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4 ASSOCIATION, :

6 v. :

8 DIRECTOR, COLORADO :

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12 Monday, December 8, 2014

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:05 a.m.

18 GEORGE S. ISAACSON, ESQ., Lewiston, Maine; on behalf of
19 Petitioner.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case No. 13-1032, Direct
5 Marketing Association v. Brohl, Executive Director,
6 Colorado Department of Revenue.

7 Mr. Isaacson.

8 ORAL ARGUMENT OF GEORGE S. ISAACSON

9 ON BEHALF OF THE PETITIONER

10 MR. ISAACSON: Mr. Chief Justice, and may it
11 please the Court:

12 The matter before the Court today concerns
13 the scope and application of the Tax Injunction Act, a
14 law passed by Congress in 1937 for the purpose of
15 preventing State taxpayers from circumventing
16 State-established and available procedures for
17 challenging State tax assessments and instead, going
18 directly to Federal court seeking to invoke the equity
19 powers of Federal courts to enjoin the assessment and
20 enforcement of State tax laws.

21 The matter before the Court is one of
22 statutory construction. In 2010, the State of Colorado
23 passed legislation that had three components to it. It
24 was directed at exclusively out-of-State retailers and
25 required those retailers who made sales to Colorado

1 residents and did not collect Colorado use tax to first
2 provide a transaction notice in connection with each
3 sale to a Colorado customer informing them of their
4 obligation to self-report the use tax to the Colorado
5 Department of Revenue; and then on an annual basis to
6 send a mailing to Colorado customers informing them of
7 all purchases that they made during the past year and,
8 again, reiterating the requirement that they inform the
9 Department of Revenue of their tax obligations; and
10 third, for those out-of-State retailers affected by the
11 law, to report to the Colorado Department of Revenue all
12 of the customer transaction information that occurred
13 during the past year for each Colorado customer.

14 The case has an interesting procedural
15 history which I think is of relevance both to the Tax
16 Injunction Act and also to the issue of comity. The
17 executive director did not raise the Tax Injunction Act
18 at the district court level and did not challenge the
19 jurisdiction of the district court.

20 When the district court entered a permanent
21 injunction enjoining enforcement of the Colorado statute
22 and it was appealed by the executive director, the
23 executive director, in her briefing to the Tenth
24 Circuit, expressly informed the court that the Tax
25 Injunction Act and comity did not apply and were not a

1 bar to the Federal appellate court proceeding to hear
2 the case.

3 When the appeal was made on a petition for
4 certiorari to this Court, in her brief in opposition to
5 the petition for certiorari, the executive director
6 explained that the reason that she did not raise the
7 jurisdictional issue below was because she favored
8 having an expedited hearing on this matter so that
9 the --

10 JUSTICE SCALIA: Well, it often happens.
11 It's a jurisdictional issue. So what's the point?

12 MR. ISAACSON: Well --

13 JUSTICE SCALIA: I mean, the fact that she
14 didn't raise it is irrelevant. In fact, even -- even if
15 she didn't raise it here, we would have to raise it
16 here, wouldn't we?

17 MR. ISAACSON: I believe that certainly for
18 purposes of comity, Your Honor, the decision on the part
19 of the government to seek the resolution of the matter
20 in -- in a court is -- constitutes effectively a waiver
21 of -- of the comity question.

22 JUSTICE SCALIA: Oh, the comity, okay. And
23 you -- you agree it has nothing to do with the -- with
24 the principal question?

25 MR. ISAACSON: No. I believe that under the

1 Tax Injunction Act, if the State affirmatively seeks the
2 relief from the Court, that it -- it can -- it can
3 proceed. And in -- in this case, I think that it's
4 especially --

5 JUSTICE SCALIA: Excuse -- if the -- if
6 the -- would the State be seeking the relief?

7 MR. ISAACSON: Yes. In this case --

8 JUSTICE SCALIA: The State would be seeking
9 to enjoin its own tax?

10 MR. ISAACSON: What -- what the State --
11 State sought was a summary judgment. They affirmatively
12 moved for summary judgment at the district court level.

13 JUSTICE SCALIA: Well, but that -- that just
14 means the district court should throw it out. I mean,
15 I --

16 MR. ISAACSON: But that wasn't the request
17 on summary judgment. The summary judgement was a
18 request for the court to address the merits of the case,
19 not to dismiss the case on jurisdictional grounds.

20 JUSTICE SOTOMAYOR: Actually, you have
21 raised the very question I started with, which is the
22 waiver question. Is it your position that the T -- that
23 the TIA is a waivable protection? Is that what you're
24 arguing?

25 MR. ISAACSON: I think -- I think the issue

1 may not be expressly one of waiver, but may be one of
2 consent to agreeing to--

3 JUSTICE SOTOMAYOR: Either way consent or --
4 it probably is consent. If it is consensual, what
5 you're suggesting is that the reason for the TIA is not
6 jurisdictional in its traditional sense, but one based
7 on comity that can be -- that can be consented to.

8 MR. ISAACSON: That's correct. And I
9 believe, Justice Sotomayor, that the Court has made
10 clear, including in the -- in the Fair Assessment case,
11 Fair Assessment v. McNary, that the Tax Injunction Act
12 is really a codified subset of the law of comity. So
13 that the TIA did not supplant or replace comity, but
14 instead codified a certain element of comity.

15 JUSTICE SCALIA: But the statute's addressed
16 to the courts. And the statute says the courts will not
17 enjoin State -- State taxes. Now, how -- how can that
18 mandate to the court be altered by -- by private
19 parties?

20 MR. ISAACSON: Well --

21 JUSTICE SCALIA: It seems to me it says that
22 we just don't have the power, period. But you say the
23 States can give us the power?

24 MR. ISAACSON: I believe they can.

25 But in addition to that, Justice Scalia, I

1 think what is significant about the fact that the
2 executive director took the position both before the
3 appellate court and before this Court in the opposition
4 to the petition for certiorari of saying that this
5 Court -- that the reason why they decided to proceed was
6 they wanted an expedited hearing.

7 What I think it is remarkably reflective of
8 is the opinion or the view of the executive director
9 that the Tax Injunction Act does not apply to this
10 situation.

11 JUSTICE SCALIA: Well, that's -- that's
12 fine. I -- I can understand that. You say they used to
13 think that it didn't apply, now they're saying it
14 applies. I agree, that's a good argument.

15 But you're arguing much beyond that. You're
16 arguing that it doesn't matter any more because they
17 once said that they wanted the Court to decide it, even
18 though the Court had no power to decide it, right? I
19 mean, that's a different argument. It's that one that I
20 criticize. If you want to say the State's argument
21 seems weaker because they've changed their mind, that's
22 fair enough.

