No. 14-______

IN THE

Supreme Court of the United States

DIRECTV, INC., AND ECHOSTAR SATELLITE L.L.C., NOW KNOWN AS DISH NETWORK L.L.C.,
Petitioners,

v.

RICHARD H. ROBERTS, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

E. Joshua Rosenkranz
Counsel of Record
Nicholas G. Green
Rachel Wainer Apter
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Eric Shumsky
Robert Yablon
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Counsel for Petitioners

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, it is undisputed that "[s]atellite providers DIRECTV and DISH compete for subscribers with cable providers," Pet. App. 3a, but the Tennessee Court of Appeals nonetheless held that they are not "similarly situated" because they are regulated differently. 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 require a court to attempt to assess whether the businesses are regulated differently, how the businesses operate, and how the state justifies the law (as four circuits and one state supreme court have held)?

CORPORATE DISCLOSURE STATEMENT

The caption lists all of the parties to the proceedings before the Tennessee Court of Appeals.

During the pendency of the proceedings below, DIRECTV, Inc. merged with DIRECTV, LLC. 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).

EchoStar Satellite L.L.C., now known as 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.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS AND ORDERS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

I. Factual Background 5

A. The pay-tv market, and the economics of in-state vs. out-of-state assembly and distribution 5

B. Cable secures preferential treatment from the Tennessee General Assembly 9

II. Procedural Background 12

A. The chancery court finds the differential tax unconstitutional. 12

B. The court of appeals holds that cable and satellite are not similarly situated. 14

REASONS FOR GRANTING THE PETITION 17

I. The Lower Courts Are Hopelessly Split As To What Makes Two Businesses Similarly Situated. 18

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...... 19

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. 20

C. The split extends to the precise facts of this case................................ 22

II. The Decision Below Conflicts With This Court's Established Precedent..................... 24

III. These Cases Present Excellent Vehicles For Resolving An Issue Of National Importance Affecting Many Industries............ 26

CONCLUSION.. 27

APPENDIX A

Decision of the Tennessee Court of Appeals (Feb. 27, 2015).. 1a

APPENDIX B

Memorandum & Final Order of the Chancery Court (June 21, 2013)... 35a

APPENDIX C

Amended Final Order of the Chancery Court (Jul. 17, 2013).. 75a

APPENDIX D

Order of the Tennessee Supreme Court Denying Review (June 12, 2015) 80a

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Armco Inc. v. Hardesty,
467 U.S. 638 (1984)..14

Family Winemakers of California v. Jenkins,
592 F.3d 1 (1st Cir. 2010) 19, 20

General Motors Corp. v. Tracy,
519 U.S. 278 (1997)...........1, 18, 19, 20, 24, 25, 26

LensCrafters, Inc. v. Robinson,
403 F.3d 798 (6th Cir. 2005)...............................21

Nat'l Ass'n of Optometrists & Opticians v. Brown,
567 F.3d 521 (9th Cir. 2009)...................20, 21, 22

New Energy Co. of Ind. v. Limbach,
486 U.S. 269 (1988)..17

Oregon Waste Sys. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994)..17

Quill Corp. v. North Dakota,
504 U.S. 298 (1992)..17

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
550 U.S. 330 (2007)..17

State Cases

DIRECTV, Inc. v. Levin,
941 N.E.2d 1187 (Ohio 2010) 15, 22

DIRECTV, Inc. v. State, Dep't of Revenue,
Nos. 1D13-5444 & 1D14-0292, __So.3d__, 2015 WL 3622354 (Fla. Dist. Ct. App. June 11, 2015) 22

DIRECTV, LLC v. Dep't of Revenue,
470 Mass. 647 (2015) 20, 23

Smith v. New Hampshire Dep't of Revenue Admin.,
813 A.2d 372 (N.H. 2002) 19

Constitutional Provisions

U.S. Const. Art. I, § 8, cl. 3 ....3, 17

Federal Statutes

28 U.S.C. § 1257 3

47 U.S.C. § 541(a)(2) 7

47 U.S.C. § 541(b)(1) 7

47 U.S.C. § 542 8

47 U.S.C. § 542 (b)...8

State Statutes and Rules

Tennessee Code Ann. § 67-6-226 3

Tennessee Code Ann. § 67-6-227 4

Tenn. S. Ct. R. 4(G)(1)..3

Other Authorities

H.R. Rep. No. 104-204 (1995) 8

1 *Telecommunications Regulation: Cable, Broadcasting, Satellite and the Internet* (Matthew Bender, rev. ed.) 7, 8

INTRODUCTION

This is a companion to the petition filed on June 18, 2015 in *DIRECTV, LLC and DISH Network, L.L.C. v. Commonwealth of Massachusetts Department of Revenue*, No. 14-___.[1] It involves the same Petitioners (although a different Respondent), and, if anything, presents the same legal issue even more clearly. Specifically, as the Massachusetts Petition explains (at 1-3), 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. 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 Tennessee Court of Appeals 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 held that cable and satellite companies are not similarly situated because they are regulated differently.

[1] In an effort to avoid burdening the Court with needless repetition, we adopt arguments made in *Massachusetts Department of Revenue* ("the Massachusetts Petition"), in portions of this Petition.

In doing so, the Tennessee Court of Appeals deepened an existing 6-5 split about what makes businesses similarly situated under the dormant Commerce Clause. On one side, three federal courts of appeals 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 one state supreme court do not treat direct competition as enough. Instead, they have created a new test that is nearly impossible to apply, a boundless inquiry into what entities are regulated by which governments in what ways; claimed differences in the affected businesses' methods of operation; and even the state's purported justification for the law.

The confusion extends even to the precise type of regulation at issue here. The Tennessee Court of Appeals followed the Massachusetts Supreme Judicial Court in holding 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 Memorandum & Final Order of the Chancery Court is unpublished and is reprinted at Pet. App. 35a-74a. The Tennessee Court of Appeals has not yet determined whether its decision, which is reprinted at Pet. App. 1a-34a, will be published. Even

if unpublished, the decision is citable as persuasive authority under Tennessee law. *See* Tenn. S. Ct. R. 4(G)(1). The Order of the Tennessee Supreme Court denying review is unpublished and is reprinted at Pet. App. 80a.

JURISDICTION

The Tennessee Court of Appeals issued its decision on February 27, 2015. The Tennessee Supreme Court denied review on June 12, 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.

Section 67-6-226 of the Tennessee Code provides:

> Notwithstanding other provisions of this chapter to the contrary, commencing on September 1, 1999, state tax at the rate of eight and one-quarter percent (8.25%) on each sale at retail is imposed with respect to fees for subscription to, access to, or use of television programming or television services provided by a video programming service provider …, except such state tax

> shall not apply to television programming or television service charges or fees in an amount less than fifteen dollars ($15.00) provided by a video programming service provider ….

Section 67-6-227 of the Tennessee Code provides:

> Notwithstanding other provisions of this chapter to the contrary, state tax at the rate of eight and one-quarter percent (8.25%) on each sale at retail is imposed with respect to fees for subscription to, access to, or use of television programming or television services delivered by a provider of direct-to-home satellite service.

STATEMENT OF THE CASE

I. Factual Background[2]

A. The pay-tv market, and the economics of in-state vs. out-of-state assembly and distribution

Like Massachusetts residents, Tennessee 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 are "ardent competitors" in the pay-TV market. Pet. App. 3a, 28a. Both offer TV programming packages to suit different budgets and tastes, including local broadcast stations, basic channels (such as CNN and ESPN), premium channels (such as HBO and Showtime), and pay-per-view movies and events. R. XIII, 1786-87. Cable and satellite both negotiate with TV programmers to obtain distribution rights. Both use retailers, the Internet, and call centers to sell pay-

[2] Because the relationship between cable and satellite is the same in Massachusetts and Tennessee, there is substantial overlap in the facts. *Cf.* Massachusetts Petition at 4-9. We present essentially the same background here (§ I.A.), however, with some slight variation for Tennessee, in order to provide the Court with appropriate citations to the record and decisions below. The course and specific wording of the legislation and the course of the litigation (§§ I.B. and II) are different. The Record on Appeal in the Tennessee Court of Appeals ("R.") is cited by volume number (in Roman numerals), then page number.

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. Pet. App. 3a; *see* R. XIII, 1786-87.

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. R. XIII, 1788.

There is, however, a critical difference between cable and satellite providers: "the manner in which they assemble and deliver programming to customers," which "result[s] in differing infrastructure requirements." Pet. App. 4a. Cable providers gather and assemble packages of TV programming at more than 80 digital production facilities, called "headends," in Tennessee. 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 45,000 miles of fiber-optic and coaxial cables laid underground and hung from electric utility poles on Tennessee's public rights-of-way. *Id.* at 5a-6a; R. XIII, 1789.

Satellite providers, in contrast, gather and assemble TV programming into packages at digital production facilities that are located *outside* Tennessee—in Wyoming, Arizona, Colorado, and California. After assembling programming packages, satellite

providers beam them to satellites orbiting the Earth, which beam the signals back down "directly to customers," who receive them "by means of a receiving dish mounted on or near their homes." Pet. App. 5a; R. XIII, 1790-91. Not a foot of cable in Tennessee 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 consumers, who see the same TV programs either way, they matter a great deal to state and local governments. As the court of appeals explained: "The different approaches to program assembly and distribution, besides demanding different levels of in-state infrastructure, produce differing in-state economic impacts. Cable providers have invested over $1 billion to build, service, and maintain their in-state distribution system of headend buildings and miles of cable." Pet. App. 5a-6a. Cable providers also employ 4,000 Tennessee residents, many of whom assemble programming packages at headends, and construct, operate, and maintain their in-state distribution infrastructure. *Id.*; R. XIII, 1793.

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 easements," a cable provider must obtain a franchise from a local government. 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); *see* R. XIII, 1794-95. In any given year, cable companies pay some $40 million in franchise fees to Tennessee municipalities. R. XIII, 1795. Cable providers also pay millions of dollars each year to local utility companies in exchange for the right to attach cables to existing utility poles. *Id.*; *see also* 1 *Telecommunications Regulation*, *supra*, at § 16.01.

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* R. XIII, 1798; 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 the federal government for orbital slots (the right to locate satellites in specified locations in space) and spectrum (the right to use specified frequencies on the public airwaves). R. XIII, 1797-98; 1 *Telecommunications Regulation*, *supra*, at § 20.04(2).

Similarly, because satellite providers rely on out-of-state infrastructure to assemble and deliver pay-TV, they do not generate economic activity in Tennessee comparable to cable. They invest in uplink facilities in Wyoming, Arizona, Colorado and California—not in Tennessee. R. XIII, 1796-97, 1894.

They maintain no Tennessee headends, no web of cables under or over Tennessee rights-of-way, and "have no or nearly no infrastructure investment in Tennessee." Pet. App. 4a, 22a. And, unlike cable, satellite providers employ no Tennesseans to assemble or distribute satellite TV; instead, they employ only a few hundred employees in the state, all of whom perform installation services unrelated to programming assembly or distribution. *Id.* at 6a; R. XIII, 1796-97.

B. Cable secures preferential treatment from the Tennessee General Assembly.

The legislative activities relevant here began in 1998, when a committee of the Tennessee General Assembly considered equalizing a tax scheme that, until that time, had imposed differential taxes on cable and satellite. Under the regime then in existence, a cable subscriber was exempt from tax on "basic" cable service, but a satellite subscriber paid tax on every dollar of his bill. As one state senator explained, "You know, we've got one entity being treated differently than another—another entity. And to the average person on the street, TV is TV …. So in my opinion, we either ought to get rid of all the taxes or go ahead and tax cable like we tax the rest of these folks." R. XIII, 1798, 1800. Another senator asked, "[H]ow [do] we face the satellite folks when they come down here and say, 'Now here's who we're in competition with. You've got them exempt .... Why don't you treat us the same? … [J]ust because we're—we've got satellites in the sky and we're not—we're not a local company, why are you taxing us dif-

ferently?" *Id.* at 1799-1800 (internal quotation marks omitted).

The committee therefore asked the Tennessee Department of Revenue ("the Department") to investigate equalizing the taxation of pay TV. The Department did so, drafting legislation that would have exempted the first $12 per month of every customer's pay-TV bill, and taxed the remainder of the bill at 8.25%. As the Department explained, "'[t]he bill will ensure that all paid television providers are treated equally, regardless of the technology used.'" *Id.* at 1802-03. With the Governor's approval, the Department's pay-TV equalization bill was introduced in the House of Representatives in February 1999. *Id.* at 1802.

The equalization bill ran into fierce opposition from cable. "Time Warner and other members of the Tennessee Cable Telecommunications Association" strongly opposed the bill and "spent many hours in Nashville … fighting [the] legislation." R. X, 1362 (statement of Time Warner executive Dean Deyo). Their message was unabashedly protectionist. When asked why cable TV customers should receive a tax exemption but satellite customers should not, the cable industry's chief lobbyist, Bo Johnson, responded candidly:

> Cable Television companies should receive preferential tax treatment for their customers because Cable Television companies have invested millions of dollars in Tennessee, employ Tennessee citizens, pay franchise fees and excise taxes to Tennessee,

> and otherwise have a presence in Tennessee communities. By contrast, Satellite Television companies do not have a significant presence or make a significant investment in Tennessee.

R. V, 708. Cable eventually "worked out" an amendment to the Department's bill. *Id.* at 717-20; R. XIII, 1809-11. The amendment granted a tax exemption to cable customers on the first $15 of their bill, while denying any exemption to satellite customers. *Id.* at 1809-10. During a committee hearing, one legislator discussed the bill with the Deputy Revenue Commissioner and made clear his understanding that cable and satellite had different ties to Tennessee. *Id.* at 1811. The amendment passed the House of Representatives that day. *Id.* at 1813.

In an article published shortly thereafter, the Deputy Commissioner forthrightly explained what had happened: "In [the] original bill, satellite television customers got the same sales tax exemption that cable customers got, 'but by the time the cable people were through with it, they (satellite customers) got no exemption.'" *Id.* at 1815-16. In that same article, the TCTA's lobbyist confirmed the protectionist justification for the legislation: "[C]able companies 'have millions of dollars invested in Tennessee, we pay local governments for the use of their right-of-way, those are costs that those other entities don't have.'" *Id.* at 1816 (citation omitted). Responding to criticism that cable was responsible for the unequal tax, a Time Warner Cable executive explained in a letter to a leading newspaper that "[t]he logic … is extremely simple":

> Cable television companies in Tennessee have established a huge infrastructure. This includes the formation of local companies which spend hundreds of millions of dollars annually to provide jobs, services and buying power in Tennessee. These companies provide local programming and free installations to schools, libraries and city buildings .... They have become a part of the Tennessee cities and towns that they serve. This is an investment that our satellite competitors do not provide.

R. X, 1363.

The disparate pay-TV sales tax has had precisely the desired effect: As a direct result of the tax, satellite providers lost 92,000 Tennessee customers, and cable providers kept 76,000 Tennessee customers they would have lost if not for the preferential treatment. R. XIII, 1820-21. In other words, the differential tax boosted the pay-TV providers that assemble and distribute their programming packages in Tennessee, at the expense of the pay-TV providers that do not.

