In the

United States Court of Appeals
For The Tenth Circuit

Docket No. 12-1175

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

AMICUS BRIEF OF THE TAX FOUNDATION

Joseph D. Henchman
TAX FOUNDATION
1325 G Street N.W.
Suite 950
Washington, DC 20005
(202) 464-6200
JDH@taxfoundation.org

Joseph P. Kennedy*
Counsel of Record
KENNEDY KENNEDY & IVES, LLC
1000 Second Street N.W.
Albuquerque, NM 87102
(505) 244-1400
kennedylaw@civilrightslawnewmexico.co
m

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, *amicus curiae* discloses the following: The Tax Foundation is not a publicly held corporation or publicly held entity; it does not have a parent corporation; and no publicly held company owns 10% or more stock in any of the above.

/s/ Joseph P. Kennedy
Joseph P. Kennedy
Counsel of Record for The Tax Foundation

Dated: June 16, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. **DEPUTIZING OUT-OF-STATE RETAILERS TO ASSIST IN THE COLLECTION OF USE TAX IS UNSOUND TAX POLICY AND UNDULY BURDENSOME.** 2

A. **There Are Many Sales And Use Tax Jurisdictions In The United States.** 2

B. **The Burden Of Sales And Use Tax Collection On Sellers Should Stay Within a State.** 3

C. **The Challenged Statute is Unduly Burdensome.** 6

II. THE CHALLENGED STATUTE VIOLATES THE BRIGHT-LINE SUBSTANTIAL NEXUS TEST OF QUILL AND BELLAS HESS. 10

III. THE CHALLENGED STATUTE IS PURPOSEFULLY AND THUS IMPERMISSIBLY DISCRIMINATORY. 12

CONCLUSION 15

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF DIGITAL SUBMISSION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

PAGE(S)

CASES

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) 13

Best & Co. v. Maxwell, 311 U.S. 454 (1940) 10-11

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 12

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 12

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 3, 6, 8

Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) 6, 7

Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015) 11-12

Direct Mktg. Ass'n v. Huber, No. 10-cv-01546-REB-CBS, 2012 U.S. Dist. LEXIS 44468, (D. Colo. Mar. 30, 2012) 13

E. Ky. Res. v. Fiscal Court, 127 F.3d 532 (6th Cir. 1997) 12-13

Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) 14

Hohn v. United States, 524 U.S. 236 (1998) 12

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) 13

McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944) 4

Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967) 4, 6, 11

Quill v. North Dakota, 504 U.S. 298 (1992) .... passim

United States v. Brooks, 751 F.3d 1204 (10th Cir. 2014) 11

W. Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 3

W. Lynn Creamery v. Healy, 512 U.S. 186 (1994) .... passim

Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001) 12

STATUTES

Colo.Rev.Stat. § 39-21-112.3.5 (2014) 5, 6

Colo.Rev.Stat. § 39-21-112.3.5(a) (2014) 13

REGULATIONS

Colo. Code Regs. § 201-4:39-26-102.3 (2015) 4-5

Colo. Code Regs. § 201-4:39-26-103.5(7)(a) (2015) 7

Colo. Code Regs. § 201-4:39-26-104(1)(A) (2015) 4-5

Colo. Code Regs. § 201-4:39-26-202 (2015) 5

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (9th ed. 2009) 4

Richard Borean & Joseph Henchman, *State Sales Tax Jurisdictions Approach 10,000* (June 9, 2015), http://www.taxfoundation.org/blog/state-sales-tax-jurisdictions-approach-10000 3

Scott Drenkard & Jared Walczak, *State and Local Sales Tax Rates in 2015* (June 8, 2015), http://www.taxfoundation.org/article/state-and-local-sales-tax-rates-2015 .... 2, 3, 11

Supplemental Opening Brief of Defendant-Appellant, *Direct Mktg. Ass'n v. Brohl*, No. 12-1175 (10th Cir. May 13, 2015) 5, 10

Tim Hoover, *Federal Judge Tosses Out 'Dirty Dozen' Tax on Online Retailers*, THE DENVER POST, April 4, 2012, http://www.denverpost.com/ci_20325190/federal-just-tosses-out-dirty-dozen-tax-online 7, 14

INTEREST OF AMICUS CURIAE[1]

The Tax Foundation submits this brief as amicus curiae in support of Appellee in the above-captioned matter.