23 MR. ISAACSON: Well, I -- I think the
24 State's argument is weaker not merely because they
25 changed their mind, but because I think they made a

1 studied decision that the Tax Injunction Act, by its
2 terms, and what the Court is presented with is an issue
3 of statutory construction as construed by the executive
4 director to the point of informing both the appellate
5 court and -- and this Court that the Tax Injunction Act
6 was not a jurisdictional bar. I think that that was
7 reflective of the fact that -- that the position of the
8 State, especially in the absence of any precedent
9 supporting the very broad position that the Tenth
10 Circuit assumed on its own, that --

11 JUSTICE GINSBURG: Mr. Isaacson, can we get
12 to the nub of this question? We have your petition, the
13 fact it is a restriction on the Court's jurisdiction.

14 But you recognize that the TIA does cover
15 regulations that require an employer to report an
16 employer's -- an employee's taxable income. That's a
17 straight reporting requirement, and you recognize that
18 that's covered by the TIA. So this is another
19 information reporting that will enable or facilitate the
20 State's collection of its tax. So what's the
21 difference? Why -- why is it that the one comes under
22 the TIA and not the other?

23 MR. ISAACSON: So I believe, Justice
24 Ginsburg, those cases that you're referring to, like the
25 Blangeres case and the Sipe's case, are situations in

1 which it was the taxpayer that was seeking to prevent
2 that information-reporting from taking place. And it is
3 clear that in those cases it was doing so for the
4 purposes of anticipating a tax assessment, and
5 attempting to prevent the issuance of that -- that
6 assessment by depriving the director of -- of necessary
7 information.

8 JUSTICE KAGAN: But suppose it weren't the
9 taxpayer. I mean, suppose a State has a form that's
10 equivalent to the Federal W-2, requiring employers to
11 say how much wages have been paid. And suppose the
12 employer itself challenges the use of that form, what do
13 you think the result is in that case?

14 MR. ISAACSON: In that case, I believe that
15 the Tax Injunction Act would bar -- the Tax Injunction
16 Act would not bar Federal court jurisdiction. I think
17 that that would be the classic situation that was
18 described by the Court in *Levin v. Commerce Energy*
19 where --

20 JUSTICE KENNEDY: So -- so you say the words
21 "assessment" and "levy" in the statute apply only to
22 taxpayers.

23 MR. ISAACSON: No. There are situations in
24 which there may be proxies that are acting on behalf of
25 the taxpayer so that you could have a situation, for --

1 for example, where you have a successor in interest to a
2 taxpayer that may be bringing the claim. But in all of
3 those situations, they are ones in which -- and this is
4 the case law regarding the Tax Injunction Act -- that
5 they are all situations in which the taxpayer or the
6 person acting on behalf of the taxpayer is bringing an
7 action --

8 JUSTICE SOTOMAYOR: But --

9 JUSTICE BREYER: I'm sorry.

10 JUSTICE SCALIA: My very point. So what?

11 Go ahead.

12 JUSTICE BREYER: The question is whether the
13 word "collection" includes an injunction that makes it
14 more difficult for the State to collect the tax. And in
15 the case that Justice Ginsburg brought up, the
16 injunction, because it would stop the -- the employer
17 from telling the State how much has been earned, would
18 make it more difficult to collect the tax.

19 In this case, the injunction, by stopping
20 sellers from telling the State how much the Colorado
21 citizen has bought, would make it more difficult for
22 them to collect the tax. So if collection includes in
23 the one case an injunction that makes it more difficult
24 to collect an income tax, why doesn't it in this case
25 include an injunction that makes it more difficult to

1 collect a use tax? The point was they are identical
2 conceptually.

3 Now, I don't care whether it's -- who --
4 who brings the suit. In terms of the word "collection,"
5 they seem identical. Now, what is your response to that
6 question, which is what I think was being asked?

7 MR. ISAACSON: So, Justice Breyer, I think
8 you have to read the word "injunction," which is the
9 first set of operative words --

10 JUSTICE BREYER: It doesn't say anywhere
11 "injunction."

12 MR. ISAACSON: Enjoin.

13 JUSTICE BREYER: What the word is, "enjoin,"
14 "suspend" or "restrain." And I get -- I'm totally with
15 you on those, but what you are enjoining, suspend -- you
16 are enjoining something. There is an injunction that
17 says the State cannot enforce its provision requiring
18 out-of-State sellers to report what Colorado customers
19 buy. I don't see how you can deny that's an injunction.
20 I think you could deny that it enjoins the collection of
21 a tax. But to do that, you will have to go right back
22 to the question that Justice Ginsburg asked, and tell me
23 how to distinguish the two cases she mentioned. This
24 one and the case where it's reporting income by an
25 in-State citizen.

1 MR. ISAACSON: So the words "enjoin" and
2 "suspend" operate on the words "assessment," "levy" and
3 "collection."

4 JUSTICE BREYER: Yes.

5 MR. ISAACSON: And as this Court ruled in
6 the -- in the Hibbs case, in which even though the Court
7 was divided on the issue of the meaning of the term
8 "assessment," which was the key issue in -- in that
9 case, that the assessment is the recording of liability.

10 And this Court also ruled in -- in -- in the
11 Hibbs case that assessment triggers collection. So in
12 the Tax Injunction Act, the word "collection" is
13 referring to actions of government officials following
14 the assessment of the tax. And the injunction that --
15 that Your Honor is referring to is one which is relating
16 to the actions of third parties, private parties, not
17 government officials.

18 JUSTICE BREYER: So your point is that if,
19 in fact, there is in Colorado a law somewhat like
20 Federal law that says all employers must report to the
21 State the wages that in this Boulder area, or Denver, we
22 pay our employees and someone tries to enjoin that law
23 in Federal court, you are saying they can do it. Right?
24 It doesn't matter whether it's use, out of the State or
25 employment within the State, and we simply have to

1 accept that consequence because of Hibbs.

2 MR. ISAACSON: Well, in the W-2 concept,
3 what Justice Kagan was referring to, there's a tax
4 liability responsibility that the employer themselves
5 have, so that I think that a court might well conclude
6 that because of the obligation --

7 JUSTICE BREYER: 1099s.

8 MR. ISAACSON: In that situation, I think if
9 it's a third party, that third party is an outsider as
10 this Court defined outsider, an individual whose own tax
11 liability is not of relevance. And I think in the
12 context of the Tax Injunction Act, it's been
13 consistently been interpreted that -- that way, that all
14 of the cases that have been cited by the executive
15 director, whether those cases address specifically the
16 tax assessment or some liability, are all cases that
17 were brought by a taxpayer and the issue related to what
18 that taxpayer's liabilities --

19 JUSTICE ALITO: What about the Alexander v.
20 Americans United case under the Anti-Injunction Act?
21 That was not -- that was a third-party suit, wasn't it?
22 An organization was -- wanted -- wanted a determination
23 that contributions would be tax deductible.

24 MR. ISAACSON: Right. I think in Americans
25 United, the -- the plaintiff in that case was, one,

1 determining its own 50(c) status and so it was
2 interested in what its own status was. But I think
3 in -- in addition to that, you had a -- an underlying
4 tax statute that was at issue. The issue concerned the
5 question of eligibility for tax-exempt status.

