No. 14-_______

IN THE

Supreme Court of the United States

DIRECTV, LLC AND DISH NETWORK L.L.C.,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The dormant Commerce Clause forbids states from enacting laws that discriminate against interstate commerce except when a state can make the rare showing that its law is necessary to serve a legitimate purpose. This core prohibition applies to laws that differentiate among businesses that are "similarly situated"—that is, that compete in the relevant market, and thereby implicate the Commerce Clause's central concern of protecting a national market for commerce. Here, the Supreme Judicial Court of Massachusetts ("SJC") merged the "similarly situated" inquiry with the distinct inquiry into whether the discrimination has been adequately justified. It held that two businesses are not "similarly situated," even though they indisputably compete head-to-head, because Massachusetts has a reasonable justification for its discriminatory policy and the competing businesses have operational differences. The question presented is:

Does the threshold requirement that two businesses be "similarly situated" for Commerce Clause purposes depend on whether they directly compete in the relevant market (which is how three circuits and three state supreme courts analyze the issue), or does it instead encompass a wide-ranging inquiry into the justifications for the law and operational differences (as four circuits and, now, one state supreme court have held)?

CORPORATE DISCLOSURE STATEMENT

The caption lists all of the parties to the proceedings before the Massachusetts Supreme Judicial Court.

DIRECTV, LLC is a wholly owned, direct subsidiary of DIRECTV Holdings LLC, a Delaware limited liability company, which is a direct subsidiary of The DIRECTV Group, Inc., a Delaware corporation; none of these entities are publicly traded. The DIRECTV Group, Inc., is a wholly owned, direct subsidiary of DIRECTV, a Delaware corporation that is publicly traded (NASDAQ: DTV).

DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, which is a wholly owned subsidiary of DISH Orbital Corporation, which is a wholly owned subsidiary of DISH Network Corporation. DISH Network Corporation has publicly traded equity (NASDAQ: DISH) and DISH DBS Corporation has publicly traded debt.

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INTRODUCTION

The dormant Commerce Clause provides a critical, constitutional, structural bulwark against state economic parochialism. It does so by prohibiting "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 331 (2007) (internal quotation marks omitted). But, as multiple Justices have recognized, the dormant Commerce Clause has been a source of persistent confusion. Nowhere is that confusion more evident than in the decision below.

This petition should be considered in tandem with a companion petition that will be filed shortly in *DIRECTV, Inc. v. Roberts*, No. M2013-01673-COA-R3-CV, 2015 WL 899025, at *1 (Tenn. Ct. App. Feb. 27, 2015), *review denied*, No. M2013-01673-SC-R11-CV (Tenn. S. Ct. June 12, 2015). Together, these cases provide an excellent opportunity to bring needed clarity to an important aspect of dormant Commerce Clause doctrine that has severely divided the lower courts. Specifically, this Court held in *General Motors Corp. v. Tracy* that a "threshold" requirement of a dormant Commerce Clause claim is that the differently regulated entities be "similarly situated," 519 U.S. 278, 299 (1997), i.e., that they compete in the relevant market. After all, the dormant Commerce Clause seeks to protect a free market for national competition, and if the entities do not compete, the Clause has little to say. Here, however, the Massachusetts Supreme Judicial Court (SJC) repeated an error that has divided the lower courts.

As part of what should have been a modest, threshold inquiry into whether cable and satellite providers compete—and in the face of undisputed evidence that these entities do compete, fiercely and directly—the court undertook a free-wheeling discussion of "the nuances of the divergence between the ways in which the cable and satellite companies are treated, examined in light of the differences between the ways in which these two types of company do business." Petition Appendix ("Pet. App.") 25a. But those considerations are relevant, if at all, to *justifying* discrimination that is found to exist. Accordingly, they must satisfy strict scrutiny. By importing these factors into the threshold similarly situated analysis, the court effectively read that scrutiny out of the constitutional analysis.

In so ruling, the Massachusetts Supreme Judicial Court has deepened an existing 6-4 split about what makes businesses similarly situated under the dormant Commerce Clause. On one side, three circuits and three state supreme courts correctly hold that entities are similarly situated so long as they directly compete in the relevant market. On the other side, four circuits, and now one state supreme court, do not treat direct competition as enough; instead, they import an array of other considerations—claimed differences in the affected businesses' methods of operation, their regulatory burdens, and even the state's purported justification for the law.

Thus, in some parts of the country, a state can differentiate between competing products or producers in a manner that advantages the local economy—and will be insulated from Commerce Clause scruti-

ny so long as it can point to some difference between the favored and disfavored competitors. In other parts of the country, the same law will be properly invalidated as impermissible parochialism. In Massachusetts the answer will depend on whether a claim is brought in state court or in the federal court across the street.

The confusion extends even to the precise facts presented by this case: The SJC and the Tennessee Court of Appeals hold that cable and satellite providers are not similarly situated, whereas the Florida Court of Appeals holds that they are. This persistent confusion is contrary to the very purpose of the dormant Commerce Clause, which is to ensure national commercial markets. This Court's intervention is required to clarify a basic element of this core constitutional protection.

OPINIONS AND ORDERS BELOW

The decision of the Supreme Judicial Court of Massachusetts is reported at 25 N.E.3d 258, and reprinted at Pet. App. 1a. The Memorandum of Decision and Order of the Superior Court, Suffolk County, Massachusetts is unpublished, and reprinted at Pet. App. 30a.

JURISDICTION

The Supreme Judicial Court of Massachusetts issued its decision on February 18, 2015. On April 24, 2015, Justice Breyer extended the deadline for filing this petition to and including June 18, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides:

> The Congress shall have Power ... [t]o regulate Commerce ... among the several States.

Massachusetts General Law, c.64M, § 2, provides in relevant part:

> An excise is hereby imposed upon the provision of direct broadcast satellite service to a subscriber or customer by any direct broadcast satellite service provider in an amount equal to 5 per cent of the direct broadcast satellite service provider's gross revenues derived from or attributable to such customer or subscriber.

STATEMENT OF THE CASE

The Pay-TV Market, And The Economics Of In-State Vs. Out-Of-State Assembly And Distribution

Massachusetts residents have two basic choices when it comes to purchasing a pay-TV subscription. They can choose a cable provider, like Comcast, or a direct broadcast satellite provider, like Petitioners DIRECTV and DISH Network. Critically important here, it is undisputed that cable and satellite providers "compete in the market for video programming services." Pet. App. 3a. Both offer TV programming packages to suit different budgets and tastes, includ-

ing local broadcast stations, basic channels (such as CNN and ESPN), premium channels (such as HBO and Showtime), and pay-per-view movies and events. *Id.* at 3a-4a. Cable and satellite both negotiate with TV programmers to obtain distribution rights. Both use retailers, the Internet, and call centers to sell pay-TV packages to customers. Both dedicate channels to public, educational, and governmental programming. Both provide customers with equipment to receive and convert programming signals into content that can be viewed on a TV set. Both rely on technicians to install and service that equipment. *Id.* 35a-36a.

And ultimately, the image that appears on a subscriber's screen is identical, regardless of which pay-TV provider the subscriber chooses. It is not surprising, therefore, that customers view cable and satellite TV as fungible. As the SJC acknowledged, customers in this competitive marketplace "typically choose between cable and satellite on the basis of considerations such as price, customer service, reception quality, and program offerings." *Id.* at 4a.

There is, however, a critical difference between cable and satellite providers: "the methods by which they assemble and deliver programming to their customers." *Id.* Cable providers gather and assemble packages of TV programming at 60 digital production facilities, called "headends," which are located within Massachusetts. These buildings are bustling with employees and surrounded by satellite dishes. Once programming signals are assembled at the headends, cable providers deliver them to their customers' homes via "more than 30,000 miles of fiber-

optic and coaxial" cables, which are "laid in trenches or hung from utility poles" in Massachusetts' public rights-of-way. *Id.* at 34a-35a.

Satellite providers, in contrast, gather and assemble TV programming into packages at digital production facilities that are located *outside* Massachusetts—in Wyoming, Arizona, Colorado, and California. *Id.* at 32a. After assembling programming packages, satellite providers beam them to satellites orbiting the Earth, which then direct those signals to small satellite dishes that sit on or next to customers' homes. *Id.* Not a foot of cable in Massachusetts is used to transmit the programming from the digital plants to the subscribers' homes.

Although these differences in assembly and distribution may not matter much to Massachusetts consumers, who see the same TV programs either way, they matter a great deal to state and local governments. As the SJC explained: "The methods of assembly and delivery used by cable and satellite result in different impacts on the Commonwealth's economy. From 2006 to 2010, the cable companies spent more than $1.6 billion in Massachusetts, including investments in headend facilities, cable networks, and vehicles." *Id.* at 5a. Cable providers also employ some 5,500 people in Massachusetts to assemble programming packages at headends, and to construct, operate, and maintain their network of cables. *Id.*

Not just anyone may dig up the public streets and lay cables. In order to "construct[] … a cable system over public rights-of-way, and through ease-

ments," a cable provider must obtain a franchise from local governments. 47 U.S.C. § 541(a)(2) & (b)(1); 1 *Telecommunications Regulation: Cable, Broadcasting, Satellite and the Internet* § 13.02(1) (Matthew Bender, rev. ed.) ("[A] cable franchise is the grant by a city to a private entity of the authority to construct and operate, for the profit of the grantee, a system of wires along or under the city's streets for transmission of television signals."). In exchange, local governments charge "franchise fees" of up to 5% of revenues "from the operation of the cable system." 47 U.S.C. § 542(b). In any given year, cable companies pay some $60 million in franchise fees to cities and towns in Massachusetts. Pet. App. 38a.

Satellite providers, however, do not "construct[] … cable system[s] over public rights-of-way, and through easements." Accordingly, they do not obtain franchises from local governments, and do not pay franchise fees. 47 U.S.C. §§ 541(a)(2)&(b)(1), 542; *see* Pet. App. 38a; H.R. Rep. No. 104-204, pt. 1, at 125 (1995) ("[S]atellite service is a national rather than local service" and "do[es] not require the use of public rights-of-way, or the physical facilities or services of a community."). Instead, satellite providers "pay fees to the Federal government for the right to locate their satellites in outer space and to use certain transmission frequencies." Pet. App. 5a-6a.

Similarly, because satellite providers rely on out-of-state infrastructure to assemble and deliver pay-TV, they do not generate economic activity in the Commonwealth comparable to Cable. While they "spend millions annually on employment, assembly,

and distribution," *id.* at 38a, they "hire relatively few employees in Massachusetts." *Id.* at 5a. Instead, their "expenditures … are concentrated primarily on their out-of-State uplink centers" in Wyoming, Arizona, Colorado, and California. *Id.*

Cable Secures Preferential Treatment From The Massachusetts Legislature

Chafing at the competitive advantage satellite enjoyed by virtue of its superior distribution technology, the cable industry turned to the legislature to put a thumb on the scale of competition. In 2008, the New England Cable & Telecommunications Association ("NECTA") lobbied the Massachusetts legislature to impose an excise tax on the satellite industry. The message was pure protectionism. It argued for preferential treatment on the theory that cable providers "have large fulltime workforces, investment in infrastructure and dozens of physical locations throughout the state, all of which contribute to state tax coffers," whereas "the largest satellite providers have no employee base, infrastructure, or physical plant in the Commonwealth." Joint Appendix of the Record on Appeal, filed in the Massachusetts Supreme Judicial Court ("JA") 1573 (emphasis omitted). Cable stressed that "[t]he cable television industry employs thousands in Massachusetts, has call centers in Massachusetts and supports the municipalities. The satellite industry does none of this." JA 1575 (emphasis omitted). Cable complained, "Despite selling their services here, [satellite TV companies] give almost nothing back to Massachusetts. They don't even employ people here!" JA 1578 (emphasis omitted). Cable also told legislators that what

it euphemistically called "tax parity legislation" was needed to bring "video broadcast industry fees and taxes into line" and "compensate" for the fact that satellite providers did not pay franchise fees. JA 1573. Ultimately, in the face of the cable industry's extensive lobbying, JA 1581-83, the legislature imposed an excise tax of 5% on satellite TV providers, and no comparable tax on cable providers, JA 1586-87.

The satellite-only excise tax had precisely the desired effect: In this intensely price-sensitive market, the additional cost has increased Cable's share of the Massachusetts pay-TV market, and reduced satellite's share. JA 1571. In other words, the differential tax has boosted the pay-TV providers that assemble and distribute their programming packages in the Commonwealth, at the expense of the pay-TV providers that assemble, and distribute their programming packages from, out of state.

Procedural Background

Petitioners DIRECTV and DISH Network filed suit in 2010, alleging that the satellite-only excise tax violates the dormant Commerce Clause by discriminating against interstate commerce in its purpose and practical effects. The trial court entered summary judgment for the Department of Revenue ("Department"). It first held, as a "threshold" matter, that cable and satellite companies are not "similarly situated" because they have "different structures, methods of operation, and regulatory obligations." Pet. App. 48a. The trial court further concluded that "[t]he fact that cable and satellite providers are not

similarly situated effectively sidelines any concern over the purpose behind their differential tax treatment." *Id.* at 55a. The court nonetheless found the evidence of discriminatory intent to be "unconvincing." *Id.*

The satellite providers sought direct review in Massachusetts' highest court, which directly reviews trial court decisions only under certain exceptional circumstances.[1] The satellite providers argued that *all* of those exceptional criteria were met—and the Department agreed.[2] Recognizing the importance of the issue, the SJC granted review.

The SJC upheld the tax, even though it assumed "that the cable companies and the satellite companies represent in-State and out-of-State interests,

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[1] *See* Mass. R. App. P. 11(a):

> [A]ny party … may apply… for direct appellate review, provided the questions presented by the appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

[2] *See* Appellants DIRECTV, LLC and DISH Network L.L.C.'s Unopposed Application for Direct Appellate Review, No. DAR-22287 (Mass. filed Feb. 20, 2014); Ltr. from Pierce O. Cray, Asst. Att'y Gen., to Clerk of Court, Mass. Supreme Judicial Ct. (Mar. 3, 2014).

respectively." *Id.* at 13a. Despite that fact, the court held that "the excise tax is not discriminatory because the cable and satellite companies are not similarly situated." *Id.* at 12a-13a. To reach this conclusion, the court held that "competing in the same market is not sufficient to conclude that entities are similarly situated." *Id.* at 11a, n.10 (internal quotation marks omitted).