The Tax Foundation is a non-partisan, non-profit, research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington D.C., the Tax Foundation seeks to make information about government finance more accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and advocating for sound tax policy. This case involves an important issue of tax policy, and the Tax Foundation has testified and written extensively on taxpayer protections and burdens. As such, the Tax Foundation has an institutional interest in ensuring the dormant Commerce Clause rights of taxpayers are respected. A motion for leave to file accompanies this brief.

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for the Tax Foundation represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the Tax Foundation or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Colorado is explicitly prohibited from burdening out-of-state retailers with a requirement to collect use tax from Colorado residents. *See Quill v. North Dakota*, 504 U.S. 298 (1992). In response to this prohibition, Colorado enacted a law ("the Challenged Statute") that presents out-of-state retailers with an impermissible dilemma. Under the Challenged Statute, such retailers must either (1) shoulder the burden of use tax collection from Colorado residents or (2) comply with a regulatory reporting system more burdensome than use tax collection. Colorado argues that the Challenged Statute is neither impermissibly discriminatory nor unduly burdensome. It is both, and represents an unsound tax policy which has the potential to devastate the internet and direct mail retail industries.

ARGUMENT

I. COLORADO'S STATUTE DEPUTIZING OUT-OF-STATE RETAILERS TO ASSIST IN THE COLLECTION OF USE TAX IMPERMISSIBLY BURDENS INTERSTATE COMMERCE.

A. There Are Many Sales and Use Tax Jurisdictions in the United States.

Sales and use taxes are one of the most common ways for state and local governments to generate revenue – only three states do not impose a state or local sales tax on retail transactions. *See* Scott Drenkard & Jared Walczak, *State and*

Local Sales Tax Rates in 2015 (June 8, 2015), http://www.taxfoundation.org/article/state-and-local-sales-tax-rates-2015.

However, the number of sales tax systems is far greater than the number of states. As of March 2014, the total number of sales tax jurisdictions in the United States was 9,998 – 307 of which were located in Colorado. *See* Richard Borean & Joseph Henchman, *State Sales Tax Jurisdictions Approach 10,000* (June 9, 2015), http://www.taxfoundation.org/blog/state-sales-tax-jurisdictions-approach-10000. Tax rates, exemptions, audit protocols, tax return filing requirements, and other regulations can and do differ greatly across these jurisdictions. The result is anything but a uniform or simple sales tax system.

B. The Burden of Sales and Use Tax Collection on Sellers Should Stay Within a State.

The Supreme Court has expressed strong concern for the burdening of out-of-state retailers, and it has made a judgment that Congress is best placed to expand state tax authority. It is true that being involved in interstate commerce does not absolve an entity from its share of a sales tax burden. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (citing *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). However, the Supreme Court has concluded that the deputation of use tax collection to market participants without substantial nexus in the state is unduly burdensome. *Complete Auto*, 430 U.S. at 279, *Quill*,

504 U.S. at 315-17, *Nat'l Bellas Hess v. Dep't of Revenue*, 386 U.S. 753, 759 (1967).

Generally, as an entity's business presence expands in size and scope, so too does the burden placed on it by the collection of sales tax. When a business is small or its geographic scope is limited, the burden is manageable. However, as the business falls under additional taxing jurisdictions, the burden becomes less easily managed. People and systems used to implement, collect, and record the tax cannot be standardized across the entity's operation once multiple taxing jurisdictions with different regulations and requirements are considered. This leads to an increase in cost and time required to comply with the tax regulations.

