No. 14-1524

In the Supreme Court of the United States

DIRECTV, INC., *et al.*,
Petitioners,
v.

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

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tennessee Court of Appeals correctly held that Tennessee's different tax treatment of cable and satellite television programming services does not discriminate against interstate commerce when both cable operators and satellite providers are out-of-state companies serving a national market and cable operators are more heavily regulated than satellite providers.

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STATEMENT OF THE CASE

Tennessee imposes sales taxes on cable and satellite television programming services under similar, but not identical, taxing schemes. Satellite customers pay a flat state tax rate of 8.25% on all services received. Tenn. Code Ann. § 67-6-227. Cable customers, on the other hand, receive a tax exemption for the first $15.00 of their monthly service fees. Tenn. Code Ann. § 67-6-226. Cable customers then pay a flat state tax rate of 8.25% on all amounts between $15.00 and $27.50. Tenn. Code Ann. § 67-6-226. On service fees exceeding $27.50, cable customers actually pay a higher effective tax rate than do satellite customers. On these amounts, cable customers pay the standard state sales tax of 7%, plus the local-option sales tax applicable in their respective jurisdictions, in amounts of up to 2.75%, for a total potential tax rate of 9.75%. Tenn. Code Ann. §§ 67-6-103(f) & 67-6-702(a)(1).

This statutory scheme was enacted in May 1999, but a version of this exemption, designed to allow Tennessee residents to receive basic television programming services free of tax (R. IV. 572, 576), has been a feature of Tennessee law since 1984. *See* 1984 Tenn. Pub. Acts, ch. 13, § 1. It is undisputed that when these current statutes were passed in 1999, the satellite providers did not offer local television programming services in Tennessee. A change in federal law permitted them to begin offering local programming later that year. (R. IV. 457, 505). Prior to the 1999 legislation, satellite television services were not taxable under Tennessee law, *see HBO Direct, Inc. v. Johnson,* No. 01A01-9804-CH-00221, 1999 WL 452317 (Tenn. Ct. App. July 1, 1999) (no perm. app.

filed), and the basic cable exemption applied only to cable operators.

It is unsurprising that there would be some differences in the tax structures applicable to cable and satellite television services. In 1996, three years before Tennessee enacted the current statutes, Congress passed an act exempting satellite television service providers from collecting or remitting taxes or fees to local governments. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 144 (reprinted at 47 U.S.C.A. § 152, historical and statutory notes). In doing so, however, Congress specifically preserved the authority of the states to tax such services and to distribute revenues derived therefrom to local governments. *Id.* Thus, while local-option sales taxes can be applied to cable television services, as they are in Tennessee, they cannot be applied to satellite services.

Federal laws and regulations historically have treated the cable and satellite television industries differently. Federal laws applicable only to cable operators authorize local governments to award cable franchises and to collect franchise fees in amounts up to 5% of gross revenues. *See* 47 U.S.C. §§ 541 & 542. Unlike satellite providers, cable operators are required by law to carry the signals of local commercial-television stations and noncommercial educational-television stations. *See* 47 U.S.C. §§ 534 & 535.[1]

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[1] In contrast, satellite providers are not required to carry the signals of local television stations. If they choose to provide local programming, however, satellite providers must carry upon request the signals of all television broadcast stations located within that local market. *See* 47 U.S.C. § 338.

Additionally, cable operators are required to make available emergency-broadcast-system information to viewers and to designate a percentage of overall channel capacity for use by unaffiliated entities. 47 U.S.C. §§ 532 & 544(g).

The major providers of cable television services in Tennessee are out-of-state businesses, and most of their employees and assets are not located in Tennessee. (R. III. 435). Petitioners, the two satellite broadcasting companies that provide services to Tennessee, likewise are incorporated and headquartered outside Tennessee. (R. I. 4, 26). Both cable operators and the satellite providers own property in Tennessee and have employees in the state.[2] (R. IV. 471-73, 503, 525; Brian Smith Depo. 24-25).

Nevertheless, petitioners challenged Tennessee's sales tax on satellite television services, alleging that it violated the dormant Commerce Clause of the United States Constitution. Pet. 12-13. They advanced an "economic footprint" theory in support of this claim, arguing that because the cable industry has a relatively larger monetary investment in the state, the dormant Commerce Clause prevents the state from imposing a tax scheme that treats satellite television companies differently from cable television companies. Pet. 13. The trial court granted summary judgment to petitioners. It accepted this theory, finding that "the cable industry has a significantly larger Tennessee

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[2] Although petitioners attempt to minimize their presence in Tennessee, it is undisputed that as of 2010, they and their affiliates had over 700 employees in the state. (R. IV. 525; Smith Depo. 24-25).

footprint than does the satellite industry," and it ruled that the sales-tax statute discriminated against interstate commerce because the exemption on the first $15.00 of monthly cable television charges "has the actual effect of substantially favoring the cable industry over the satellite industry." Pet. App. 71a.