II. Procedural Background

A. The chancery court finds the differential tax unconstitutional.

Petitioners DIRECTV and DISH Network filed suit in 2003, alleging that Tennessee's disparate pay-TV sales tax violates the dormant Commerce Clause by discriminating against interstate com-

merce in its purpose and in practical effect. The trial court entered summary judgment in favor of Petitioners. Noting that cable providers assemble and distribute pay-TV packages using in-state infrastructure, while satellite providers perform the same activities out-of-state, the court concluded that "cable has a much greater physical and economic footprint in Tennessee." Pet. App. 41a-46a, 56a. And Petitioners offered "proof that the exemption recognized the positive impact the cable industry had on Tennessee's economy because of its impact on employment and other local interests." *Id.* at 67a. The trial court also declined to follow decisions from other states upholding disparate pay-TV taxes, finding that some were distinguishable, and others misapplied controlling Supreme Court precedent.

The chancery court concluded that cable and satellite providers are similarly situated, and that the disparate pay-TV sales tax discriminates against interstate commerce in its practical effect. *First*, the court concluded that cable and satellite TV providers "are similarly situated for dormant Commerce Clause purposes … because they vigorously compete and sell virtually identical products at retail—the point where the challenged differences in sales tax obligations are triggered." *Id.* at 63a-64a; *see also id.* at 39a-41a, 68a ("satellite TV providers and cable TV providers [are] competitors in the same market for pay-TV services in Tennessee" and they "provide virtually identical or interchangeable products"). *Second*, the court held that the disparate pay-TV tax discriminates against interstate commerce because it "ha[s] the parochial effect of rewarding in-state commercial activity, while burdening out-of-state

commercial activity." *Id.* at 68a-71a. The Department appealed.

B. The court of appeals holds that cable and satellite are not similarly situated.

Contrary to what occurred in Massachusetts, *see* Massachusetts Petition at 10-12, the Tennessee Court of Appeals actually agreed with the satellite providers in large measure. It recognized that "[a] tax discriminates against interstate commerce when it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" Pet. App. 14a (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). It also agreed that cable and satellite providers' respective assembly and distribution methods "demand[] different levels of in-state infrastructure" and "produce differ[ent] in-state economic impacts." Pet. App. 5a-6a.

Indeed, the majority of the court of appeals' decision embraced arguments made by the satellite providers, and repudiated arguments made by the Department in defense of the differential tax. For example, the Department had urged the court to rely on decisions from other jurisdictions. The court considered them at length, and like the chancery court, concluded that they were inconsistent with decisions of this Court. *Id.* at 15a-20a ("to the extent any of these decisions can be read as authorizing taxes that discriminate against interstate commerce where the differential treatment is based upon operational differences, they undermine negative Commerce Clause precedent").

Second, a centerpiece of the Department's argument was that "operational differences" could justify differential treatment. The court of appeals rejected that argument too, holding that

> [o]perational differences can be, and in this case are, linked to geography. By using cable, rather than satellites, to reach their customers, cable providers make greater use of Tennessee infrastructure. Where operational differences and geography are linked, the negative Commerce Clause does not permit favoritism to local interests at the expense of out-of-state interests, even where the challenged tax scheme discriminates only by reference to operational differences.

Id. at 20a-21a.

The Department also had argued that the disparate pay-TV tax did not discriminate against interstate commerce because cable and satellite providers are both "interstate" companies. Again, the court of appeals disagreed: "[T]he fact that the parties benefitting from a tax are themselves interstate companies does not shield the tax from negative Commerce Clause review." *Id.* at 21a. This is because "a business need not be locally owned or headquartered to benefit the local economy." *Id.*, (quoting *DIRECTV, Inc. v. Levin*, 941 N.E.2d 1187, 1198 (Ohio 2010) (Brown, C.J. dissenting)) (internal quotation marks omitted). The dormant Commerce Clause "protect[s] against favoritism to local investment as well as to local businesses." *Id.*

Ultimately, however, the court of appeals declined to assess constitutionality on the basis of these principles, as the bulk of its decision had suggested it would. It did not consider whether Tennessee's disparate pay-TV tax discriminates against interstate commerce in purpose or effect, whether any discrimination furthers a legitimate local interest, or whether the Tennessee legislature had any reasonable nondiscriminatory alternatives available. Instead, following the Massachusetts decision that had issued nine days before, it concluded as a "threshold" matter that satellite and cable providers are not "substantially similar" entities for purposes of the dormant Commerce Clause. *Id.* at 27a. This is so, the court held, even though it is undisputed that "[s]atellite providers DIRECTV and DISH compete for subscribers with cable providers." *Id.* at 3a; *see also id.* at 27a-28a ("One need look no further than his mailbox or television screens, where their commercials appear, for evidence that satellite providers and cable providers are ardent competitors for customers.").

"Yet," the court held, "even where the entities are competitors, it does not necessarily follow that the entities are similarly situated." *Id.* at 28a. Why? Because "[c]able providers are heavily regulated by the federal government, while satellite providers are 'minimally' regulated." *Id.* at 29a. The court cited statutes requiring cable but not satellite providers to dedicate channels to local broadcast stations, to carry qualified educational television programming, and to carry information from the emergency broadcasting systems. *Id.* at 29a-30a. It also noted that cable providers are "subject to minimum standards for of-

fice hours, telephone availability, installation, service outage, repair times, and billing." *Id.* at 30a. Thus, even though "the services cable providers must offer under federal law may not be widely known to or necessarily coveted by consumers," *id.* at 32a, "satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause," *id.*

The Tennessee Supreme Court denied review. Pet. App. 80a.

REASONS FOR GRANTING THE PETITION

As the Massachusetts Petition explains (at 12-14), 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 against interstate commerce 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, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 331 (2007) (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).

This case concerns a threshold inquiry—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. Yet the Tennessee Court of Appeals did not do so. Instead, it concluded that cable and satellite providers are not similarly situated because they are regulated differently under federal law.

This and the companion Massachusetts Petition more than satisfy the Court's traditional criteria for review, and especially when considered in tandem. They implicate a growing and entrenched circuit split; they conflict with decisions of this Court; and this is an important and recurring issue. These issues are described in greater detail in the Massachusetts Petition; set forth below are additional reasons that the Court should grant review.

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

The lower courts are deeply divided over what it means for businesses to be similarly situated within the meaning of the dormant Commerce Clause. *See* Massachusetts Petition at 15-25. Three circuits and three state high courts treat businesses as similarly situated so long as they compete in the relevant market. In stark contrast, four circuits, joined by the Massachusetts Supreme Judicial Court and the Tennessee Court of Appeals, hold that competing in

the relevant market is not sufficient. Instead, these courts assess whether businesses are similarly situated based on their methods of operation, regulatory differences, 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). The decisions of the Kansas, New Hampshire, and Florida Supreme Courts, along with the Seventh and Eleventh Circuits, are discussed at length in the Massachusetts Petition (at 16-17 & 18-20), and in the interest of efficiency, we do not repeat that discussion here.

The decision of the First Circuit in *Family Winemakers* merits additional attention because it conflicts so starkly with the decision below. As the Massachusetts Petition discusses (at 17-18), the First Circuit held that "small" wineries in Massachusetts were similarly situated to "large" wineries located out-of-state. *Family Winemakers of Califor-*

nia v. Jenkins, 592 F.3d 1, 5, 15-16 (1st Cir. 2010). A state statute gave preferential treatment to "small" wineries over "large" wineries. *Id.* at 1, 4. Both small and large wineries competed in "a single[,] although differentiated" wine market. *Id.* at 13. Yet there were obvious differences between the two. Especially relevant here, the federal government treated wineries differently based on size. *Id.* at 15-16 & n.18. Even so, the First Circuit did not conclude that these regulatory differences prevented the entities from being similarly situated. Instead, it concluded that small wineries are "similarly situated" to large wineries. *Id.* at 5, 10 (citing *Tracy*).

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 Tennessee court below, four circuits and the Massachusetts Supreme Judicial Court have held that "competing in the same market is not sufficient to conclude that entities are similarly situated" for Commerce Clause purposes. *DIRECTV, LLC v. Dep't of Revenue*, 470 Mass. 647, 653 n.10 (2015) (quoting *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." *Brown*, 567 F.3d at 527. The decisions of the Second and Fifth Circuits are discussed in the Massachusetts Petition at 11-12 and 21-23; the decision of the Massachusetts Supreme Judicial Court is discussed

in the Massachusetts Petition at 11-12 and below at 23. Because the Tennessee Court of Appeals focused on regulatory differences, we outline here the decisions of the Sixth and Ninth Circuits that have done the same.

In *Brown*, the Ninth Circuit held that "competing in the same market is not sufficient to conclude that entities are similarly situated." 567 F.3d at 527. The court listed a litany of ways in which ophthalmologists and optometrists are regulated differently from opticians. Ophthalmologists require a medical degree, while optometrists must complete undergraduate requirements and graduate from a four-year, approved, optometry school. *Id.* at 526. Optometrists must pass national and state licensing exams and complete continuing education requirements. *Id.* Ophthalmologists and optometrists have "special ethical and professional responsibilities regulated by the state." *Id.* at 526-27. In contrast, opticians "are not bound by the same ethical and professional responsibilities"; "are not health care providers"; "do not diagnose or treat diseases of the eye"; and may be "operated as commercial concerns." *Id.* at 527. Thus, the court concluded, "opticians are not similarly situated to optometrists and ophthalmologists," even though they "compete[] in the same market for the sale of eyewear." *Id.* at 525-528.

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 reached this conclusion on

the theory that, "[u]nlike retail optical stores, licensed optometrists are health-care providers and, as such, have unique responsibilities and obligations to their patients that are not shared by optometric stores." *Id.* at 804.

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

As the Massachusetts Petition explains (at 23-25), courts have even divided on the precise question of whether cable and satellite companies are similarly situated for Commerce Clause purposes—and the decision below only makes this conflict starker.

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 Levin*, 941 N.E.2d at 1201 (Brown, C.J., dissenting) (cable and satellite providers are similarly situated because they "unquestionably compete").

On the other side, the court below and the Massachusetts Supreme Judicial Court have concluded that cable and satellite providers are not similarly situated. Pet. App. 32a; *Dep't of Revenue*, 470 Mass. at 654. But even they have disagreed on the rationale. While the court below based its decision squarely on regulatory differences, *supra* at 16-17, the Massachusetts decision was all over the map. Ostensibly within the context of explaining why cable and satellite companies were not similarly situated, the Supreme Judicial Court engaged in a freewheeling analysis that touched upon: (a) why it was fair to impose a type of statewide franchise fee on satellite providers, *Dep't of Revenue*, 470 Mass. at 655-57; (b) how satellite providers were actually benefited, rather than burdened, by the satellite-only excise tax, *id.* at 657-58; and (c) how, to the extent satellite providers "were able to show some discrepancy between the amounts charged to them and to the cable companies," that "discrepancy would be permissibly attributable to important differences between the cable and satellite industries," including regulatory differences, *id.* at 659-62.

Thus, in Massachusetts and Tennessee, laws that discriminate against satellite providers are immune from dormant Commerce Clause scrutiny at the outset, because cable and satellite providers are deemed not substantially similar. 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 Com-

merce Clause, the very purpose of which was to preserve a national market for competition.

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

In the decision below, the Tennessee court concluded that cable and satellite providers are not "similarly situated," despite the undisputed fact that they compete head-to-head for the same Tennessee customers, because they are regulated differently. That decision conflicts with clear precedent from this Court. If this were the law, it would transform a modest threshold inquiry that almost always is satisfied into a new test that would be nearly impossible to meet—and that would overwhelm dormant Commerce Clause analysis with an endless inquiry into what entities are regulated by which governments in what ways. Specifically, the Tennessee Court of Appeals departed from this Court's precedents when it concluded that "even where the entities are competitors, it does not necessarily follow that the entities are similarly situated." Pet. App. 28a. As the Massachusetts Petition explains (at 27-32), competition has always been the critical inquiry at the threshold.

The conflict is particularly clear with regard to *General Motors Corp. v. Tracy*, the only decision of this Court upon which the Tennessee court relied for its conclusion. Pet. App. 27a-29a. *Tracy* 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 ex-

plained 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, 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 thus embraces the established rule that competition in the relevant market is the touchstone of whether two entities are similarly situated. *See* Massachusetts Petition at 30-32. Here, of course, cable and satellite TV providers compete vigorously in the one and only market to which the differential pay-TV sales tax applies, and neither the Department nor the court of appeals suggested otherwise. To the contrary, the court of appeals acknowledged that "consumers view satellite and cable as similar and substitutable. One need look no further than his mailbox or television screens, where their commercials appear, for evidence that satellite providers and cable providers are ardent competitors for customers." Pet. App. 27a-28a.

Whatever regulatory differences exist between cable and satellite companies have not given rise to the sort of separate, non-competitive market that existed in *Tracy*. That being so, the court should have affirmed the chancery court's conclusion that cable and satellite providers are similarly situated for Commerce Clause purposes. The failure to do so conflicts with this Court's precedents and merits this Court's intervention.

III. These Cases Present Excellent Vehicles For Resolving An Issue Of National Importance Affecting Many Industries.

This important issue merits the Court's attention for the reasons already stated. *See* Massachu-

setts Petition at 34-37. In addition, this case provides an excellent vehicle for review. The decision below squarely held that cable and satellite providers are not similarly situated because they are regulated differently under federal law. Pet. App. 29a-32a. The issue was dispositive, and indeed it was the only area in which the court of appeals disagreed with the chancery court's analysis. Especially in tandem with the companion petition from the Massachusetts Supreme Judicial Court, this case 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. Massachusetts Department of Revenue* and hold this petition.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Date: June 23, 2015

APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 22, 2014 Session

DIRECTV, INC., ET AL. v. RICHARD H. ROBERTS, COMMISSIONER OF REVENUE, STATE OF TENNESSEE

Appeal from the Chancery Court for Davidson County No. 0324081V
Russell M. Perkins, Chancellor

[FILED
FEB 27 2015
Clerk of the Courts]

No. M2013-01673-COA-R3-CV

Plaintiffs contend that the sales tax law unconstitutionally discriminates against satellite television providers. The law taxes the entire subscription fee billed to satellite customers while the first $15 of the subscription fee billed to cable customers is exempt. On cross-motions for summary judgment, the trial court found the sales tax law violated the Commerce Clause of the United States Constitution. The Commissioner of Revenue appeals. Because we find that satellite providers and cable providers are not similarly situated for purposes of the Commerce Clause, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph F. Whalen, Associate Solicitor General; and Mary Ellen Knack, Senior Counsel, for the appellant, Richard H. Roberts,[1] Commissioner of Revenue.

Stephen J. Jasper, Nashville, Tennessee; E. Joshua Rosenkranz and Jeremy N. Kudon, New York, New York; and Eric A. Shumsky, Washington, D.C., for the appellees, DIRECTV, Inc. and DISH Network L.L.C.

Carolyn W. Schott and Andrée Sophia Blumstein, Nashville, Tennessee, and John A. Hinman, San Francisco, California, for the Amicus Curiae, National Association of Wine Retailers.

Joseph F. Welborn, III, Nashville, Tennessee, for the Amicus Curiae, Satellite Broadcasting & Communications Association.

