Nos. 13-252 & 13-259

IN THE
Supreme Court of the United States

OVERSTOCK.COM, INC.,
Petitioner,
AND

AMAZON.COM LLC AND AMAZON SERVICES LLC,
Petitioners,
v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF THE AMERICAN ASSOCIATION OF ATTORNEY–CERTIFIED PUBLIC ACCOUNANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

AMERICAN ASSOCIATION OF ATTORNEY – CERTIFIED PUBLIC ACCOUNTANTS, INC.
8647 Richmond Hwy, Suite 639
Alexandria, Virginia 22309
(703) 352-8064

JAMES H SUTTON, JR., CPA, ESQ.
Counsel of Record
Moffa, Gainor, & Sutton, PA
8875 Hidden River Pkwy
Suite 300
Tampa, FL 33637
(813) 367-2134
JamesSutton@FloridaSalesTax.com

September 23, 2013

SYDNEY S. TRAUM, ESQ., CPA, LLM (TAX)
Law Offices of Sydney S. Traum, P.A.
Of Counsel to Levey, Filler, Rodriguez, Kelso, &
Magilligan, LLP
1688 Meridian Avenue, Suite 900
Miami Beach, FL 33139
(305) 672-5007
sydtraum@attorney-cpa.com

JOHN W. PRAMBERG, ESQ.
102 State Street
P.O. Box 455
Newburyport, MA, 01950-0555
(978) 462-7818
JohnWPrambergEsq@Attorney-CPA.com

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the American Association of Attorney – Certified Public Accountants, Inc. ("AAA-CPA"), a not-for-profit corporation, formed in 1964 and now headquartered in Virginia. The AAA-CPA has members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant.

AAA-CPA members, with both accounting and law backgrounds, have unique perspectives on business and the courts. At the same time, a significant portion of the AAA-CPA members have devoted their careers to the field of tax law, both federal taxes and state and local taxes, representing a very wide variety of industries. As such, the AAA-CPA membership is in a unique position to view how New York's "click-through-nexus" statute has wide ranging effects on thousands of companies beyond the two petitioners herein. From the AAA-CPA point of view, those effects, which are worsened by the decision below, urgently requires this Court's review.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* 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 *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* represents that all parties were provided notice of *amicus*'s intention to file this brief at on September 16, 2013 and that all parties have consented to the filing of this brief. Both Petitioners filed letters with the Clerk granting blanket consent to *amicus* briefs, and respondent provided amicus counsel separate written consent to file this brief via email on September 16, 2013.

INTRODUCTION

The Commerce Clause of the U.S. Constitution (Art. 1, Sec. 8, Clause 3) was a profound expression by the founders of our great country that if our nation is to have a thriving national economy, then we need commerce to flow freely between the states without undue burdens. A little more than 20 years ago, this Court authoritatively intervened[2] in the middle of a struggle that has been ongoing for over 100 years in our great nation. This struggle is between the tax-hungry states that are looking out for their states' own interests without regard to the consequences outside the individual state's borders and our national economy, consisting of businesses that sell goods and services across state lines. Since the *Quill* decision[3] urging Congress to utilize the powers granted by the Commerce Clause, many states have taken bolder and bolder legislative steps to ignore this Court's holding in *Quill* to satify their insatiable demand for tax revenues at the expense of citizens outside their states' borders.

Compounding the problem, there is no question of whether remote sellers are paying their fair share of tax, because transactions that occur outside the state make the in-state purchasers subject to use tax, not the sellers. Therefore, New York's "click-

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[2] *See*, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (creating a bright line test requiring physical presence in state before the state can force use tax collection requirements on a remote seller).

[3] Since the 1992 *Quill* case, the Court has not granted *certiorari* to another state tax nexus case. *See id.*

through nexus" statute forces remote sellers, such as the Petitioners, to be tax collection agents for the state. **Use tax collection statutes are the most extreme types of burdens on interstate commerce that exist in the state tax arena. This is the epitome of a burden on interstate commerce – a tax collection responsibility for a tax imposed on a third party, regardless of profit, cost of compliance, or even liability for the tax – imposed ONLY on out of state companies.** If the remote seller makes a mistake in the endlessly complex use tax collection process for New York, then the remote seller becomes liable for the tax, which becomes an even greater burden. New York extends this costly tax collection burden on remote sellers everywhere by turning non-nexus-creating internet advertising agreements into commissioned sales agency relationships by mere statutory presumption.