The Tennessee Court of Appeals reversed. The court appeared to comment on petitioners' "economic footprint" theory when it observed that caselaw does not explain "how state legislatures are to weigh variances in investment in order to avoid favoritism," nor "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." Pet. App. 21a-22a. But the court proceeded to address as a threshold question whether satellite providers and cable providers are "substantially similar entities," Pet. App. 27a (quoting *Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 298 (1997)), concluding that they are not: "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." Pet. App. 29a. In this regard, the court made specific reference to "the significant public interest regulations imposed on cable providers by Congress and the Federal Communications Commission." Pet. App. 29a. Because "satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause," the court held, "the disparate tax treatment of satellite providers and cable providers does not constitute discrimination." Pet. App. 32a.

REASONS FOR DENYING REVIEW

In *DIRECTV, Inc. v. Levin,* 941 N.E.2d 1187 (Ohio 2010), the Ohio Supreme Court held that the imposition of a state sales tax on satellite broadcasting companies but not on cable broadcasting companies does not violate the dormant Commerce Clause. 941 N.E.2d at 1190. After calling for and receiving the views of the United States, this Court denied review. *See DIRECTV, Inc. v. Testa,* 133 S. Ct. 51 (2012). *See also DIRECTV, Inc. v. Treesh,* 487 F.3d 471 (6th Cir. 2007), *cert. denied,* 552 U.S. 1311 (2008) (holding that dormant Commerce Clause is not violated by affording state tax credits to cable companies but not to satellite companies).

One year later, this Court also denied review of the decision of the Ninth Circuit Court of Appeals in *Nat'l Ass'n of Optometrists & Opticians v. Brown,* 567 F.3d 521 (9th Cir. 2009). *See Nat'l Ass'n of Optometrists & Opticians v. Harris,* 133 S. Ct. 1241 (2013). That case involved state laws that treated (largely in-state) optometrists and ophthalmologists differently from (largely out-of-state) opticians. 567 F.3d at 524-25. But essentially the same question was presented there as petitioners present here: whether the lower court could properly conclude that the corresponding entities were not similarly situated, and thus that the state law in question did not discriminate against interstate commerce, even though the entities competed in the same market. *See* Pet. For Writ of Cert., *Nat'l Ass'n of Optometrists & Opticians v. Harris,* 2012 WL 4883562,

at *i-ii (U.S. Oct. 11, 2012).[3] *See also LensCrafters, Inc. v. Robinson,* 403 F.3d 798 (6th Cir. 2005), *cert. denied,* 546 U.S. 1172 (2006) (holding that state law did not discriminate against out-of-state opticians in part because "dispensing optometrists and optical stores are not similarly situated for Commerce Clause purposes").

There is no more reason for this Court to grant certiorari now than there was when it denied certiorari in *Brown* and in *Levin*, just two and three years ago respectively. The decision of the Tennessee Court of Appeals is consistent with decisions in other jurisdictions likewise holding that disparate treatment of cable and satellite broadcasting companies does not violate the dormant Commerce Clause. And contrary to petitioners' assertions, the decision of the Tennessee Court of Appeals does not conflict with decisions of the federal circuit courts or of other state courts, or with this Court's dormant Commerce Clause precedents.

I. The Tennessee Court of Appeals' Decision Comports with Decisions in Other Jurisdictions that Have Considered the Satellite Providers' Dormant Commerce Clause Claim.

The Tennessee Court of Appeals' decision does not conflict with any final decisions from other jurisdictions that have considered petitioners' Commerce Clause challenge. To date, virtually every court that has considered petitioners' claim has held that different tax treatment of cable operators and satellite providers

[3] The petition for writ of certiorari was filed in 2012, after the Ninth Circuit had remanded in *Brown* and after a second appeal, *Nat'l Ass'n of Optometrists & Opticians v. Harris,* 682 F.3d 1144 (9th Cir. 2012).

does not violate the dormant Commerce Clause. *See DIRECTV, LLC v. Dep't of Revenue*, 25 N.E.3d 258, 266 (Mass. 2015), *petition for cert. filed*, No. 14-1499 (U.S. June 18, 2015); *DIRECTV v. Levin*, 941 N.E.2d at 1194; *DIRECTV, Inc. v. North Carolina,* 632 S.E.2d 543, 549-50 (N.C. Ct. App. 2006); *see also Treesh,* 487 F.3d at 481.