Sales and use taxes are designed to work in tandem with each other by securing the same revenues and complementing the purpose of the other tax. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 331 (1944). However, the taxes are inherently different, as they each assess "taxes on different transactions and for different opportunities afforded by a State." *Id.* Sales taxes are generally imposed on the retail sale of goods and services and usually collected and remitted by the seller, whereas use taxes are imposed on the use of goods that are bought outside the taxing authority's jurisdiction and are remitted by the purchaser. *See TAX,* BLACK'S LAW DICTIONARY, 1597 (9th ed. 2009).

Colorado follows this same practice, imposing a sales tax on all retail sales and requires the seller, if they hold a Colorado sales tax license, to collect the tax from the purchaser and remit it to the state. Colo. Code Regs. § 201-4:39-26-102.3, 104(1)(A) (2015). Colorado imposes a use tax based on the fair market value on "the privilege of storing, using or consuming any tangible personal property purchased at retail" when the applicable Colorado sales tax cannot or has not been collected. Colo. Code Regs. § 201-4:39-26-202 (2015). The user of the property is obligated to pay and remit the tax. *Id.* Absent from Colorado's statutes is any requirement for an entity not doing business in the state of Colorado to collect and remit sales or use tax to the state. This is in keeping with the Supreme Court's ruling in *Quill* regarding the "substantial nexus" requirement of *Complete Auto*. *See Quill*, 504 U.S. at 313.

Due in large part to the difficulty of collecting use tax from internet purchases, Colorado enacted a multi-part sales and use tax information reporting requirement for any out-of-state retailer with over $100,000 of gross sales in Colorado. *See* Colo.Rev.Stat. § 39-21-112.3.5 (2014). Colorado contends this Challenged Statute is narrowly drawn and requires no collection of information that is not already collected by retailers. Supplemental Brief of Defendant-Appellant at 18, *Direct Mktg. Ass'n v. Brohl*, No. 12-1175 (10th Cir. May 13,

2015). The facts do not support Colorado's claim that the burden created is worth the cost of compliance.

Colorado emphasizes that out-of-state retailers may choose to collect and remit the tax absent any legal requirement to do so. *See Id*. at 15. Should out-of-state retailers choose not to collect Colorado's tax, then they must comply with the reporting requirement outlined in Colo.Rev.Stat. § 39-21-112.3.5.

C. The Challenged Statute is Unduly Burdensome.

As the Supreme Court of the United States noted recently, the dormant aspect of the Commerce Clause prohibits states from "discriminating against or imposing excessive burdens on interstate commerce without congressional approval." *Comptroller of Md. v. Wynne*, 135 S. Ct. 1794, at 823. The clause thus strikes at "one of the chief evils that led to the adoption of the Constitution, namely state tariffs and other laws that burdened interstate commerce." *Id*. Thus, if this Court holds the bright-line rule established in *Bellas Hess* and *Quill* inapplicable to the challenged statute, it must still determine whether the statute is impermissibly discriminatory or unduly burdensome. A scheme is unduly burdensome under the *Complete Auto* rule when it imposes tax burdens on out-of-state market participants without substantial nexus in the taxing state. *See Bellas Hess*, 386 U.S. at 759-60; *Complete Auto*, 430 U.S. at 279; *Quill*, 504 U.S. at 309. In evaluating a claim of undue burden under the *Complete Auto* rule, a court must consider "not

the formal language of the tax statute, but rather its practical effect." *Wynne*, 135 S. Ct. at 1795 (citing *Complete Auto*, 430 U.S. at 279).

The substantial nexus component of the *Complete Auto* analysis is "a means for limiting state burdens on interstate commerce." *Quill*, 504 U.S. at 314. Even if this Court holds that the Challenged Statute is not covered by the bright-line test from *Quill*, it must analyze the burden the Challenged Statute places on interstate commerce. This analysis of burden is mandated by the Supreme Court's dormant Commerce Clause jurisprudence, which directs that courts consider "not the formal language of the tax statute but rather its practical effect". *Wynne*, 135 S. Ct. at 1795.