Brett R. Carter, Nashville, Tennessee, and Eric S. Tresh and Zachary T. Atkins, Atlanta, Georgia, for

---

[1] In accordance with Tenn. R. App. P. 19(c), Richard H. Roberts, the current Commissioner of Revenue, has been substituted for his predecessors.

the Amicus Curiae, Tennessee Cable Telecommunications Association, Inc.

OPINION

I. FACTS AND PROCEDURAL HISTORY[2]

Plaintiffs DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite Corporation, now known as DISH Network L.L.C. ("DISH"), provide direct-to-home satellite television service. Satellite providers DIRECTV and DISH compete for subscribers with cable providers. The competitors are similar in several respects. Satellite providers, like cable providers, secure television programming by negotiating with programmers to obtain the rights to distribute programming content. Both use retailers, websites, and call centers to sell their programming packages to customers. Both provide their subscribers with equipment that receives and converts programming signals into content that can be viewed at the subscriber's home and rely upon technicians to install and service the home equipment. Both satellite providers and cable providers offer an array of programming packages for which they bill their subscribers monthly.

The major satellite providers and major cable providers are interstate enterprises. DIRECTV is a California corporation headquartered in El Segundo,

---

[2] Except as otherwise indicated, the facts are taken from the parties' statements of material facts. In some instances, the facts are undisputed only for the purposes of ruling on the motions for summary judgment. *See* Tenn. R. Civ. P. 56.03.

California, and DISH is a Nevada corporation headquartered in Englewood, Colorado. Major cable providers include Delaware corporation Time Warner Cable, which is headquartered in New York, New York; Pennsylvania corporation Comcast, which is headquartered in Philadelphia, Pennsylvania;[3] and Delaware corporation Charter Communications, which is headquartered in Stamford, Connecticut.[4]

A. PROGRAM ASSEMBLY AND DELIVERY BY SATELLITE AND CABLE PROVIDERS

Although satellite and cable providers have similarities, the manner in which they assemble and deliver programming to customers is very different. The different approaches to assembly and delivery of programming result in differing infrastructure requirements. Satellite providers collect and assemble program signals at uplink facilities located outside of the State. Each of the facilities has its own farm of satellite dishes, studio equipment, and staff of trained employees. From the uplink facilities, the satellite providers digitize, process, and compress the program signals; convert them into radio frequencies; and transmit them to their satellites. The two largest

---

[3] Joint Application of Comcast Corp. and Time Warner Cable Inc. for Consent Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Subsidiaries of Time Warner Cable, Inc., Federal Communications Commission, MB Docket No. 14-57.

[4] Charter Commc'ns, Inc., Current Report (Form 8-K) (Feb. 5, 2015).

uplink facilities used by DIRECTV are located in Colorado and California. DISH's two largest uplink facilities are located in Wyoming and Arizona.

Satellites in geostationary orbits above the Earth receive the signals from the uplink facilities. From the satellites, the programming signals are beamed back down to Earth directly to customers. The customers receive the signals by means of a receiving dish mounted on or near their homes.

In contrast to satellite providers, cable providers collect and assemble program signals at distribution points called "headends." Over eighty headends are located in Tennessee. The typical headend is a building surrounded by several large satellite dishes. The satellite dishes collect programming signals and then direct them to receivers located within the headend building. Employees then modulate the signals and insert local programming and advertising.

From the headends, signals travel through underground "trunk" lines and then are distributed through "hubs" and/or "nodes" into "feeder" or distribution lines. Hubs and nodes are physical buildings or cabinet devices that are installed in each neighborhood. The program signals reach customers from "drop lines," which are connected to small boxes along the distribution lines or "taps." The signal can be viewed on any television connected to a cable set-top box.

The different approaches to program assembly and distribution, besides demanding different levels

of in-state infrastructure, produce differing in-state economic impacts. Cable providers have invested over $1 billion to build, service, and maintain their in-state distribution system of headend buildings and miles of cable. They also employ over 4,000 Tennessee residents, many in connection with the assembly and distribution of programming.

DIRECTV and DISH, on the other hand, either directly or through affiliates, lease space in Tennessee to provide office support for installation technicians and storage of installation-related equipment. They also lease space in Tennessee for the collection of local television signals for rebroadcast to their subscribers. DIRECTV has an ownership interest in an office building in Tullahoma, Tennessee. As of 2010, DIRECTV had 493 Tennessee employees. At the same point in time, DISH had no Tennessee employees, but an affiliated company employed 239 Tennesseans to perform installation services.

B. TAXATION OF SATELLITE AND CABLE SUBSCRIPTION FEES

Historically, Tennessee has taxed cable and satellite services differently. In 1984, the Legislature enacted Public Chapter 13, which imposed an amusement tax on cable television subscription charges in excess of "those charges made for the basic or lowest rate charged by the supplier of such services." 1984 Tenn. Pub. Acts 75-76 (ch. 13 § 1). After initially determining such services were not subject to sales or use tax, starting in 1994, the Department of Revenue began taxing satellite as a

telecommunications service. *See HBO Direct, Inc. v. Johnson,* No. 01A01-9804-CH-00221, 1999 WL 452317, at *3 (Tenn. Ct. App. July 1, 1999). By 1998, the amusement tax rate and the tax rate for telecommunications services were the same, but customers of satellite providers did not enjoy an exemption for basic service.

In 1999, Tennessee removed cable services from the amusement category and began treating subscription fees charged by cable and satellite providers as a taxable privilege, subject to sales tax. 1999 Tenn. Pub. Acts 1030-32 (ch. 423). The Legislature created a three-tiered taxing structure for cable television services and a single-tiered taxing structure for satellite services. *Id.* For cable services, rather than exempting "the basic or lowest rate charged" by the cable provider, the State exempted charges or fees less than $15.00. *Id.* The State taxed cable services of $15.00 or more, but not exceeding $27.50, at the rate of 8.25%. *Id.* Cable charges or fees in excess of $27.50 were subject to the state tax rate of 6% plus a local option tax of up to 2.75%. *Id.* For satellite services, the State taxed subscription fees at the rate of 8.25% with no exemption.[5] *Id.*

The three-tiered taxing structure for cable television services and the single-tiered taxing structure for satellite services have remained in effect until the present, except the state tax rate for

[5] Satellite providers are exempt from local option taxes. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 144 (reprinted at 47 U.S.C. § 152).

cable charges or fees in excess of $27.50 is now 7% plus a local option tax. Tenn Code Ann. §§ 67-6-103(f), -202(a), -226, -227, -714 (2013). Cable customers continue to receive an exemption from the sales tax on the first $15.00 of monthly charges, while satellite customers do not. *Id.* §§ 67-6-03(f), -226, -227.

C. PROCEEDINGS BELOW

In August 2003, DIRECTV and DISH filed a complaint against the Commissioner of Revenue seeking a refund of sales and use taxes paid since January 1, 2002.[6] DIRECTV and DISH alleged that the sales tax on satellite television services violated the Commerce Clause and the Equal Protection Clause of the United States Constitution, as well as the equal protection guarantee of the Tennessee Constitution.

The parties filed cross-motions for summary judgment. Following a hearing, the trial court entered an order granting DIRECTV's and DISH's motion for summary judgment and denying the Commissioner's motion. The trial court concluded that the exemption on the first $15.00 of monthly charges granted to cable—but not satellite—customers, violated the dormant or negative Commerce Clause of the United

---

[6] If an assessment of taxes is believed to be "unjust, illegal or incorrect," a taxpayer "may pay the tax and file claim for refund of the tax." Tenn. Code Ann. § 67-1-1801(a)(1) (Supp. 2014). In this case, the Commissioner waived the claim for refund requirement to permit DIRECTV and DISH to file suit directly. *See id.* § 67-1-1802(c)(3).

States Constitution. According to the court, the undisputed facts showed that: "1) the cable tax exemption taxes virtually identical retail transactions among competitors differently; 2) the tax exemption … has the actual effect of substantially favoring the cable industry over the satellite industry; and 3) the cable industry has a significantly larger Tennessee footprint than does the satellite industry."

The trial court rejected the equal protection challenges to the tax structure. The court first noted that the equal protection guarantee of the State Constitution afforded essentially the same protections as the Equal Protection Clause of the federal Constitution. Then, applying a rational basis test, the court found that the separate sales tax structures for cable and satellite services bore a reasonable relationship to a legitimate state interest.

On appeal, the Commissioner raises a single issue for review. Specifically, the Commissioner asserts the trial court erred in finding that the sales tax exemption on the first $15.00 in monthly fees charged by cable providers "violates the dormant Commerce Clause … when the differential treatment results from differences in the nature of their businesses, not the location of their activities, and when the trial court found that a rational, non-discriminatory basis existed for the differential treatment." DIRECTV and DISH raise an additional issue for review. They assert that, not only does the exemption discriminate in actual effect, but it was also enacted with a discriminatory purpose.

II. STANDARD OF REVIEW

The requirements for a grant of summary judgment are well known. Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, 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." Tenn R. Civ. P. 56.04; *see also Martin v. Norfolk S. Ry. Co.,* 271 S.W.3d 76, 83 (Tenn. 2008); *Penley v. Honda Motor Co.,* 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall,* 847 S.W.2d 208, 215 (Tenn. 1993). The party moving for summary judgment bears the burden of demonstrating both that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law. *Martin,* 271 S.W.3d at 83.

When considering cross-motions for summary judgment, the trial court "must rule on each party's motion on an individual and separate basis." *CAO Holdings, Inc. v. Trost,* 333 S.W.3d 73, 83 (Tenn. 2010).

> With regard to each motion, the court must determine (1) whether genuine disputes of material fact with regard to that motion exist and (2) whether the party seeking the summary judgment has satisfied Tenn. R. Civ. P. 56's standards for a judgment as a matter of law. Therefore, in practice, a cross-motion for summary judgment operates

> exactly like a single summary judgment motion.

Id. (citations omitted). For the respective competing motions, the trial court must view the evidence in the light most favorable to the opposing party and draw all reasonable inferences in the opposing party's favor. *See Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997). The court is not to "weigh" the evidence when evaluating a motion for summary judgment, or substitute its judgment for that of the trier of fact. *Martin,* 271 S.W.3d at 87; *Byrd,* 847 S.W.2d at 211. The denial of a cross-motion for summary judgment does not necessitate the granting of the competing cross-motion. *CAO Holdings, Inc.,* 333 S.W.3d at 83.

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin,* 271 S.W.3d at 84; *Blair v. West Town Mall,* 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Martin,* 271 S.W.3d at 84; *Blair,* 130 S.W.3d at 763. Accordingly, this Court must review the record de novo and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co.,* 142 S.W.3d 288, 291 (Tenn. 2004); *Blair,* 130 S.W.3d at 763.

III. ANALYSIS

The Commerce Clause of the United States Constitution empowers Congress "[t]o regulate Commerce … among the several States.... " U.S. Const. art. I, § 8, cl. 3. The United States Supreme Court has interpreted the Clause to empower the

Federal Government and, by implication, to limit the states. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 571 (1997); *S.C. State Highway Dep't v. Barnwell Bros.,* 303 U.S. 177, 184-85 (1938). This implied limitation on state power is known as the "negative" or "dormant" Commerce Clause. *Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 287 (1997).

Negative Commerce Clause jurisprudence has never been a model of clarity or stability. As conceded by the Supreme Court in the 1940's, the Commerce Clause's limitation on state power is both implied and

> open to different implications of meaning. And this accounts largely for variations in this field continuing almost from the beginning until now. They started with Marshall and Taney, went forward from Waite to Fuller, and have been projected in later differences perhaps less broad, but hardly less controversial. Consequently in its prohibitive, as in its affirmative or enabling, effects the history of the commerce clause has been one of very considerable judicial oscillation.

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 418-20 (1946) (footnotes omitted). The judicial oscillation has continued since the 1940's. *See Nw. States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959) ("The resulting judicial application of constitutional principles to specific state statutes leaves much room

for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine,* 50 Wm. & Mary L. Rev. 417, 428 (2008) ("[E]ven a brief tour d'horizon of the [dormant Commerce Clause doctrine's] evolution … will show that the Court has reeled from one set of decision rules to another."). The fact that the negative Commerce Clause doctrine is still susceptible to "different implications of meaning" can be seen in the criticism of the doctrine by current members of the Supreme Court, *see, e.g., Camps Newfound/Owatonna, Inc.,* 520 U.S. at 610 (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."); *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) ("[O]ur applications of the [negative Commerce Clause] doctrine have, not to put too fine a point on the matter, made no sense."), and others who find the negative Commerce Clause to be "a horrid mess in application." *See* Michael S. Greve, The Dormant Coordination Clause, 67 Vand. L. Rev. En Banc 269, 270 (2014), available at http://www.vanderbiltlawreview.org/content/articles/2014/11/The-Dormant-Coordination-Clause.pdf.

Yet, despite the judicial oscillation, confusing results, and criticism, the decisional rule applicable to Commerce Clause challenges of state taxes has

remained the same since 1977.[7] State taxes are upheld "against [a negative] Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). Both motions for summary judgment focused on the discrimination component of the decisional rule.[8] A tax discriminates against interstate commerce when it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty,* 467 U.S. 638, 642 (1984). Such discrimination may appear "(a) facially, (b) purposefully, or (c) in practical effect." *E. Ky. Res. v. Fiscal Court of Magoffin Cnty., Ky.,* 127 F.3d 532, 540 (6th Cir. 1997). DIRECTV and DISH claim that the sales tax on satellite television

---

[7] The decisional rule has remained the same, but there have been qualifiers. For instance, a discriminatory tax may survive a negative Commerce Clause challenge "if it is a valid "compensatory tax" designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Indus. of Mo. v. Lohman,* 511 U.S. 641, 647 (1994). There have also been detractors. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 201 (1995) (Scalia, J., concurring) (describing the four-part test as "eminently unhelpful.")

[8] DIRECTV and DISH do not limit their negative Commerce Clause challenge to the assertion that the tax is discriminatory. In their complaint, they also allege that the "sales tax on satellite operators is not fairly related to the services provided by the State."

services discriminates both purposefully and, as found by the trial court, in practical effect.

A. CHALLENGES TO DISPARATE TAXATION OF SATELLITE AND CABLE PROVIDERS

As the Commissioner hastens to point out, this case does not represent the first Commerce Clause challenge by satellite providers to state tax schemes that treat satellite providers and cable providers differently. However, where these challenges have resulted in final decisions, the cases, all of which reject the satellite providers' position, do not necessarily aid this Court. First, in examining alleged barriers to interstate commerce, we must look past form and conduct "a sensitive, case-by-case analysis of purposes and effects" of the challenged tax. *W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 201 (1994). For example, a tax, which on its own is constitutional, may be unconstitutional in combination with a subsidy. *Id.* at 200. Second, the analysis found in some of the decisions can be seen as difficult to square with negative Commerce Clause precedent.