Instead, to assess whether cable and satellite providers are similarly situated within the meaning of the dormant Commerce Clause, the court engaged in a lengthy, freewheeling discussion of "the nuances of the divergence between the ways in which the cable and satellite companies are treated, examined in light of the differences between the ways in which these two types of company do business." *Id.* at 25a. Without explaining how any of the following factors relate to the threshold similarly situated inquiry, the court concluded:

- Local franchise fees paid by cable companies are not "rent" for the use of public rights-of-way. Instead, they are "statutorily authorized tax payments" for the "privilege of doing business with local consumers." It therefore was fair to impose a similar statewide tax on satellite providers. *Id.* at 14a-17a.

- Satellite companies are actually *benefited* by the excise tax, the court reasoned, because while cable companies must pay franchise fees to "each of the localities in which they operate," satellite companies pay the excise tax only to the Department. *Id.* at 18a-19a.

Moreover, the court said, cable companies are subject to various local obligations that satellite providers are not. *Id.* at 20a-21a.

- To the extent that satellite providers "were able to show some [overall] discrepancy between the amounts charged to them and to the cable companies … this discrepancy would be permissibly attributable to important differences between the cable and satellite industries." *Id.* at 21a. For example, cable companies are "subject to an extensive scheme of Federal regulation," while satellite providers are not. *Id.* at 23a-24a.

Despite holding that cable and satellite companies were not similarly situated, the SJC also went on to conclude that the satellite-only excise tax was not "discriminatory in its purpose." Pet. App. 25a. It reasoned that "the excise tax is understood most naturally as an element of a balanced scheme of taxation that imposes corresponding burdens, different in nuanced and rational ways, on the cable and satellite companies." *Id.* at 27a. This was so, the court explained, because "before the 2010 appropriations act was passed, the satellite companies paid no tax corresponding to the franchise fees paid by cable companies." *Id.* at 28a-29a (noting that the excise tax "expand[ed] the [5%] franchise fee to include satellite companies").

REASONS FOR GRANTING THE PETITION

The Commerce Clause grants Congress the power "[t]o regulate Commerce … among the several

States." U.S. Const. art. I, § 8, cl. 3. It thereby impliedly prohibits the states from discriminating in ways that amount to "economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). "In this context, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *United Haulers Ass'n,* 550 U.S. at 331 (quoting *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). This prohibition is called the "dormant" or "negative" Commerce Clause. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (internal quotation marks omitted). In a typical case alleging discrimination against interstate commerce, a business objects that it is being treated differently from other businesses, and asserts that the discriminatory treatment has the purpose or practical effect of favoring the local economy. The Court has segmented the analysis of such a claim into three distinct inquiries.

The first, which is most directly relevant here, is whether the favored and disfavored businesses are "similarly situated." *Tracy*, 519 U.S. at 299. The Court has recognized that this "threshold" inquiry has "more often than not itself remained dormant" in this Court's cases, *id.*, because it is so easily satisfied. When the issue has surfaced, the Court has focused squarely on whether the favored and disfavored businesses compete directly in a relevant market.

Second, the Court asks whether the differential treatment amounts to discrimination against interstate commerce. When, as here, the challenged stat-

ute does not state explicitly that in-state businesses are favored over out-of-state businesses (facial discrimination), a disfavored business can prevail by demonstrating that the statute has the practical "effect of unduly burdening interstate commerce" or that it is infected by "a discriminatory intent" to achieve that end. *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 75 (1989). This element demands "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

Only after a plaintiff demonstrates discrimination does the third inquiry come into play: The statute is invalid unless the state can overcome "the strictest scrutiny," *Maine v. Taylor*, 477 U.S. 131, 144 (1986) (internal quotation marks omitted)—namely, by establishing that the discrimination "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (internal quotation marks omitted). The state's burden of proving "such justification [is] high." *New Energy Co. of Ind.*, 486 U.S. at 278.

In dismissing Petitioners' claim at the threshold similarly situated inquiry, the Massachusetts court did not focus simply on whether the cable and satellite TV providers compete. It embarked instead on an unbounded inquiry into the different "tax obligations" and burdens of cable and satellite providers; the "ways in which they are collected and calculated"; "characteristics of the cable and satellite companies' respective methods of operation"; and "the

different regulatory regimes to which they are subject." Pet. App.2a.

This Court should review this case, and the companion case out of Tennessee, for three reasons: (I) the courts below have contributed to a growing and entrenched split on what it means to be "similarly situated"; (II) the Massachusetts court's treatment of this threshold element conflicts with decisions of this Court; and (III) how courts treat this "similarly situated" element is an important issue, not only for critical competition in the pay-TV market but across numerous industries, particularly at a time when innovative businesses are using technology to compete with entrenched local interests.

I. The Lower Courts Are Hopelessly Split As To What Makes Two Businesses Similarly Situated.

The lower courts are deeply divided, 6-5, over what makes businesses similarly situated for Commerce Clause purposes. Three circuits and three state high courts treat businesses as similarly situated so long as they simply compete in the relevant market. In stark contrast, four circuits, joined now by the Massachusetts Supreme Judicial Court, hold that competing in the relevant market is not sufficient to make businesses similarly situated. Instead, these courts assess whether businesses are similarly situated based on their methods of operation, regulatory responsibilities, the state's justification for the discrimination, and a grab-bag of other factors. Only this Court can resolve these squarely conflicting approaches.

A. Three circuits and three state supreme courts have concluded that competing in the same market is sufficient to establish that businesses are similarly situated.

The First, Seventh, and Eleventh Circuits, together with the highest courts of Kansas, New Hampshire, and Florida have correctly concluded that "[e]ntities are 'substantially similar' or 'similarly situated' … when they compete against one another in the same market." *Smith v. New Hampshire Dep't of Revenue Admin.*, 813 A.2d 372, 377 (N.H. 2002) (citing *Tracy*, 519 U.S. at 299).

Multiple state supreme courts explicitly hold that "similarly situated" simply means competing in the relevant market. In *In re CIG Field Service Co.*, the Kansas Supreme Court considered "the threshold question of whether" *inter*state and *inter*county natural gas gathering systems were "similarly situated" to *intra*county natural gas gathering systems. 112 P.3d 138, 146 (Kan. 2005). After reviewing *Tracy*, the court held that the "essential" inquiry was whether the systems "serve the same market." *Id.* In other words, does the allegedly discriminatory tax "affect[] the systems' economic choices in competitive markets"? *Id.* The issue was highly disputed by the parties' competing experts, and the Board of Tax Appeals found that the systems did compete. *Id.* at 147. The Kansas Supreme Court concluded that substantial evidence supported that factual finding, and therefore concluded that the systems were similarly situated. *Id.*

The New Hampshire Supreme Court reasoned similarly in *Smith*, which involved a tax exemption for interest and dividends earned on investments in New Hampshire banks. Because the "in-state banks and out-of-state non-bank investment sources" had "different investment products," the court held that there was a "threshold question whether the [entities] are indeed similarly situated for constitutional purposes." 813 A.2d at 376-77. After analyzing *Tracy*, the court observed that "[e]ntities are 'substantially similar' or 'similarly situated' for Commerce Clause purposes when they compete against one another in the same market." *Id.* at 377 (citing *Tracy*). The court then reviewed the evidence introduced at trial and concluded that substantial evidence supported the trial court's factual finding that "investment products from out-of-state non-banks do not compete in the same market with investment products from New Hampshire banks." *Id.* at 381.

The First Circuit adopted this approach when it considered the validity of a state statute that gave preferential treatment to "small" wineries (defined as those producing fewer than 30,000 gallons of wine per year) over "large" wineries (which produced more than 30,000 gallons per year). *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 4 (1st Cir. 2010). Both small and large wineries competed in "a single[,] although differentiated" wine market. *Id.* at 13. Yet there were obvious differences between the two: Large wineries generally specialized in "high-volume, lower-cost wines," of which they produced millions of gallons per year. And small wineries generally specialized in "low-volume, higher-quality, higher-priced boutique wines," which were produced

with "a relatively small quantity of grapes." *Id.* at 6. Even the federal government imposed different taxes on wineries based on their size. *Id.* at 15-16 & n.18.

The First Circuit might have concluded, as the SJC did below, that these differences meant the disparately regulated entities were not similarly situated. But it did not. Instead, the First Circuit concluded that small wineries—including all Massachusetts wineries—were "similarly situated" to large wineries, all of which were located "outside Massachusetts." *Id.* at 5, 10 (citing *Tracy*). It went on to hold that the law discriminated in effect by "significantly alter[ing] the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries." *Id.* at 11. Only then did the First Circuit address whether the discriminatory law was justified. The court ultimately held that the Commonwealth failed to meet its "heavy burden of showing that the statute is nonetheless constitutional because it serves a legitimate local purpose that cannot be attained through reasonable non-discriminatory alternatives." *Id.* at 17-18.

The Seventh Circuit takes the same approach. It struck down an Indiana "backhaul ban" that, as a practical matter, raised the cost of transporting out-of-state waste into Indiana but left "Indiana-generated municipal waste" unaffected. *Gov't Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267, 1270-73, 1278-79 (7th Cir. 1992) (internal quotation mark omitted). Even though Indiana waste was generally transported in "traditional, dedicated garbage trucks," and interstate waste was generally transported by hauling goods from the Midwest to

the East Coast and then hauling trash back in non-dedicated trucks, the court held that Indiana garbage truck owners were the "[in-state] counterparts" of interstate waste transporters, and compared the treatment of the two. *Id.* at 1278-79 (internal quotation marks omitted; alteration in original). Because the law "'raise[d] the costs of doing business' for out-of-state entities, 'while leaving those of their in-state counterparts unaffected,'" the court held that the law discriminated in practical effect. *Id.* at 1279 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977)).

It was only *after* the Seventh Circuit found that the law discriminated in practical effect that it considered the State's justification for the law, in order to determine whether the law "further[ed] health and safety concerns that [could not] be adequately served by nondiscriminatory alternatives." *Id.* (quoting *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 367 (1992)).

For its part, the Eleventh Circuit treated chain restaurants as similarly situated to local mom-and-pop restaurants in a case involving an ordinance that banned chain restaurants. *Cachia v. Islamorada*, 542 F.3d 839, 840-41 (11th Cir. 2008). Despite obvious operational differences between the two, the court struck down the law, concluding that the ordinance's "prohibition of restaurants operating under the same name, trademark, menu, or style is not evenhanded in effect, and disproportionately targets restaurants operating in interstate commerce." *Id.* at 843; *see also Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008).

Finally, the Florida Supreme Court did the same while invalidating a state law that gave preferential tax treatment to distillers of citrus and sugarcane, both commonly grown in Florida. *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1002 (Fla. 1988), *rev'd on other grounds*, 496 U.S. 18 (1990). The citrus and sugarcane distillers were obviously not identical to "manufacturers and distributors of [other] alcoholic beverages"—consumers even viewed citrus and sugar alcohol as "less desirable" than other alcohol manufactured out of state. *Id.* at 1008. But because the manufacturers were all in "direct competition," the court compared their treatment, and concluded that "the challenged tax preference scheme [unconstitutionally] strip[ped] away from manufacturers and distributors of those beverages the competitive and economic advantages which naturally flow from marketing beverages which are considered superior by the public." *Id.*

B. Four circuits and a state supreme court hold that competing in the same market is not sufficient to establish that businesses are similarly situated.

Like the Massachusetts court below, four circuits have held that "competing in the same market is not sufficient to conclude that entities are similarly situated" for Commerce Clause purposes. *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009). These courts hold that "a business entity's structure," the way the business is regulated, and even the justification for the state law, are "material characteristic[s] for determining if entities are similarly situated." *Id.*

For example, in *Brown* the Ninth Circuit held that "opticians are not similarly situated to optometrists and ophthalmologists," even though they "compete[] in the same market for the sale of eyewear." *Id.* at 525-27. The court concluded that the challenged laws "sought to protect optometrists and ophthalmologists as heath care professionals from being affected by subtle pressures from commercial interest," and that it "must give deference to the State's choice to protect its citizens in this way." *Id.* at 526. It then listed the ways in which opticians differed from optometrists and ophthalmologists: regulatory differences, and "different responsibilities, different purposes, and different business structures." *Id.* at 527-28.

The Sixth Circuit held likewise in *LensCrafters, Inc. v. Robinson*, concluding that optical stores like Lenscrafters were not similarly situated to optometrists, despite competing "for the same customers in the same market for retail eyewear." 403 F.3d 798, 803-04 (6th Cir. 2005). It did so because "[u]nlike retail optical stores, licensed optometrists are healthcare providers and, as such, have unique responsibilities and obligations to their patients that are not shared by optometric stores." *Id.* at 804. This conclusion was further influenced by the court's view of the justification for the law: "to protect optometry from commercialism." *Id.* at 803.

The Fifth Circuit repeatedly has concluded that considerations other than competition suffice to remove regulated businesses from the protection of the dormant Commerce Clause. For example, in *Ford Motor Co. v. Texas Department of Transportation*,

that court found that the State's interest in protecting against vertical integration meant that independent auto dealers were not similarly situated to auto manufacturers who own car dealerships—even though they indisputably competed against one another in the used car market. 264 F.3d 493, 498, 501-02 (5th Cir. 2001); *see also Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 154, 157 (5th Cir. 2007) (auto body repair shops owned by insurance companies not similarly situated to independent repair shops); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (out-of-state wine retailer not similarly situated to in-state wine retailers); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725-26 (5th Cir. 2004) (truck manufacturers not similarly situated to in-state dealers).

The Second Circuit adopted this same approach in concluding that not all cigarette retailers were similarly situated, despite head-to-head competition in the retail market. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 215-16 (2d Cir. 2003). There, a New York statute prohibited retailers from shipping cigarettes directly to New York customers, but allowed brick-and-mortar stores to sell cigarettes in person, and to deliver up to 800 cigarettes to a New York customer using their own delivery vans. *Id.* at 214-15. Although the law clearly advantaged in-state brick-and-mortar retailers, the Second Circuit refused to consider whether this was a discriminatory effect. Instead, it concluded that out-of-state retailers were not similarly situated to in-state brick-and-mortar retailers—they were only similarly situated to "non-brick-and-mortar sellers who ship cigarettes directly to New York consumers

following purchases made by Internet, telephone, or mail order." *Id.* at 215-16; *see also id.* at 212-13.

These cases stand in clear conflict with the numerous authorities that properly treat entities competing in the relevant market as similarly situated, notwithstanding operational and regulatory differences, or arguments purporting to justify the discriminatory regime. The natural result of the decision below, and courts aligned with it, is that except when companies are carbon copies—which they rarely will be—states may adopt laws distinguishing among them, free entirely from Commerce Clause scrutiny.