The use tax collection process is so complex and confusing that even the lower courts mistakenly refer to the tax at issue as a "sales tax," when the tax to be imposed on the petitioners is a "use tax."[4] If the courts of New York cannot determine the type of tax at issue, then it speaks volumes as to the over burdensome complexity of both the statute and the use tax collection process.

What should also be very troublesome to this Court is the notion that out of state vendors have no

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[4] *Amazon.com LLC v. New York Dept. of Tax. & Fin.*, 877 N.Y.S. 2d 842, 844 (N.Y. Sup. Ct. 2009)(referring to the tax as a the statutes "forces on-line retailers to collect a sales tax on purchases made by New York residents").

employees or owners with any vote in how New York's use tax collection laws are written.[5] The only thing standing in the way of the many states acting selfishly to push their own tax collection burdens entirely on the citizenry of the other 49 states is the Commerce Clause, as championed almost single-handedly by this Court. Members of the American Association of Attorney – Certified Public Accountants ("AAA-CPA") have been in the front lines of this struggle and we respectfully request that this Court to once again champion the free flow of commerce in our national economy over any one state's need to raise revenue. The states often claim that technology has so advanced that use tax collection should be easier and we agree. Technology has advanced so much that it should be much easier for the states to collect use tax from their own citizens than it ever has in been the past without the need to hinder interstate commerce with extremely burdensome tax collection responsibilities. We also believe that this Court should once again remind Congress why the Commerce Clause was created and suggest Congress act with the least burdensome means to end the strife. This Court might suggest that Congress enact legislation similar to the remote seller reporting statute recently enacted by the state of Colorado.[6] A reporting statute allowing users to self-report use taxes would be very similar to the very successful income

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[5] Most states, including New York, have statutes that determine a company has nexus with the state if any substantial owner or employee lives in the state. (e.g. N.Y. Tax Law § 1101(b)(8)(vi))

[6] Col. Rev. Stat. § 39-21-112(3.5), (2010).

tax reporting statutes used for federal income tax purposes.

ARGUMENT

I. THE STRUGGLE BETWEEN STATES AND REMOTE SELLERS IS NOT NEW, BUT THE EFFECTS ARE BECOMING MUCH MORE BURDENSOME ON THE NATIONAL ECONOMY

The Commerce Clause of the U.S. Constitution (Art. 1, Sec. 8, Clause 3) was a profound expression by the founders of this great country that if our nation is going to thrive, then we need commerce to flow freely among the states without undue burdens.[7] The federal government is presumed to act in the best interests of the nation as a whole, versus the self-interested nature of the individual states that could threaten our national economy with ruin under the guise of state taxation.

This Court recognized the importance of the Commerce Clause more than a hundred years ago, nurturing and protecting the free flow of commerce among states through a myriad of state tax opinions. This Court knows better than any other that this is not a new dispute. It has been ever-present to a lesser extent between similarly situated players ever

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[7] See, *Gonzales v. Raich*, 545 U.S. 1, 16 (2005)(mentioning one of the greatest shortcomings of the Articles of Confederacy was that it allowed the states erect protectionist trade barriers between the states; the Commerce Clause was deemed the remedy to this oversight).

since the Mississippi legislature enacted the first state sales tax in 1932.[8] This Court has been the court of final redress in far too many cases dealing with a state's jurisdictional overreaching. From navigating in waters between the states[9] to the mail order catalog industry,[10] this Court has been the last line of defense against states acting in their own self-interest through the imposition of unreasonable burdens on interstate commerce.

Every decade or two, the type of industry seeking protection from overly aggressive states changes. Now it is the electronic commerce vendors seeking this Court's protection. The dispute permeates the front pages of national media, the tax departments of every company selling across state lines, the floors of both state and federal legislatures, and finally the courts. States are even fighting with each other in the battle with Montana, Oregon, and Alaska forming a coalition against the Marketplace Fairness Act S. 336/S.743/HR. 684 bills in Congress. Our entire nation has been dragged into this dispute – and this burdens the economy as a whole. Of greatest import, advances in technology do not change the constitutional importance of avoiding undue burdens on interstate commerce.

Since this Court's decision in *Quill* to add bright line clarity to the situation – while expressly

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[8] *See, State and Local Taxation*, 9th Edition, pg. 607, by Hellerstein, Stark, Swain, and Youngman.

[9] *Gibson v. Ogden*, 22 U.S. 1 (1824).