Although the Challenged Statute does not explicitly command that out-of-state retailers collect the Colorado use tax, it presents out-of-state retailers with an impermissible dilemma: collect the use tax or comply with an intentionally onerous reporting requirement. Retailers electing to report and not collect are not entitled to the 3.33% Colorado Sale Tax Service Fee, a tax collection bonus from the state to sales tax-collecting retailers. Colo. Code Regs. 201-4:39-26-103.5(7)(a) (2015).

The onerous nature of the reporting requirement is not unintentional: a legislative sponsor of the Challenged statute stated in an interview that the Challenged Statute was designed to encourage online retailers to collect the use tax. *See* Tim Hoover, *Federal Judge Tosses Out 'Dirty Dozen' Tax on Online*

Retailers, THE DENVER POST, April 4, 2012, http://www.denverpost.com/ci_20325190/federal-just-tosses-out-dirty-dozen-tax-online. Rather than simply mandate that out-of-state retailers notify Colorado purchasers of their use tax liability, the Challenged Statute demands a multi-part compliance regime. At the time of a qualifying transaction, a retailer must notify a Colorado purchaser that they owe Colorado use tax. Then, a retailer must annually send, via first class mail, each Colorado qualifying purchaser a notice detailing the dates, amounts, and products purchased from the retailer (this mailer cannot be attached to another shipment). This notice must be sent, even if the retailer knows that the items sold are exempt from Colorado tax. Then, a retailer must submit a form to the Colorado Department of Revenue including information about the purchaser and amounts purchased.

Effectively, under the Challenged Statute, out-of-state retailers no longer have the option to decline to assist Colorado in the enforcement of the sales and use tax statutes – notwithstanding their right as retailers to decline if they do not have a substantial nexus in Colorado. *See Complete Auto*, 430 U.S. at 279; *Quill*, 504 U.S. at 313. Under the Challenged Statute, out-of-state retailers are now required to either (1) report extensive information on their Colorado purchasers or (2) collect and remit sales and use tax directly.

This dilemma flies in the face of the *Complete Auto* substantial nexus requirement. Colorado is not permitted to require out-of-state retailers to collect use tax because such a requirement is unduly burdensome. *See Quill*, 504 U.S. at 313. If use tax collection is unduly burdensome, it must be unduly burdensome for a state to encourage such tax collection by forcing retailers to choose between use tax collection and a burdensome and costly reporting requirement; especially since the reporting option does not allow out-of-state retailers to collect the 3.33% rebate that sales tax collectors receive. Taken as a whole, this system is reminiscent of the system in *W. Lynn Creamery*, in which the Supreme Court stressed that dormant Commerce Clause cases should eschew "formalism for a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery*, 512 U.S. 186, 201 (1994). As in *W. Lynn Creamery*, a system that operates together to burden interstate commerce is impermissible.

It is notable that Colorado does not require its own brick and mortar businesses to check customer identifications and ensure that use taxes are paid to the appropriate state, county, or municipality, or report customer purchasing information to the Department of Revenue. It is manifest that this regulatory burden would drown Colorado's retailers in compliance costs and paperwork and destroy Colorado jobs and businesses, thus Colorado's legislature has likely determined that the hypothetical costs of such a system outweigh the benefits.

Unfortunately, Colorado's legislature showed no concern for out-of-state jobs or businesses when it passed the Challenged Statute.

The difficulty in enforcing use tax payments on internet purchases is a genuine problem that Colorado faces. However, the state does not and should not have legal authority to force an out-of-state retailer to solve the state's problem. *Quill* clearly establishes that states cannot commandeer the resources of out-of-state retailers for tax collection, and the internet and direct mail industries have grown in reliance upon this established rule. A ruling upholding the Challenged Statute would threaten the direct mail and internet retail industries by imposing a potentially massive regulatory burden on retailers.