C. The split extends to the precise facts of this case.

Courts have even divided on the precise question of whether cable and satellite companies are similarly situated for Commerce Clause purposes. Most recently, a Florida appellate court held that cable and satellite providers are similarly situated because they "operate in the same market and are direct competitors within that market." *DIRECTV, Inc. v. State, Dep't of Revenue*, Nos. 1D13-5444 & 1D14-0292, __So.3d__, 2015 WL 3622354, at *4 (Fla. Dist. Ct. App. June 11, 2015). Acknowledging that cable and satellite providers "differ in the deployment of technology, the need for local infrastructure, and the additional services offered," the court held that those differences did not prevent them from being similarly situated for Commerce Clause purposes. Rather, "mere differences in how a service is provided is not enough to overcome the fact that the companies

compete in the same market and sell virtually identical products at retail." *Id.*; *see also DIRECTV, Inc. v. Levin*, 941 N.E.2d 1187, 1201 (Ohio 2010) (Brown, C.J., dissenting) (cable and satellite providers are similarly situated because they "unquestionably compete").

On the other side, the SJC and a Tennessee appellate court have concluded that cable and satellite providers are not similarly situated. *See* Pet. App. 12a-13a; *DIRECTV, Inc. v. Roberts*, No. M2013-01673-COA-R3-CV, 2015 WL 899025, at *11, *review denied*, No. M2013-01673-SC-R11-CV (Tenn. S. Ct. June 12, 2015). But even they have disagreed on the rationale. As the companion petition will explain, the Tennessee court did not base its conclusion on any free-wheeling discussion of operational differences between cable and satellite, or the supposed fairness of a satellite-only tax. Indeed, it acknowledged that "[o]perational differences can be, and in this case are, linked to geography." *Id.* at *7. Instead, according to the Tennessee court, cable and satellite providers are not similarly situated because "[c]able providers are heavily regulated by the federal government, while satellite providers are minimally regulated." *Id.* at *10 (internal quotation marks omitted).

Thus, in Massachusetts and Tennessee, laws that discriminate against satellite providers are immune from dormant Commerce Clause scrutiny at the gate, because cable and satellite providers are deemed not substantially similar, and the protections of the dormant Commerce Clause are therefore not triggered. Meanwhile, in Florida, the Commerce

Clause is alive and well. There, a satellite-only tax is properly subject to scrutiny (and, indeed, was struck down) because the exact same pay-TV providers, competing in the exact same market, are understood to be similarly situated. This makes a mockery of the dormant Commerce Clause, which was intended to preserve a national market for competition. It also conflicts with this Court's precedents, as we discuss next.

II. The Decision Below Conflicts With This Court's Established Precedent.

The three discrete inquiries of a dormant Commerce Clause discrimination claim described above (at 13-14) have different content because they serve different purposes and carry different burdens of proof. The proper way to conduct the analysis is to treat each inquiry separately.

Step one: Cable and satellite TV are similarly situated for the simple reason that it is undisputed that they compete—vigorously and directly—in the same market for the same customers. They are direct "competitors in the [pay-TV] industry," competing "with one another and with each other for pay-TV subscribers in Massachusetts and throughout the United States." JA 1552. Because cable and satellite TV providers compete vigorously in the one and only market to which the differential sales tax applies, the undisputed facts compel a conclusion that cable and satellite providers are similarly situated.

Step two: Next, the analysis turns to whether the differential treatment of cable and satellite

amounts to discrimination against interstate commerce—i.e., whether it has the purpose or the practical effect of favoring the local economy at the expense of the national economy or the economies of other states. In this regard, the Court repeatedly has held that a law discriminates if it has the purpose or practical effect of rewarding the business that build facilities or conducts certain activities within the state over those that build their facilities or perform the same activities outside the state. For example, a law has a discriminatory effect if it provides a tax break based on whether a company manufactures products within the state, *see Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), or uses distribution facilities within the state, *Westinghouse*, *Elec. Corp. v. Tully*, 466 U.S. 388, 402-07 (1984). Massachusetts' satellite-only tax is a classic example of such discrimination. It has the practical effect of rewarding the business that builds its digital manufacturing plants within the Commonwealth over those that build similar facilities in other states; and it favors the business for which distribution entails laying thousands of miles of cable within the Commonwealth over the business whose distribution is conducted from outside the state. The SJC acknowledged as much, assuming "that the cable companies and the satellite companies represent in-State and out-of-State interests, respectively." Pet. App. 13a.

Similarly, a tax has a discriminatory purpose to the extent it was motivated by the desire to reward businesses that have "large fulltime workforces, investment in infrastructure and dozens of physical locations throughout the state, all of which contrib-

ute to state tax coffers" and burden the businesses with "no employee base, infrastructure, or physical plant in the Commonwealth." JA 1573 (emphasis omitted).

Step three: Having demonstrated that the satellite-only tax is discriminatory, a heavy burden then shifts to the Department to demonstrate why the discrimination is the only adequate means of advancing legitimate state interests. *See Granholm*, 544 U.S. at 489. To the extent that the Department defends on the ground that the satellite-only tax is necessary to compensate for other tax disparities, the Department has the burden of proving that the discriminatory tax fits within the strict confines of the compensatory tax doctrine, which Massachusetts' tax does not (and the Department has not even argued that it does).

The court below erred in concluding that step one—the similarly situated analysis—goes beyond the question of competition. *Infra* § II.A. In incorporating other factors into the threshold inquiry, the court converted the threshold analysis into a mishmash of elements that bypasses the inquiry into discrimination and dilutes strict scrutiny. *Infra* § II.B.

A. Competing in the same market is sufficient to establish that entities are similarly situated.

The Massachusetts Supreme Judicial Court departed from this Court's precedents when it concluded that "competing in the same market is not sufficient to conclude that entities are similarly situ-

ated." Pet. App. 11a, n.10 (internal quotation marks omitted). Competition has always been the critical inquiry at the threshold. That is why this threshold inquiry has "more often than not itself remained dormant" in this Court's cases. *Tracy*, 519 U.S. at 299.

The point of the threshold inquiry is to advance the "fundamental objective" of the dormant Commerce Clause, which is to "preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id*. States threaten that national market when they distinguish between competing products in ways that favor their own parochial economic interests. No such threat arises when states differentiate between products or producers that do *not* compete. In that circumstance, interstate markets are not distorted, and "eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective." *Id.* Thus, all a court needs to ascertain at the threshold is whether the favored and disfavored businesses compete in the relevant market.

More than 50 years ago, the Court drew exactly that line in *Alaska v. Arctic Maid* before determining whether there was "discrimination in favor" of one competitor "and against" another. 366 U.S. 199, 204 (1961). The case involved a tax on freezer ships. The freezer-ship owners argued that they were improperly taxed at a higher rate than local fish processors. The Court refused to compare the two because "[t]he freezer ships do not compete with those who freeze fish for the retail market." *Id.* Rather, the freezer

ships' "competitors are the Alaskan canners." *Id.* The Court therefore compared the tax on freezer ships to the tax imposed on Alaskan canners, and found no advantage in favor of the local canners. *Id.*

In keeping with this principle, this Court has had no trouble finding the threshold element satisfied based on even a minimal level of competition in the relevant market. A good example is *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Hawaii sought to boost its local economy by granting a tax exemption to fruit wines and okolehaho, a type of brandy distilled from the root of a Hawaiian shrub. *Id.* at 265. This amounted to discrimination in practical effect, since the exemption "applie[d] only to locally produced beverages." *Id.* at 271. The State argued that the benefited products were not situated similarly to the burdened ones, because local fruit wine did not meaningfully compete with out-of-state beer and spirits. *Id.* at 268-69. The Court disagreed, holding that the relevant question was simply "*whether competition exists* between the locally produced beverages and foreign beverages." *Id.* at 269 (emphasis added). The Court explained that there need only be "some competition between the locally produced exempt products and nonexempt products from outside the State" for the law to run afoul of the Commerce Clause. *Id.* at 271.

Other cases have invalidated statutes that treated direct competitors differently without ever even questioning that the competitors were similarly situated for Commerce Clause purposes. Implicit in all of these cases is an understanding that competition between the benefitted and burdened businesses suf-

fices to trigger Commerce Clause scrutiny. *E.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 330-31 (1977) (comparing tax treatment of sales on the New York Stock Exchange with sales on competing out-of-state exchanges); *West Lynn Creamery,* 512 U.S. at 193-94 (comparing treatment of "higher cost Massachusetts dairy farmers" with their competitors—"lower cost dairy farmers in other States"); *Granholm*, 544 U.S. at 466-67 (comparing treatment of in-state and out-of-state wineries); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (comparing treatment of out-of-state bank holding companies with competing in-state bank holding companies). In most of these cases—and certainly in *Bacchus*—the State could easily have argued along the lines of the Massachusetts decision here: that the operations were different or that the discrimination was justified in the name of parity.

More importantly, the decision below flatly conflicts with *Tracy*. That decision concerned an Ohio law that granted an exemption from the State's general sales and use taxes for natural gas sold by public utility companies but not for natural gas sold by other marketers. 519 U.S. at 282. The Court explained that when a law differentiates between "allegedly competing entities" that "provide different products … there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Id.* at 299. "This is so," the Court noted, "for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Id.* The Court continued: "If in fact

that should be the case, eliminating the tax … would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition." *Id.*

Applying that test and citing *Arctic Maid*, the Court observed that there was no competition between natural gas marketers and public utilities in the utilities' "core" market—residential consumers of natural gas—because natural gas marketers simply did not, and could not, serve individual residents. *Id.* at 301-02. So as to that "captive" residential market, "competition would not be served by eliminating any tax differential as between sellers, and the dormant Commerce Clause has no job to do." *Id.* at 303. However, the marketers and utilities did compete in a separate "noncaptive" market—bulk natural gas purchasers like General Motors. *Id.* at 303. Therefore, "the question raised by this case," the Court asked, is "[s]hould we accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities alone operate?" *Id.* at 303-04. Based on a variety of case-specific factors, the Court ultimately decided "to give the greater weight to the captive market," and thus to treat the entities "as dissimilar" for Commerce Clause purposes. *Id.* at 304.

Tracy is therefore critical here, but not in the way the court below thought. *Tracy* embraces the established rule that competition is the touchstone of whether two entities are similarly situated. It confirms the common-sense proposition that "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a

single market there can be no local preference … to which the dormant Commerce Clause may apply." *Id.* at 300. Conversely, when the entities do compete in the relevant market, the Commerce Clause's "fundamental objective of preserving a national market for competition" is at play, *id.* at 299, and the entities are similarly situated.

B. The court below diluted both the inquiry into discrimination and the strict scrutiny of justifications for discrimination.

Instead of focusing its similarly situated analysis on competition, the court below assessed "the broader context" to conclude that the Commonwealth had acceptable reasons for enacting the satellite-only tax. These reasons included that Cable paid local franchise fees for "the privilege of doing business with local consumers," and that satellite companies could fairly be made to pay for that privilege as well, Pet. App. 14a-17a; that satellite companies could not show that their total obligations were more burdensome than Cable's, and that if they could, "this discrepancy would be permissibly attributable to important differences between the cable and satellite industries," *id.* at 20a-21a; and that cable and satellite providers are subject to "divergent regulatory regimes," *id.* at 24a.

In importing these considerations from the merits into the threshold analysis, the court below effectively pretermitted any meaningful analysis of whether an enactment is discriminatory, as well as whether it can nevertheless be constitutionally justi-

fied. This approach replaces this Court's clear and simple threshold test with an unprincipled inquiry that allows each judge to decide whether to bless a statute—at the threshold—based on his or her own gut instinct as to whether the differential treatment is good policy.

Moreover, the court below flipped all the burdens for justifying discrimination. Instead of requiring the Department to "sho[w] that [the discriminatory regime] advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *Oregon Waste Sys., Inc.,* 511 U.S. at 100-101 (first alteration in original), the court indulged a free-wheeling inquiry that revolved around whether the overall regime felt fair or reasonable. It failed to hold the Department to the strict requirements of the compensatory tax doctrine, on which the Department bore a heavy burden. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331-32, 344 (1996). The court below evaded these essential requirements by importing notions of rough equity into the threshold similarly situated inquiry, and requiring the satellite providers to prove that "their obligations are more burdensome than those of the cable companies," including the "value of the in-kind services that cable companies provide to local governments." Pet. App. 21a. In short, the court conducted an "amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities," *Associated Indus., of Mo. v. Lohman,* 511 U.S. 641, 655 n.5 (1994), an inquiry utterly at odds with what the Court has required.

III. This Case Is An Ideal Vehicle For Resolving An Issue Of National Importance Affecting Many Industries.

The issues in this case directly affect the 84% of households across the country that subscribe to some form of pay-TV service.[3] Until the 1990s, Cable had a monopoly on the market for pay-TV. Without competition, cable providers had no incentive to improve service, innovate, or keep prices down. In response to a bitter consumer uprising, Congress stepped in to foster competition from satellite TV. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 602, 110 Stat. 56, 144 (1996), reprinted in 47 U.S.C. § 152 note.

Needless to say, Cable was not pleased. Over the past decade, the cable industry has lobbied state legislatures to enact satellite-only tax schemes like the one at issue here. Many states have rebuffed Cable's efforts to protect its turf by raising satellite providers' costs of doing business. Government, they have recognized, should not be in the business of enacting legislation designed to shield local economic interests from competition. Other states have acceded, and enacted variations of the differential pay-TV tax at issue here—and every year, cable lobbyists urge more to follow suit.

The satellite providers have challenged each of these taxes as violating the Commerce Clause, and

[3] *See* Leichtman Research Group, *More Than Five Of Every Six TV Households Subscribe To A Pay-TV Service* (Sept. 2, 2014), http://tinyurl.com/p7o6ppe.

judges have divided on their constitutionality. Most recently, a Florida appellate court struck down Florida's discriminatory tax scheme. Other judges would have done the same, including trial courts in Tennessee and Ohio, as well as the Chief Justice of the Ohio Supreme Court in a vigorous dissent. *See Levin*, 941 N.E.2d 1187 (Brown, C.J. dissenting); *DIRECTV, Inc. v. Roberts*, No. 03-2408-IV (Ch. Tenn. June 21, 2013); *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-7135 (Ohio Ct. C.P., Franklin Cnty., Oct. 17, 2007). Other courts have affirmed the constitutionality of these laws on a variety of different bases. *See DIRECTV, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007); *Levin*, 941 N.E.2d 1187 (majority opinion); *DIRECTV, Inc. v. State*, 632 S.E.2d 543 (N.C. Ct. App. 2006). These erroneous rulings artificially tilt the playing field in favor of Cable and its associated local economic interests, to the detriment of pay-TV consumers and innovation in the pay-TV market. The Court's review is necessary to preserve the competitiveness of this critical industry, and the diversity of views, technological advancement, and improved product offerings that competitiveness in this vital market generates.