[10] *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

inviting Congress to intervene – this Court has patiently waited on the sidelines. However, the states have not been sitting idle, instead enacting statute after statute imposing increasingly complex and burdensome responsibilities on out of state companies. These statutes are so complex that even the lower courts in this case mistakenly refer to the tax at issue as a "sales tax," when the taxes the petitioners would be required to collect under the statute would be "use taxes."[11]

These statutes have been so bold as to intentionally cross the line to include activities long recognized as "safe," such as advertising, in the list of nexus-creating activities, which expose a remote seller to a foreign state's taxing laws. These overreaching statutes always include a blanket caveat that if the statute is held to be unconstitutional, then only that small portion of the statute is deemed void. That leaves extreme uncertainty in our interstate commerce marketplace where taxing authorities are essentially compelled to enforce statutes until a court holds them unconstitutional. Many companies continue their in-state advertising activities relying on the precedent set by this Court to protect them. But when this Court declines to hear the cases and the lower courts decide this Court's opinions are no longer relevant, taxpayer's reliance on what should be the highest law in the land not only falters, but

[11] Because the transactions of both Amazon and Overstock are approved and finalized outside of the state, New York sales tax would never apply to the transactions. The taxes at issue for the petitioners are all use taxes.

they are held responsible for tax collection obligations going back in time[12] as if this Court's decisions on the matter were never issued.

We have reached a watershed moment in our country's history when small, local businesses and consumers can cheaply and easily find each other and conduct business from anywhere in the country utilizing the internet marketplace. This is the epitome of a highly advanced, capitalistic marketplace that benefits the country as a whole. However, legislation such as New York's place undue burdens on this young, thriving commercial marketplace disregarding this Court's Commerce Clause jurisprudence. The states will continue to do so unless this Court intervenes. The Petitioners herein are but the tips of the iceberg in this industry, representing hundreds of thousands of smaller businesses struggling to find a national customer base free from extreme tax burdens that the states themselves should be collecting from their own citizens. As such, we have another blossoming industry that requires this Court's protection from the more than 9,600 state and local jurisdictions[13] in this country that impose a use tax.

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[12] *E.g., Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (good example of a judicial change in the interpretation of the law being retroactively applied against a taxpayer with great financial harm resulting).

[13] *See*, written submission of Joseph Henchman to Committee on Commerce, Science, and Transportation U.S. Senate, *The Proper Role of Congress in State Taxation: Ensuring the Interstate Reach of State Taxes Does Not Harm the National Economy*, Tax Foundation, (August 1, 2012)(providing that there are over 9,600 local sales tax jurisdictions in the U.S.); *See, also, McConnell's Claim That There Are Nearly 10,000 Tax Codes Nationwide*, The Washington Post, by Glenn Kessler, (April 29,

II. CLICK-THROUGH-NEXUS USE TAXES ARE THE MOST BURDENSOME AND DISTRUPTIVE SOLUTION TO THE STATES' REVENUE PROBLEMS

The New York "click-through-nexus" statute represents one of the most severe burdens on interstate commerce that exists in the state tax arena, specifically use tax collection. Despite what the media claim and what the lower courts suggested, the burden New York attempts to impose on Overstock (and Amazon) is not a sales tax. Sales tax applies to transactions that take place wholly within the borders of the taxing state and it is imposed on the business selling the taxable good or service in that state. While sales tax is required to be passed on to the purchaser, sales tax is a burden placed on the seller for the privilege of selling goods or services within the borders of the state. The Internet purchases made by people in New York are legally taking place outside of New York, in the domicile state of the seller (in Overstock's case, Utah). Because the transaction is not taking place in the state of New York, the state's sales tax does not apply. Instead, the use tax is imposed on the purchaser's use of the property in New York and each in-state purchaser/user is legally responsible for the use tax. What New York's "click-through-nexus" statute attempts to do is force remote sellers, such as Overstock, to be use tax collection agents for the state.

2013) (citing Tax Foundation's estimate of 9,600 jurisdictions, Vertex, Inc.'s estimate of 9,646, CCH's estimate of 7,600, and Avalara's estimate of 14,500).

This is the epitome of a burden on interstate commerce – a tax collection encumbrance regardless of profit, cost of compliance, or even legal liability for the tax.