6 What I think is significant in this case is
7 not only the fact that you have an obligation that is
8 not borne by taxpayers but is imposed exclusively on
9 non-taxpayers, but it also is not a tax statute. It's a
10 statute that's --

11 JUSTICE KAGAN: But where -- where do you
12 get, Mr. Isaacson, this idea that the -- the plaintiff
13 has to be the taxpayer? Because certainly the text of
14 the statute does not say that. The text of the statute
15 speaks to what kinds of remedies a court can give. It
16 does not speak to what kind of plaintiffs have to bring
17 the lawsuit.

18 MR. ISAACSON: I think the discussion of the
19 Tax Injunction Act in the Levin case, Levin v. Commerce
20 Energy, where a group is identified as outsiders,
21 individuals or entities whose own tax liability is not
22 of relevance to the -- to the case, is the source of --
23 of that authority.

24 And in this case, that's exactly the
25 situation that you have, that we're not talking about

1 the tax liability of out-of-State retailers. Their tax
2 liability is irrelevant. Furthermore, those
3 out-of-State retailers are not challenging anyone's tax
4 liability, which I think is also a distinction from the
5 American United's case where they were -- they were
6 concerned about the tax liabilities of contributors to
7 their organization.

8 JUSTICE KAGAN: I guess I don't -- what I
9 don't understand about your statutory argument, I mean,
10 it seems a kind of natural thing for somebody to say
11 suppose it's like we're going to all have pizza tonight,
12 and we're going to take up a collection to buy the
13 pizza. And I assign one of my clerks, go collect the
14 money for the pizza.

15 So what that clerk is going to do is he's
16 going to figure out who it is that's going to owe the
17 money, right? Who's going to partake of the pizza, so
18 who owes the money. And then, you know, maybe he's
19 going to send an e-mail to those people and he's going
20 to say you owe this money for pizza. And then if no --
21 if somebody doesn't pay, he's going to identify the
22 delinquent and -- and say, really, you owe this money
23 for pizza.

24 So that's all part of the collection
25 process, isn't it? I mean, basically, identifying --

1 informing the -- the people who have to pay, informing
2 the people who have to pay and identifying the people
3 who don't pay, and -- and the amounts that they owe.

4 MR. ISAACSON: I think two responses,
5 Justice Kagan. One, the terms "collection,"
6 "assessment," "levy," and "collection" are terms of art
7 that have particular relevance in tax parlance, just as
8 the terms "enjoin," "suspend" have particular relevance
9 in regard to the Court's equity powers.

10 So in this situation, what collection is
11 referring to, and it's consistent with how the Internal
12 Revenue Code treats the term "collection," it's the
13 action that is taken by tax authorities, by government
14 officials, after a determination of tax liability has
15 been made, after notice has been given to the taxpayer
16 of their obligation, and it's the efforts of the
17 government to then recover the amount of money which is
18 owed.

19 The fact that there may be information which
20 is of use, of relevance that may precede the collection
21 activity of the government doesn't convert those
22 preliminary activities into collection itself. So I
23 think what -- what is -- is really critical on this --

24 JUSTICE SOTOMAYOR: But you're saying that
25 collection is only as the money changes hands, that

1 that's the only thing that constitutes collection?

2 MR. ISAACSON: No. What I'm saying is that
3 collection follows assessment, and after the assessment
4 has occurred, it is the activities of government
5 officials in order to recover money from taxpayers.

6 CHIEF JUSTICE ROBERTS: So -- so you're
7 saying it's just like garnishment or things like that?
8 It has to be focused on a specific amount that's already
9 been calculated and the taxpayer has not turned over?

10 MR. ISAACSON: It -- it certainly goes far
11 beyond garnishment and would include any activities on
12 the part of government officials once the taxpayer's
13 liability has been determined.

14 CHIEF JUSTICE ROBERTS: So you've got to
15 know that he or she owes \$1,482 because they've done the
16 calculations and they haven't paid that over.

17 MR. ISAACSON: Yes. As -- as this Court
18 decided in the -- in the Hibbs case, the decision
19 written by Justice Ginsburg, it's assessment that
20 triggers collection, so that they -- they fall in
21 sequence to each other.

22 JUSTICE SCALIA: Well, I'm not sure what --
23 what you have conceded. Do you acknowledge that if
24 there were a State law which required in-State sellers
25 not to collect the tax, but just to advise the -- the

1 State revenue service that someone has purchased an item
 2 on which tax is due, would you acknowledge that that
 3 could be enjoined? That someone could bring a suit
 4 saying, I'm not the taxpayer, this is not the assessment
 5 or collection of a tax, and therefore you -- a suit will
 6 lie for me to say that this is an unconstitutional
 7 assessment or imposition upon me. Would that suit lie
 8 or not?

9 MR. ISAACSON: Well, I'm not sure what the
 10 basis, the underlying basis for Federal jurisdiction
 11 would be in -- in the hypothetical that -- that you
 12 have --

13 JUSTICE SCALIA: Well, it's -- it's a
 14 Federal constitutional violation.

15 MR. ISAACSON: I think if it's a Federal
 16 constitutional violation, the Tax Injunction Act would
 17 not be a bar to it. Now, I think in that situation, you
 18 may have comity concerns that are significantly
 19 different than the potential comity concerns in -- in
 20 this circumstance.

21 JUSTICE SCALIA: So the only thing that
 22 would make the States able to do -- to get information
 23 about tax liability without being sued in Federal court
 24 is the fact that the person from whom the information is
 25 sought is liable for the tax, if the seller has to

1 retain the sales tax.

2 MR. ISAACSON: Well, as I -- as I pointed
3 out, there may be circumstances in which you have a
4 third party that is effectively acting in regard to a
5 taxpayer's liability. So I think you have -- you have
6 two convergences, Justice Scalia, that I think are
7 important to the resolution of this case.

8 JUSTICE SCALIA: I don't know what you mean
9 by a third party acting in regard to --

10 MR. ISAACSON: It could be a successor in
11 interest, for example.

12 JUSTICE SCALIA: Oh, of course.

13 MR. ISAACSON: But I think you have two
14 convergences here that would -- would not necessarily be
15 present in the hypothetical that you present. One is
16 you have a non-taxpayer that -- that is one of the
17 elements of it. But also, that that non-taxpayer is not
18 disputing anyone's liability. So, you know, I think one
19 of the issues that was present in -- in the Hibbs v.
20 Winn case, and I think it was part of the concern that
21 Justice Kennedy had in his dissent in that case, is that
22 you were still having a so-called outsider that was
23 interested in the tax liability of another party.

24 In the current case, the issue of tax
25 liability of the customers of the out-of-State retailers

1 is not being contested. The -- the out-of-State
 2 retailers normally are not disputing any issue relating
 3 to their own tax liability -- there is none -- but they
 4 are also not claiming that their customers are not
 5 subject to use tax. They are not challenge --

6 JUSTICE KENNEDY: But the -- the State's not
 7 interested in just liability. It's interested in
 8 collecting, and the statute talks about collection.