The stakes are equally high for industries across the economy. The cases discussed above illustrate how the question presented affects nearly every imaginable sector—from cars to eyeglasses; from municipal waste to alcoholic beverages. Under the SJC's conception of the Commerce Clause, the modest, threshold "similarly situated" requirement will rarely be satisfied—entities are nearly always distinguishable in some way or another—and interstate

markets will be left largely unprotected from discriminatory laws.

The decision below and those like it pose an especially grave threat to innovators seeking to challenge established competitors. In numerous industries, new entrants are using new technologies to serve customers from afar, often more efficiently and with less local infrastructure. Today, using Amazon, one can purchase everything from chocolate pudding to a new wardrobe without ever setting foot in a grocery store or a mall. And using iTunes or a Kindle, people can purchase their favorite music and books without patronizing the local CD or book store. While these new ways of doing business benefit the national economy as whole, they also threaten entrenched businesses, making innovators a natural target for protectionist legislation. Under the approach adopted below, such laws are insulated from Commerce Clause review whenever the State can point to some difference between the favored and disfavored companies, or some reason for treating them differently. Until the division of authority is resolved, these businesses face the risk that a state, at the behest of local interests, may counter their innovation with special burdens.

These uncertainties are problematic for state legislators and regulators as well. They need to know which laws are permissible and which ones are impermissible. The need for clarity is especially compelling in the context of discriminatory taxes. If a state is wrong, it may be required to refund millions of dollars in taxes, many years after the funds were collected and spent. *See, e.g., McKesson Corp. v. Div.*

of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31-32 (1990) (remedy for Commerce Clause violation is a tax refund).

There is no reason to await further percolation, and compelling reasons not to. This Court's precedent is well-established; *Tracy* is more than two decades old. Four circuits have concluded, some on multiple occasions, that competing in the relevant market does not make entities similarly situated, placing disparate tax and regulatory treatment beyond the scope of the Commerce Clause. Three other circuits and multiple state high courts disagree. And the exact same companies, competing in the exact same market, are similarly situated in Florida, but are not similarly situated in Tennessee or Massachusetts. In short, dormant Commerce Clause doctrine is a terrible mess and is only getting messier. This Court's guidance is crucial for getting the doctrine in order.

Finally, this case provides an excellent vehicle for reviewing these issues. The decision below was rendered by a state high court on the basis of an extensive summary judgment record. The central facts are largely undisputed, and therefore squarely raise the question of law that has divided courts around the country. And, especially in tandem with the companion Tennessee petition, it presents the issue squarely and thoroughly for the Court's consideration.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari; or, in the alternative, grant the companion petition in *DIRECTV v. Roberts* and hold this petition.

Respectfully submitted,

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Date: June 18, 2015

APPENDIX A

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK

DIRECTV, LLC, & another[1] *v. DEPARTMENT OF REVENUE.*

SJC-11658

November 4, 2014, Argued

February 18, 2015, Decided

Opinion

LENK, J.

General Laws c. 64M, § 2, imposes a five per cent excise tax on video programming delivered by direct broadcast satellite (tax). The plaintiffs are two companies that provide services subject to the tax (satellite companies). They brought a complaint for declaratory and injunctive relief in the Superior Court, alleging that the tax violates the commerce clause of the United States Constitution.[2] The satellite companies contend that the tax

[1] Dish Network L.L.C.

[2] The companies that provide video programming delivered by direct broadcast satellite (satellite companies) also argued below that the excise tax violates their right to equal protection. They do not pursue this claim on appeal.

discriminates against interstate commerce, both in its effect and in its purpose, by disfavoring them as compared with those companies that provide video programming via cable (cable companies). The satellite and cable companies that operate in Massachusetts are all incorporated and headquartered in other States; the satellite companies argue, however, that the cable companies represent in-State interests inasmuch as their in-State commercial operations are substantially greater than those of the satellite companies.

A Superior Court judge granted summary judgment in favor of the defendant, the Department of Revenue (department). The satellite companies appealed, and we allowed their application for direct appellate review.

We conclude that summary judgment was warranted. The cable companies and the satellite companies are subject to similar tax obligations, which differ primarily in the ways in which they are collected and calculated. These differences are grounded in important characteristics of the cable and satellite companies' respective methods of operation, and in the different regulatory regimes to which they are subject. The satellite companies thus have raised no genuine issue as to the facts material to their claim of discrimination against interstate commerce, and the department is entitled to judgment as a matter of law.[3]

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[3] We acknowledge the amicus briefs submitted by Public Knowledge, the Satellite Broadcasting and Communications

1. *Facts*. We summarize the undisputed facts important to our analysis, focusing on the nature of the video programming industry; the similarities and differences between the methods of operation used by the participants in this industry, namely cable companies and satellite companies; these companies' respective economic impacts on Massachusetts; their respective tax obligations; and the changes to those obligations introduced by the Legislature in 2010.

a. *The video programming industry*. The service that permits customers to view a variety of video channels on their television sets is known as multi-channel video programming. The satellite companies compete in the market for video programming services primarily with cable companies, including Comcast Corporation (Comcast) and Charter Communications Inc. Verizon Communications, Inc. (Verizon), a telephone company, participates in this market as well. All of the major participants in the market for video programming services, including Verizon, are incorporated and headquartered outside of Massachusetts.

The cable companies and the satellite companies both offer several programming packages. These packages generally include local broadcasts,

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Association, and the National Association of Wine Retailers on behalf of the satellite companies; and the briefs by the National Governors Association, the Multistate Tax Commission, and the New England Cable and Telecommunications Association on behalf of the Department of Revenue.

basic cable channels, premium cable channels, pay-per-view movies and events, and on-demand programming. Customers typically choose between cable and satellite on the basis of considerations such as price, customer service, reception quality, and program offerings.

b. *Methods of operation*. The methods of operation used by the cable and satellite companies overlap substantially. Both types of company purchase the rights to distribute programming from content providers. Both designate certain percentages of their channel capacity to public, educational, and government programming.[4] Both advertise their services using television, billboards, mail, newspapers, and the Internet. Both lease some equipment, such as set-top boxes (which convert signals for viewing on television sets) and recording devices, to their subscribers.

The cable companies and the satellite companies differ, however, in the methods by which they assemble and deliver programming to their customers. The cable companies assemble their programming in local facilities known as "headends." There are approximately sixty headends in Massachusetts. At the headends, programming signals are gathered by satellite dishes and fiber optics equipment. These signals are then processed, packaged, and delivered to customers' homes

[4] See note 16, *infra*.

through networks of cables laid on the ground or hung from buildings and poles.[5]

The satellite companies, by contrast, collect, process, and package their programming at "uplink centers." Each of the satellite companies has two primary uplink centers nationally. These uplink centers are located outside Massachusetts. Programming signals are transmitted from the uplink centers to satellites orbiting the earth, and then relayed to small receiver dishes mounted on or near customers' homes. The satellite companies maintain small, intermittently-staffed "collection facilities," which gather content from local broadcast stations and transmit it to the uplink centers.

c. *Economic impact*. The methods of assembly and delivery used by cable and satellite result in different impacts on the Commonwealth's economy. From 2006 to 2010, the cable companies spent more than $1.6 billion in Massachusetts, including investments in headend facilities, cable networks, and vehicles. As of 2010, the cable companies employed approximately 5,500 people in Massachusetts.

The satellite companies, on the other hand, hire relatively few employees in Massachusetts. Their expenditures on facilities and equipment are concentrated primarily on their out-of-State uplink centers. The satellite companies also pay fees to the

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[5] Telephone companies like Verizon Communications, Inc., use similar technology.

Federal government for the right to locate their satellites in outer space and to use certain transmission frequencies.

d. *Tax obligations*. Both the cable companies and the satellite companies are subject to real property taxes in Massachusetts, and both pay personal property taxes on possessions located in the Commonwealth. They both pay State income taxes, and they collect and remit sales tax on certain transactions.

The cable companies, in addition, pay "franchise fees" to local governments. The rates of these fees are determined in negotiated agreements. Under Federal law, franchise fees may be no higher than five per cent of a cable company's gross revenue from the provision of cable services. See 47 U.S.C. § 542(b) (2012). Typically, the fees charged in Massachusetts are three to five per cent of gross revenue. Local governments also usually impose an additional fee on cable companies, at an average rate of 1.09% of gross revenue, dedicated to supporting public, educational, and government programming. In addition to these fees, cable companies ordinarily are required by local governments to (a) provide services, facilities, and equipment for the use of public, educational, and governmental channels; (b) deliver free video programming services to municipal buildings, schools, and libraries; and (c) meet certain service quality and customer service requirements.[6]

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[6] The agreements between the local governments and the companies that provide video programming via cable (cable companies) also typically require that the companies set aside

A Federal statute prohibits the imposition of any such fees or taxes on the satellite companies at the local level, but it permits the taxation of the satellite companies by the States. See Telecommunications Act of 1996 § 602, P.L. 104–104, 110 Stat. 144 (reprinted in notes following 47 U.S.C. § 152 [2012]) (Telecommunications Act).

e. *Changes introduced in 2010*. The Act making appropriations for the fiscal year 2010,[7] St. 2009, c. 27 (2010 appropriations act), introduced two significant changes to the scheme of taxation that governs the video programming industry. First, the 2010 appropriations act established the excise tax. See St. 2009, c. 27, § 61, enacting G. L. c. 64M. The excise tax is imposed upon the satellite companies at a rate of five per cent of their gross revenues derived from the provision of video programming in Massachusetts. See G. L. c. 64M, §§ 1, 2. The satellite companies pass on the cost of the excise tax to their customers. See G. L. c. 64M, § 3.[8]

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channels for public, educational, and governmental programming. These obligations apparently augment the requirement of Federal law that the cable companies designate a percentage of their channel capacity to public-oriented programming. See note 16, *infra*.

[7] The full title of the act is “An Act making appropriations for the fiscal year 2010 for the maintenance of the departments, boards, commissions, institutions and certain activities of the Commonwealth, for interest, sinking fund and serial bond requirements and for certain permanent improvements.”

[8] The cable companies also pass on the cost of the franchise fees to their customers.

The 2010 appropriations act also imposed a personal property tax on "[p]oles, underground conduits, wires and pipes of telecommunications companies." St. 2009, c. 27, § 25, amending G. L. c. 59, § 18. "[T]elecommunications companies" are defined to include "cable television, [I]nternet service, telephone service, data service and any other telecommunications service providers." *Id.* In essence, this provision increased the personal property tax liability of the cable and telephone companies, but not of the satellite companies (which do not use poles, wires, and the like).

2. *Legal framework.* a. *Summary judgment.* We review a grant of summary judgment de novo. See *Federal Nat'l Mtge. Ass'n v. Hendricks,* 463 Mass. 635, 637, 977 N.E.2d 552 (2012); *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 699, 964 N.E.2d 318 (2012). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . , together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). The evidence in the record must be viewed "in the light most favorable to the nonmoving party." *Surabian Realty Co. v. NGM Ins. Co.*, 462 Mass. 715, 718, 971 N.E.2d 268 (2012), quoting *Fuller v. First Fin. Ins. Co.*, 448 Mass. 1, 5, 858 N.E.2d 288 (2006). We "need not rely on the rationale cited and 'may consider any ground supporting the judgment.'" *District Attorney for N. Dist. v. School Comm. of Wayland*, 455 Mass. 561,

566, 918 N.E.2d 796 (2009), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991).

b. *The dormant commerce clause.* The commerce clause provides that "Congress shall have Power…to regulate commerce with foreign nations, and among the several [S]tates, and with the Indian Tribes." Art. I, § 8, cl. 3 of the United States Constitution. The United States Supreme Court has "long interpreted the commerce clause as an implicit restraint on [S]tate authority, even in the absence of a conflicting [F]ederal statute." *United Haulers Assn v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (collecting cases). This implicit restraint is known as the "dormant" commerce clause. See *id.*

A State tax is permissible under the dormant commerce clause if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). See *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n,* 545 U.S. 429, 438, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005). The satellite companies' challenge to the excise tax is limited to the third of these requirements, namely the prohibition on discrimination against interstate commerce.

c. *Discrimination against interstate commerce.* The ban on discrimination against interstate

commerce is rooted in the "principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (*Oregon Waste*), quoting *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537 – 538, 69 S.Ct. 657, 93 L.Ed. 865 (1949). The dormant commerce clause seeks to prevent economic "Balkanization," *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), and to protect "an area of free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977), quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944).

In the context of the dormant commerce clause, "'discrimination' simply means differential treatment of in-[S]tate and out-of-[S]tate economic interests that benefits the former and burdens the latter." *Oregon Waste*, 511 U.S. at 99, 114 S.Ct. 1345, 114 S.Ct. 1345.[9] The concept of "discrimination" also implicitly assumes "a comparison of substantially

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[9] Notwithstanding the stated simplicity of this test, the United States Supreme Court has recognized that its "case-by-case" approach to the dormant commerce clause "has left 'much room for controversy and confusion and little in the way of precise guides to the States.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403, 104 S.Ct. 1856, 80 L.Ed.2d 388 (1984), quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). See also E. Chemerinsky, Constitutional Law, Principles and Policies, § 5.3 at 444 – 445 (4th ed. 2011).

similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997).[10]

A statute may be discriminatory on its face, in its effect, or in its underlying purpose. See *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 75, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989) (*Amerada Hess); Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 344 n.6, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). The burden to show discrimination against interstate commerce rests on the party challenging the validity of a statute. See *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Family Winemakers of Cal. v. Jenkins*, 592

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[10] In *General Motors Corp. v. Tracy*, 519 U.S. 278, 299, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997), the United States Supreme Court determined that the entities involved were dissimilarly situated because they "serve[d] different markets." Relying on the analysis of *Tracy*, the satellite companies argue that any entities that serve the same market are necessarily similarly situated. But the conceptual prerequisite that entities must be "substantially similar" in order for discrimination to occur also may be undermined by other types of differences. Thus, "competing in the same market is not sufficient to conclude that entities are similarly situated." *National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009). See *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 78, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989) (*Amerada Hess*) (differential treatment permissible when it "results solely from differences between the nature of [entities'] businesses, not from the location of their activities"); *Philadelphia v. New Jersey*, 437 U.S. 617, 626 – 627, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (differential treatment permissible if "there is *some reason*, apart from . . . origin, to treat [entities] differently" [emphasis supplied]).

F.3d 1, 9 (1st Cir. 2010). If this burden is carried, the discriminatory law is "virtually per se invalid." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed. 2d 685 (2008), citing *Oregon Waste*, 511 U.S. at 99, 114 S.Ct. 1345, 114 S.Ct. 1345.[11]

3. *Analysis*. a. *Discriminatory effect*. The satellite companies argue that the excise tax discriminates against interstate commerce in its effect by disadvantaging the satellite companies and benefiting the cable companies. The department responds, first, that the cable companies and the satellite companies do not represent in-State and out-of-State interests, respectively. The department argues also that the excise tax is not discriminatory because the cable and satellite companies are not similarly situated.