II. THE CHALLENGED STATUTE VIOLATES THE BRIGHT-LINE SUBSTANTIAL NEXUS TEST OF *QUILL* AND *BELLAS HESS*.

The Supreme Court has determined that retailers "whose only connection with customers in the [taxing] State is by common carrier or the United States mail … are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 315 (internal quotation marks omitted). Colorado argues that because its system does not actually require retailers to collect use taxes, it has not violated this rule. *See* Supplemental Brief of Defendant-Appellant at 15, *Direct Mktg. Ass'n v. Brohl*, No. 12-1175 (10th Cir. May 13, 2015). Colorado's argument is logical in the most formal sense, but interpreting this rule in the most formal sense is

inappropriate; dormant Commerce Clause jurisprudence demands a more dynamic and vigorous analysis than mere formalism. The Supreme Court has stressed that

> Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather [courts should] eschew formalism for a sensitive, case-by-case analysis of purposes and effects. As the [Supreme Court] declared over 50 years ago: 'The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'

W. Lynn Creamery, 512 U.S. at 201 (citing *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)).

The purpose of the Challenged Statute is to commandeer the resources of out-of-state retailers to aid in the collection Colorado's use tax. While out-of-state retailers are not explicitly forced to collect the use tax, *Quill*, *Complete Auto*, and *Bellas Hess* placed no particular importance upon the act of collection. Rather, the bright-line rule arose out of the immense burden the Supreme Court correctly feared would fall on interstate retailers absent a clear rule. When *Bellas Hess* was decided, there were over 2,300 localities imposing some version of a sales or use tax; today there are almost 10,000. *See Bellas Hess* 386 U.S. at 759 n.12; Drenkard & Walczak, *supra*. Today, the welter of complicated sales tax obligations imposed by local jurisdictions is by no means less complex than it was in 1967 when *Bellas Hess* was decided. 386 U.S. at 759-60.

Colorado and supporting *amici* argue that *Quill* is not good policy. Even if this Court believes these arguments have some merit, it would be improper for this Court to rule on them. "Supreme Court precedent binds [this court]." *United States v. Brooks*, 751 F.3d 1204, 1212 (10th Cir. 2014). Reasonable jurists can disagree on whether it was wise to reaffirm *Bellas Hess* in *Quill*. *See Direct Mktg. Ass'n v. Brohl,* 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring). But, the American legal system depends upon the principle that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). The Supreme Court has presently settled the assignment of responsibility for use tax collection: a state may only assign this responsibility to firms with a sufficient nexus in that state. If Colorado disagrees with the bright-line rule, it must do as Justice Kennedy suggested in *Direct Mktg.* and present "an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Direct Mktg.,* 135 S. Ct. 1124, 1135 (Kennedy, J., concurring).[2] Until then, Supreme Court "decisions remain binding precedent until [the Supreme Court sees] fit to

---

[2] Justice Kennedy's concurrence in *Direct Mktg.* is sharply critical of *Quill's* rule, yet he nowhere suggests that the Challenged Statute is permissible under the rule of *Quill.*

reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

III. THE CHALLENGED STATUTE IS PURPOSEFULLY AND THUS IMPERMISSIBLY DISCRIMINATORY.

A virtually *per se* rule of invalidity applies to statutes enacted for the purpose of discrimination. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624-27 (1978); *accord Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 333 (4th Cir. 2001). "It is axiomatic that a state law that purposefully discriminates against out-of-state interests is unconstitutional." *E. Ky. Res. v. Fiscal Court*, 127 F.3d 532 (6th Cir. 1997).

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

W. Lynn Creamery, 512 U.S. at 186 (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (Cardozo, J., for a unanimous court)). This rule holds true even where states are attempting to protect domestic businesses from unfair interstate competition. *See generally Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

The Challenged Statute was written to apply solely to "any retailer that does not collect Colorado sales tax." Colo.Rev.Stat. § 39-21-112.3.5(a) (2014). "[O]nly out-of state retailers must provide the Transaction Notice and the Annual Purchase

Summary to their customers. Only out-of state retailers must provide the Customer Information Report to the state." *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 U.S. Dist. LEXIS 44468, at *14 (D. Colo. Mar. 30, 2012). Colorado Senator Rollie Heath, who sponsored the Challenged Statute, stated that "the whole intent of the [Challenged Statute] was to protect Colorado jobs and Colorado residents." Hoover, *supra*.