In 2010, the Ohio Supreme Court considered whether a sales tax on "satellite broadcasting service" violated the negative Commerce Clause. *DIRECTV, Inc. v. Levin,* 941 N.E.2d 1187, 1191 (Ohio 2010). The definition of "satellite broadcasting service" excluded "transactions involving the distribution of pay-television programming using ground receiving or distribution equipment," so cable services were not subject to the sales tax. *Id.* The satellite providers filed a declaratory-judgment

action arguing that the sales tax discriminated facially, purposefully, and in practical effect. *Id.* The trial court found that the tax had the practical effect of discriminating against out-of-state economic interests to benefit in-state economic interests and granted partial summary judgment on that issue. *Id.* The court of appeals reversed and directed entry of a judgment in favor of the tax commissioner on all issues. *Id.*

In affirming the court of appeals, the supreme court concluded that the sales tax did not violate the negative Commerce Clause. *Id.* at 1196. The court rested this conclusion upon two grounds. First, the court found the tax statute could permissibly rely upon the differences in the way satellite and cable providers deliver and assemble programing.

> The statute's application depends on the technological mode of operation, not geographic location, and while it distinguishes between different types of interstate firms, it does not favor in-state interests at the expense of out-of-state enterprises.
>
> Here, the tax applies to a transaction involving pay-television services depending only on the technological mode of distribution of those services….
>
> Application of the sales tax does not depend on the geographic location of the programming provider. Rather, the

> sale of satellite broadcasting services is subject to tax regardless of whether the provider is an in-state or out-of-state business and without considering the amount of local economic activity or investment in facilities that the satellite companies bring to Ohio.

Id. at 1195 (citations omitted). Second, as suggested by the reference to "interstate firms" above, the court found no benefit to in-state economic interests at the expense of out-of-state competitors.

> [T]he cable industry is not a local interest benefitted at the expense of out-of-state competitors. Like the satellite companies, the major cable providers are interstate companies selling an interstate product to an interstate market. Both the satellite and cable industries serve customers in Ohio, own property in Ohio, and employ residents of Ohio, but no major pay-television provider is headquartered in Ohio or could otherwise be considered more local than any other.

Id. at 1196.

In 2006, a North Carolina court addressed the same situation as in *DIRECTV, Inc. v. Levin.* Like Ohio, North Carolina imposed a sales tax on direct-to-home satellite service but not on cable

television service. *DIRECTV, Inc. v. State,* 632 S.E.2d 543, 661 (N.C. Ct. App. 2006). The satellite providers contended that the tax statute discriminated both "on its face and in its practical effect." *Id.* at 663. On cross-motions for summary judgment, the trial court granted the State's motion and dismissed the satellite providers' complaint. *Id.* at 661. The North Carolina Court of Appeals affirmed. *Id.* at 660.

In affirming, the North Carolina court cited very similar grounds to those relied upon by the Ohio Supreme Court. The court "conclude[d] that the dormant Commerce Clause prohibits discrimination against the interstate marketing for multichannel video programming, but that it does not necessarily prohibit discrimination against programmers in that market who deliver programming by satellite as opposed to cable." *Id.* at 667. The court also concluded:

> [C]able companies are no more "local" in nature than are satellite companies. Indeed, the record reveals that both businesses are interstate in nature, as they both utilize in-state and out-of-state equipment and facilities in providing service to North Carolina subscribers and both own property within the State of North Carolina. Thus, … neither satellite companies nor cable companies are properly characterized as an in-state or out-of-state economic interest.

Id. at 664.

A third decision, by the United States Court of Appeals for the Sixth Circuit, is the least analogous to the facts before us. The case involved Kentucky tax credits available to cable providers but not satellite providers. *DIRECTV, Inc. v. Treesh,* 487 F.3d 471, 475 (6th Cir. 2007). Both cable and satellite services were subject to a 3% state excise tax, and cable and satellite providers paid a 2.4% state tax on gross revenues from Kentucky sales. *Id.* Kentucky law also prohibited local governments from levying any franchise fee or tax on multichannel video programming service, but if a multichannel video programming provider paid such a local fee or tax, it could receive a credit against the state tax. *Id.*

Satellite providers complained that the tax structure violated the negative Commerce Clause in practical effect. *Id.* at 478. Because satellite providers are exempt from local taxes as a matter of federal law, only cable providers could receive the tax credit. Satellite providers also objected that cable providers were relieved from paying franchise fees to access local rights-of-way, which are required for cable but not for satellite service. *Id.* at 475-76.

The court of appeals rejected the satellite providers' arguments, affirming dismissal of their complaint. The court noted that states and local governments were "under no mandate to charge for the use of local rights-of-way" and forgoing such fees would not violate the Commerce Clause even if there

was some benefit to local interests. *Id.* at 479. There was also no direct subsidy to cable providers, rather cable providers only received the right to conduct business without local taxation or fees. *Id.* at 480. However, perhaps echoing *DIRECTV, Inc. v. State* or previsioning *DIRECTV, Inc. v. Levin,* the court also noted that the "goods" involved were "distinct, consisting of two very different means of delivering broadcasts." *Id*

As argued by DIRECTV and DISH in this case, to the extent any of these decisions can be read as authorizing taxes that discriminate against interstate commerce where the differential treatment is based upon operational differences, they undermine negative Commerce Clause precedent.[9] Because taxes may discriminate by intent or in practical effect as well as facially, it stands to reason that distinctions other than location or geography may conceal discrimination against interstate commerce. Operational differences can be, and in this case are, linked to geography. By using cable, rather than satellites, to reach their customers, cable providers make greater use of Tennessee infrastructure. Where operational differences and geography are linked, the negative Commerce Clause does not permit favoritism to local interests at the expense of out-of-state interests, even where the challenged tax scheme discriminates only by reference to operational

---

[9] A fuller discussion of this point may be found in Brief Amici Curiae of Constitutional Law Professors in Support of Petitioners at 13-19, *DIRECTV, Inc. v. Levin,* 133 S. Ct. 51 (2012) (No. 10-1322).

differences. *See, e.g., Bacchus Imports Ltd. v. Dias,* 468 U.S. 263 (1984) (holding tax exemption only for wine and liquor produced from a native plant or fruit violates negative Commerce Clause).

In addition, the fact that the parties benefitting from a tax are themselves interstate companies does not shield the tax from negative Commerce Clause review. Both *DIRECTV, Inc. v. State* and *DIRECTV, Inc. v. Levin* note that cable providers are not in-state economic interests. *Levin,* 941 N.E.2d at 1196; *State,* 632 S.E.2d at 548. However, "[a] State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce." *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 334-35 (1977). Taxation "that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses … is constitutionally impermissible." *Id.* at 335. As noted by the dissent in *DIRECTV, Inc. v. Levin,* "a business need not be locally owned or headquartered to benefit the local economy." *Levin,* 941 N.E.2d at 1198 (Brown, C.J., dissenting). Therefore, despite any implication to the contrary in either *DIRECTV, Inc. v. State* or *DIRECTV, Inc. v. Levin,* the negative Commerce Clause has been interpreted to protect against favoritism to local investment as well as to local businesses. *C & A Carbone, Inc. v. Clarkstown,* 511 U.S. 383, 392 (1994).

What negative Commerce Clause precedent does not explain is how state legislatures are to weigh

variances in investment in order to avoid favoritism. DIRECTV and DISH argue that "Tennessee's tax scheme … tilts the playing field in favor of pay-TV providers that incur infrastructure expenses within the state." While they may have no or nearly no infrastructure investment in Tennessee, satellite providers invest in Tennessee in other ways. Satellite providers have employees and facilities in Tennessee supporting dish installation activities. Case law does not explain what differential, either in value or type, of local investment will render different treatment of competing companies discriminatory for purposes of the negative Commerce Clause.

B. HISTORY OF TAXATION OF SATELLITE AND CABLE PROVIDERS BY TENNESSEE

As quick as the Commissioner is to point out the prior unsuccessful court challenges by the satellite providers, DIRECTV and DISH are equally ready to point to the history surrounding the 1999 legislation that was the genesis of the current tax structure. As originally filed, the bill subjected all pay-television services, including cable and satellite, to an 8.25% tax on charges in excess of $12.00 per month. A bill summary prepared by the Department of Revenue identified the different sales tax treatment for paid television services as a problem and stated that the "bill will ensure that all paid television providers are treated equally, regardless of the technology used."

Representatives from the cable industry objected to the proposed legislation. In meetings with the Department of Revenue and state legislators, cable representatives argued that cable providers

were more deserving of a tax exemption than satellite providers and emphasized the monies invested in the state, the residents employed, and the local taxes paid by cable providers. Cable providers also stressed their payment of state franchise and excise taxes.

Ultimately, the 1999 legislation was amended to exempt from tax the first $15.00 per month for cable services. The exemption for satellite services was removed entirely. The legislation as amended passed and became law. 1999 Tenn. Pub. Acts 1030-32 (ch. 423).

According to DIRECTV and DISH, what occurred with tax reform for satellite and cable services during the 1999 legislative session could be summed up by a newspaper article appearing in August of that year. In the article, a deputy commissioner for the Department of Revenue confirmed that "[i]n … [the] original bill, satellite television customers got the same sales tax exemption that cable companies got, 'but by the time the cable people were through with it, they (satellite customers) got no exemption.'"[10] Later in the article, a lobbyist for the cable industry explained that the differing tax treatment was justified because "cable companies 'have millions of dollars invested in Tennessee, we pay local governments for the use of their right of way, those are costs that those other entities don't have.'"[11]

---

[10] Paula Wade, *As Taxes and Bills Rise, Cable Firms Get A Break,* The Commercial Appeal, Aug. 20, 1999, at Al.

[11] *Id.*

Although often noted in the context of statutory construction, it also seems appropriate to proceed with caution here because “[l]egislative records are not always distinguished for their candor and accuracy.” *BellSouth Telecomms., Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Further, the motive behind legislative statements must be considered. “Rather than reflecting the issues actually debated by the legislature, legislative history frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the courts” interpretation of the statute.” *Id.* at 673-74. It is also not difficult to imagine self-serving statements favorable to particular interest groups included in the legislative record solely to curry favor with those interest groups.

The legislative statements of one member or group of members also can not [sic] be reliably attributed to all members. Some even question whether a single motive can ever be attributed to legislation.

> Legislators do not have common objectives, so the basis for imputing agreement to them is weaker than the foundation for this technique in private law … Statutes are drafted by multiple persons, often with conflicting objectives. There will not be a single objective, and discretionary interpretation favors some members over others.

Frank H. Easterbrook, *What Does Legislative History Tell Us?,* 66 Chi.-Kent L. Rev. 444, 446-47 (1990). Perhaps this is why "[i]nvalidating laws on the basis of allegedly unconstitutional motives of legislators has a checkered history in constitutional law." Denning, *Reconstructing Doctrine,* 50 Wm. & Mary L. Rev. at 502; *see also* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second Look Rules of Interbranch Dialogue,* 42 Wm. & Mary L. Rev. 1575 (2001) (discussing the controversy over purpose inquiries).

More than one legislative objective might reasonably be attributed to the tax exemption for basic cable services and the 1999 legislation. When first proposed in 1984, the exemption appeared to stem from the belief that, where access to local television programming was only available by cable service, no tax should be assessed for such service. One senator made the following statement:

> The basic rate may include some channels. But over in McKenzie and Union City and others where you can't reach Nashville and some of the programming areas very well, you either have to put up an expensive antenna or you go on cable. And a lot of folks over that way have elected to go on cable, and that's the way they get their news, weather, and sports, which I think is regular programming and probably

> shouldn't be paid for. I hope you will support this amendment.[12]

Another senator commented: "I think what we are looking for is to give those people in Appalachia and those people in the mountains the right to get the basic services free, and I'm for that and I understand that, and I think cable does a lot of good."[13]

Although the Department of Revenue promulgated a rule defining basic cable television service, the Department and the cable industry interpreted what constituted basic service differently. In the bill summary, the Department of Revenue also cited "determining what programming may be included in the basic, tax-exempt package delivered by traditional cable" as another problem prompting the legislation. Therefore, concerns over the disparate tax treatment of satellite and cable could not be seen as the only impetus for the 1999 legislation.

Despite the fact that the legislative objective behind the 1999 legislation may be uncertain, as DIRECTV and DISH note, the objective of the cable industry was clear, as was their argument for maintaining the exemption for cable services. The cable industry emphasized that, unlike cable providers, satellite providers "do not have a significant presence or make a significant investment in

---

[12] S. Fin., Ways & Means Comm., 93rd General Assembly, 1st Extraordinary Sess., Tape 2 (Feb. 14, 1984) (statement of Sen. Milton H. Hamilton, Jr.).

[13] *Id.* (statement of Sen. Stephen Ira Cohen).

Tennessee." While such a statement, if adopted as a preamble to the 1999 legislation, would evidence an impermissibly discriminatory purpose, we cannot assume that the Legislature embraced the cable industry's argument. *DIRECTV, LLC v. Dep't of Revenue,* No. SJC-11658, 2014 WL 7883570 (Mass. Feb. 18, 2015). Legislative history is far more problematic when sources outside of the Legislature are consulted, or we "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); *see also Kelly v. Robinson,* 479 U.S. 36, 51 n.13 (1986) ("[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.").

C. THE DISTINCTION BETWEEN SATELLITE AND CABLE PROVIDERS

Before delving further into either precedent or legislative history, we must address a threshold question, specifically whether satellite providers and cable providers are "substantially similar entities." *See Gen. Motors Corp.,* 519 U.S. at 298. "Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated." *Camps Newfound/Owatonna, Inc.,* 520 U.S. at 601 (Scalia, J., dissenting). DIRECTV and DISH argue, not unconvincingly, that satellite providers and cable providers are substantially similar entities because consumers view satellite and cable as similar and substitutable. One need look no further than his

mailbox or television screens, where their commercials appear, for evidence that satellite providers and cable providers are ardent competitors for customers.

What constitutes "substantially similar entities" has not been extensively explored by the courts. *See Gen. Motors Corp.,* 519 U.S. at 298-99 (the "central assumption [of substantially similar entities] has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause … "). At the very least, the entities must be in competition to be substantially similar entities. "[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Id.* at 300. Yet, even where the entities are competitors, it does not necessarily follow that the entities are similarly situated. *See DIRECTV, LLC v. Dep't of Revenue,* 2014 WL 7883570, at *4-5. As an example, although state-regulated natural gas utilities and independent gas marketers may compete for some customers, they are not substantially similar because the natural gas utilities have a "captive market" of residential customers that are not likely to purchase from independent gas marketers. *Gen. Motors Corp.,* 519 U.S. at 301-304. These residential customers benefit from a bundle of services, which in many cases, are mandated by state statute, so although the natural gas utilities and independent gas marketers both sell

natural gas, the product sold by the utilities is different. *Id.* at 294-98.

Despite being competitors, satellite and cable providers do have an important distinction. Cable providers are heavily regulated by the federal government, while satellite providers are "minimally" regulated. *See* 2 C.D. Ferris & F.W. Lloyd, Telecommunications Regulation: Cable, Broadcasting, Satellite, and the Internet, 5.09, 6-17B, 20.04(5)(b) (rev. ed. 2014) (hereinafter "Telecommunications Regulation"); *see generally* Paul Valle-Riestra, Telecommunications 91, 94-113, 258 (2002) (outlining federal, state, and local regulation of cable systems and federal regulation of satellite service). Satellite and cable providers are subject to some of the same federal regulations, including political broadcasting rules, equal opportunity employment rules, and commercial advertising limits in children's programming. *See* Telecommunications Regulation, 20.04(6); *see also* 47 C.F.R. § 25.601.

