. 1136 (2015), the Court rejected a similar argument brought under a provision of the federal "4-R Act" prohibiting taxes that "discriminate," against rail carriers. There, a rail carrier was not allowed to claim that it should be exempt from a tax not imposed on its competitors, where those competitors were subject to a different and sometimes higher tax burden.

Additionally, the DMA cannot assert that Colorado's tax discriminates against interstate commerce where many other out-of-state

businesses must collect the tax on Colorado sales. If the differential treatment does not depend on whether the affected businesses operate primarily outside the state, then the Commerce Clause will not prevent that differential treatment. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) is directly on point. That case concerned Ohio's different tax treatment of sales by natural gas wholesalers, who happened to be primarily interstate in operation, with regulated natural gas distributors, who tended to be local businesses. The Court held that the differential tax treatment of those out-of-state businesses was not discriminatory where the treatment was due to differences in how those businesses operate. *Accord*, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978)(holding that "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce).

Colorado imposes information-reporting requirements on the remote sellers here not because they are out-of-state sellers, but because the state is precluded from requiring them to collect the tax. The group to which the DMA's remote sellers compare themselves also has members who operate primarily outside the state. Leaving aside the fact that the differential treatment does not disfavor the remote sellers, the DMA's case cannot succeed unless the Commerce Clause is implicated when states require

reporting of different information from out-of-state businesses without physical presence than out-of-state businesses with some presence. The only possible support for distinguishing groups of out-of-state sellers in this way is *Quill*.

But *Quill* cannot be read as creating some sort of special sub-class of out-of-state businesses entitled to more favorable treatment generally than other out-of-state businesses. Quill merely represents the Supreme Court's decision to impose a bright line limit on states when requiring collection of sales and use taxes. While this construes *Quill*'s application narrowly, in effect as an exception to the general rule, such narrow confinement of its holding is justified.

First, expansion of *Quill*'s application would conflict with numerous holdings of this and other courts. In the period between *Bellas Hess* and *Quill*, the Supreme Court decided *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Complete Auto* established a four-part test governing the validity of state taxes under the Commerce Clause—which includes substantial nexus and no discrimination. While many believe *Complete Auto* overturned *Bellas Hess*, the Court in *Quill* determined to continue the bright-line physical presence rule from that case as a proxy for substantial nexus, in large part because businesses had relied on that rule. The Court has never

seen fit to expand the rule outside of the context of use tax collection, however. State and federal courts—including this court[37]—have generally held that *Quill* is confined to its facts, and instead look to *Complete Auto* as the governing precedent.[38]

Quill's holding should also be applied narrowly because it was decided primarily on *stare decisis* principles. But even more importantly, factors that the Court will typically look to when determining whether to depart from the rule of *stare decisis* would, today, counsel in favor of overruling *Quill*. In a recent concurrence, Justice Kennedy characterized the *Quill* holding as "tenuous," and placed the blame on *stare decisis*, saying that the court relied on the doctrine "to reaffirm the physical presence

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[37] *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000)

[38] *See, e.g., Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993); *Lamtec Corp. v. Dep't of Revenue of the State of Washington*, 246 P.3d 788 (Wash. 2011), *cert. denied*, 132 S.Ct. 95 (2011); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 132 S.Ct. 97 (2011); *Lanco, Inc. v. Dir., Div. of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *FIA Card Servs. NA, fka MBNA Am. Bank NA, v. Tax Comm'r,* 640 S.E.2d. 226 (W. Va. 2006), *cert. denied*, 551 U.S. 1141 (2007); *Capital One Bank v. Comm'n of Rev*., 899 N.E.2d 76 (Mass. 2009), *cert. denied*, 129 S. Ct. 2827 (2009); *Geoffrey, Inc. v. Comm'n of Rev.*, 899 N.E.2d 87 (Mass. 2009), *cert. denied*, 557 U.S. 920 (2009); *A & F Trademark, Inc. v. Tolson,* 605 S.E.2d 187 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005); *Gen. Motors Corp. v. City of Seattle*, 25 P.3d 1022 (2001), *cert denied*, 535 U.S. 1056 (2002). *But see J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999*), cert denied*, 531 U.S. 927 (2000).

requirement…despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc. v. Brady*, 'contemporary Commerce Clause jurisprudence might not dictate the same result' as the Court had reached in *Bellas Hess*." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134 (2015)(Kennedy, J., concurring)(internal citations omitted). Justice Kennedy cited *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) for the proposition that *stare decisis* is weakened where "experience has pointed up the precedent's shortcomings."

The Supreme Court has identified four factors that it considers when deciding whether to overturn a case despite *stare decisis*: (1) whether the old rule has become unworkable; (2) whether reliance on the rule is sufficient that a change would result in hardship or unfairness; (3) whether there has been significant change in related principles of law; and (4) whether there has been a change in facts (social, economic, cultural, technological, and so on) such that the old rule is no longer applicable or fair. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992). Based on Justice Kennedy's assessment of its holding, along with sea changes in electronic sales technology, *Quill*'s continuing validity, even limited to its facts, is questionable.

If *Quill* does not invest remote sellers with the ability to challenge as discriminatory any differences in their own information-reporting requirements as compared to out-of-state sellers who must collect tax, then the DMA's challenge must fail. There is no indication that the Supreme Court, in 1992, meant *Quill* to support such a challenge and even less evidence that the Court would conclude it supports such a challenge today.

CONCLUSION

Colorado's information-reporting requirements are a reasonable solution to a problem that continues to grow and that affects all states that impose a sales and use tax. The DMA's challenge to these requirements relies fundamentally on *Quill*. But Quill does not stand for the proposition that states are prohibited from obtaining information from remote sellers that would enable tax compliance and enforcement. This court should therefore reject the DMA's challenge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 5,839 words.

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/s/ Lila Disque

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing ***Amicus Curiae*** **Brief of the Multistate Tax Commission In Support of Barbara Brohl, In Her Capacity as Executive Director, Colorado Department of Revenue, Supporting Reversal of the District Court's Decision**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses using Symantec Endpoint Protection, Version 12.1.4100.4126.105, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that a copy of the foregoing ***Amicus Curiae*** **Brief of Multistate Tax Commission In Support of Barbara Brohl, In Her Capacity as Executive Director, Colorado Department of Revenue**, was furnished through ECF to the following on May 20, 2015, addressed as follows:

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