9 MR. ISAACSON: Absolutely. And --

10 JUSTICE KENNEDY: So it seems to me that
 11 that -- that's just not responsive to the issue.

12 MR. ISAACSON: No, I -- I agree with you,
 13 Justice Kennedy, that the -- in this case the Direct
 14 Marketing Association members are not challenging the
 15 authority of the State to pursue collection of tax
 16 revenues from customers. They're not contesting --

17 JUSTICE KENNEDY: We're talking not about
 18 what you're challenging, we're talking about what the
 19 State's interest is.

20 MR. ISAACSON: The fact that the State has
 21 an interest in this information and much of the briefing
 22 that the State has presented emphasizes the importance
 23 of this -- of this information to -- to their tax
 24 system. But the fact that --

25 JUSTICE KAGAN: But it's importance for a

1 reason. It's importance to enable them to collect.
2 Essentially the State is saying we're not going to be
3 able to collect this tax unless we do these things,
4 unless we tell people that they, in fact, owe the tax
5 and unless we have a mechanism to make sure that people
6 who don't pay the tax are identified. And that's what
7 all these forms are all about. It's about collecting a
8 tax that most people do not pay.

9 MR. ISAACSON: I'm not sure that the State
10 is saying they're not able to collect the tax absent
11 this information. In fact, the anticipated revenue on
12 the revenue note that went with this was twelve and a half million
13 dollars, it was less than 2/10ths of 1 percent of the
14 total State -- State revenues.

15 But assuming for the moment that the State
16 does believe that this is important information,
17 valuable information, that doesn't mean that it fits
18 within the language of what was excluded by the Tax
19 Injunction Act from Federal court jurisdiction.

20 JUSTICE KAGAN: But wouldn't you agree that
21 in any case in which a -- a government goes about
22 collecting the tax it has to say how are we going to
23 collect this tax. And this is just this State's answer
24 to the how are we going to collect this tax. Well, what
25 we're going to do is that we're going to inform people

1 that they owe the tax and then we're going to get
2 information that enables us to make sure that the
3 delinquents pay up. That's how we're going to collect
4 it.

5 MR. ISAACSON: I believe the -- I believe
6 the issue that the Court is confronted with is in the
7 construction of this statute in regard to what the
8 meaning of the word "collection" means in the context of
9 being associated with assessment, levy, and collection.
10 What is the act of collection? Not what is the interest
11 of the State in being able to pursue collection, but
12 what is the act of collection that is enjoined. And I
13 think that is what is determinative of whether there's
14 a -- a Federal forum to be able to address that issue.

15 If there are no further questions,
16 Mr. Chief Justice, I'd like to reserve the remainder of
17 my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Domenico.

20 ORAL ARGUMENT OF DANIEL D. DOMENICO
21 ON BEHALF OF RESPONDENT

22 MR. DOMENICO: Mr. Chief Justice, and may it
23 please the Court:

24 Justice Kagan, this injunction has deprived
25 Colorado of the tool provided by the State legislature

1 under State law for the assessment and collection of
2 these taxes.

3 JUSTICE SCALIA: Am I correct that Colorado
4 is the only State that seeks to do this with respect to
5 out-of-State sellers?

6 MR. DOMENICO: Colorado is the only State
7 with this precise combination --

8 JUSTICE SCALIA: That -- that's amazing. If
9 indeed this is a, you know, a proper operation, why
10 wouldn't all 50 -- in my experience, you know, if it
11 moves, you tax it. And I --

12 (Laughter.)

13 JUSTICE SCALIA: I cannot imagine that the
14 other States have not piled on with this thing if it
15 is -- if it is so essential to the tax system and if
16 there are no problems with -- with doing it. My
17 goodness.

18 MR. DOMENICO: Well, of course, the question
19 on the merits is whether there are, in fact, problems
20 with it.

21 JUSTICE SCALIA: No. I understand.

22 MR. DOMENICO: And --

23 JUSTICE SCALIA: But the fact that it's --
24 it's a one of a kind gives me some pause. This is
25 certainly a -- a very important case because I have no

1 doubt that if we come out agreeing with you, every one
2 of the States is going to pass laws like this.

3 MR. DOMENICO: Well, I would agree with
4 that.

5 JUSTICE SCALIA: And all sellers will also
6 have to be providing this information.

7 MR. DOMENICO: Certainly, I think if we
8 ultimately prevail on the merits, that's true. The
9 question is whether that challenge on the merits goes
10 through Federal or State courts.

11 JUSTICE SCALIA: Let's assume I am a not --
12 not-for-profit -- an unpopular not-for-profit
13 corporation that has members who don't -- who don't want
14 their identity known because hurtful things will be done
15 to them. And I make a sale which would -- would be
16 exempt from Colorado's laws if indeed it was made by a
17 not-for-profit organization to one of its members. And
18 Colorado demands from this organization the names of its
19 members. And you tell me that cannot get into -- I'm
20 claiming a First Amendment objection to turning over the
21 names of my members, and you tell me that cannot get
22 into Federal court.

23 MR. DOMENICO: Justice Scalia, I'm telling
24 you that cannot get into Federal court. That is a
25 part -- a central part of the State's tax system, it may

1 very well be unconstitutional on the merits.

2 JUSTICE SCALIA: It can't be that central if
3 no other State has it.

4 MR. DOMENICO: Justice --

5 JUSTICE SCALIA: How central can it be?

6 MR. DOMENICO: Well, Justice Scalia, the use
7 tax is obviously a large and growing portion of -- of
8 the tax base that States should be able to collect. And
9 Colorado has been unable, except in per -- in a
10 minuscule percentage, 0 to 5 percent are the estimates,
11 of who actually pays this tax, are paying it.

12 JUSTICE SOTOMAYOR: I'm -- I'm a little bit
13 confused. In the normal tax situation, meaning my
14 employer, the U.S. Courts, removes taxes from whatever
15 area I declare is -- is my residency.

16 MR. DOMENICO: That's right.

17 JUSTICE SOTOMAYOR: All right. Is my
18 employer required to send that information to the State
19 government? I don't think it is. I think I'm required
20 to send my W-2.

21 MR. DOMENICO: Well, it comes indirectly,
22 that the States typically get that information from the
23 IRS. So it is an obligation. It's just sort of, I
24 think, indirect. So we do --

25 JUSTICE SOTOMAYOR: So there is no -- okay.

1 Is -- that's what I thought.

2 Now, the -- some employers have to withhold
3 taxes --

4 MR. DOMENICO: Correct.

5 JUSTICE SOTOMAYOR: -- for certain entities
6 in which they're resident or working.

7 MR. DOMENICO: Right.

8 JUSTICE SOTOMAYOR: And so that's because of
9 jurisdictional powers.

10 MR. DOMENICO: That's right.

11 JUSTICE SOTOMAYOR: The State can control
12 someone who is within their jurisdiction.

13 MR. DOMENICO: Right.

14 JUSTICE SOTOMAYOR: So that makes sense to
15 me. What doesn't is how can we apply the TIA to an
16 entity that has no direct responsibility to you?
17 When -- and you have no jurisdictional control over
18 them. I mean, there is a presumption in the TIA that
19 collection, assessment, et cetera, is going to be
20 against an entity that owes you something.