While the typical citizen in this country believes collecting sales tax is an easy process, members of the AAA-CPA have been in the trenches of the evolution of sales and use taxes in this county. We know from firsthand knowledge that businesses across the country are plagued by severe uncertainty of what is and what is not subject to sales tax or use tax much less how to keep up with the extreme tax return burdens. If New York's click-through-nexus statute is held constitutional, companies will have to keep up with the sales tax and use tax reporting rules not only in 45 states,[14] but also in over 9,600 individual localities that have their own sales tax and use tax rules.[15]

Moreover, a significant number of states impose criminal penalties for failing to remit even small amounts of collected sales tax.[16] Therefore, even if a retailer manages to hire enough qualified personnel to

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[14] Alaska, Delaware, New Hampshire, Montana, and Oregon do not have a state sales tax, although some local jurisdictions do have a sales and use tax in some of these states

[15] See, written submission of Joseph Henchman to Committee on Commerce, Science, and Transportation U.S. Senate, *The Proper Role of Congress in State Taxation: Ensuring the* Interstate Reach of State Taxes Does Not Harm the National Economy, Tax Foundation, (August 1, 2012)(providing that there are over 9,600 local sales tax jurisdictions in the U.S.)

[16] *E.g.*, under §212.12(2)(c), Fla. Stat., Florida imposes up to 5 years in jail and $5,000 in fines for a mere $301 of collected but unremitted sales tax.

handle the research of what is and is not subject to tax in every sales tax jurisdiction and the personnel to compile and file the sales tax returns across the country, the company still must contend with excruciating long and expensive sales and use tax audits from each of the states, then be held financially or potentially criminally liable for mistakes.

Given that a company is typically audited by a state once every five years, a company must absorb the extremely high cost of managing more than eight sales and use tax state tax audits every single year. What smaller to medium sized internet retailer company could possibly afford this type of administrative burden? The cost of compliance, including suffering through multiple sales and use tax audits every year, will likely exceed the amount of tax collected and remitted to the states for a significant number of smaller companies. There is a fundamental flaw in a tax collection statute that has the distinct possibility of costing businesses more to implement and maintain that the revenue it collects for the states. What could possibly be more burdensome on interstate commerce?

Offending traditional notions of fair play, these tax collection burdens placed on remote sellers are not even tax liabilities of the remote seller.[17] The use taxes are imposed on the buyer of the goods and services. New York has complete jurisdiction over the use of the

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[17] Worthy of note, this level of activity would likely not give rise to the Petitioners being subject to New York's income tax because Congress has seen fit to provide protections from the state income tax jurisdictional reach for click-through-advertising via Public Law 86-272.

goods purchased once the goods reach the customer and New York has the legal right to enforce the use tax on the purchaser with minimal chance of constitutional constraint. If the purchaser fails to remit the use tax to New York, then New York is free to impose penalties, interest, and even criminal sanctions against the in state purchaser, who can likely have a vote in how the use tax laws are enforced.

As Attorney – Certified Public Accountants, most members of our organization have studied, researched, cited, or even taught the opinions handed down by this Court on Commerce Clause jurisprudence. Our members are often at the forefront of this struggle between the states and remote sellers. If this Court does not intervene in New York, then click-through-nexus statutes will most likely be enacted in many more states as it already has in twelve states,[18] further crippling the electronic commerce in this country. From the forefront of the struggle between states and remote sellers, we implore this Court to recognize how uncertain and onerous the situation has become for remote sellers and grant certiorari in this case to protect the national economy as a whole from interference by individual states.

III. ON-LINE ADVERTISING IS STILL ADVERTISING, NOT AN IN STATE SALES FORCE

[18] As of June 2013, the twelve states with "click-through-nexus" statutes are New York, Illinois, Kansas, Minnesota, Maine, Arkansas, California, Connecticut, Georgia, North Carolina, Pennsylvania, and Rhode Island.

This Court has long recognized that a remote seller's mere advertising in a state does not create nexus for sales and use tax purposes.[19] At the same time, this Court has clearly established that a remote seller may not engage an agent to carry out in-state activities that an employee could not do without creating substantial nexus for sales tax or use tax commerce clause purposes.[20] Therefore, at the heart of the New York statute Section 1101(b)(8)(vi), the argument stems from the statute's presumption that one method of paying for online advertisement turns constitutionally permissible advertising into a nexus creating agency relationship. The logic is flawed and is yet another example of a state twisting the facts and law to force additional tax collection burdens on interstate commerce. Such a flaw in logic makes the statute facially unconstitutional.

Advertising has been ever present in North America since before the Constitution was written. From newspaper advertisements to billboards and even ads on bathroom stalls, advertising has come in many forms. To understand how the statute creates an unconstitutional presumption, an analysis of the on-line advertising industry is necessary.