Colorado argues that this discriminatory purpose is permissible because the Challenged Statute imposes a mere regulatory burden falling entirely on interstate companies, as in *Exxon Corp. v. Governor of Md*. 437 U.S. 117 (1978). However, in *Exxon*, the Supreme Court held that the regulations in question were not discriminatory because they applied to all refiners and because they treated in-state and out-of-state retailers equally. *Id.* at 125-27. The regulations in *Exxon* were aimed at leveling the playing field between retailers owned by refiners and independent retailers; they were unconcerned with protecting locally owned retailers from interstate competition. In contrast, the intent of the Challenged Statute is to reduce the competitiveness of out-of-state businesses that threaten in-state jobs and businesses.

Appellant further argues that Challenged Statute is not discriminatory because many out-of-state companies are unaffected. While the Challenged Statute does not apply to out-of-state domiciled companies who already collect sales tax

for Colorado, no case supports the proposed rule that a statute must be targeted against all interstate domiciled companies to violate the dormant Commerce Clause. Rather, a statute violates the dormant Commerce Clause when it is enacted to protect businesses operating in-state from businesses operating out-of-state. *See generally W. Lynn Creamery*, 512 U.S. 186.

CONCLUSION

Most American internet and direct mail sellers do business across the United States. Dormant Commerce Clause jurisprudence limits their tax collection burden to the states in which they have nexus because the alternative is a system in which these sellers must comply with the laws of fifty states and thousands of localities. Colorado's Challenged Statute, if upheld, will be used to justify statutes and ordinances across the country, smothering the internet and direct mail industries in compliance costs.

For the forgoing reasons, the Tax Foundation respectfully requests that the decision of the court below be affirmed.

Respectfully submitted,

TAX FOUNDATION

/s/ Joseph D. Henchman
By: Joseph D. Henchman
TAX FOUNDATION
1325 G Street N.W.
Suite 950
Washington, DC 20005
(202) 464-6200
JDH@taxfoundation.org

Respectfully submitted,

KENNEDY KENNEDY & IVES, LLC

/s/ Joseph P. Kennedy
By: Joseph P. Kennedy*
Counsel of Record
KENNEDY KENNEDY & IVES, LLC
1000 Second Street N.W.
Albuquerque, NM 87102
(505) 244-1400
kennedylaw@civilrightslawnewmexico.com

Dated: Washington, D.C.
June 16, 2015

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 3408 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: Washington, D.C.
June 16, 2015

s/ Joseph P. Kennedy
Joseph P. Kennedy
KENNEDY KENNEDY & IVES, LLC

CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, and according to the program are free of viruses.

Dated: Washington, D.C.
June 16, 2015

s/ Joseph P. Kennedy
Joseph P. Kennedy
KENNEDY KENNEDY & IVES, LLC

CERTIFICATION OF SERVICE

I, Joseph P. Kennedy, hereby certify that a copy of the within TAX FOUNDATION AMICUS BRIEF was furnished through ECF to the following on this 16th day of JUNE, 2015, addressed as follows.

George S. Isaacson
Matthew P. Schaefer
BRANN & ISAACSON
184 Main Street, P.O. Box 3070
Lewiston, ME 04243-3070
gisaacson@brannlaw.com
mschaefer@brannlaw.com

Cynthia H. Coffman
Attorney General
Frederick R. Yarger
Solicitor General
Melanie J. Snyder
Chief of Staff
Claudia Brett Goldin
First Assistant Attorney General
Stephanie Lindquist Scoville
Senior Assistant Attorney General
Grant T. Sullivan
Assistant Solicitor General
1300 Broadway, 8th Floor
Denver, Colorado 80203
(720) 508-6000
melanie.snyder@state.co.us

Dated: Washington, D.C.
June 16, 2015

s/ Joseph P. Kennedy
Joseph P. Kennedy
KENNEDY KENNEDY & IVES, LLC