21 MR. DOMENICO: Well, the -- I don't think
22 that the TIA says that. The TIA talks first about
23 enjoining, restraining or suspending. Then it talks --
24 JUSTICE SOTOMAYOR: How are -- how are they
25 enjoined? You can collect everything you want against

1 your taxpayer over you have -- over your having
2 jurisdiction. So how are we restraining you from --
3 we're not giving you information, but this injunction is
4 not stopping you from collecting that tax.

5 MR. DOMENICO: It is stopping us from using
6 the tool -- the means provided under Colorado law for
7 assessing and collecting that tax. There may -- I'm
8 sorry. Go ahead.

9 JUSTICE SCALIA: Let's -- let's assume a
10 State law that gives the State taxing authority a lot of
11 money for new computers, and somebody challenges that
12 law on some State ground, whatever it is. Would that
13 challenge -- on some Federal ground. Would that
14 challenge not be able to be brought in Federal court
15 because the computers are going to help the tax service
16 to get more delinquent taxpayers and, therefore, you are
17 restraining the collection of taxes?

18 MR. DOMENICO: I don't think so, Your Honor.

19 JUSTICE SCALIA: Why not?

20 MR. DOMENICO: The circuit courts have --
21 have addressed these types of questions much more often
22 than this Court have, and they've uniformly -- at least
23 eight of them that have addressed that kind of question
24 have drawn essentially the same line. It's the one
25 expressed in cases like Kemlon and Judicial Watch, and

1 the question they ask is, is the action you're
2 attacking, is the purpose of that action, the State
3 action, is the purpose -- is it intended to culminate in
4 assessment or collection of taxes and is the likely
5 effect to culminate --

6 JUSTICE BREYER: That isn't a very narrowing
7 thing. I mean, Henry Friendly, some years ago, said of
8 course you can use the term collection to refer to any
9 method of helping to secure payment. But Congress was
10 referring to methods similar to assessing and levy that
11 would produce money or other property directly rather
12 than indirectly. The reason being, once we start down
13 your road, there is no stopping place.

14 MR. DOMENICO: I don't think --

15 JUSTICE BREYER: GDP consists of about
16 \$16 trillion. It's very hard to think of even one of
17 those trillion dollars that you couldn't figure out
18 passed through somebody's hands who owed a tax and then
19 later went into somebody else's hands and it would help
20 the State or the Federal government to know from that
21 second or third person how it got the money from the
22 first person's hands. That's true of houses. It's true
23 of food. It's true of -- in States that tax food. It's
24 true of this desk. It's true of everything you can
25 think of. And therefore, there will be -- I mean, ruled

1 out, unless you are going to start line drawing, and I
2 don't know what lines to draw.

3 Therefore, said Henry Friendly, let's not.
4 Let us read collection to mean what it means in context,
5 namely what Hibbs suggests the three phrases mean. Read
6 them together. That, I think, is the strongest argument
7 against you and, therefore, I would like to hear your
8 response.

9 MR. DOMENICO: Justice Breyer, I agree with
10 you, that's the strongest argument against us. This
11 injunction makes it impossible for Colorado, under the
12 State law that the legislature has enacted, to do any
13 form of assessment, any form of collection on hundreds
14 of--

15 JUSTICE BREYER: Really, you can't ask your
16 citizens the same way that the Federal government asks
17 us? "Pay," that's their polite way of saying it. And
18 by the way, if you fill out your form incorrectly,
19 depending upon your state of mind, you may discover you
20 are in prison.

21 Now, that seems to be a not-perfect way of
22 doing it, but it does tend to encourage people to pay
23 the taxes that they believe they owe.

24 MR. DOMENICO: Justice Breyer, indirectly,
25 at least, Colorado makes the same statement to its

1 citizens about this tax, but it can't determine who owes
2 the tax and it can't determine how much they owe, and
3 it therefore --

4 JUSTICE BREYER: If they tell you the truth.

5 MR. DOMENICO: That would be nice.

6 JUSTICE BREYER: This is the west. I
7 understand. I don't -- I'm from the west.

8 (Laughter.)

9 JUSTICE SCALIA: Can it make the -- the
10 foreign seller collect the tax?

11 MR. DOMENICO: Not under Quill.

12 JUSTICE SCALIA: Well, that is sort of
13 strange. It can't make them collect it, but it -- it
14 has the power to compel them, non -- non-State citizens,
15 out-of-State people, provide the information, assist in
16 the State's collection of the tax? I don't know why --

17 MR. DOMENICO: Well, this is exactly --

18 JUSTICE SCALIA: I don't know why the one
19 and not the other.

20 MR. DOMENICO: This is exactly their
21 argument on the merits. But that is exactly why this
22 violates the Tax Injunction Act because --

23 JUSTICE SOTOMAYOR: Couldn't we --

24 JUSTICE ALITO: Can I ask a question about
25 where your argument might lead? I think you

1 acknowledged earlier that if we hold that your statute
2 cannot be challenged under the Tax Injunction Act and
3 it's ultimately determined to be constitutional, this
4 would be very attractive for all the other States to
5 copy.

6 So let's -- let's suppose that that happens
7 and so now every State has a law like this, and every
8 State -- and there are many different variations in the
9 forms. Maybe there are 50 forms that have to be
10 submitted to State tax authorities. And let's say I
11 start up a small business and I'm selling a few thousand
12 dollars worth of goods via the internet to people from
13 all over the country.

14 Now I will have to submit potentially 50
15 different forms to all of these States reporting that
16 somebody in South Carolina purchased something from me
17 that cost 23.99. Now, I know you have a -- you have a
18 requirement that it has to reach a certain threshold,
19 but I don't see it and that's just something that you've
20 chosen to do. But that's where this all could lead,
21 couldn't it?

22 MR. DOMENICO: Justice Alito, that is where
23 this could lead and that's a slightly more detailed
24 version of their argument on the merits. But the point
25 of the Tax Injunction Act, of course, is that that's a

1 challenge that has to be brought in State court. For
2 example, Quill itself, the case that, kind of, the
3 merits turn on, was a State court case that proceeded
4 through, I believe, North Dakota's States. This Court,
5 to the extent it believes that's a constitutional
6 problem that you just identified, would have the right
7 to -- would -- would have the power to hold it to be an
8 unconstitutional violation. In fact, it's worth noting
9 that the Plaintiffs have availed themselves of Colorado
10 courts to make just this challenge and already have an
11 injunction for those, based on --

12 JUSTICE SCALIA: But you know that we accept
13 minuscule, minuscule percentage of appeals from State
14 supreme courts. And as a practical matter, these
15 challenges in State supreme courts, if they're -- if
16 they're ruled in a manner that -- that violates Federal
17 law, they're not going to come up here -- 90 percent of
18 them aren't going to come up -- more than 90 percent.
19 So it is important that it begin in Federal court
20 when -- especially when what is at issue is the selfish
21 State's assessment and collection of taxes. I mean,
22 there is a real incentive on the part of the State
23 government which includes the State courts to, you know,
24 to find the tax not paid.