However, any common regulatory burdens are outweighed by the significant public interest regulations imposed on cable providers by Congress and the Federal Communications Commission ("FCC"). Cable television systems are subject to "must-carry" provisions,[14] requiring them to dedicate some of their channels to local broadcast television stations and qualified low power stations. 47

---

[14] The "must-carry" rule allows broadcasters to choose, every three years, whether to operate under must-carry protection or under the retransmission consent system. *See* 47 C.F.R. § 76.64.

U.S.C.A. § 534(a); *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180 (1997) (holding must-carry provisions constitutional). Additionally, cable television systems with more than 36 channels must carry "the signals of all qualified noncommercial educational television stations requesting carriage," unless those stations would duplicate the programming of another station being carried. 47 U.S.C.A. § 535(a); 47 C.F.R. § 76.56. Local governments may further control cable programming by forbidding cable providers from showing channels with obscene content. *See* 47 U.S.C.A. § 544(d)(1). Upon request, cable providers must offer customers a device that allows the customer to limit access to certain channels. *Id.* § 544(d)(2) (2012). Cable providers must also afford "the same emergency information as is afforded by the emergency broadcasting system." *Id.* § 544(g).

Cable providers' technical and business operations are also regulated in detail. Cable signal quality must comply with standards set by the FCC. *See id.* § 544(e); 47 C.F.R. § 76.601-76.640. Additionally, cable providers are subject to minimum standards for office hours, telephone availability, installation, service outage, repair times, and billing. *See* 47 U.S.C.A. § 552(b) (2012); 47 C.F.R. § 76.309. Cable company ownership, 47 U.S.C.A. § 533, 652; cable franchise acquisition, 47 U.S.C.A. § 547; cable rates, 47 U.S.C. § 543(b),(d); and the transfer of cable television systems, 47 C.F.R. § 76.502, are all regulated by federal law.

For their part, DIRECTV and DISH argue that the differences between the regulatory treatment of satellite providers and cable providers are exaggerated. Yet, even a cursory review of telecommunication regulation reveals that Congress has chosen to more heavily regulate cable providers. *See* Telecommunications Regulation, 5.09, 6-17B, 20. Satellite providers are subject to only three primary federal public-interest regulations. In 1996, satellite providers that were authorized for new or replacement satellites were required to provide service to Alaska and Hawaii if technically feasible. *See* 47 C.F.R. § 25.148(c). Second, in 1998, the FCC required satellite providers that offered 25 or more video channels to set aside four percent of their channel capacity for "noncommercial programming of an educational or informational nature." *See* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Report and Order, 13 F.C.C. Rcd. 23254 (1998); *see also* 47 C.F.R. § 25.701(f). Satellite providers could choose among "qualified national educational programming suppliers" to fill the set-aside channels. Finally, satellite providers *may* transmit signals of local broadcasters, but they are not required to do so. *See* 47 U.S.C.A. § 338. However, if the satellite provider chooses to carry one local television station, they must carry all local stations. *Id.* § 338.

The difference in regulatory treatment between satellite and cable and the resulting benefits inuring to cable customers mean that

satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause. Like the natural gas utilities in *General Motors Corp.,* the bundle of services offered by cable providers differs substantially from the bundle of services provided by satellite providers. Cable providers *must* offer several public service items, including local broadcast stations, educational stations, emergency information, and certain signal quality. Satellite providers are almost entirely free from these obligations. While the services cable providers must offer under federal law may not be widely known to or necessarily coveted by consumers, federal law nonetheless distinguishes the services and cable providers and satellite providers. Therefore, the disparate tax treatment of satellite providers and cable providers does not constitute discrimination.

IV. CONCLUSION

We reverse the trial court's grant of summary judgment in favor of DIRECTV and DISH. Because we find that satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause, we direct entry of summary judgment in favor of the Commissioner on the issue of discrimination. This matter is remanded for further proceedings consistent with this opinion.

/s/ W. Neal McBrayer
W. NEAL McBRAYER, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 22, 2014 Session

DIRECTV, INC., ET AL. V. RICHARD H. ROBERTS, COMMISSIONER OF REVENUE, STATE OF TENNESSEE

Chancery Court for Davidson County
No. 0324081V

No. M2013-01673-C0A-R3-CV

[FILED
FEB 27 2015
Clerk of the Courts]

JUDGMENT

This cause came to be heard upon the record on appeal from the Davidson County Chancery Court, the briefs of the parties, and the arguments of counsel. Upon consideration of the entire record, this court finds and concludes that the trial court's judgment should be reversed and remanded.

In accordance with the opinion filed contemporaneously with this judgment, it is, therefore, ordered, adjudged, and decreed that the trial court's judgment be and is hereby reversed and that the cause be remanded to the trial court for further proceedings consistent with this court's opinion.

It is further ordered that the costs of this appeal be taxed to the appellees, DIRECTV, Inc. and

DISH Network, L.L.C., for which execution may issue if necessary.

APPENDIX B

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

DIRECTV, INC. and ECHOSTAR SATELLITE L.L.C., now known as DISH NETWORK, L.L.C,

Plaintiffs,

vs.

RICHARD H. ROBERTS,[1] in his capacity as COMMISSIONER OF REVENUE, for the STATE OF TENNESSEE,

Defendant.

CASE NO. 03-2408-IV

[FILED
2013 JUN 21 PM 4:42
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
___SM_____D.C. & M.]

[F09.]

---

[1] Richard H. Roberts is the current Commissioner of the Tennessee Department of Revenue. Commissioner Roberts was automatically substituted as a party when he took office. *See* Tenn. R. Civ. P. 25.04(1).

MEMORANDUM AND FINAL ORDER

Tennessee taxes pay-TV transactions involving two sets of competitors differently. Satellite company customers pay sales tax on the entire purchase. Cable company customers pay sales tax, but the first $15 is tax-free.[2] Two satellite companies sued, challenging the constitutionality of this statutorily-prescribed difference in tax treatment.

On August 19, 2003, Plaintiffs, DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite L.L.C., now known as Dish Network, L.L.C. ("DISH") (collectively "Plaintiffs"), filed a four-count Complaint[3] claiming that Tennessee's tax exemption favoring cable companies violates the Commerce Clause and the Equal Protection Clause of the United States Constitution. Defendant, Commissioner of Revenue, State of Tennessee ("Commissioner" or "Defendant"), counters, urging that the challenged tax exemption is a constitutionally permissible expression of the State's

---

[2] This tax framework is described more fully at pages 14-17, below.

[3] The counts in the Complaint are designated as follows: 1) Discrimination Against Interstate Commerce; 2) No Fair Relationship to State-Provided Services; 3) Equal Protection; and 4) Tennessee Constitution. Count 2 appears to be an aspect of the Commerce Clause claim.

taxing power.[4] This matter is before the Court on the parties' cross-motions for summary judgment.

Procedural History

On July 21, 2003, "the Commissioner of Revenue granted a written waiver of the requirement that a claim for refund be filed with respect to each plaintiff pursuant to Tenn. Code Ann. § 67-1-1802(c)(2) (letter attached as Exhibit 1)." Complaint, ¶ 42. Plaintiff timely brought this refund suit on August 19, 2003, within six months of the waiver under Tenn. Code Ann. §§ 67-1-1801(a)(1)(A) & 67-1-1802(c)(2). *See id*. The Commissioner filed an Answer on October 21, 2003, stating that the Plaintiffs' refund suit only "applies to returns filed on or after January 1, 2002, and before July 21, 2003." Answer, ¶ 2.

On December 8, 2003, the Court entered an Order denying the Tennessee Cable Telecommunications Association's ("TCTA") Motion for Intervention as a Matter of Right or by Leave of Court. In that same Order, the Court permitted the TCTA to participate as *amicus curiae*. TCTA, therefore, was allowed to file summary judgment briefs in support of the constitutionality of the tax exemption favoring the cable industry. In an Order entered May 18, 2011, however, the Court denied

---

[4] Previously, courts have rejected all of the satellite industry's dormant Commerce Clause challenges to state tax statutes (Kentucky, Ohio, North Carolina, and Massachusetts) which treat the cable and satellite industries differently. These decisions are cited on p. 23, below.

TCTA's motion to participate in oral argument on the parties' cross-motions for summary judgment.

Overview

Article I, § 8, cl. 3 of the United States Constitution grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Id*. In addition to this affirmative grant of power to Congress, the Commerce Clause, by implication, necessarily contains an inherent "dormant,"[5] "negative" or prohibitory thrust which prevents states from taking action that places an impermissible burden on interstate commerce. *See United Haulers Ass'n, Inc. v. Oneida—Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007); *Quill Corp. v. North Dakota*, 504 U.S. 298, 312-13 (1992). Here, Plaintiffs are making a dormant Commerce Clause challenge to Tennessee's sales tax exemption that favors cable companies.

The Tennessee General Assembly has broad taxing authority that courts should not interfere with unless a taxing measure violates the federal or state constitution. *See Sears, Roebuck & Co. v. Woods*, 708 S.W.2d 379, 383 (Tenn. 1986); *Evans v. McCabe,* 52 S.W.2d 159, 160 (Tenn. 1932). Similarly, Tennessee courts "do not decide constitutional questions unless resolution is absolutely necessary

---

[5] The basic idea is that when Congress fails to act in an area of interstate commerce, the constitutional power to do so lies dormant until a state or local government enacts a measure that potentially impacts interstate commerce.

to determining the issues in the case and adjudicating the rights of the parties." *State v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002)(citing *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). Tennessee statutes are presumed to be constitutional.[6] *See Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009); *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). The challenger, as a general proposition, must persuade the court that no set of circumstances exists under which the statute, as written, would be valid. *See U.S. v. Salerno*, 481 U.S. 739, 745 (1987); *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (quoting *Davis—Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)). States, moreover, may not make or enforce laws that deny any person the equal protection of the laws.

Facts[7]

The Satellite and Cable Industries

Plaintiff DIRECTV, Inc. ("DIRECTV") is a corporation organized in the State of California and headquartered in El Segundo, California. *See* Deposition of Brian Smith ("Smith Dep.") 6:21-22,

---

[6] Similarly, the United States Supreme Court has declared that statutes "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality[.]" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The presumption of constitutionality applies to Plaintiffs' dormant Commerce Clause and equal protection challenges to the tax exemption.

[7] These facts are undisputed for summary judgment purposes.

Feb. 5, 2010. Plaintiff EchoStar Satellite, L.L.C., now known as DISH Network, L.L.C. ("DISH"), is a corporation organized under the laws of Colorado and headquartered in Englewood, Colorado. *See* Deposition of Tamara Volmer ("Volmer Dep.") 5:3-7, March 4, 2010. DISH and DIRECTV (collectively, "satellite TV providers") are two providers of multi-channel video programming distribution ("MVPD") in the United States. They offer pay-TV programming to customers in Tennessee and across the United States through "direct broadcast satellite" service, abbreviated as "DBS." Affidavit of Giles Lundberg ("Lundberg Aff.") ¶ 2, Feb. 1, 2011; Affidavit of David Shull ("Shull Aff.") ¶ 2, Jan. 31, 2011.

MVPD programming is also delivered to customers in Tennessee and across the United States by companies ("cable TV providers") that use ground-based distribution systems requiring tens of thousands of miles of cables and scores of related physical structures (e.g., headend facilities, hubs, and nodes). *See* Tenn. Cable Telecomms. Ass'n Answer in Intervention ("TCTA's Answer") at p. 3, ¶ 15, *DIRECTV, Inc. v. Chumley*, No. 03-2408-IV (Tenn. Chancery Ct. Oct. 28, 2003); Affidavit of Walter Ciciora ("Ciciora Aft.") ¶ 24-25, 28, Feb. 10, 2011. At all relevant times in the Complaint (i.e., January 1998 through the present date), satellite TV providers and cable TV providers have been competitors in the same market for pay-TV services in Tennessee. *See*, *e.g.*, Affidavit of Allyn R. Gibson ("Gibson Aff."), Ex. J at 4-6, 81-82, 86-88, Feb. 15, 2011; TCTA's Answer at p. 3, ¶ 14 & p. 6, ¶ 27; Shull Aff. ¶ 2; Lundberg Aff. ¶ 3; Deposition of Sherry

Hathaway ("Hathaway Dep.") 13:03-8 Oct. 28, 2009; Non-Party Comcast Corporation's Stip. of Facts ("Comcast Stip.") ¶ 1, July 26, 2010.

In the late 1990's, pay-TV customers in certain parts of Tennessee could also choose to subscribe to a third type of pay-TV service known as "wireless cable" TV. Wireless cable providers deliver television programming by transmitting it through the air from towers located on the ground to receiving equipment at customers' homes, without the use of cable lines. Tennessee Wireless Inc. was a Knoxville-based wireless cable provider that transmitted television programming from a tower on Sharp's Ridge in Tennessee exclusively to Tennessee customers in the late 1990's. *See* Hathaway Dep. 137:2-16; Hathaway Dep., Ex. 11; Affidavit of Edward L. Spangler, Jr. ("Spangler Aff.") ¶¶ 2, 4-7, Aug. 30, 2010. Both cable TV providers and satellite TV providers offer customers a variety of television programming packages to suit different budgets and tastes. *See* Lundberg Aff. ¶¶ 5-6; Shull Aff. ¶¶ 3-4; Smith Dep. 35:11-37:6. Although cable TV providers and satellite TV providers both deliver pay-TV programming to customers, they assemble and deliver that programming differently. *Compare* Comcast Stip., July 26, 2010 *with* Affidavit of James Butterworth ("Butterworth Aff.") ¶¶ 2-10, Feb. 1, 2011; *see also* Affidavit of Jeffrey McSchooler ("McSchooler Aff.") ¶¶ 2-11, Feb. 3, 2011.

The typical cable TV provider obtains television programming from networks by various sources (including satellite) and collects those signals back at assembly and distribution points

called "headends." Comcast Stip. ¶¶ 2, 4, July 26, 2010; Ciciora Aff. ¶ 22. The typical cable headend in Tennessee is a building surrounded by several large satellite dishes. Some of those satellite dishes are the size of a truck. *See* Ciciora Aff. ¶ 22; *see also* Gibson Aff., Ex. C. The satellite dishes at cable TV providers' headend facilities gather programming signals and direct them to hundreds of receivers located in the headend building. *See* Ciciora Aff. ¶ 22; *see* Comcast Stip. ¶¶ 4-5, July 26, 2010. At each headend facility, scores of cable employees take the signals received by the dishes at the facility, modulate those signals, insert local advertising, and assemble the signals and advertising into defined programming packages. *See* Ciciora Aff. ¶ 24; Comcast Stip. ¶5, July 26, 2010. Those programming packages are then delivered into tens of thousands of miles of fiber optic cables or coaxial cables laid in trenches along roads or hung from electric utility poles. *See* Ciciora Aff. ¶¶ 23, 25; Comcast Stip. ¶¶ 5-9, July 26, 2010; TCTA's Answer at p. 6, ¶ 21.