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[11] [N]ondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The satellite companies do not contend that the excise tax fails this test. Conversely, a discriminatory statute may be upheld if "the State has no other means to advance a legitimate local purpose." *United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-339, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007), citing *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). The Department of Revenue has not argued that the excise tax satisfies this requirement.

For the reasons we describe, we adopt the latter argument. In so doing, we follow the other courts that have considered and rejected the satellite companies' challenges to the laws of other States. See *Directv, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007) (*Treesh I*), cert. denied, 552 U.S. 1311, 128 S.Ct. 1876, 170 L.Ed.2d 746 (2008); *DIRECTV, Inc. v. State*, 178 N.C. App. 659, 632 S.E.2d 543 (2006); *DIRECTV, Inc. v. Levin*, 128 Ohio St. 3d 68, 941 N.E.2d 1187 (2010), cert. denied, 133 S.Ct. 51 (2012). We assume for purposes of our analysis, while appreciating the weighty arguments to the contrary, that the cable companies and the satellite companies represent in-State and out-of-State interests, respectively.[12]

[12] As to this issue, compare *Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205, 218 (2d Cir. 2004) ("For dormant [c]ommerce [c]lause purposes, the relevant 'economic interests' . . . are parties using the stream of commerce, not those of the state itself"), with *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 403-404, 104 S.Ct. 1856 (discussing cases in which "the Court struck down state tax statutes that encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on similar activities within the State"); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 n.9, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) ("discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism we have identified"); and *Philadelphia v. New Jersey*, 437 U.S. at 627, 98 S.Ct. 2531 ("The Court has consistently found parochial legislation … to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk …, or to create jobs by keeping industry within the State …, or to preserve the State's financial resources from depletion by fencing out indigent immigrants" [citations omitted]).

i. *The broader context*. The excise tax applies to satellite companies only. Our analysis must not be "divorced," however, from the broader context of the act; we are required to consider the regulatory scheme "as a whole." See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (*West Lynn Creamery*). Accord *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 122 (4th Cir. 2008) (*Tolson*); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 572 N.W.2d 300, 304 (Minn. 1997), cert. denied, 523 U.S. 1145, 118 S.Ct. 1857, 140 L.Ed.2d 1105 (1998). See *also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 589 n.12, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (United States Supreme Court "evaluat[es] the relative burdens of different methods of taxation" in commerce clause cases). As described *supra*, both the cable companies and the satellite companies are subject to corporate income taxes, sales taxes, real property taxes, and personal property taxes. The cable companies are, in addition, subject to obligations in money and in services to local governments.

The satellite companies suggest that the cable companies' obligations toward local governments should play no part in our analysis of the ways in which the two types of company are treated. In the satellite companies' view, these obligations are merely "rent" payments imposed on cable companies on the basis of the use that they, but not the satellite companies, make of public spaces. We do not agree.

The localities' power to charge franchise fees as to cable companies but not satellite companies

flows, not from the localities' ownership of public property, but from statutory provisions. A Federal statute provides that, subject to certain limitations, "any cable operator may be required . . . to pay a franchise fee." 47 U.S.C. § 542(a) (2012). The imposition of such fees is facilitated by a Massachusetts statute that prohibits the construction or operation of any cable system "in any city or town . . . without first obtaining . . . a written license from each city or town." G. L. c. 166A, § 3. Franchise fees and related obligations are, in this sense, not rent payments, but rather statutorily authorized tax payments. See *Tolson*, 513 F.3d at 123, 125-126 & n.3 (holding that cable franchise fees are "taxes" for purposes of Tax Injunction Act, 28 U.S.C. § 1341 (2012), and explaining that "a sum fixed for the privilege of doing business" is unlike "[a] per-pole charge levied . . . for the use of [a] city's telegraph poles").

Correspondingly, cable companies do not obtain leases or other property rights in return for their franchise fees. What they do receive in return are special privileges. See *Tolson*, 513 F.3d at 126 n.3 ("Taxpayers . . . often receive something of value in exchange for their taxes"). In the Superior Court proceedings, the satellite companies recognized that the privileges granted in exchange for franchise fees are "the privilege of doing business in a locality and . . . the rights to access public-rights-of-way in a locality." See 47 U.S.C. § 522(9) (2012) (franchise permits "construction" or "operation" of cable system); *Treesh I*, 487 F.3d at 480 (Kentucky cable

franchises provided "the right to conduct business and use local rights-of-way").[13]

Because of the method by which they deliver their programming, the satellite companies do not need to access public rights-of-way. The privilege of doing business with local consumers, on the other hand, is one that benefits the satellite companies no less than the cable companies. Consequently, if not for the Telecommunications Act's prohibition on the imposition of local taxes on satellite services, the satellite companies "certainly could have been" subjected "to the tangled regime of local taxation and franchise fees" that applies to cable companies. See *Treesh I*, 487 F.3d at 481. Namely, by way of a statute akin to G. L. c. 166A, § 3, the Legislature could have forbidden the provision of video services by satellite without a license from a local authority. Cf. *Commissioner of Corps. & Taxation v. Metropolitan Life Ins. Co.*, 327 Mass. 582, 584, 99 N.E.2d 866 (1951) (excise tax on insurance imposed "for the privilege of doing business in this Commonwealth").

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[13] At his deposition, a representative of Charter Communications Inc. defined a franchise fee as "a fee to authorize [the company] to do business in [a] community," paid as compensation both for "using the public right-of-way" and for "being authorized to provide the service to customers." A representative of Comcast Corporation (Comcast) testified that a franchise agreement "allow[s] [Comcast] to operate within [an] area by selling its products and services." The representative agreed that the right to use public rights-of-way is "one component of a franchise."

In our analysis of whether the cable and satellite companies are subjected to "differential treatment . . . that benefits the former and burdens the latter," *Oregon Waste*, 511 U.S. at 99, 114 S.Ct. 1345, we therefore consider the fact that each of these types of company is subject to unique obligations in connection with the privilege of selling video programming services to Massachusetts consumers.

ii. *Differences between the obligations of the cable and satellite companies*. The cable companies' local obligations and the excise tax imposed on the satellite companies are different in two ways. First, the cable companies' obligations are collected piecemeal by an assortment of local authorities, whereas the satellite companies pay the entirety of the excise tax to the department. Second, the cable companies' local obligations are made up of several components determined via negotiations with each locality, including franchise fees, additional payments to support public-oriented programming, and services in kind. The excise tax, on the other hand, is set at a uniform, flat rate.

These differences in the manners in which the cable and satellite companies are treated do not amount to actionable discrimination if they do not impose a greater burden on the satellite companies. See *Oregon Waste*, 511 U.S. at 99, 114 S.Ct.1345. These differences also are not discriminatory if they are rooted in meaningful differences between the two types of company. See *Tracy*, 519 U.S. at 298, 117

S.Ct. 811.[14] We conclude that, on the summary judgment record, the satellite companies have "no reasonable expectation" of proving a discriminatory effect; there is thus no genuine issue of material fact, see *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 522, 984 N.Ed.2d 755 (2013) (*HipSaver*), quoting *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991), and the department is entitled to judgment as a matter of law.

A. *Method of collection.* We examine first the divergent manners by which payments for the privilege of doing business in Massachusetts are collected from cable and satellite companies, respectively. As previously described, the excise tax is collected in its entirety by the department, whereas the cable companies owe varying obligations to each of the localities in which they operate. This instance of differential treatment,

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[14] The bare existence of differences between the satellite and cable companies would not alone defeat allegations of discrimination, because a statute does not "need to be drafted explicitly along [S]tate lines in order to demonstrate its discriminatory design." *Amerada Hess*, 490 U.S. at 76, 109 S.Ct. 1617. Differences between entities render regulation nondiscriminatory only if they represent substantive reasons to treat the entities differently, rather than proxies for geographical distinctions. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (*West Lynn Creamery*), quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456, 61 S.Ct. 334, 85 L.Ed. 275 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce").

rather than burdening the satellite companies, is advantageous to them. The excise tax provides a streamlined method of collection, far less cumbersome than the cable companies' assortment of local obligations.

Congress conferred this benefit on the satellite companies by design in the Telecommunications Act. Section 602(a) of that statute states that "[a] provider of … satellite service shall be exempt from … any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." 110 Stat. at 144. The phrase "tax or fee" is defined to include a number of different types of taxes, including any "privilege tax" and any "fee that is imposed for the privilege of doing business." Telecommunications Act § 602(b)(5), 110 Stat. at 145. On the other hand, the same section states that it "shall not be construed to prevent taxation of a provider of … satellite service by a State." Telecommunications Act § 602(c). 110 Stat. at 145.

The decision to excuse the satellite companies from burdensome dealings with local authorities was rooted in the characteristics of their operations. "Congress's intent ... was not to spare the [satellite] providers from taxation as such, but to spare national businesses with little impact on local resources from the administrative costs and burdens of local taxation." *DirecTV, Inc. v. Treesh*, 290 S.W.3d 638, 643 (Ky. 2009), cert. denied, 558 U.S. 1111, (2010) (*Treesh II*). This objective was explained on the floor of the House of Representatives by Congressman Henry Hyde:

> "[Satellite companies] utilize satellites to provide programming to their subscribers in every jurisdiction. To permit thousands of local taxing jurisdictions to tax such a national service would create an unnecessary and undue burden on the providers of such services .... The power of the States to tax this service is not affected by [Telecommunications Act §] 602."

142 Cong. Rec. H1145, H1158 (Feb. 1, 1996). See W. Hellerstein, State Taxation ¶4.25[1][1] (3d ed. 2014) ("Congress was concerned with burdening [satellite] providers with the requirement of complying with taxes in thousands of local taxing jurisdictions. This was the rationale for preempting *local*, but not *[S]tate*, taxing authority" [emphasis in original]). In sum, the divergent methods by which payment for the privilege of doing local business is collected from the cable and satellite companies are both advantageous to the satellite companies and rooted in the different operational methods employed by the two types of company.

B. *Method of calculation*. We turn to the different methods by which the obligations of the cable and satellite companies are calculated. Whereas the satellite companies' services are subject to a flat tax rate of five percent of gross revenues, the cable companies' obligations are composed of (a) franchise fees, running to approximately three to five per cent of gross revenues; (b) additional fees, used to support public-oriented programming, averaging 1.09% of gross revenues; (c) services,

facilities, and equipment for the use of public, educational, and governmental channels; (d) free video programming services delivered to municipal buildings, schools, and libraries; and (e) requirements imposed by local governments concerning service quality and customer service. On the basis of these facts, the satellite companies do not have a "reasonable expectation" of proving that their obligations are more burdensome than those of the cable companies.[15] See *HipSaver*, 464 Mass. at 522, 984 N.E.2d 755. This is particularly so given that no affidavits or other evidence has been submitted that might shed light on the value of the in-kind services that cable companies provide to local governments.

Moreover, even if the satellite companies were able to show some discrepancy between the amounts charged to them and to the cable companies, respectively, this discrepancy would be permissibly attributable to important differences between the cable and satellite industries, some of which we have already discussed.

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[15] Implicit in the satellite companies' argument is the assumption that because they, unlike the cable companies, do not use local rights-of-way, the Legislature is required to impose a heavier tax burden on the cable companies. As explained by the United States Court of Appeals for the Sixth Circuit, however, "States and local government are under no mandate to charge for the use of local rights-of-way; this is readily apparent from the fact that not every road is a toll road. .... The provision of access to the [S]tate infrastructure free of charge is an acceptable option that the [S]tate may exercise." *Directv, Inc. v. Treesh*, 487 F.3d 471, 479 (6th Cir. 2007), citing *West Lynn Creamery*, 512 U.S. at 199 n.15, 114 S.Ct. 2205.

For one, franchise fees are, as noted, capped by Federal law at five per cent of gross revenue. See 47 U.S.C. § 542(b) (2012). Massachusetts law does not require that cable's franchise fees be any lower. It follows that if the cable companies' obligations to local governments amount to a lighter burden than the satellite companies' excise tax, this discrepancy results from certain localities' consent to reduce franchise fees from the statutory maximum. In this sense, any benefit to the cable companies results from the fact that they are required, unlike the satellite companies, to negotiate separate arrangements with an array of local governments. In turn, this difference between the treatment of the cable and satellite companies is rooted, as we have explained, in the different nature of these businesses, namely in the fact that the cable companies, unlike the satellite companies, cannot avoid interface with local governments. See *Treesh II*, 290 S.W.3d at 643.

As the department argues, another difference between the cable and satellite companies' respective operations would support the imposition of a somewhat lower tax rate on cable. This difference lies in the respective regulatory regimes to which the two types of company are subject.

When the technology for satellite provision of video programming became available in the 1980s, the Federal government "concluded that the public interest is best served by a flexible regulatory approach." 2 D.L. Brenner, M.E. Price, & M.I. Meyerson, Cable Television and Other Nonbroadcast Video, Law and Policy, § 15:5 (2014). Accordingly,

the satellite industry was subjected to "regulatory requirements [that are] minimal .... This approach allows [satellite] operations to experiment with service offerings and methods of financing. Few rules exist." *Id.* See 2 C.D. Ferris & F.W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet ¶ 20.04[5][b], at 20-9 (rev. ed. 2014).

Cable, on the other hand, a veteran industry with well-established methods of operation, has long been subject to an extensive scheme of Federal regulation. See 1 C.D. Ferris & F.W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet ¶5.04[1], at 5-5 (rev. ed. 2014) (discussing development of cable in 1940s and 1950s); *id.* at ¶5.04[3][b], at 5-7 (rev. ed. 2014) (discussing origins of cable regulation in 1960s). Among other things, cable companies must comply with standards concerning the technical operation and signal quality of their programming. See 47 U.S.C. § 544(e) (2012); 47 C.F.R. §§ 76.601-76.640 (2013). They are subject to minimum standards for office hours, telephone availability, installations, outages, service calls, and billing. See 47 U.S.C. § 552(b) (2012); 47 C.F.R. § 76.309 (2013). They are required to enable their customers to receive emergency information. See 47 U.S.C. § 544(g) (2012). They must provide subscribers with a device that permits the subscribers to limit access to certain channels, see 47 U.S.C. § 544(d)(2) (2012), and they may be forbidden by localities to provide access to channels that carry obscene content. See 47 U.S.C. § 544(d)(1) (2012).