The forms of advertising are ever changing, and so is the creativity of the methods of paying for

[19] *See, e.g., Quill, Id.*

[20] *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (In-state activities of an agent of the taxpayer will meet the substantial nexus requirement if the same activity by an employee would cause substantial nexus with the state).

advertising. While a newspaper historically charges to "run an ad" in the paper, a billboard might charge a flat fee per month. However, these are not the only ways of paying for advertising. As technology advances, so do the means of conducting business. For example, what if the billboard advertising is not effective at all? Should the business have to pay for the billboard ad? When technology advanced, billboard advertisers could include a special phone number for the customers to call that would be tracked by the billboard company so that the advertising charges could be made on a per call basis. This is a reasonable form of paying for advertising in which the billboard company takes the risk of no calls, but the purchaser of the ad takes the risk of having to pay a lot for the advertising if there are a lot of calls. What if the purchaser of the billboard ad still had a problem with this scenario because calls do not necessarily equal sales? When technology advanced, the billboard company could not only track the calls, but also the amount of revenue generated from using that unique phone number on the billboard. The billboard company can now offer the client the option of paying, a flat fee per unit of time, $x per call, or y% of the revenue generated from those calls. While the client has options to select the method of paying for the advertising and the risks and rewards change depending on the method of payment, the fact remains that the billboard company is still merely an advertiser and not a salesman for the company. Furthermore, the billboard advertiser has a vested interest in making sure that people call the number on the billboard because no matter what method of payment is used the billboard owner will make more money if the advertisement is successful. Even the flat

monthly fee payments would stop due to a non-renewal of the advertising agreement if the billboard ad produced no discernable revenue for the client.

The description of various billboard advertising payment methods is essentially what the on-line advertising industry has evolved into. With technology involved at every stage of on-line commerce advertising, high tech advertising firms have developed several very creative means of charging for advertising, much like our billboard examples above. Generally speaking, on-line advertising has four methods of calculating the cost of advertising as follows:[21]

a. Flat fee per amount of time to leave the advertisement on a site.
b. Fee per number of "impressions" (mouse cursor moving over the add even without a click)
c. Fee per click (fee each time someone clicks on the advertisement)
d. Fee based on the amount of revenue generated by people clicking on the advertisement.

Each payment method poses different business risks to both the advertiser and the advertising firm, but the fact clearly remains that services being paid for are advertising. All four methods also leave the advertising company with an incentive to help the client because, one way or another, if the on-line ad

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[21] See, *IAB Internet Advertising Revenue Report: 2012*, PriceWaterhouseCoopers, April 2013.

does not generate revenue, then the client will take his advertising budget elsewhere.

The New York "click-through-nexus" statute creates a presumption that an advertising agreement is somehow turned into an agency relationship, which effectively extends New York's jurisdictional reach to out of state companies forcing them to prove, to the satisfaction of the state, that the agreement is advertising. A literal reading of the New York click through nexus statute, would apply to all four types of advertising agreements.[22] The leap in logic is irrational. The fact that the statute places an automatic burden on remote sellers who choose one method of payment over another for advertising offends all notions of fair play. The state is merely using twisted logic to turn an advertising payment method into a means to exert jurisdiction over remote sellers where it has no jurisdiction. [23] This forces the remote sellers to collect New York's use taxes instead of New York enforcing its use taxes against the citizens that

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[22] *Overstock.com, Inc. & Amazon.com, LLC v. New York Dept. of Tax. & Fin.*, 20 NY3d 586, 599, (Mar. 28, 2013)(dissenting opinion, "Read literally, the statute would reach essentially all Internet advertising that links to a seller's website: it includes any agreement for referral of customers, by a link or otherwise, "for a commission or other consideration." Since this literal reading would unquestionably render the statute unconstitutional, the Department of Taxation and Finance has adopted a narrowing construction, largely ignoring the words "or other consideration ...").

[23] *Id.*, 600, ("the record contains no evidence, that compensation "based on the volume of completed sales" is an unusual way of charging for web advertising, or that such compensation is primarily associated with active solicitation on the seller's behalf by the website owner.")

owe the tax. To statutorily establish a presumption of nexus on these remote sellers places an unreasonable burden on interstate commerce that should not withstand Commerce Clause scrutiny.