Most specifically, after leaving the headend, the signals travel through "trunk" lines located several feet below the earth and are then distributed further through "hubs" and/or "nodes" into "feeder" or distribution lines. Hubs and nodes are physical buildings or cabinet devices that must be installed and maintained on a neighborhood-by-neighborhood basis across the state. *See* Comcast Stip. ¶¶ 6-7, July 26, 2010; Ciciora Aff. ¶ 24. Cable Television programming signals ultimately reach each subscriber's home via a "drop" line running from a feeder line. The network of trunk, feeder, distribution and drop lines and the interconnecting

hubs, nodes and taps that cable TV providers use to distribute television programming to their Tennessee customers are physical structures located on the ground, laid in trenches, and/or attached to buildings and poles in Tennessee. *See* Comcast Stip. ¶¶ 8-9, July 26, 2010; Ciciora Aff. ¶ 24.

Satellite TV providers use an arguably more efficient assembly and distribution system. They do not use headends in Tennessee to assemble the television programming they provide their subscribers but, rather, collect and assemble the signal at uplink facilities which in turn transmit the signals to some 22 satellites located 22,300 miles above the Earth's atmosphere. *See* Butterworth Aff. ¶¶ 3, 4, 6; McSchooler Aff. ¶¶ 3, 6, 9; *see also* Smith Dep. 12:20-12:13; Volmer Dep. 8:18-9:9:2. The two largest uplink facilities DISH uses are located in Cheyenne, Wyoming and Gilbert, Arizona. DIRECTV's two largest uplink facilities are located near Castle Rock, Colorado and Los Angles, California. Neither company has any uplink facilities in Tennessee. *See* Butterworth Aff. ¶¶ 6, 9; McSchooler Aff. ¶¶ 4, 8.

Like cable headends, uplink facilities are responsible for gathering, merging and encrypting television programming signals. Thus, each of the uplink facilities identified above has its own farm of satellite dishes, studio equipment, and staff of trained employees. *See* Butterworth Aff. ¶ 7; McSchooler Aff. ¶ 5. From the uplink facilities, the programming signals are transmitted to satellites that hang in geostationary orbit above the Earth. *See* Butterworth Aff. ¶¶ 3, 7; McSchooler Aff. ¶¶ 3, 5;

Smith Dep. 12:20-13:13. From the satellites orbiting in space, the signals of television programming from satellite TV providers are beamed back down through the air directly to customers, who receive the signals by means of a pizza-sized receiving dish mounted at or near their homes. *See* Butterworth Aff. ¶ 8; McSchooler Aff. ¶ 6; Smith Dep. 13:7-14:3; Volmer Dep. 9:2-5.

Tennessee cable companies have invested over $1 billion to build, service, and maintain cable's in-state distribution systems. *See* Affidavit of Stacey Burks Briggs ("Briggs Aff.") ¶ 7, Feb. 4, 2011; Gibson Aff., Ex. E. Tennessee's four largest cable operators employed a total of 1,531 people as of February 1999; had a total infrastructure investment for 1998 of $127.4 million; had a total projected infrastructure investment for 1999 of $128.7 million; and had gross receipts in 1997 of $417 million. *See* Deposition of Stacey Burks Briggs ("Briggs Dep.") 90:15-92:10, Mar. 16 2010; Briggs Dep., Ex. 46; *see also* Briggs Aff. ¶¶ 5-6. As of March 2010, cable TV companies employ over 4,000 Tennessee residents, many of whom assemble programming packages, construct, operate, and maintain the web of cables and related distribution facilities, and/or connect and disconnect drop lines to subscribers home. *See* Affidavit of Anna Durham Window ("Window Aff."), Ex. A, Feb. 14, 2011; *see also* Briggs Dep. 97:22-24; Ciciora Aff. ¶ 26.

The employee figures described above do not include the number of independent contractors who worked for cable TV providers to repair cable lines in Tennessee or to install cable television systems in the homes of subscribers in Tennessee. *See* Briggs

Aff. ¶¶ 6-7. This workforce is not fungible. Many of the employees included in the figures identified above require a particular set of skills and training that cannot be readily transferred to a different industry. *See* Ciciora Aff. ¶¶ 23, 26.

Because cable TV providers must utilize the public right-of-way to install or lay their cables, cable TV providers must obtain permission, in the form of a franchise from the local governmental authorities, to access and use public property. In exchange for these valuable property rights, cable TV providers must pay "franchise fees" to local governments within the state. *See* Comcast Stip. ¶ 10, July 26, 2010, TCTA's Answer at p. 6, ¶ 24; Ciciora Aff. ¶ 11; Hathaway Dep. 93:23-94:11. The typical franchise fees charged to a cable TV provider by a local government in Tennessee are 3-5% of that cable company's gross revenue from sales to customers within a given area. Cable pays $40 million annually to Tennessee municipalities. *See* Ciciora Aff. ¶ 11; Briggs Aff. ¶ 7; Briggs Dep., Ex. 45; *see also* Gibson Aff., Ex. H.

Cable TV providers also pay millions of dollars each year to municipal utility companies for the right to attach their delivery wires to utility poles in the state. *See* Ciciora Aff. ¶ 11. Because of its in-state distribution system, the cable industry is "an economic engine that drives direct and indirect benefits" to Tennessee in the form of employees, infrastructure, and revenue from taxes and fees paid to local towns and cities in the State. In addition Tennessee "cable companies are … valuable employers and good corporate citizens, generating

revenues for municipalities and the state[.]" Gibson Aff., Ex. E. Satellite TV providers, on the other hand, pay for the right to locate their satellites in outer space and beam their signals through certain frequencies. Those fees are paid to the federal government and not Tennessee municipalities. *See* Butterworth Aff. ¶ 13; McSchooler Aff. ¶ 13.

Tennessee's Tax Treatment of Satellite and Cable

As of 1998, the three types of pay-TV service available in Tennessee—cable, satellite TV, and wireless cable—were subject to different sales tax treatment. *See* Deposition of Mike Cole ("Cole Dep.") 32:5-35:7, Jan. 28. 2010; Cole Dep., Ex. 30 at TN 005; Hathaway Dep. Ex. 16. In 1998, cable service was taxed under the State amusement tax, Tenn. Code Ann. § 67-6-212(a), at the State Sales tax rate of 6% for any charges in excess of "basic" service, a term subject to varying interpretations. *See* Hathaway Dep. 46:18-48:3; Cole Dep. 32:5-35:7; Cole Dep., Ex. 30 at TN 005; Tenn. Code Ann. § 67-6-212(a)(1998). In 1998, wireless cable TV service and satellite TV service were taxed under Tenn. Code Ann. § 67-6-102 as telecommunication services at the State rate of 6%. *See* Hathaway Dep. 54:19-55:10; Cole Dep., Ex. 30 at TN 005; Tenn. Code Ann. § 67-6-102(30)(1998). Purchase of wireless cable TV and satellite TV services received no tax exemption for charges for basic TV programming. *See* Cole Dep., Ex. 30 at TN 005.

On February 25, 1998, the Tennessee General Assembly's Joint Select Committee on Business Taxes convened to discuss proposed legislation that

would have granted wireless cable television service the same tax exemption on "basic service" enjoyed by traditional cable television service under the sales tax statutes then in effect. *See* Cole Dep. 44:10-50:4; Cole Dep., Ex. 31; Gibson Aff., Ex. B. At the conclusion of the 1998 Hearing, the Committee rejected the proposed bill but requested the Department of Revenue to look into equalizing the taxation of TV services. *See* Gibson Aff., Ex. B at 18-20. Following the directive from the Tennessee General Assembly's Joint Select Committee on Business Taxes at the 1998 Hearing, the Tennessee Department of Revenue drafted a technology neutral tax bill for the 1999 legislative session that would have applied the same sales tax rate and provided the same sales tax exemption to all three kinds of providers of pay-TV service in Tennessee-cable, wireless cable, and satellite (the "1999 Bill"). *See* Cole Dep. 36:25-40:22, 110:1-16, Cole Dep. 122:11-123:2; Hathaway Dep., Ex. 16. The 1999 Bill was an initiative from the Department of Revenue that was approved by the Governor. *See* Cole Dep. 37:18-38:2, 65:20-66:15.

As initially drafted, the 1999 Bill subjected all pay-TV services to sales tax at the rate of 8.25% on all charges in excess of $12.00 per month, regardless of the means by which the television services were provided. *See* Hathaway Dep., Ex. 16. On February 17, 1999, the pay-TV tax equalization bill sponsored by the Department of Revenue and approved by the Governor was introduced in the Tennessee House of Representatives and Senate. *See* Cole Dep. 65:6-66:17; Hathaway Dep., Exs. 12, 13. The Department of Revenue prepared a "bill capsule" to summarize

the 1999 Bill (the "Bill Capsule") and explain the rationale behind the bill to legislators on the various tax or finance committees that would consider the bill. *See* Cole Dep. 36:24-37:17, 41:19-25; Hathaway Dep., Ex. 16. The Bill Capsule set forth the issue to be addressed by the 1999 Bill; namely, that cable, wireless cable, and satellite TV providers were subject to different and inconsistent tax schemes. *See* Hathaway Dep., Ex. 16. To resolve these issues, "[t]he bill will ensure that all paid television providers are treated equally, regardless of the technology used." Hathaway Dep., Ex. 16. Bo Johnson worked as the chief lobbyist for the TCTA during the Tennessee General Assembly's 1999 legislative session. *See* Briggs Dep. 52:20-25; *see also* Affidavit of Bo Johnson ("Johnson Aff.") ¶ 4, April 8, 2010. In his capacity as lobbyist for the TCTA, Johnson represented the interests of the member entities of the TCTA—cable companies operating in Tennessee—and his responsibilities included tracking legislative proposals that potentially affected cable companies, discussing those bills with members of the TCTA, and devising and carrying out lobbying campaigns to advance the interests of the TCTA's member companies. *See* Johnson Aff. ¶ 4.

Macon Dew served as Director for the Audit for the Tennessee Department of Revenue for several years, including during calendar year 1999. As Director of Audit, Dew's responsibilities included reviewing and assisting in the preparation of proposed tax legislation and serving as a liaison between industry representatives and Department of Revenue Commissioner Ruth Johnson and the Department of Revenue. The TCTA regarded Dew as

a "decision maker" at the Department of Revenue. *See* Affidavit of Macon Dew ("Dew Aff.") ¶ 2, March 30, 2010; Cole Dep., Ex. 36 at TCTA_0000288.

Mike Cole served as Deputy Commissioner of the Tennessee Department of Revenue from 1993 to 2002. As Deputy Commissioner, Cole's responsibilities included overseeing the assistant commissioners and acting as the chief legislative liaison for the Department of Revenue. Cole was also responsible for overseeing proposed legislation. *See* Cole Dep. 8:19-24, 14:1-8, 24:2-7. During the Tennessee General Assembly's legislative sessions that took place while Mike Cole was Deputy Commissioner, Cole had daily contact with legislators from both houses of the Tennessee General Assembly. Cole interacted with legislators at the Legislative Plaza, answered questions from legislators by phone, met with legislators in their offices, and attended and spoke at legislative hearings. *See* Cole Dep. 15:7-16:7, 30:4-23, 128:7-10.

During his time as Deputy Commissioner, whenever a Department of Revenue initiative was introduced as a bill, Cole worked to get it passed. For example, when a bill was scheduled for consideration by a legislative committee, Cole would meet with every member of that committee to explain what the Department was trying to accomplish with that legislation, prepare to answer questions in committee meetings, and discuss proposed amendments in committee meetings. *See* Cole Dep. 76:14-77:21. During the legislative sessions that took place while he was Deputy Commissioner, Cole also

met with industry groups and lobbyists. *See* Cole Dep. 18:15-25.

On January 21, 1999, the Department of Revenue discussed its proposed pay-TV tax equalization bill (i.e., 1999 Bill) with representatives from the pay-TV industry, including Bo Johnson. *See* Hathaway Dep. 96:6-97:21; Hathaway Dep., Ex. 6 at TN 003-004 & Ex. 7; Briggs Dep., Ex. 44. During the January 21, 1999 meeting, Johnson objected to the proposed tax equalization bill, reminding the attendees of the expenses that cable companies incur in the state due to cable's equipment requirements and the equipment taxes, use taxes, property taxes and franchise fees cable companies had to pay to Tennessee and to local municipalities in order to deliver their programming. *See* Hathaway Dep., Exs. 6 & 7; Hathaway Dep. 102:21-24,108:11-111:5.

In the same time frame as the January 21, 1999 meeting, representatives from the cable industry met with other leaders of the Department of Revenue, including Cole, and reiterated cable's objection to the 1999 Bill. Among other points, representatives and lobbyists from the cable industry emphasized cable's support for local infrastructure. *See* Hathaway Dep., Ex. 7; Cole Dep., Ex. 32 *see* Cole Dep. 61:19-64:9, 83:18-84:25; 87:7-88:20; *see also* Hathaway Dep., Ex. 10. During meetings with representatives from the Department of Revenue, including Cole and Dew, Bo Johnson and representatives for Tennessee cable TV providers argued that cable TV providers were more deserving of a tax exemption than satellite TV providers because the cable industry invested millions of

dollars in the State of Tennessee, employed thousands of state residents, paid franchise fees and excise taxes in Tennessee, and otherwise had a strong presence in Tennessee communities. They then compared cable's contribution to satellite's contributions to Tennessee, noting that satellite TV providers do none of the things cable TV providers do to benefit Tennessee. *See* Dew Aff. ¶¶ 6-8; Johnson Aff. ¶¶ 8-13; Cole Dep. 83:18-84:25, 87:7-88:20.

In the Spring of 1999, lobbyists and representatives for the cable industry made the same arguments to legislators similar to the ones that they had made in their meetings with the Department of Revenue, arguing in favor of a tax exemption for cable TV providers and against a tax exemption for satellite TV providers because cable television companies invested millions of dollars in the state of Tennessee, provided jobs for hundreds of Tennessee citizens, paid franchise fees and excise taxes in Tennessee, and had a strong presence in Tennessee communities—all things that satellite companies did not do. *See* Dew Aff. ¶¶ 6-9; Johnson Aff. ¶¶ 9-10, 13-14, 16; Cole Dep., 83:18-84:25; *see also* Cole Dep. 63:8-64:9. As part of the Tennessee cable industry's lobbying efforts during the 1999 legislative session, the TCTA sent cable employees to meet with senior leadership and key members of the Senate and House Finance, Ways, and Means Committees (i.e., the committees charged with voting on the Department's bill in the first instance). *See* Cole Dep., Ex. 33; Cole Dep. 68:18-77:21; Briggs Dep. 123:19-125:13; 126:13-134:22; Johnson Aff. ¶ 15.

In early March 1999, the TCTA dispatched representatives comprised of employees from Tennessee cable operators led by Tennessee cable executives including Gene Shatlock from Comcast—Chattanooga (head of "Team Shatlock") and Dean Deyo from Time Warner—Memphis (head of "Team Dean Deyo"). *See* Cole Dep., Ex.33. While the 1999 Bill was pending before the General Assembly, the TCTA held its annual "Cable Days" with members of the General Assembly at the Crowne Plaza Hotel. *See* Cole Dep., Ex. 37; Briggs Dep., Ex. 50 & Ex. 51; Briggs Dep. 154:18-156:16; 156:19-167:23. TCTA's Cable Days provided the cable industry with an opportunity to present legislators and meetings, presentations, and social events. *See* Cole Dep., Ex 33; Briggs Dep., Ex. 50 & Ex. 51; Briggs Dep. 156:19-167:23.