In addition, the rates for the provision of basic cable services are determined by Federal regulations, unless the Federal Communications Commission finds that these services are subject to "effective competition." See 47 U.S.C. § 543(a)(2) (2012); 47 C.F.R. §§ 76.901-76.990 (2013). Cable companies may not discriminate between different "tiers" of subscribers in the provision of programming offered on a per-channel or per-program basis. See 47 U.S.C. § 543(b)(8)(A) (2012). With some exceptions, cable companies are required to operate a geographically uniform rate structure. See 47 U.S.C. § 543(d) (2012).[16]

The divergent regulatory regimes that govern the cable and satellite companies' respective operations are relevant to the selection of the tax obligations to which these companies are subjected. Cf. *Tracy*, 519 U.S. at 295-297, 300-301 (considering regulatory obligations of local utility companies); *National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526-527 (9th Cir. 2009) (considering regulatory obligations of optometrists and ophthalmologists). The rate of the excise tax permissibly may allow for the fact that

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[16] In addition, cable companies are required to devote a greater percentage of their channel capacity to public, educational, and government programming than satellite companies are. See 47 U.S.C. §§ 335, 531, 534, 535 (2012). Compare 1 C.D. Ferris & F.W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet ¶ 7.15[2], at 7-40 (rev. ed. 2014), with 2 C.D. Ferris & F.W. Lloyd, Telecommunications Regulation ¶ 20.4[6][c], at 20-11 (rev. ed. 2014).

satellite companies do not bear the additional regulatory burdens imposed on cable companies. The Legislature also permissibly may wish to support the provision of cable services, in order to ensure that this regulated product remains available to Massachusetts consumers. See *Treesh I*, 487 F.3d at 481 (Kentucky may have sought to support viability of cable "for reasons entirely unrelated to geography—for example, that cable providers often provide [I]nternet access as well, that cable providers are more likely to provide public access channels, etc.").

In summary, given the nuances of the divergence between the ways in which the cable and satellite companies are treated, examined in light of the differences between the ways in which these two types of company do business, the satellite companies have no reasonable expectation of proving that the excise tax discriminates against interstate commerce in its effect. See *HipSaver*, 464 Mass. at 522, 984 N.E.2d 755. No genuine issue of material fact was presented, therefore, and the department was entitled to judgment as a matter of law.

b. *Discriminatory purpose*. The satellite companies contend also that the excise tax is unconstitutional because it is discriminatory in its purpose. This argument relies almost entirely on lobbying materials prepared on behalf of the cable

industry.[17] For instance, a letter sent by cable lobbyists to members of the Legislature read, in part:

> "Satellite TV companies have long enjoyed a one-way relationship with Massachusetts, selling their service here but giving almost nothing back. Unlike cable companies, satellite providers pay no personal property or real estate taxes.... Nor do satellite companies make investments in the economy or community, as cable providers do. Comcast alone, for example, employs more than 5,000 people in Massachusetts who collect more than $336 million in salary and benefits."

The satellite companies assert that lobbying efforts of this nature indicate that the excise tax was intended to reward the cable companies for their contributions to the Commonwealth's economy. We conclude that the summary judgment record does not support a reasonable expectation that a discriminatory purpose could be proved. See *HipSaver*, 464 Mass. at 522, 984 N.E.2d 755.

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[17] The satellite companies point also to the testimony of a high-ranking satellite company executive who asserted at deposition that he had been told by members of the Legislature that they would vote for the excise tax, at least in part, because of the cable industry's "significant local presence." Like the Superior Court judge, we ascribe little significance to this vague testimony.

"It is well settled that a statute is presumed to be constitutional, and every rational presumption in favor of its validity is to be made." *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 367, 844 N.E.2d 623 (2006). See *Commonwealth v. King*, 374 Mass. 5, 16, 372 N.E.2d 196 (1977). For the reasons previously explained, the excise tax is understood most naturally as an element of a balanced scheme of taxation that imposes corresponding burdens, different in nuanced and rational ways, on the cable and satellite companies. The burden of establishing that the statute was motivated not by this legitimate goal, but rather by a discriminatory purpose, is necessarily difficult to carry. See *Treesh I*, 487 F.3d at 480 (affirming dismissal of discrimination claim where, "[w]hile a purpose of the [statute] might have been to aid the cable industry rather than the satellite industry ... there were clearly *many other* purposes," including "collecting taxes from the previously untaxed, burgeoning satellite industry").

The evidence offered by the satellite companies does not suffice to carry this burden. In the context of statutory interpretation, we have cautioned against "confus[ing] the intention of the private proponents of legislation with the intentions of the legislative body that enacted the statutory change, to the extent we may ascertain them. They are not necessarily the same." *Commonwealth v. Ray*, 435 Mass. 249, 257 n. 15, (2001). The United States Supreme Court similarly has explained that:

> "Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed

> committees of the [Legislature]. It becomes far more so when we consult sources still more steps removed ... and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation."

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), citing *Kelly v. Robinson*, 479 U.S. 36, 51 n. 13, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). We cannot assume, in other words, that the Legislature embraced the reasons expressed by private interests, such as lobbyists for the cable companies, merely because those interests advocated vocally for a statute.[18]

Moreover, the lobbying materials identified by the satellite companies also make repeated reference to the goal of "tax parity." Written testimony by a cable industry executive before a committee of the Legislature stated, for instance, that the excise tax would "ensure[ ] that the overall level of taxation is equal among video providers, so that all multichannel video providers operate on a level playing field.... Tax parity ensures fair competition and true consumer choice." Other communications stressed that, before the 2010 appropriations act was passed, the satellite companies paid no tax corresponding to the franchise fees paid by cable

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[18] A representative of DIRECTV, LLC acknowledged at his deposition that his company does not know whether the cable companies' lobbying materials had an impact "on any individual legislator" or "on the Legislature as a whole."

companies. A letter to legislators from the New England Cable and Telecommunications Association stated that the excise tax would create a "competitively neutral tax policy for the delivery of video signals," and described the tax as "expanding the [five per cent] franchise fee to include satellite companies." These facts further weaken the suggestion that the Legislature was motivated by sympathy for in-State interests as such.

The conclusion that the excise tax was not intended to confer a special disadvantage on the satellite companies is reinforced by the context in which the tax was enacted. As mentioned, in addition to creating the excise tax, the 2010 appropriations act also imposed a personal property tax on "[p]oles, underground conduits, wires and pipes of telecommunications companies." St. 2009, c. 27, § 25, amending G.L. c. 59, § 18. This provision increased Comcast's annual tax obligations by approximately $5.1 million. It also resulted, in 2010, in a tax assessment of approximately $29.8 million against Verizon. Verizon employs approximately 9,500 people in Massachusetts, 4,000 more than the cable companies. These facts support the conclusion that the excise tax was not intended to discriminate against interstate commerce, but rather was part of an effort to increase, across the board, the amount of tax revenue collected from the video programming industry.

Judgment affirmed.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT CIVIL ACTION NO: 10-0324-BLS1**

DIRECTV, LLC and DISH NETWORK, L.L.C.

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF REVENUE

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS DIRECTV, LLC AND DISH NETWORK L.L.C.'S MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT'S MOTION TO STRIKE CERTAIN OF PLAINTIFFS' STATEMENT OF MATERIAL FACTS FOR NONCOMPLIANCE WITH RULE 56(e)

In this action the plaintiffs, DIRECTV, LLC and DISH NETWORK, L.L.C. challenge the constitutionality of G.L. c. 64M, §1 *et seq.*, the so-called "satellite tax," as violating the Commerce Clause of the United States Constitution and the Equal Protection Clauses of the United States and Massachusetts Constitutions. Now before the Court are cross-motions for summary judgment, and the defendant's motion to strike certain statements of

material fact. Both sides agree—as, on the record before me, do I—that the issues can be decided as a matter of law.

For the following reasons, the plaintiffs motion for summary judgment is DENIED; the defendant's motion for summary judgment is ALLOWED; and the defendant's motion to strike is DENIED as moot.

BACKGROUND

The record reveals the following facts, which are largely undisputed. Pay television ("pay-TV"), or multi-channel video programming, provides the subscriber with multiple shows, movies, sporting events, news channels, and more. Massachusetts residents wishing to subscribe to pay-TV typically have two options. They can order their service from a cable provider that assembles its programming packages in Massachusetts and distributes them through a local cable infrastructure ("cable TV").[1] As an alternative, they can order the service through a provider that assembles its programming packages outside Massachusetts and beams its signals directly to subscribers' homes by way of orbiting satellites ("satellite TV").

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[1] The major cable providers are Comcast Corporation and Charter Communications, Inc., which are cable television providers, and Verizon Communications Inc. which is a wire-line telephone company. Verizon is not meaningfully different from the cable companies in terms of local assembly and ground-based distribution of Verizon pay-TV service.

Plaintiff DIRECTV is a limited liability company headquartered in El Segundo, California. Plaintiff DISH is a limited liability company headquartered in Englewood, California. Both plaintiffs offer pay-TV programming to customers in Massachusetts and throughout the United States via satellite. Satellite TV uses uplink centers to gather, merge, and encrypt television programming signals. DIRECTV's uplink centers are in Cheyenne, Wyoming, and Gilbert, Arizona; DISH's are near Castle Rock, Colorado, and Los Angeles, California. Each uplink center has its own "farm" of satellite dishes, studio equipment, and staff of trained employees. At the uplink, centers, content signals are gathered, local advertising is inserted, and the programming packaged.

Satellite TV programming signals are then transmitted from the uplink centers to satellites that reside in geostationary orbit 22,300 miles above the Earth's atmosphere. From these satellites in space, the programming signals are transmitted directly to satellite TV customers, who receive the signals by way of a receiving dish mounted on or located near their homes. To gather local TV signals—that is, those from local broadcast stations such as WBZ or WHDH—the plaintiffs maintain local collection facilities in Massachusetts. These local collection facilities typically consist of a single room or closet containing receivers and antennas that gather content from local broadcast stations, and transmit that content via fiber-optic cables leased from telecommunications service providers in Massachusetts to their uplink centers west of the Mississippi. The fiber-optic cables that the plaintiffs

lease for this purpose are also used by other persons transmitting data at the same time.

During the time frame at issue in this case, January 1, 2006 through December 31, 2010, DIRECTV had local collection facilities in four Massachusetts cities; DISH had them in three Massachusetts cities. These local collection facilities are maintained by DIRECTV or DISH employees and/or by independent contractors. Because they typically consist of only a small room or closet, they are not staffed on a daily basis.

Both plaintiffs use authorized local retailers to sell their products and services to Massachusetts subscribers. They also sell products and services at the Massachusetts stores of national retailers, such as Best Buy, Sears, BJ's Wholesale Club, and Kmart, with whom they have distribution agreements.[2] From January 1, 2007 through July 1, 2009, DIRECTV contracted with Halstead Communications and Multiband Corporation, each of which has employees in Massachusetts, for installation, maintenance, and/or repair services for those DIRECTV subscribers in Massachusetts. DISH contracted with Prime Service Center, which has employees in Massachusetts, for similar services during the same period.

DISH also used its subsidiary, DISH Network Services, LLC, for installation, maintenance and

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[2] Each plaintiff had distribution agreements with different retailers.

repair. DISH Network Services had 176 employees in Massachusetts in 2006, 207 in 2007, 188 in 2008, 178 in 2009, and 141 in 2010. From January 1, 2006, through December 31, 2010, DISH Network Services leased facilities in Massachusetts, which it used to store office equipment and vehicles used for installation and repair. For that period, both plaintiffs paid a yearly personal property tax in Massachusetts.

The plaintiffs spend millions of dollars annually on assembly and distribution, largely on satellites located in outer space and at their uplink centers. They also pay for the right to locate their satellites in outer space and transmit their signals through the air using certain frequencies. These fees are paid to the federal government, not to Massachusetts or its local governments.

Cable TV providers, by contrast, use ground-based facilities, thousands of miles of cable, and thousands of Massachusetts-based employees to distribute their programming. All such programming must pass through terrestrial distribution points in Massachusetts called "headend" facilities, typically buildings of between 3000 and 4000 square feet.[3] Large satellite dishes, usually between five and seven feet in diameter and located outside the headend buildings, gather the cable programming

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[3] In 2010, for example, cable TV providers operated and maintained more than 60 headend facilities in Massachusetts operated by a staff of trained employees. These providers also used contractors to build and install new equipment in the facilities.

signals from the airwaves and transmit them to hundreds of receivers located inside the buildings. Once inside the buildings, these signals are modulated, local advertising is inserted, and the cable programming is assembled into different packages.

Those packages are then distributed to cable TV subscribers through thousands of miles of fiber-optic and/or coaxial cable that is laid in trenches or hung from utility poles.[4] The signals travel through "trunk" lines located several feet underground and then distributed through "hubs" and "nodes" into "feeder" lines. Hubs and nodes are physical buildings or cabinet devices that are maintained on a neighborhood-by-neighborhood basis. Ultimately, cable TV signals reach each subscriber's home through a "drop" line running from the feeder line. This network of cables, hubs, nodes, and trunk, feeder, and drop lines are all located, under or above ground, in Massachusetts.

Technologies and physical facilities aside, there is no dispute that both satellite TV and cable TV operate in a similar manner and provide pay-TV service in a similar way. Both offer a variety of programming packages. Both offer local broadcast stations. Both offer basic cable channels, such as CNN, ESPN and C-SPAN. Both offer premium cable channels such as HBO and Showtime. Both offer

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[4] In 2011, cable TV providers used more than 30,000 miles of fiber-optic and coaxial wire to distribute programming to Massachusetts customers, and used independent contractors for some aspects of construction.

pay-per-view movies and events. Both offer on-demand programming services. Both offer music channel services. Both secure rights to distribute original programming from content providers. Both advertise their services through the internet, television, direct mail, newspaper circulars, and billboards.

Additionally, both cable TV and satellite TV use call centers to respond to new customers and existing customer inquiries. Both lease equipment to subscribers, such as set-up boxes and digital recording devices. Both use employees and independent contractors for installation, maintenance, and repair. Both pay Massachusetts taxes on their personal property located within the Commonwealth, such as the set-up boxes and DVR devices. They pay corporate income taxes to Massachusetts, and collect and remit sales taxes on qualifying sale-purchase transactions in Massachusetts. Both designate a certain percentage of their channel capacity to public access, educational and government programming. The parties do not dispute that the services are virtually identical, and that customers view them as similar and substitutable. They agree that the typical Massachusetts customer selects a service based on price, customer service, reception quality, and the breadth and types of programming offered.