25 MR. DOMENICO: Justice Scalia, that's an

1 argument that Congress has rejected in enacting the Tax
2 Injunction Act.

3 JUSTICE SCALIA: Well, for collection, yes.

4 MR. DOMENICO: Assessment and collection of
5 the tax.

6 JUSTICE GINSBURG: Mr. Domenico, you don't
7 dispute that what Congress had in mind when it passed
8 the Tax Injunction Act was the proposition that States
9 that have a system, taxpayer, you pay now, you sue for a
10 refund later. It was that scheme that the Tax
11 Injunction Act was meant to shield so the taxpayer
12 couldn't say I'd rather pay later.

13 You pay up front, and then you sue for a
14 refund. That's -- that was what was in the front of
15 Congress's mind. You don't doubt that, do you?

16 MR. DOMENICO: That was the Paradigm case, I
17 think, is an accurate way to describe that. That's
18 most -- going to be the most common form of a case that
19 would raise these issues. But what Congress wrote was a
20 statute that by its terms is broader than that.

21 JUSTICE ALITO: Well, Congress wrote a
22 statute with terms that seem most naturally read to have
23 a technical meaning, restrain, suspend, enjoin, assess,
24 levy, and collect. Those are not -- those are not the
25 terms that one might use if one were speaking

1 colloquially.

2 Let me come back to Justice Kagan's pizza
3 example. So her clerks are collecting money for pizza
4 to be had at night and let's say the Chief Justice says
5 this is fine, but you -- you may not use court e-mail to
6 try to collect this. Now, would you say that the Chief
7 Justice has restrained, suspended or enjoined the
8 collection of the pizza money? You might say he's made
9 it a little bit harder, maybe he's interfered with it.
10 But would -- would anybody naturally use those technical
11 terms.

12 MR. DOMENICO: Well, in the pizza context, I
13 think it would be unlikely to use those technical terms.
14 But I think in -- in the tax context, if someone told
15 the Department of Revenue you may not assess or collect
16 these taxes, I would be very nervous about advising them
17 nonetheless to proceed with enforcing these laws.
18 Because by their natural terms the way they're used,
19 this is part of the assessment process. This is a means
20 -- its only purpose as everybody agreed, the district
21 court, the Plaintiffs, everyone agreed the sole purpose
22 of this law was to -- to reach the point where we could
23 assess and collect the taxes.

24 JUSTICE ALITO: Well, let's say we're back
25 in -- we're in the pre-internet era and I order

1 something over the phone from an out-of-State vendor.
2 So this vendor is going to mail it to me across State
3 lines. And let's say this particular vendor is somebody
4 who feels very strongly that everybody ought to pay
5 taxes that are due. So this vendor voluntarily, once my
6 order has been placed, says to me, now, I'm going to
7 ship this to you in your State and I'm not going to
8 charge you -- say I'm not going to make you pay sales
9 tax in my State. I just want to remind you that you are
10 obligated under the law of your State to pay use tax.
11 Would you say that that vendor has assessed the use tax?

12 MR. DOMENICO: The vendor has assessed it
13 simply by informing them that they have to pay the tax?

14 JUSTICE ALITO: Yes. Yes. Yes.

15 MR. DOMENICO: I wouldn't say they've
16 assessed the tax, no.

17 JUSTICE ALITO: Well, that's -- that's what
18 you're arguing here, isn't it?

19 MR. DOMENICO: I don't think so.

20 JUSTICE ALITO: That's exactly what happens.

21 MR. DOMENICO: The State's law is the means
22 by which it can assess the tax. If it doesn't get that
23 -- I would say this: If the vendor said do not pay this
24 tax, do not tell Colorado, they're the opposite version,
25 they're someone who objects to the tax, and they said

1 precisely the opposite, then I would say that they have
2 interfered with -- they have restrained, suspended the
3 assessment and collection of that tax. And that's
4 what's going on here.

5 JUSTICE ALITO: You would say that by saying
6 that, making that illegal statement, they've enjoined
7 the -- the payment of the tax?

8 MR. DOMENICO: No, I wouldn't say it. But
9 I'd say they have restrained --

10 JUSTICE ALITO: They have restrained it?

11 MR. DOMENICO: Yes. But individuals don't
12 have -- obviously, the company doesn't have the power of
13 an injunction.

14 JUSTICE SCALIA: Restrain means impede?

15 MR. DOMENICO: Well, what the Court has
16 said --

17 JUSTICE SCALIA: Isn't restrained a synonym
18 for impede? I -- I thought restrain means to stop. You
19 restrain somebody, you prevent that person from doing
20 what he wants to do. But you're using it to mean, you
21 know, whatever impedes the collection of the tax. It
22 doesn't make it impossible, it doesn't stop it. It
23 just -- it just impedes it.

24 MR. DOMENICO: The Court has used the words
25 interrupt the assessment or collection of the tax to --

1 the practical effect of suspending it during the
2 litigation. I don't think there can be any doubt about
3 that.

4 CHIEF JUSTICE ROBERTS: Well, so let's say
5 the law says not only do you have to notify the people
6 at the point of sale on the internet, but it must be in
7 inch-high type so they're sure to see it. Is that okay?
8 Because that makes it -- impedes the collection.
9 Because where, presumably, they can't just put it in the
10 tiniest little type at the bottom of the page.

11 MR. DOMENICO: If the challenge is only to
12 the size of the font requirement?

13 CHIEF JUSTICE ROBERTS: Well, I mean, you --
14 you can make light of it if you like, but they're more
15 likely to notice it if it's there glaring them in the
16 face as opposed to a little footnote at the bottom along
17 with the all the other --

18 MR. DOMENICO: Well -- and there are
19 regulations of that sort with this law and that's --

20 CHIEF JUSTICE ROBERTS: And that restrains
21 the collection of the tax?

22 MR. DOMENICO: If you don't -- it restrains
23 the means of assessment and collection of the tax under
24 State law. This Court has referred repeatedly to the
25 means, the methods, the modes, the system of assessment

1 and collection dating back before the existence of the
2 Tax Injunction Act. The Court referred to the modes, it
3 was of the utmost importance, the Court said in *Dow v.*
4 *Chicago* that this -- that Federal courts would be
5 restrained from interfering with the modes of collection
6 of a tax. That would restrain the mode under State law,
7 the method, the means under State law of collecting the
8 tax.

9 JUSTICE GINSBURG: Your argument is at least
10 intentioned with this Court's decision in *Hibbs*. So
11 what is your best argument for why *Hibbs* doesn't
12 control? *Hibbs* says this statute is about stopping
13 taxpayers from avoiding the obligation to paying the
14 government, and here we have a third party not a
15 taxpayer.