On May 24, 1999, Representative Rinks introduced an amendment to the 1999 Bill during a House Finance and Ways Committee hearing (the "May 24, 1999 Hearing") that changed the 1999 Bill to grant cable TV service a $15 sales tax exemption, while the other two pay-TV services—satellite and wireless cable—were taxed at the first dollar. *See* Hathaway Dep., Ex. 22, Ex. 23, Ex. 24; Cole Dep. 124:7-127:2, 131:9-133:1. At the May 24, 1999 Hearing, Representative Rinks emphasized the fact that cable companies had property in the state and paid taxes on those properties, while satellite companies did not have property in the state and, accordingly, did not pay those same taxes. *See* Cole Dep. 136:4-140:8. Deputy Commissioner Cole recalls hearing other versions of this same argument during the 1999 legislative session. *See* Cole Dep. 140:3-8,

141:25-142:6. According to Deputy Commissioner Cole, cable lobbyists made similar arguments to members of the General Assembly that they presented to Cole and others at the Department of Revenue. *See* Cole Dep. 142:2-142:6. On May 24, 1999, the Tennessee House of Representatives adopted the 1999 Bill as amended at the May 24, 1999 hearing. *See* Hathaway Dep., Ex. 24 at 4-5; Cole Dep. 145:4-146:14.

Tax Treatment During Relevant Period

Effective July 1, 1999, purchase of traditional cable TV and wireless cable TV were exempt from all sales tax on the first $15 of each bill. The amount of each bill between $15.01 and $27.50 was subject to tax at a rate of 8.25% and any charge for traditional cable TV and wireless cable TV greater than $27.50 was subject to the state sales tax rate of 6%, plus a local option tax of up to 2.75%. *See* Tenn. Code Ann. § 67-6-226, § 67-6-103(f) & § 67-6-714(a). Effective July 1, 1999, purchases of satellite TV were subject to state sales tax at a rate of 8.25% on all charges for satellite TV service. Purchases of satellite TV did not receive any exemption for the first $15 paid for those services. *See* Tenn. Code Ann. § 67-6-227 (1999).

The tax scheme described in the prior paragraph remained in effect from July 1, 1999 to the present day, with the only change to the rates applicable to pay-TV coming in 2002, when the generally applicable state sales tax rate was increased from 6% to 7%, making any charges for traditional cable TV and wireless cable TV greater than $27.50 subject to State sales tax at a rate of

7% plus a local option tax of up to 2.75%. *See* Tenn. Code Ann. § 67-6-202 & § 67-6-226. In an article that appeared in *The Commercial Appeal* (Memphis, TN) on August 20, 1999 describing the enactment of the 1999 Bill, Deputy Commissioner Cole confirmed that "[i]n [the] original bill, satellite television customers got the same sales tax exemption that cable customers got, 'but *by the time the cable people were through with it, they* (satellite customers) got no exemption.'" Cole Dep., Ex. 34 (emphasis added). In the same August 20, 1999 *The Commercial Appeal* article, Bo Johnson explained that the disparate tax treatment of satellite TV providers was justified because "cable companies 'have millions of dollars invested in Tennessee, we pay local governments for the use of their right-of-way, those are costs that those other entities don't have.'" Cole Dep., Ex. 34. An August 27, 1999 Letter to the Editor of *The Commercial Appeal* explained the cable industry's rationale for opposing any change in the structure of taxation for satellite companies as follows:

> The logic for this is extremely simple. Cable television companies in Tennessee have established a huge infrastructure. This includes the formation of local companies which spend hundreds of millions of dollars annually to provide jobs, services and buying power in Tennessee … They have become a part of the Tennessee cities and town that they serve. This is an investment that our satellite competitors do not provide.

Cole Dep., Ex. 35 at TCTA_0000081.

Impact of Tax Exemption

In one of its briefs, the Commissioner provided the following example as an effort to illustrate the impact of the tax exemption:

> Although cable operators do not have to charge a sales tax on the first $15.00 of monthly service fees, they pay a higher tax rate on monthly service fees in excess of $27.50. At a rate of 8.25%, the state sales tax on the first $15.00 of service equals $1.24. When package rates exceed $27.50, the cable customer begins to lose the benefit of the $15.00 exemption. For example, a resident of Williamson or Davidson County, where the local option sales tax rate is 2.5%, would pay $2.22 in sales taxes on a monthly cable package of $39.99 as compared to $3.30 in sales taxes for the comparable satellite package. This cable customer has saved only $1.08 in taxes, not $1.24. Moreover, a cable customer in these counties additionally would pay a franchise fee of up to 5%, or about $2.00, raising the cable customer's taxes and fees to $4.22, as compared to $3.30 for a satellite customer in the same county.

Commissioner of Revenue's Response in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 3-4. The facts in the foregoing excerpt are undisputed,

even though the parties may not agree with the characterizations or comparisons implicated by the excerpt. The impact on the satellite industry is direct. Every Tennessee satellite customer pays sales tax on their entire satellite bill every month, while every Tennessee cable customer pays no sales tax on the first $15.00 of their monthly cable bill. Although Plaintiffs and the key cable companies all have a Tennessee presence and all are engaged in interstate commerce, it is undisputed that cable has a much greater physical and economic footprint in Tennessee and that this difference in footprint was given weight by some of the people involved in the legislative process.

Applicable Procedural Standard

Tennessee Rule of Civil Procedure 56, which was adopted in 1970, allows parties to obtain a partial or full judgment before trial if the moving party is able to "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. The summary judgment mechanism was designed to fill a then-existing procedural gap "for disposition of a case in the trial courts without an actual trial on the merits if the case could not be disposed of on demurrer or plea in abatement." Tenn. R. Civ. P. 56 advisory commission comment. The Commission, therefore, described the rule as "a substantial step forward to the end that litigation may be accelerated, insubstantial issues removed,

and trial confined only to genuine issues."[8] *Id*. Rule 56, consistent with corresponding rules adopted for the federal system and by other states, contemplates that litigants would have an adequate opportunity to develop the evidentiary record (through discovery and other means) before the case, or issues in a case, may properly be decided by summary judgment. *See* Tenn. R. Civ. P. 56.03, 56.04, 56.06, 56.07; *Craven v. Lawson*, 534 S.W.2d 653, 655 (Tenn. 1976).

It is now well-settled that a court may grant summary judgment if it determines that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In the summary judgment context, the court's consideration of the facts is record driven. *See McClung v. Delta Square Ltd. P 'ship*, 937 S.W.2d 891, 894 (Tenn. 1996). The parties, therefore, should not attempt to establish or refute liability under Tenn. R. Civ. P. 56 by merely resting on general allegations in the pleadings. *See* Tenn. R. Civ. P. 56.06; *Byrd*, 847 S.W.2d at 215; *McCarley v. West*

---

[8] Although frivolous claims would appear to be necessarily included in the Rule 56 policy of summarily adjudicating "insubstantial" issues or claims failing to raise "genuine issues of material fact," the Rule and its Advisory Commission Comments do not mention frivolous claims. Consequently, even though courts sometimes refer to frivolous claims when discussing the summary judgment standard, it appears that this is merely a shorthand reference to the actual standard set forth in Rule 56 and the case law. This Court, therefore, does not require that a claim be frivolous before it can be disposed of by summary judgment.

Quality Food Serv., 948 S.W.2d 477 (Tenn. 1997). On the question of burden-shifting, the Tennessee Supreme Court recently held that "a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). In determining whether there are genuine issues of material fact, the court is required to construe the facts in the light most favorable to the nonmoving party. *See Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000).

Analysis and Rulings
Dormant Commerce Clause

The constitutional proviso that Congress "shall have power … to regulate commerce … among the several states" necessarily prohibits states from adopting legislative measures that "regulate" interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3. The difficulty arises, in part, because the Commerce Clause's straight forward designation of Congress as the body authorized to regulate interstate commerce, and the negative implication that states cannot, provides little guidance for courts to decide, on a principled basis, which state measures "regulate" interstate commerce in a way that runs afoul of the dormant Commerce Clause. The fact that many might agree that the word "regulate" means, in

effect, "to govern or direct according to rule"[9] does not reveal much about the contours of this constitutional prohibition, particularly when it is applied to our complex, technology-driven, border-transcending economy where diverse states and ever-changing industries and companies compete with each other.[10]

One of the fundamental values in dormant Commerce Clause jurisprudence is that states cannot engage in economic protectionism at the expense of other states or interstate commerce. Dormant Commerce Clause precedent limits the extent to which states and localities may "regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). In this context, whether a measure is viewed as protectionist turns on "whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). On the other hand, our Constitution, including the Commerce Clause, features a basic framework (federalism) that posits that state and local governments retain certain zones of autonomy.

Recently, the Sixth Circuit reiterated its approach to dormant Commerce Clause challenges:

---

[9] *See* http://www.merriam-webster.com/dictionary/regulate.

[10] These complexities militate in favor of the sensitive case-by-case analysis required by the case law. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

This Circuit has adopted a two-step analysis to evaluate challenges to the dormant Commerce Clause. *Int'l Dairy Foods Ass'n v. Boggs,* 622 F.3d 628, 644 (6th Cir. 2010). Under the first step, we must determine whether "a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests." *Id.* (*quoting Brown-Forman*, 476 U.S. at 579, 106 S. Ct. 2080). "A [state regulation] can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *Id.* at 648 (quoting *E. Ky. Res. v. Fiscal Court of Magoffin Cnty. Ky.*, 127 F.3d 532, 540 (6th Cir. 1997)). "[T]he critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 476 U.S. at 579, 106 S. Ct. 2080. The plaintiff bears the initial burden of proof to show that the state regulation is discriminatory. *Davis*, 553 U.S. at 338, 128 S. Ct. 1801.

If the plaintiff satisfied its burden, then "a discriminatory law 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." *Id.* at 328, 128 S. Ct. 1801

> (quoting *Or. Waste Sys., Inc.*, 511 U.S. at 101, 114 S. Ct. 1345 (internal citation omitted)). However, if the state regulation is neither discriminatory nor extraterritorial, then the court must apply the balancing test established in *Pike*. Under the *Pike* balancing test, a state regulation is upheld "unless the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Int'l Diary*, 622 F.3d at 644 (quoting *Pike*, 397 U.S. at 142, 90 S. Ct. 844).

American Beverage Ass'n v. Snyder, 700 F.3d. 796, 803-04 (6th Cir. 2012). The United States Supreme Court has held that state taxes will be upheld against dormant Commerce Clause challenges if: 1) the tax was applied to an activity that had a "substantial nexus" with the taxing state; 2) the tax was "fairly apportioned;" 3) the tax did not "discriminate against interstate commerce;" and 4) the tax was "fairly related" to the services provided by the taxing state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Over the years, the Court has continued to apply this four-part test in evaluating challenges to state tax laws under the dormant Commerce Clause.

In a discrimination case under the dormant Commerce Clause, the statutory measure itself is the starting point. In other words, the first thing to determine in a dormant Commerce Clause challenge is whether the measure, on its face, prescribes "differential treatment of in-state and out-of-state

economic interests that benefits the former and burdens the latter." *Oregon Waste Sys, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). If the "statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the courts] have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Here, the statute provides a partial sales tax exemption for cable-TV sales that it does not provide for satellite-TV sales. This statutory exemption, by its language, does not indicate any difference in treatment between in-state commercial activities or interests and out-of-state commercial activities or interests. The Court concludes, therefore, that the cable tax exemption here does not, on its face, discriminate against out-of-state economic interests. Plaintiffs have not established that the Tennessee tax exemption for cable is an instance of facial discrimination under the United States Supreme Court dormant Commerce Clause jurisprudence. Consequently, the Court concludes that the challenged tax exemption should not be invalidated as facially discriminatory or as a virtually *per se* violation of the dormant Commerce Clause.

Given that the language of the measure does not itself evince an impermissible purpose or effect, the Court is required to conduct "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). At the outset, a plaintiff, in making a dormant Commerce Clause challenge when the statute is not

facially discriminatory, must show that the businesses or industries that are treated differently are "similarly situated for constitutional purposes." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). These businesses, for example, must compete in the same market. Then, the Court is required to examine the basis for the difference in treatment.

Plaintiffs contend that the tax exemption, as a practical matter, is based on "whether or not a subscriber used a pay-TV service that builds (or uses) ground distribution equipment within the state." Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, p. 31. The retail sale of pay-TV to Tennessee consumers triggers a sales tax obligation, regardless of whether the product is delivered at retail through a cable or satellite delivery system. In other words, the sale is the taxable event at issue here. Satellite and cable companies are direct competitors for these sales. In Tennessee, all the main actors (Plaintiffs and the major cable companies) on both sides of this tax exemption dispute are engaged in interstate commerce and have a Tennessee presence. In comparing the cable and satellite industries, there are differences in facilities, the deployment of technology, the need for local infrastructure, the degree of Tennessee footprint and investment, and the imposition of regulatory and governmental fees and requirements on federal, state, and local levels.[11] Although the cable and satellite industries are

---

[11] Cable, for example, pays local franchise fees and has to provide certain local programming; satellite does not.

different industries using different distribution systems, the Court concludes that they are similarly situated for dormant Commerce Clause purposes here because they vigorously compete and sell virtually identical products at retail—the point where the challenged differences in sales tax obligations are triggered. The Court concludes, therefore, that these industries are similarly situated for purposes of examining the cable tax exemption in question. After briefly discussing similar cases from other jurisdictions, the Court will discuss the issues of discriminatory purpose and discriminatory effect separately, even though the questions of purpose and effect are intertwined, as evidenced by key terms such as "protectionist" and "discriminatory."

Similar Cases in Other Jurisdictions

Courts in other jurisdictions have considered whether the dormant Commerce Clause prohibits differential taxation of satellite providers and cable providers. In each instance, the challenged tax has been upheld. See *DIRECTV, Inc. v. Treesh*, 487 F.3d 471, 480 (6th Cir. 2007), *cert. denied*, 552 U.S. 1311 (2008); *DIRECTV, Inc. v. Commonwealth*, No. 10-0324-BLS1, 2012 WL 6062737, at *1 (Mass. Super. Ct. Nov. 26, 2012); *DIRECTV, Inc. v. State*, 632 S.E.2d 543, 549-50 (N.C. Ct. App. 2006); *DIRECTV, Inc. v. Levin*, 941 N.E.2d 1187, 1193-94 (Ohio 2010), *cert. denied*, *DIRECTV, Inc. v. Testa*, 133 S. Ct. 51 (June 25, 2012). The cases provide persuasive authority. The Court respectfully declines to adopt the approach used by the Ohio Supreme Court because the Court believes that the United States Supreme Court precedent requires this Court

to do a sensitive, case-by-case inquiry and to not limit the inquiry because differing commercial interests in a dormant Commerce Clause case might all be engaged in interstate commerce or on the basis of operational differences that are not necessarily on all fours with the tax or regulatory measure being challenged. The Sixth Circuit case, *Treesh*, supra, involved state excise and gross revenue tax relief for cable companies, which the satellite companies claimed, among other things, constituted a tariff against the satellite companies. *Treesh* is not on all fours with this case.