The major players on both sides of the controversy are large interstate enterprises: DIRECTV is a corporation chartered in California and headquartered in Segundo; DISH is chartered in Colorado and headquartered in Englewood; Comcast

is a Delaware corporation whose principal place of business is in Pennsylvania, and (as of 12/31/09) operated cable systems in 39 states; and Charter Communications is a Delaware corporation, headquartered in Missouri, and operates in 27 states.[5]

The major difference, and for the purposes of these motions the only relevant difference, between satellite TV and cable TV is the method by which the signals are assembled and distributed to customers. The former uses satellites located in outer space; the latter uses headends and an extensive web of ground-based equipment and cables all located in Massachusetts. The parties do not dispute that these different assembly and distribution systems translate into substantially different economic footprints in Massachusetts. From 2006 to 2010, Massachusetts major cable companies spent more than $1.66 billion on capital improvements, $303.3 million in 2010 alone, including investments in headend facilities, cable network, vehicles, and customer equipment. In 2010, major Massachusetts cable companies employed almost 5000 people in the Commonwealth, with a combined payroll of $357 million. The household spending of these employees contributed an additional $274.4 million in economic activity and supported more than 1,800 additional jobs in other industries in Massachusetts.

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[5] The parties' stipulation stops here, but it is judicially noticeable that the other major cable companies (Verizon, Cox Communications, Time Warner Cable, and RCN) likewise are headquartered outside of Massachusetts and have substantial regional or national footprints.

The different assembly and distribution systems also translate into different revenue streams for local governments. To place cables under or above ground, and to provide cable services to customers in a particular locality, cable companies must secure permission from local governments, in exchange for which they pay franchise fees to those municipalities in which they operate. The typical franchise fee is 3-5% of gross revenue from sales to subscribers within any given area. In 2010 this resulted in more than $63.3 million in revenue for cities and towns in Massachusetts. In addition to the fees, the typical, non-exclusive, franchise agreement requires that the cable TV provider meet certain obligations, including: meeting service quality and customer service standards; setting aside channels for public, educational, and governmental channels; providing services, facilities, and equipment to localities to support those channels; and providing free service to municipal buildings, schools, and libraries. Massachusetts municipalities also impose an average charge of 1.09% above the franchise fee for the financial support of public, educational, and government programming.

Satellite TV, on the other hand, hires far fewer employees; does not invest billions of dollars to build, service, or maintain facilities in Massachusetts; does not bargain for rights-of-way or pay franchise fees to local governments; and has no obligations to the local municipality similar to those of cable TV. While satellite TV providers still spend millions annually on employment, assembly, and distribution, that money is spent primarily at the providers' uplink centers, all located outside

Massachusetts. The plaintiffs do hire independent contractors in Massachusetts to maintain their collection facilities and for installation, maintenance, and repair of their equipment.

The New England Cable & Telecommunications Association ("NECTA") is a regional trade association that represents the interests of substantially all the private cable companies in Massachusetts. Beginning in 2008, NECTA started lobbying for the imposition of an excise tax on satellite TV providers to achieve tax parity with cable TV companies. NECTA representatives inundated legislators with written materials and in-person meetings, and NECTA's president Paul Cianelli, made statements to the press and the public to the effect that the satellite TV providers enjoyed a special tax exemption. In early June, 2009, NECTA created a website designed to engender support for the tax. Comcast joined NECTA's campaign.

The thrust of NECTA's argument was that cable companies paid franchise fees, while satellite did not, and that cable also paid substantially greater real and personal property taxes to local government than satellite; there was therefore what cable repeatedly called a "tax parity" issue.[6] Some of the communications also mentioned the cable

[6] Some of NECTA's lobbying materials refer to the measure as the "Massachusetts Tax Equalization Act." Satellite, meanwhile, was urging legislators to "Support Fair Taxation in the Video Marketplace" by "Reject[ing] Senate Bill 1314." (Jt. App. Ex. 47, 54)

companies had a large real estate footprint and employed thousands locally, see *supra*, whereas the satellite companies had almost no real estate in Massachusetts and far fewer local employees.

On or about January 14, 2009, Senator Michael Morrissey filed Senate Bill 1314, which initially proposed a 5% excise tax on both cable and satellite providers, but allowed cable companies to offset the tax with a credit for property taxes and franchise fees. Cianelli drafted the language for Senate Bill 1314, with the help of NECTA's outside counsel. At a hearing before the Joint Committee on Revenue on April 9, 2009, Cianelli proposed an amendment that would impose the 5% tax only on satellite companies, not on cable companies. A representative from the Satellite Broadcasting and Communications Association testified in opposition. Senate Bill 1314 was never voted out of the Committee.

Earlier, in July, 2008, the Legislature had authorized the formation of the Special Committee on Municipal Relief as a joint bipartisan effort of the Senate and the House of Representatives to promote fiscal stability in the Commonwealth. NECTA lobbied members of the Special Committee to recommend the excise tax on their report to the Legislature. The Special Committee held a public hearing on December 3, 2008.

On May 8, 2009, the Special Committee released a report with recommendations, as well as draft legislation, that would impose a 5% excise tax on both cable and satellite TV providers, and allowed

a credit for cable TV companies for franchise fees. Lobbyists for NECTA and Comcast then campaigned to change the language of the proposed excise tax so that it applied only to satellite TV providers. On May 21, 2009, the Senate passed an amendment to the House Bill making appropriations for fiscal year 2010 that imposed an excise tax of five percent of gross revenues of satellite TV providers, but not cable TV providers.

Members of the Committee of Conference finalized the details and submitted the appropriations bill, HB 4129, to a vote by the House and Senate. HB4129 included the 5% excise tax on satellite TV. The Legislature passed the bill on June 19, 2009, and Governor Patrick signed the FY 2010 General Appropriation Act, St. 2007, c. 27, into law on June 29, 2009, with the satellite tax as one of many outside sections. See *id.*, §61 ("FY 2010 Appropriations Act"). The tax was codified as G.L. c. 64M, Taxation of Direct Broadcast Satellite Service.[7]

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[7] General Laws c. 64M, § 2, the pertinent statutory provision, is entitled "Excise on direct broadcast satellite service; rate; time of payment" and reads as follows:

> An excise is hereby imposed upon the provision of direct broadcast satellite service to a subscriber or customer by any direct broadcast satellite service provider in an amount equal to 5 per cent of the direct broadcast satellite service provider's gross revenues derived from or attributable to such customer or subscriber. A direct broadcast satellite service provider shall pay the excise to the commissioner at the time provided for filing the return required by section 16 of chapter 62C.

Between August 2, 2009, and November 30, 2010, it generated approximately $16,972,698 in revenue for the Commonwealth.

The plaintiffs filed their Amended Complaint in this case on April 1, 2011, seeking a declaratory judgment to the effect that G.L. c. 64M, §1 *et seq*. violates the Commerce Clause of the United States Constitution (Count I); the Equal Protection Clause of the United States Constitution (Count II); and the Equal Protection Clause of the Massachusetts Constitution (Count II). The gist of their Commerce Clause argument is that the imposition of the tax has a discriminatory effect in that it protects and enhances the Massachusetts economy at the expense of interstate competition. They further argue that the Legislature enacted the excise tax with a discriminatory purpose; that is, to reward cable TV providers for their local economic activities and to penalize satellite TV providers for failing to invest and operate in the Commonwealth. The tax, the plaintiffs contend, confers an unfair advantage on cable companies and a competitive disadvantage on satellite companies, and is excessive in relation to the local benefits bestowed by the cable providers.

With respect to their equal protection claims, the plaintiffs take the position that the satellite-only tax serves no legitimate public purpose and that there is no rational basis for discrimination between satellite TV and cable TV. The only purpose of the differential treatment, according to the plaintiffs, is to serve the parochial economic interests of local cable companies and government entities. They seek, in addition to a declaratory judgment, a permanent

injunction against the enforcement of the statute and a refund of taxes already paid.

Defendant Department of Revenue ("Department") first responds that there is no violation of the Commerce Clause where satellite TV and cable TV are not similarly situated. In that respect, the Department points out that the two sectors have different technologies, equipment, regulatory responsibilities, and fiscal obligations to local government. That satellite TV and cable TV are not similarly situated, the Department argues, disposes of the plaintiffs' claim of unlawful discrimination against interstate commerce. Furthermore, the Department contends that the plaintiffs' have failed to adduce sufficient evidence that the Legislature purposefully discriminated against satellite TV, where the clear purpose of the act was revenue generation at a time of fiscal constraint, not economic protectionism. As to the plaintiffs equal protection claim, the Department asserts that the tax statute has a fair and rational relationship to the Legislature's efforts to raise state and local revenue. Finally, the Department argues that there can be no refunds absent a request brought before the Appellate Tax Board through the statutory abatement process.

DISCUSSION

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to judgment as a matter of law. *Cabot Corp. v. AVX*

Corp., 448 Mass. 629, 636-637 (2007); Mass. R. Civ. P. 56(c). "The moving party must establish that there are no genuine issues of material fact, and that the nonmoving party has no reasonable expectation of proving an essential element of its case." *Miller v. Mooney*, 431 Mass. 57, 60 (2000). See also *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). When parties file cross-motions for summary judgment, the court adopts what has been described as a "Janus-like" dual perspective to view the facts for purposes of each motion through the lens most favorable to the nonmoving party. *Allstate Ins. Co. v. Occidental Int'l, Inc.*, 140 F.3d 1, 2 (1st Cir. 1998). Each of the moving parties bears the burden of affirmatively demonstrating the absence of a triable issue as to its respective claim. *Lev v. Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234, 237 (2010).

1. The Commerce Clause

Article 1, §8, cl. 3. of the United States Constitution expressly authorizes Congress to regulate commerce among the states. The Commerce Clause is more than an affirmative grant of power, however; it also has a "negative sweep," known as the "dormant" or "negative" Commerce Clause, by which "[a] State is ... precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States."[8]

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[8] This construction is not universally embraced, even in high places, but it is the law of the land. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 312-13 (1997) (Scalia, J., concurring) and cases cited.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 n.7 (1977).

"The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1997). The dormant Commerce Clause sweeps more broadly than this, however, and generally

> prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors .... Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down …unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Id. at 192 (invalidating order by Massachusetts Department of Agriculture imposing monetary assessment on fluid milk, two-thirds of which was produced out of state, and distributing the proceeds to Massachusetts dairy farmers).

A dormant commerce clause challenge requires "a sensitive, case-by-case analysis of the purposes and effects" of a regulatory measure "'to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate

commerce.'" *Id.* at 201 (citation omitted). Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) (striking down surcharge for disposal of solid waste generated out of state).

A statute may discriminate against out-of-state interests in any of three ways: (1) it may be discriminatory on its face; (2) it may have a discriminatory effect; or (3) it may have a discriminatory intent.[9] See *Amerada Hess Corp. v. Director, Division of Taxation, New Jersey Dep't of the Treasury*, 490 U.S. 66, 75 (1989). The burden of establishing unlawful discrimination is upon the party challenging the validity of the statute. *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 803 (6th Cir. 2005). A law that discriminates in favor of in-state business and against its out-of-state, but otherwise similarly situated, competition is "virtually per se invalid," and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Kentucky Dept. of Rev. v. Davis*, 553 U.S. 328, 338 (2008) (upholding state income tax exemption for interest earned municipal bonds of in-state, but not out-of-state, issuers). "Absent discrimination for the forbidden purpose, however, 'the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation

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[9] The plaintiff do not argue that the satellite tax statute is discriminatory on its face, and the Court agrees.

to the putative local benefits.'" *Id.* at 338-339 (citation omitted).

The purpose of the commerce clause is not to relieve those engaged in interstate commerce from their just share of the state tax burden, even though it increases the cost of doing business. See, e.g., *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). Nor are states prohibited from "structuring their tax systems" in a nondiscriminatory manner "to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336-337 (1977) (sustaining challenge to New York law imposing a greater tax burden on out-of-state securities sales than sales conducted within New York); see also *West Lynn Creamery*, 512 U.S. at 199 n.15 ("it is undisputed that States may try to attract business by creating an environment conducive to economic activity").

In this case, the satellite providers maintain that the Satellite Service Tax discriminates against interstate commerce in both effect and purpose.

A. Discriminatory Effect

"Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) ("*Tracy*"). The threshold question in making a determination as to discrimination, therefore, is "whether the companies are indeed similarly situated for constitutional purposes." *Id.*; see *Lenscrafters*, 403 F.3d at 804. The

plaintiffs argue that, because they operate in the same market as cable TV providers, and are thus competitors, they are similarly situated for constitutional purposes. The Department argues that because satellite and cable have different structures, methods of operation, and regulatory obligations, they are not similarly situated. The Department has the better of the argument.

Tracy was a challenge to the application of Ohio's general sales and use tax to interstate natural gas transmission companies, where local distribution companies ("LDCs") were exempt. The court observed that LDCs were heavily regulated territorial monopolies, burdened by "a typical blend of limitation and affirmative obligation." Each LDC was required to submit annual forecasts of supply and demand; to "comply with a range of accounting, reporting and disclosure rules"; to obtain PUC permission before it could issue securities or enter into certain contracts; to submit to detailed regulation of rates, termination of service, and backup supply; and to serve all members of the public in its geographic territory without discrimination. 519 U.S. at 295-97.

> The fact that the local utilities continue to provide a product consisting of gas bundled with the services and protections summarized above, a product thus different from the marketers' unbundled gas, raises a hurdle for GMC's[10] claim that Ohio's differential

[10] General Motors Corporation, a large consumer of natural gas for its manufacturing plants in Ohio, purchased nearly all of it

> tax treatment of natural gas utilities and independent marketers violates our "virtually *per se* rule of invalidity" prohibiting facial discrimination against interstate commerce.

Id. at 297-98. That the two business models competed, to a degree, for the same customers did not mean that the state could not differentially tax their products. To the contrary, the court saw this as reason for concern that equating the highly regulated LDCs, for tax purposes, with the comparatively unregulated interstate marketers could "affect[] the overall size of the JDCs' customer base," thereby degrading their ability "to serve the captive market where there is no such competition." *Id.* at 307.

The plaintiffs rely in large part on *Bacchus Imports, LTD v. Dias*, 468 U.S. 263 (1984); *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); and *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008) to support their contention that cable TV and satellite TV are similarly situated and so must be identically taxed. In all three of these cases, however, the courts concluded that the discriminatory statute or regulation was based entirely on protectionist distinctions between in-state and interstate businesses. See *Amerada Hess*, 490 U.S. at 77 and discussion, *infra*.

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directly from independent out-of-state marketers. 519 U.S. at 285.

In *Bacchus*, the United States Supreme Court held [sic] the Hawaii excise tax on liquor because it exempted okelehao and fruit wines. “Okelehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii,” and pineapple wine was also manufactured locally. 468 U.S. at 265. There was clear legislative history demonstrating that the reason for the tax exemptions was “‘to encourage and support the establishment of a new industry” within Hawaii. *Id*. at 271. The tax exemption was thus discriminatory in both purpose and effect.