While the petitioners are large companies with financial resources, the click-through-nexus law of New York applies to almost all Internet retailers regardless of size.[24] Many small internet retailers are mere one or two person companies that maintain a web site and never possess a single piece of inventory. Instead, these fledgling companies maintain a website, take orders electronically, and have the wholesaler drop-ship the goods at the lowest cost possible directly to consumers anywhere in the country. These companies utilize on-line advertising to help potential customers find their website. Thousands of new businesses with shoe string budgets cannot conceivably afford to keep up with the tax laws in 45 states or 9,600+ local sales tax jurisdictions. This Court should grant certiorari to protect not only large companies, such as the Petitioners, but the thousands of smaller companies that will also be affected by click-through-nexus statutes.

IV. COLORADO'S APPROACH TO REPORTING IS A DRAMATICALLY LESS BURDENSOME ALTERNATIVE THAT

[24] New York's threshold of $10,000 of sales is extremely low given that most internet retailers operate on very thin profit margins. The cost of keeping of with the use tax collection and reporting for $10,000 of sales would most likely exceed the tax revenue generated from those sales.

PROVES NEW YORK'S STATUTE VIOLATES THE COMMERCE CLAUSE

The extreme burdens of use tax collection statutes imposed by New York's click-through-nexus legislation, are even more problematic given the availability of dramatically less burdensome means for addressing the states' revenue concerns. The AAA-CPA strongly believes that a use tax reporting requirement similar to the recently struck down[25] Colorado legislation[26] would achieve the goals that states fundamentally want to achieve without the extreme burdens on remote sellers. Colorado, like every other state with sales tax and use tax, has in place the means to efficiently send out letter audits to in state purchasers to collect use taxes due on remote sales. The only things the states don't have is access to the information concerning the remote purchases. The Colorado legislation requires remote sellers to simply report sales into Colorado so that Colorado can enforce its own use tax laws against its own citizens or resident businesses. The district court struck down the law finding that the notice and reporting requirement violated the Commerce Clause. The Colorado Court correctly held that only the federal government has the power to enact such legislation.

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[25] *Direct Marketing Association v. Huber*, No. 10-CV-01546-REB-CBS (D. Colo. Mar. 30, 2012), vacated on other grounds by *Direct Marketing Association v. Brohl*, No. 12-1175, --- F.3d --- (10th Cir. Aug. 20, 2013)(holding that the Tax Injunction Act bars a taxpayer from seeking a ruling on the constitutionality of Colorado's use tax reporting requirements in federal district court).

[26] Col. Rev. Stat. § 39-21-112(3.5), (2010).

As New York so vehemently argued in the lower court, technology has advanced so much that remote sales can easily be tracked and taxed. We agree with New York that technology has so advanced. However, we believe that the states, with proper information, can use that new technology to efficiently enforce the states' use tax laws on its own citizens and businesses without having to place undue burdens on multistate commerce. If Congress were to enact federal legislation for use tax similar to the current federal income tax reporting statutes, then remote sellers could simply and cost effectively report sales information to each of the 45 states with a sales tax. This would allow states to use advances in technology to require taxpayer to calculate and pay their own use taxes, just as taxpayers now report their own income taxes.

We note that the current proposed Federal legislation referred to as the Marketplace Fairness Act ("MFA") would take up this matter. However, we believe that the proposed method under the MFA would be more burdensome on interstate commerce than necessary. We ask that this Court once again invite Congress to take up this matter and do so with legislation that places the least burden on interstate commerce, e.g. a reporting statute that resembles the federal income tax information reporting rules.

CONCLUSION

The petitions for a writ of certiorari should be granted so that this Court may, once again, expand its prior rulings to modern circumstances.

AMERICAN ASSOCIATION OF ATTORNEY – CERTIFIED PUBLIC ACCOUNTANTS, INC.
8647 Richmond Hwy,
Suite 639
Alexandria, Virginia 22309
(703) 352-8064

September 23, 2013

Respectfully submitted,

JAMES H SUTTON, JR., CPA, ESQ.
Counsel of Record
Moffa, Gainor, & Sutton, PA
8875 Hidden River Pkwy
Suite 300
Tampa, FL 33637
(813) 367-2134
JamesSutton@FloridaSalesTax.com

SYDNEY S. TRAUM, ESQ., CPA, LLM (TAX)
Law Offices of Sydney S. Traum, P.A.
Of Counsel to Levey, Filler, Rodriguez, Kelso, & Magilligan, LLP
1688 Meridian Avenue,
Suite 900
Miami Beach, FL 33139
(305) 672-5007 Ext. 215
sydtraum@attorney-cpa.com

JOHN W. PRAMBERG, ESQ.
102 State Street
P.O. Box 455
Newburyport, MA, 01950-0555
(978) 462-7818
JohnWPrambergEsq@Attorney-CPA.com