Discriminatory Purpose

Tennessee's sales tax is inherently transactional. Cable customers do not pay any sales tax on the first $15.00 of the monthly transactions between them and the cable companies. The retail sale is the taxable event here and the differences attendant to the delivery of pay-TV to Tennessee consumers by satellite or cable start to becomes less pronounced as the providers get closer to the point of selling pay-TV to Tennessee customers. In other words, when the differences in the two distribution methods are met at certain junctures with differing regulatory and governmental fee, tax, and local investment obligations, does dormant Commerce Clause jurisprudence allow the Tennessee General Assembly to prescribe another difference at the point where these industries are arguably most alike—the point of sale—particularly given that it is undisputed that the satellite industry's Tennessee presence is substantially less pronounced than that of the cable industry? Under the particularized circumstances of

this case, the Court notes that the state's taxing authority is not required by the dormant Commerce Clause to be exercised in a vacuum and that, given that only a partial sales tax exemption is at issue here, the legislature has a zone of prerogative which permits it to examine and implement a nuanced approach to imposing sales tax in the pay-TV industry in Tennessee. The inquiry, under dormant Commerce Clause jurisprudence, however, does not end here.

States cannot pass laws that have the effect of discriminating against interstate commerce. Here, it is undisputed that the satellite industry and the cable industry are both engaged in interstate commerce; that these two industries compete directly against each other for consumers in Tennessee and elsewhere; and that these industries use different facilities and product delivery systems and are accordingly subject to differing legal, regulatory, and infrastructure burdens. It is also true that these different regulatory and infrastructure burdens yield different tax and governmental fee burdens and that the cable industry has a more Tennessee-specific presence than does the satellite industry, even though both industries have a Tennessee presence. For this reason, cable companies are subject to state and local franchise fees and taxes that the satellite industry does not have to pay. If a satellite company does not need a franchise to compete in Tennessee and in interstate commerce, then it necessarily follows that it should not pay a local franchise fee.

In this case, there is a detailed record about the purposes and design of the exemption being

challenged here. It is undisputed that there is proof that some of the state and cable industry participants were seeking parity between the two industries in terms of Tennessee-specific tax and fee burdens and that the cable exemption started out as a way of exempting basic cable service from sales tax before satellite services were taxable in Tennessee. This is particularly true given that there were parts of Tennessee that had spotty reception for the receipt of free-TV. There is proof that the exemption recognized the positive impact the cable industry had on Tennessee's economy because of its impact on employment and other local interests. In short, the record demonstrates that the exemption in question may have been designed to serve a mixed collection of purposes. This proof, however, does not trump the presumption of constitutionality or the fact that there is a rational, non-discriminatory equity component to the difference in sales treatment. A statute that seeks to provide incentives to certain industries does not mean, in itself, that the statute has a constitutionally impermissible discriminatory purpose. Applying the presumption of constitutionality on the discriminatory purpose inquiry, the Court concludes that the General Assembly had a rational, legitimate basis for enacting the legislation and that the exemption is not necessarily predicated on a constitutionally impermissible discriminatory purpose. The Court concludes, therefore, that the partial tax exemption for cable survives the discriminatory purpose prong of the inquiry.

Discriminatory Effect

It is undisputed that the cable and satellite industries have different regulatory and tax or governmental obligations under Tennessee and federal law. The tax exemption in question taxes the retail sales transactions of two industries (both engaged in interstate commerce and both with Tennessee footprints) differently. Although the cable and satellite industries compete and provide virtually identical or interchangeable products at retail, it is clear that these industries have been historically treated differently at the federal and state levels. Legislative prerogative, however, does not mean that a legislature can impose taxes that have the parochial effect of rewarding in-state commercial activity, while burdening out-of-state commercial activity, without running the risk of violating the dormant Commerce Clause. The Court notes that the Supreme Court of Ohio, the Massachusetts Superior Court and other courts from that have addressed the cable v. satellite issue found no Commerce Clause violation. Most significantly, however, the Court believes the United States Supreme Court jurisprudence commands the result the Court is announcing today.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), West Virginia imposed a tax on "companies selling tangible property at wholesale in West Virginia," but exempted property that was manufactured in West Virginia. *Id*. at 642. So, for example, if a major national enterprise sold widgets at wholesale in West Virginia, the sale might or might not be taxed, depending on whether the

widgets were manufactured in Wheeling (no tax) or Pittsburgh (tax). *See id.* Indeed, even a wholesaler that had all of its operations in West Virginia was ineligible for the exemption to the extent it sold goods that were manufactured outside of the state. The Court found that this scheme unlawfully discriminated against interstate commerce. *See id.* West Virginia rewarded wholesalers that performed a specific operation—manufacturing—in the state. It made no difference to the Court that the intent of the tax scheme was not to incentivize wholesalers to build manufacturing plants in West Virginia, but was rather to protect existing manufacturers, whose goods were already subject to a hefty tax. *See id.* at 642-43. The scheme still ran afoul of the rule that a tax "may not discriminate between transactions on the basis of some interstate element." *Id* at 642 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977)).

Granholm v. Heald, 544 U.S. 460 (2005), involved the building of a distribution facility. New York law prohibited any winery from shipping wine directly to New York customers, unless the winery "establish[ed] a distribution operation in New York." *Id*. A winery could not fulfill a New York customer's order by UPS unless it built a brick-and-mortar building in the state. The Supreme Court had "no difficulty concluding that New York … discriminates against interstate commerce through its direct-shipping laws," explaining that "[t]he New York scheme grants in-state wineries access to the State's consumers on preferential terms." *Id.* at 474, 476. In-state wineries were favored, because, by definition, they already had buildings in the state. *See id.* at

474. Out-of-state wineries were the only ones that needed to build a new building in order to ship directly to customers. *See id*. The Court struck down the law, noting its "particular suspicion" of laws that "requir[ed] business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id*. at 475 (citation omitted).

The tax in question, the sales tax based on the delivery of television services to customers in Tennessee on a monthly basis, deals with virtually identical transactions between the two industries—and indisputably impacts pricing—which implicates interstate commerce to some degree. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984). There should not be a different sales tax burden placed on the satellite industry in delivering virtually identical products to Tennessee consumers because the satellite industry is more heavily federally regulated or because the satellite industry has a diminished obligation to governmental fees or taxes to state and local governments in Tennessee. *See Granholm v. Heald*, 544 U.S. 460 (2005); *Boston Stock Exch. V. State Tax Comm'n*, 429 U.S. 318 (1977). Based on the foregoing and the entire record, the Court concludes that the dormant Commerce Clause prohibits a state from taxing virtually identical taxable events among competitors differently when the difference in tax treatment has the actual effect of favoring a set of competitors with a significantly larger in-state footprint over a set of competitors with a significantly smaller in-state footprint. *See Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). The Court, accordingly, determines that there are no genuine issue of material fact that: 1) the

cable tax exemption taxes virtually identical retail transactions among competitors differently; 2) the tax exemption at issue here has the actual effect of substantially favoring the cable industry over the satellite industry; and 3) the cable industry has a significantly larger Tennessee footprint than does the satellite industry. The Court holds, therefore, that the tax exemption in question violates the dormant Commerce Clause, due to its discriminatory effect. Plaintiffs, therefore, are entitled to judgment as a matter of law.

Equal Protection[12]

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits states, among other things, from making or enforcing any law that denies "any person within its jurisdiction the equal protection of the laws." *Id*. Similarly, Article XI, Section 8 of the Tennessee Constitution provides, in part, as follows:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of

---

[12] In light of the Commerce Clause ruling, the Court does not have to reach the equal protection issue. Alternatively, given that the presumption of constitutionality applied to the discriminatory purpose prong of the dormant Commerce Clause is similar to the rational basis test applicable to Plaintiffs' equal protection challenge, the Court will discuss, in the alternative, the equal protection claim.

> the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Id. This provision of our state Constitution affords "essentially the same protection" as the United States Constitution's equal protection clause. *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994) (quoting *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)). Given that no suspect class or fundamental right is implicated by the cable tax exemption being challenged here, the rational basis test applies to Plaintiffs' equal protection claims under the federal and state constitutions. *See Tester* at 879 S.W.2d at 828.

The rational basis test is the least rigorous of the tests that courts use to evaluate due process and equal protection claims. Generally speaking, the rational basis test examines whether the challenged legislative classification bears a reasonable relationship to a legitimate state interest. *See Tennessee Small Sch. Sys.*, 851 S.W.2d at 153. "Under this standard, if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Id*. at 153 (quoting *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978)). In other words, a legislative classification can withstand an equal protection

challenge under the rational basis test if a reasonable basis for the classification is articulated and this articulated basis bears some logical relationship to a legitimate state interest, even if this articulated rationale is not itself demonstrated in the evidentiary or legislative record as the actual reason for the classification. This approach defers to the legislature's prerogative to make distinctions and classifications in the course of setting public policy.

On the question of equal protection under the state and federal constitutions, the Court concludes that the mixed rationales contained in the record satisfy the rational basis test. The measure has a rational basis. Under equal protection authorities, the statute in question may be upheld even if the articulated reasons for it are not necessarily proven by the legislative record or other proof to be the actual reasons for the legislative measure. The Court concludes, therefore, that the tax exemption in question does not violate the equal protection clause under the Constitution of Tennessee or the United States Constitution.

Conclusion

There are no genuine issues of material fact in the record; the Court concludes that Plaintiffs are entitled to judgment as a matter of law. The Court, therefore, hereby GRANTS Plaintiffs' motion for summary judgment and hereby DENIES Defendant's motion for summary judgment. The Court, accordingly, hereby GRANTS judgment in favor of Plaintiffs. The Court concludes that the cable table tax exemption has a discriminatory effect that

violates the dormant Commerce Clause under United States Supreme Court precedent. The Court determines that Plaintiffs are entitled to an award of attorneys' fees under Tenn. Code Ann. § 67-1-1803(d); those fees will be awarded separately upon Plaintiffs' application after all appeals on the merits have been resolved and have otherwise become final. The Court determines, under Tenn. R. Civ. P. 54.02, that there is no just reason for delay and hereby DIRECTS the entry of final judgment in favor of Plaintiffs and against Defendant based on the rulings contained in this Memorandum and Final Order. The Court taxes court costs against Defendant, for which execution may issue.

IT IS SO ORDERED.

/s/ Russell T. Perkins
RUSSELL T. PERKINS, CHANCELLOR

cc: Michael D. Sontag, Esq.
Stephen J. Jasper, Esq.
E. Joshua Rosenkranz, Esq.
Jeremy Kudon, Esq.
Mary Ellen Knack, Esq.

[Rule 58 Certification
A Copy of this order has been served by U.S. Mail upon all parties or their counsel named above.

/s/ Illegible — Deputy
/s/6/25/13 — Date

Clerk and Master
Chancery Court]

APPENDIX C

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
PART IV, TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE**

DIRECTV, INC. and ECHOSTAR SATELLITE L.L.C., now known as DISH NETWORK, L.L.C.,

Plaintiffs,

v.

RICHARD H. ROBERTS, in his capacity as COMMISSIONER OF REVENUE, for the STATE OF TENNESSEE,

Defendant.

No. 03-2408-IV

AF [handwritten followed by handwritten redaction]

[RECEIVED
JUL 16 2013
Dav. Co. Chancery Court]

[FILED
2013 JUL 17 AM 8:46
Illegible]

AMENDED FINAL ORDER

This Court entered a Memorandum and Final Order in this matter on June 21, 2013, whereby the Court granted the Plaintiffs' motion for summary judgment, denied the Defendant's motion for summary judgment, and granted judgment in favor of the Plaintiffs on their refund claims against the Defendant. The Court hereby enters this Amended Final Order to clarify that the appropriate remedy in this case is for the Defendant to refund to each Plaintiff sales taxes in an amount equal to the difference between the amount the Plaintiff paid in Tennessee sales taxes during the refund period of January 1, 2000, to July 21, 2003, and the amount the Plaintiff would have paid if it were subject to the same sales tax exemption and rates applicable to cable television providers, plus interest on that amount at the rate established in accordance with Tenn. Code Ann. § 67-1-801(a). Prior to receiving payment of the refund amounts the Defendant is required to pay to the Plaintiffs pursuant to this Order and the June 21, 2013 Memorandum and Final Order, Plaintiffs shall provide to the Defendant documentation or other proof that, in accordance with Tenn. Code Ann. § 67-1-1802(a)(1)(A), satisfies the requirement of a refund or credit of the underlying taxes collected from their customers. Accordingly, judgment is hereby entered in favor of the Plaintiffs, and the Defendant is directed to refund the foregoing amounts to the Plaintiffs.

As stated in this Court's Memorandum and Final Order, the Plaintiffs are also entitled to an award of attorneys' fees and expenses of litigation under Tenn. Code Ann. § 67-1-1803(d). The Court

finds, however, that determination of the amount of such fees and expenses to which the Plaintiffs are entitled should await the outcome of any appeals in this case. Accordingly, the Court reserves determination of the amount of attorneys' fees and expenses of litigation to be awarded pursuant to Tenn. Code Ann. § 67-1-1803(d) in this case until all appeals are concluded. If no notice of appeal is filed, the Plaintiffs may file an application for an award of fees and expenses in this Court. If the decision of this Court is appealed, the prevailing party may file an application for an award of fees and expenses in this Court after issuance of the mandate concluding proceedings in the appellate courts.

This Court's Memorandum and Final Order entered on June 21, 2013, shall remain in effect and is incorporated herein as if repeated verbatim. The time for filing a notice of appeal shall run from the date of entry of this Amended Final Order in accordance with Tenn. R. Civ. P. 54.02.

It is so ORDERED.

/s/ Russell T. Perkins
RUSSELL T. PERKINS
CHANCELLOR

APPROVED FOR ENTRY BY:

ROBERT E. COOPER, JR.
Attorney General and Reporter

/s/ Mary Ellen Knack
MARY ELLEN KNACK (#14927)
Senior Counsel
Office of the Attorney General
Tax Division
Mailing Address:
P.O. Box 20207
Nashville, Tennessee 37202
Street Address:
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-6427
(615) 532-2571 *fax*

Attorneys for Defendant

/s/ Stephen J. Jasper [by MEKnack with permission]
MICHAEL D. SONTAG (#11142)
STEPHEN J. JASPER (#22861)
Bass, Berry, & Sims
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
(615) 742-6200
E. Joshua Rosenkranz
Jeremy N. Kudon
ORRICK, HERRINGTON & SUTCLIFF LLP
51 West 52nd Street
New York, New York 10010-6142

Attorneys for Plaintiff

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DIRECT TV, INC., ET AL. V. COMMISSIONER, TN. DEPT OF REVENUE

Chancery Court for Davidson County
No. 032408IV

[FILED
JUN 12 2015
Clerk of the Courts
Rec'd By______________]

No. M2013-01673-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Direct TV, Inc. and Echostar Satellite LLC, now known as Dish Network, and the record before us, the application is denied. The motions filed by Public Knowledge and Satellite Broadcasting & Communications Association for leave to file briefs in support of Rule 11 application is granted.

PER CURIAM