Similarly, in *Family Winemakers*, the First Circuit struck down as discriminatory a Massachusetts statute that allowed only “small” wineries to obtain a license that allowed them to ship wine in three ways: directly to consumers, through wholesalers, or through retail distribution. 592 F.3d at 4. “Large” wineries, by contrast, had to choose between applying for a license that allows them to distribute their product directly to consumers, or distribute wine exclusively through wholesalers; they could not do both. *Id*. All wineries in Massachusetts are “small,” in that they produce less than 30,000 gallons of grape wine annually[11]; there are no “large” wineries in Massachusetts. *Id*. The Court held that the gallonage cap changed the competitive balance so as to benefit significantly the Massachusetts wineries and burden significantly the out-of-state wineries, and that “[t]he advantages afforded to

[11] There was legislative history suggesting that the exemption for non-grape fruit wine was inserted to prevent a particular Massachusetts winery from exceeding the 30,000 gallon limit.

'small' wineries bear little relation to the market challenges caused by the relative sizes of the wineries." *Id.* at 5. Added to this, as in *Bacchus*, was compelling evidence of a protectionist purpose.[12] This made the law "'virtually per se invalid," salvageable only upon a showing that "'it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 18-19, quoting *Kentucky Department of Revenue v. Davis*, 128 S. Ct. at 1808.

In *Island Silver*, a town ordinance restricted so-called "formula" retailers (large retail chains) to a certain square footage and frontage, limited so as to be incompatible with the large area that these nationally branded retailers require. 542 F.3d at 846. The effect was to prevent the plaintiff, a local mixed use retailer, from selling its real estate to a developer planning to establish a Walgreen's drugstore on the same footprint. *Id.* at 845. The Eleventh Circuit held that the provision was subject to heightened scrutiny because it effectively eliminated all new interstate retailers. *Id.* at 846-847. Although the purported purpose of the law—preserving a small town character—was deemed "legitimate" in theory, the number of existing chain stores and dearth of historic

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[12] The statute replaced an earlier vision which explicitly made the combined-distribution license available only to in-state wineries, and had recently been ruled unconstitutional. The sponsor of the new legislation explained to the General Court that "'with the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries.'" 592 F.3d at 12-13. See also the preceding footnote.

structures in the vicinity of Island Silver's property supported the district court's finding that "[Islamorada] has not demonstrated that it has any small town character to preserve," and thus had "failed to provide a legitimate local purpose to justify the ordinance's discriminatory effects." 542 F.3d at 847-48.[13]

All three of these cases—none of which involved explicit, or even very precise, discrimination between intra- and interstate commerce—might fairly be regarded as close, were it not for the clarity of the legislative history. The present case is different, however, in a more fundamental respect. The dormant Commerce Clause protects the interstate *market*, not particular interstate films, or even particular structures or methods of operation within a market. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). Differential tax treatment of different modes of operation is not unconstitutional, where the "different effect ... on these two categories of companies results solely [from] the nature of their businesses, not from the location of their activities." *Amerada Hess*, 490 U.S. at 78 (holding that state tax code denying deduction for federal windfall profit tax on crude oil did not

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[13] Other stated justifications—encouragement of small scale and water-oriented uses, preservation of the natural environment, and avoidance of increased traffic congestion, litter, garbage and rubbish—were also rejected as inaptly served by the ordinance. The court was polite enough not to observe that what the ordinance *did* serve tolerably well was the interests of the local business community.

unconstitutionally favor local, independent retailers over large interstate oil companies).

It should come as no surprise, therefore, that every court to have considered the issue so far has concluded that the Commerce Clause does not prohibit differential taxation of providers that deliver programming by satellite as opposed to cable. See, e.g., *DIRECTV, Inc. v. Treesh*, 487 F.3d 471, 480 (6th Cir. 2007) ("*Treesh*"), *cert. denied*, 552 U.S. 1311 (2008); *DIRECTV, Inc. v. North Carolina*, 178 N.C. App. 659, 667 (2006) ("*North Carolina*"); *DIRECTV, Inc. v. Levin*, 128 Ohio St. 3d 68, 74 (2010), *cert. denied*, __ S. Ct. __ (6/25/12) ("*Levin*"); *DIRECTV, Inc. v. Tolson*, 498 F. Supp. 2d 784, 800 (E.D.N.C. 2007) (dismissing the satellite companies' complaint on other grounds but citing with approval *Treesh* and *North Carolina*).

All four of these cases involved sales taxes, though they examined two distinct systems. In *North Carolina* and *Levin*, North Carolina and Ohio had imposed a straightforward sales tax on satellite providers but not on cable providers. By the time of the *Tolson* decision, however, the North Carolina legislature had overhauled the tax code so that both cable and satellite companies paid sales tax at the same rate, but cable providers were relieved of paying franchise taxes to the municipalities in which they operated; instead, the state distributed sales tax revenues from cable and satellite providers to local governments, some of which had previously received franchise revenues. The new North Carolina law was very similar to the Kentucky system earlier upheld in *Treesh*.

All four courts rejected the satellite companies' challenges, reasoning that the dormant Commerce Clause protects the interstate market for a particular product, but not the particular structure or method of operation in a retail market. *Treesh*, 487 F.3d at 480. Accord *Levin*, 128 Ohio St. 3d at 75; *North Carolina*, 178 N.C. App. at 667-668. These courts have simply applied, to the pay TV industry, the holdings in *Amerada Hess* and *Exxon* that there is no violation of the Commerce Clause when differential tax treatment has nothing to do with the geographical location of the companies or their economic activities, and everything to do with the manner by which they distribute programming. See, e.g., *DIRECTV v. Treesh*, 469 F. Supp. 2d 425, 439 (E.D. Ken. 2006), *aff'd*, 487 F.3d 471, 480 (6th Cir. 2007). Although under the *Exxon* rule, the dormant Commerce Clause would prohibit discrimination against the interstate market for multichannel video programming, it does not prohibit a differentiation between programmers in that interstate market who deliver programming by satellite and those who deliver by cable. *Id*. at 440.

In the present case as in those, there can be no suspicion that the tax in question was intended to protect local pay-TV providers from out of state competition; all of the competitors—satellite and cable—are large out-of-state companies with regional or national footprints. Moreover, although the satellite and cable companies offer much the same programming and thus compete for many of the same

customers,[14] they go about it with different modes of operation, using very different physical infrastructures, and operating in markedly different regulatory environments, much as in *Tracy*. It follows that satellite TV and cable TV are not similarly situated for Commerce Clause purposes, and that the satellite tax does not discriminate against the satellite providers based on geography.

B. Discriminatory Purpose

The fact that cable and satellite providers are not similarly situated effectively sidelines any concern over the purpose behind their differential tax treatment. Nonetheless, the plaintiffs argue that the Legislature enacted the satellite-only tax with the intent to favor the local economy, thus purposefully discriminating against out-of-state interests in violation of the Commerce Clause. See, e.g., *Amerada Hess*, 490 U.S. at 75. The evidence they have provided of protectionist legislative intent, however, is singularly unconvincing.

The centerpiece of the plaintiffs' argument on discriminatory intent consists of multiple commu-

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[14] Cable providers, of course, are limited to the cities and towns that have granted them franchises. Satellite providers can reach all of these customers, and also those who live far beyond the reach of cable. In any event, "[a]lthough competing in different markets or offering different products generally means that entities are not similarly situated, see *Tracy*, 519 U.S. at 299, competing in the same market is not sufficient to conclude that entities are similarly situated, as *Tracy* made clear." *National Ass'n of Optometrists v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009).

nications from NECTA, its lobbyist, and Comcast to members of the Legislature. Some of these argue that cable had a larger economic footprint in the Commonwealth and made significant investment in Massachusetts in terms of jobs and infrastructure, while satellite did not—evidence, according to the plaintiffs, of discriminatory intent on the part of the legislators thus lobbied.

Statements of lobbyists, however, can furnish only the most attenuated and unreliable evidence of legislative intent.

> Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001).

The statements offered up in this case here are exemplary of the problems with this sort of evidence. The "local jobs" pitch[15] was made most directly in a

[15] This and, even less directly, the references to infrastructure improvements are the only arguments having even a whiff of economic protectionism, and that only by proxy; the cable companies are no more local Massachusetts concerns than the satellite companies are. Tax equity is not a protectionist

letter sent by NECTA to every legislator, yet even here it is only one of several arguments for the tax:

> Unlike cable companies, satellite providers pay no personal property or real estate taxes. Unlike cable, they do not pay to support public and government access channels. And unlike cable, they do not provide free video service to municipal buildings and free video and high-speed internet to schools and libraries.
>
> Nor do satellite companies make investments in the economy or community, as cable providers do. Comcast alone, for example, employs more than 5,000 people in Massachusetts who collect more than $336 million in salary and benefits. Over the past seven years, Comcast has made $1.8 billion in capital investments in Massachusetts while donating more than $15 million to charity.

(Jt. App. Ex. 50, 51)[.]

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purpose. Nothing in the record suggests that satellite companies are any less able than cable companies to provide local access programming, video service to schools, libraries and other public buildings, and donations to charity, and even if it were so, it would be a mode-of-operation issue, not an interstate commerce issue.

Other communications by NECTA, its members, and its lobbyists with legislators, other government officials and the public analyzed the legality of the bill and repeatedly intoned, "Tax parity is the goal," mentioning in-state jobs and infrastructure improvements only in passing or not at all. (Jt. App. Ex. 37, 44, 45, 47-49, 52, 53, 61, 64-66, 69, 70, 72, 96)[.] To suppose from this evidence that Massachusetts that [sic] the General Court as a whole—or even any individual legislator—voted for the satellite tax as a jobs measure, as opposed to a revenue-raising and tax parity measure, is conjectural to an impermissible degree.

The plaintiffs claim, however, to have it from the horse's mouth, in the form of statements reportedly made to Andrew Reinsdorf, senior vice president of government relations for DIRECTV, by "half a dozen to a dozen" legislators whose names he cannot remember. "My general recollection of those meetings," Reinsdorf testified, "was that generally most all of the legislators I met with, in part, relayed or expressed or voiced the view that cable has a significant local presence; that cable does PEG[16] programming; that cable employs lots of my constituents." He heard from someone else that Senator Rosenberg was "particularly adamant" on these issues. (Jt. App. Ex. 32 at 57-58, 61)[.]

Even putting aside the infirmities of this particular testimony, "statements attributed to individual legislators as to their motives or mixtures

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[16] Public, educational and governmental.

of motives in considering legislation are not an appropriate source from which to discover the intent of the legislation." *Administrative Justice of the Housing Court Dep't v. Commissioner of Admin.*, 391 Mass. 198, 205 (1984); *accord*, *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 240 n.6 (2012); *Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n.*, 408 Mass 572, 578 (1990).

Finally, the plaintiffs see evidence of discriminatory intent in what they call a "backdoor" process and the Legislature calls "outside sections." Although this device has been the subject of periodic criticism from individual legislators, the other branches of government, and the citizenry, the Supreme Judicial Court has been

> reluctant to reject the use of "outside sections" as a means to enact amendments to general legislation. "This court traditionally has avoided involvement in the internal workings of the Legislature in deference to the unique role of the Legislature and its expertise with regard to internal legislative processes." "In these circumstances, mindful of the principle of separation of powers so carefully stated in art. 30 of the Declaration of Rights, this court should not infer specific constitutional procedures that the ... legislative branch[] … must follow."

First Justice of Bristol Div. of the Juvenile Court Dept. v. Clerk-Magistrate of Bristol Div. of the Bristol Juvenile Court Dept., 438 Mass. 387, 408 (2003) (citations omitted). Outside section or no, the proposed measure was no secret from the satellite industry (which lobbied against it) or, apparently, from its customers. (Jt. App. Ex. 54, 84)[.] Finally, the plaintiffs make no connection between the use of the outside section process and any supposed intent to discriminate against interstate commerce.

In short: the plaintiffs have not shown that the satellite tax had any purpose beyond the obvious: raising revenue, by taxing an industry sector that was rationally viewed as undertaxed. Accordingly, where cable and satellite are not similarly situated, and where there is no evidence of discriminatory effect or purpose, the plaintiffs' claim of a commerce clause violation fails.

2. Violation of the Equal Protection Clause

The plaintiffs additionally argue that the imposition of satellite tax violates the Equal Protection Clauses of the Constitutions of the United States (Am. XIV) and Massachusetts (Arts. I, X) because it arbitrarily distinguishes between similarly situated businesses without any rational basis related to a legitimate state policy. The analysis is the same under both constitutions. *Brackett v. Civil Service Comm'n,* 447 Mass. 233, 243 (2006). Absent a suspect classification or a fundamental right (neither of which is present here), however, there is no equal protection violation if the statutory

distinction in question has a rational basis. *Armour v. City of Indianapolis*, ___, U.S. ___, 132 S. Ct. 2073, 2080 (2012); *Finch* at 668-69.

"'[C]reating classifications and distinctions in tax statutes"' is a domain in which "'[l]egislatures have especially broad latitude." *Armour* at 2080, quoting *Regan v. Taxation With Representation of Washington*, 461 U. S. 540, 547 (1983). "So long as any basis of fact can be reasonably conceived showing that the distinction made by a tax statute has a fair and rational relationship to the object sought to be accomplished, the legislative classification is not violative of equal protection principles." *Seiler Corp. v. Commissioner of Revenue*, 384 Mass. 635, 639 (1981).

The enactment of the satellite tax came at a time when Massachusetts was in the throes of a fiscal crisis. The Legislature was faced with a looming revenue shortfall, and it chose, as a small part of the solution, to tax a sector whose existing regulatory and fiscal obligations to the sovereign were reasonably perceived as modest when compared to those of the rest of the pay-TV industry. This was a plausible and entirely legitimate reason for the tax classification. "[T]he legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Armour*, *supra*. The plaintiffs' claim of a violation of the equal protection clauses of both the United

States Constitution and the Massachusetts Constitution therefore fails.

ORDER FOR JUDGMENT

For the forgoing reasons, plaintiffs DIRECTV, L.L.C. and DISH NETWORK, LLC's Motion for Summary Judgment is DENIED. Defendant Commonwealth of Massachusetts, Department of Revenue's Motion for Summary Judgment is ALLOWED.

Judgment shall enter, declaring that Chapter 64M of the General Laws is lawful under Article 1, §8, cl. 3 of the United States Constitution (the commerce clause) and under the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Articles I and X of the Massachusetts Constitution.

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Thomas P. Billings,
Associate Justice

Dated: November 21, 2012