16 MR. DOMENICO: Well, Justice Ginsburg, I
17 think what *Hibbs* was about was that that case did not
18 interfere with the collection -- the State's revenue
19 collection mechanisms. The text of the Act, as this
20 Court recognized, Justice Alito pointed out, the text of
21 the Act on this point is identical essentially to the
22 AIA. The Court in *Americans United* flatly rejected the
23 argument that the AIA only applied to taxpayers and it
24 would -- it would be contrary to the history of the Act
25 as well and how this Court has applied it and how the

1 lower courts have applied it.

2 JUSTICE SOTOMAYOR: Well, I'm not quite sure
3 that you're addressing the essence of Hibbs. Hibbs
4 defined the terms "collection," "assessment," et cetera
5 very narrowly. Much more narrowly than you are right
6 now. The difference that Justice Breyer was pointing to
7 is the important one. You haven't answered how you can
8 get to where you're going unless we disavow the narrow
9 definitional reading that Hibbs gave to those three
10 issues.

11 MR. DOMENICO: I don't agree with that,
12 Justice Sotomayor. The Court can simply recognize that
13 suspending, restraining, enjoining the methods of
14 reaching -- getting to the point of being able to plug
15 in the numbers into the calculation. The State right
16 now, when it makes the calculation that is an
17 assessment, has nothing to put into two of the three
18 variables. It can't put in the identity of the taxpayer
19 and it can't put in whatever the base is to apply to
20 State tax law. This law will directly provide that
21 information. It's the means of doing an assessment.

22 JUSTICE SCALIA: It's the means of what --
23 let's posit a State law that requires all taxpayers to
24 use only a single bank because it will be -- one bank
25 named by the State because it will be easier to levy

1 upon all -- upon all accounts. It makes it a lot easier
2 for the State. They just go to that bank and take your
3 bank account. Okay?

4 This is challenged as being a taking, okay,
5 and the party tries to get into Federal court with that
6 Federal challenge. Not possible, right? Because this
7 facilitates the collection of the State tax and
8 therefore to prevent that facilitation is to restrain
9 the collection of the State tax and therefore the suit
10 has to be brought in State court; is that right?

11 MR. DOMENICO: Well, I think the -- that the
12 test that's been developed and has proven workable for
13 decades in the circuit courts, none of them have
14 rejected, is the question would be is the purpose of
15 that law, the assessment or collection of taxes --

16 JUSTICE SCALIA: Yes, it is. That's the
17 whole reason --

18 MR. DOMENICO: -- and is the likely
19 effect -- if the whole reason that that law was passed
20 was to improve the assessment or collection of the tax,
21 then it would -- then the Tax Injunction Act would allow
22 that challenge to be brought in State court that the
23 State courts have proven themselves able to.

24 I mean, the worst case scenarios under any
25 of the parade of horrors that the Plaintiffs have --

1 have brought forward is that the cases go to State
2 court. This Court has recognized --

3 JUSTICE SOTOMAYOR: Well, you're disavowing
4 then our pointing to in Hibbs the Second Circuit case.
5 You're saying if the purpose of the law, a law that says
6 if you don't pay your taxes we're going to imprison you,
7 that can't be brought to Federal Court, if the purpose
8 is to ensure that you pay your taxes or to encourage you
9 to pay your taxes.

10 MR. DOMENICO: I think the Court -- I think
11 the Court, looking at Wells, can make a distinction
12 based on the fact that in that case the State had given
13 up on assessing or collecting the taxes. The facts of
14 that case were that the State was no longer trying to
15 assess or collect taxes from Mr. Wells. It was
16 instead -- had given up and was punishing him for
17 failing to comply with the law.

18 I think the Court can separate penalties
19 when a case like that comes up --

20 JUSTICE SOTOMAYOR: I don't want to miss the
21 question that we started at the beginning of your
22 brother's argument, which was the consents below issue.

23 MR. DOMENICO: Right.

24 JUSTICE SOTOMAYOR: Why was it that until
25 your briefing here you have been arguing that the TIA

1 did not apply or were not challenging the analysis by
2 your adversary?

3 MR. DOMENICO: It was just -- it was a
4 mistake. Knowing what we know now, we should have
5 argued it. That's all I can say.

6 JUSTICE BREYER: I guess Federal law is the
7 same because we have the, what is it, the AIA, the
8 Anti-Injunction Act. So if Congress tomorrow passes a
9 law -- I'm not saying they would -- but that anyone who
10 hears of anyone paying anyone else any money for any
11 service or good shall immediately report it to the
12 nearest -- nearest IRS office, and if they fail to do
13 so, it's a crime or we'll seize all his assets.

14 You wouldn't be able to bring that suit for
15 an injunction in Federal Court on the ground that it's a
16 bit extreme. You'd have to wait and pay this whatever
17 you're supposed -- you're not even supposed to pay, you
18 just have to do it and then hope somebody challenges it.

19 MR. DOMENICO: Well, Justice Breyer, under
20 the AIA, the challenge provisions are fairly
21 complicated. But if a State were to pass that --

22 JUSTICE BREYER: No, no, I'm not interested
23 in State now. I'm just interested in why it might be
24 that it is wise for Henry Friendly to narrow this word
25 "collection" because we knew not where we go when, in

1 fact, it gets too broad.

2 MR. DOMENICO: Well, Congress has used the
3 word "collection" -- "assessment," "levy" and
4 "collection." This Court has always interpreted them
5 very broadly in the context of the Tax Injunction Act,
6 at least as broadly as in the context of the
7 Anti-Injunction Act. And that Congress's determination is
8 that the collection of taxes is so important that that's
9 the process that has to be followed.

10 JUSTICE KENNEDY: It seems to me that you
11 have to distinguish some of the hypotheticals, say, from
12 Justice Scalia about the computer being used to expedite
13 tax collection or the bank by saying that what we have
14 here is an information device that's so closely linked
15 in the ordinary course to the collection of taxes that
16 it's collect -- but I -- I --

17 MR. DOMENICO: You could certainly --

18 JUSTICE KENNEDY: I don't know how you would
19 formulate that test and I'm not quite sure how you'd get
20 it out of the statute.

21 MR. DOMENICO: Well, so the -- the lower
22 courts again have -- have had more experience with this,
23 particularly under the AIA. The D.C. Circuit, for
24 example, used the word "inextricably linked" to the
25 assessment and collection process, I think, in the

1 Seven-Sky decision. You can certainly adopt some sort
2 of an attenuation principle where --

3 JUSTICE KENNEDY: But don't you have to do
4 that in order to distinguish those hypotheticals?
5 That's my question.

6 MR. DOMENICO: Well, certainly yes. I mean,
7 in this case though it's very easy. This is a very
8 common form of information reporting. It's simply been
9 imported from where it's more familiar, the income tax
10 forum, into this use tax forum. It's a very common --
11 they are the party to the transaction. They typically,
12 if they are in-State, would actually be collecting the
13 tax themselves --

14 JUSTICE ALITO: Before your time expires,
15 what's your best formulation of the connection that you
16 think is required?

17 MR. DOMENICO: Well, I think the lower
18 courts have said two things: One, the purpose again has
19 to be assessment and collection. It can't just be
20 incidental or a collateral effect. And the likely
21 effect has to culminate in assessment or collection.
22 That's the language most of the circuit courts use,
23 and -- and --

24 JUSTICE ALITO: The likely effect
25 culminating in collection just seems to me that it

1 benefits collection in some way.

2 MR. DOMENICO: Well, so there is a -- a case
3 cited, Bell South, that -- that addresses this and says
4 if the law is something that doesn't interfere between
5 the relationship between the taxing authority and the
6 taxed individual or entity, that then the link may have
7 been broken. This law clearly -- this injunction
8 interferes with the relationship between Colorado and
9 the tax because it prohibits us from getting the
10 information about who they are and how much they owe.

11 CHIEF JUSTICE ROBERTS: No, it doesn't
12 prohibit you from doing that at all.

13 MR. DOMENICO: It prohibits us from using
14 the tool provided under State law.

15 CHIEF JUSTICE ROBERTS: Well, yes, it
16 prohibits you from doing what you want to do but the
17 whole question is whether you can do it. It doesn't
18 prohibit you -- the relationship between the State and
19 the taxpayer is between, you know, John Q. Public and
20 the State. And John Q. Public owes this money and the
21 way you get it from him is the same way you get other
22 taxes that are due from him or you -- you can. You just
23 want to have a more efficient way. But it doesn't
24 interfere with that relationship.

25 MR. DOMENICO: Well, it does -- I would

1 dispute that it -- that it doesn't interfere with the
2 relationship. Certainly if the Court is going to say
3 that Federal Courts are the proper forum for telling
4 States which tools or means they can use to assess or
5 collect the tax, then -- then we shouldn't prevail. But
6 if the Tax Injunction Act is about anything, it's about
7 leaving it out of Federal COURTS --

8 JUSTICE GINSBURG: But that -- the
9 question -- this is just a forum question; right?

10 MR. DOMENICO: That's right.

11 JUSTICE GINSBURG: You can sue in Federal
12 court. The question wouldn't be the one you posed. The
13 question would be the one on the merits: Does this
14 violate the Commerce Clause?

15 MR. DOMENICO: Well, that question, under
16 the AIA or under the TIA, has to be in State court where
17 it is right now being litigated by the same parties, the
18 same claims. So yes, that question has to be decided in
19 State court.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Isaacson, you have four minutes
22 remaining.

23 REBUTTAL ARGUMENT OF GEORGE S. ISAACSON

24 ON BEHALF OF THE PETITIONER

25 MR. ISAACSON: Thank you, Your Honor.

1 I would like to address three issues that
2 have been raised by Mr. Domenico. One of the, I think
3 primary concerns is the boundless nature of the test
4 that has been suggested by the executive secretary, and
5 I believe that it's boundless in two regards: One, it
6 could reach any third party. It can reach common
7 carriers, it could reach internet service providers, it
8 could reach credit card companies, it could reach any --
9 any party that the State maintains has some information
10 that would be relevant to assist it, to facilitate it in
11 the collection of -- of taxes. There is -- there is no
12 limitation on what that scope may be, even though that
13 third party itself may not have its tax liability at
14 issue, nor may it have any interest in any other party's
15 tax liability.

16 The -- in addition to that, the definition
17 of collection as presented by my brother would reach any
18 activity that might facilitate, not only any person but
19 any activity that might -- might facilitate. So there
20 really is, again, no limitation on what the kind of
21 request for information might be that could be imposed
22 by the standard that's been suggested. The Tax
23 Injunction Act simply was not intended to provide for
24 that kind of expansive, unbounded reach.

25 Much to the contrary, as Justice Ginsburg

1 has pointed out, the purpose was to require taxpayers
2 who want to challenge their tax assessments to have to
3 go through State procedures that have been established,
4 which usually were the payment of the tax and bringing a
5 suit for refund, and not to employ Federal court equity
6 jurisdiction.

7 The -- the difference between the original
8 purpose of the Tax Injunction Act and its proposed use
9 by the State of Colorado is immense.

10 Second, Mr. Domenico said that he believed
11 that absent this information, it effectively would make
12 it impossible for the State of Colorado to be able to
13 pursue use tax collection.

14 But I believe it's interesting to note that
15 the State of Colorado has not employed many of the
16 measures that other States have employed to collect use
17 taxes. So, for example, most States have a line on
18 their income tax return that allows for the voluntary
19 reporting of -- of State taxes, or you can have
20 electronic reporting of State taxes which, in Colorado,
21 80 percent of Colorado taxpayers use electronic
22 reporting in which you can have a screen that requires
23 that there be reporting of the tax before the screen
24 proceeds to the next -- to the next entry line.

25 The State of Colorado is the only State in

1 the country that is not participating in the streamlined
2 sales tax project that is intended to simplify sales tax
3 reporting and collection, so that these alternative
4 measures certainly are available, have not been tried by
5 Colorado, but instead what Colorado has selected --

6 JUSTICE GINSBURG: How successful are any of
7 those methods? You can have as much notice as you want
8 to the taxpayer, but most people are not going to pay
9 the use tax if they don't think the government could
10 find out that they bought something in another State.

11 MR. ISAACSON: In regard to what the State
12 of Colorado does with its own taxpayers, its own
13 residents, it's free to do so. For example, there have
14 been other States that have employed a default
15 percentage, that the default percentage applies unless
16 there's affirmative reporting of an -- of an alternative
17 number. My home State of Maine previously had that --
18 that arrangement.

19 So that it is not as if the State is bereft
20 of any opportunity to enhance it. The -- the use of the
21 term "impossible" by Mr. Domenico, I think, is -- is
22 really a -- a gross overstatement.

23 I also want to point out that many of the
24 cases that have been cited by Mr. Domenico are
25 Anti-Injunction Act cases, Federal -- Federal cases.

1 For example, the case law that relates to anything that
2 is intended to culminate in collection. The language of
3 the Anti-Injunction Act and the Tax Injunction Act is
4 not the same. The language of the Anti-Injunction Act
5 refers to for the purpose of restraining and is not the
6 same as enjoined, suspend or restrained.

7 JUSTICE ALITO: Could I just ask you to
8 clarify your position on the State's alleged consent to
9 this suit? Is it your argument that the Tax Injunction
10 Act allows a Federal court to consider -- to entertain a
11 case that would be otherwise barred by that Act if the
12 State consents? If that's your position, do you have
13 authority for it and have you raised this argument in
14 your -- in your petition and in your brief?

15 MR. ISAACSON: I believe we have. The --
16 the -- for example, if the State brings a collection
17 action in -- in Federal court, those cases have been --
18 have been allowed to continue in Federal court even
19 though it's an act of collection. Citation for that
20 case is Jefferson v. Acre. Jefferson County v. Acre.

21 I think it is most telling, though, Justice
22 Alito, in regard to the comity issue.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:06 a.m., the case in the

1 above-entitled matter was submitted.)
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