These decisions recognize the important differences between cable operators and satellite providers for purposes of applying the dormant Commerce Clause's mandate that a state not discriminate against interstate commerce. As one court explained, "[t]he 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." *DIRECTV v. Levin*, 941 N.E.2d at 1195; *accord DIRECTV v. North Carolina*, 632 S.E.2d at 550 ("[T]he geographical location of the business, whether in-state or out-of-state, has nothing to do with whether the business is subjected to the tax"). *See also DIRECTV v. Dep't of Revenue,* 25 N.E.3d at 266 (agreeing that the "tax is not discriminatory because the cable and satellite companies are not similarly situated"); *Treesh,* 487 F.3d at 480 (observing that cable operators and satellite providers sell two distinct services, "consisting of two very different means of delivering broadcasts"); *DIRECTV v. Levin,* 941 N.E.2d at 1197 (upholding "[d]ifferential tax treatment of two categories of companies resulting solely from differences between the nature of their businesses"); *DIRECTV v. North Carolina,* 632 S.E.2d at 545 (upholding differential tax

that "results solely from differences between the nature of the provision of satellite and cable services").

Although these decisions vary somewhat in their modes of analysis, they all reach the same conclusion: state tax statutes that differentiate between cable operators and satellite providers do not violate the dormant Commerce Clause. The decision of the Tennessee Court of Appeals likewise recognizes an important difference between cable operators and satellite providers, and it reaches the same result. Although petitioners assert that an intermediate appellate court in Florida recently "held that cable and satellite providers *are* similarly situated," Pet. 22 (emphasis in original), that case is now on appeal to the Florida Supreme Court. *See DIRECTV, Inc. v. State,* No. 1D13-5444, 2015 WL 3622354 (Fla. Dist. Ct. App. June 11, 2015), *appeal docketed,* No. SC15-1249 (Fla. July 7, 2015).

II. The Tennessee Court of Appeals' Decision Does Not Conflict with Dormant Commerce Clause Decisions of this Court, the Federal Circuit Courts, or Other State Courts.

The Tennessee Court of Appeals' conclusion that cable operators and satellite providers are not substantially similar entities for Commerce Clause purposes is consistent with existing Commerce Clause jurisprudence, and there exists no need for this Court to address or resolve the issue. In accordance with well-established precedents of this Court, the Commerce Clause does not prohibit states from enacting taxing schemes that differentiate between two categories of companies where the differential treatment "results solely from differences between the

nature of their businesses, [and] not from the location of their activities." *Amerada Hess Corp. v. New Jersey,* 490 U.S. 66, 78 (1989); *accord Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.,* 505 U.S. 71, 78 (1992).

The circuit- and state-court decisions cited by petitioners, Pet. 19-21, do not demonstrate any conflict in this area of the law. Contrary to petitioners' contention, these cases do not hold that competing in the same market necessarily means that two entities are similarly situated for Commerce Clause purposes. When two entities do not compete in the same market, they are clearly not similarly situated for purposes of the dormant Commerce Clause. *See Tracy*, 519 U.S. at 300 ("[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 . . . to which the dormant Commerce Clause may apply."). And the cases petitioners cite support this proposition. *See, e.g., In re CIG Field Servs. Co.*, 112 P.3d 138, 146 (Kan. 2005) ("[I]t is essential that interstate and intercounty systems such as CIG serve the same market as intracounty systems or that the statute's discrimination affects the systems' economic choices in competitive markets.").

But these cases do not support the proposition that a finding of competition necessarily marks the end of the inquiry; they do not hold that a court cannot consider meaningful differences between competing entities when determining whether a state law that treats them differently discriminates against interstate commerce.[4] Indeed, the Kansas Supreme Court has

[4] As the Massachusetts Supreme Judicial Court observed in *DIRECTV v. Dep't of Revenue*, "[d]ifferences between entities

since cited its decision in *CIG Field Servs*. for the proposition that "[*g*]*enerally*, entities are similarly situated if they serve the same market." *Miami County Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1203 (Kan. 2011) (emphasis added). Even in *Smith v. Dep't of Revenue Admin.*, 813 A.2d 372 (N.H. 2002), in which the court stated that "[e]ntities are 'substantially similar' or 'similarly situated' for Commerce Clause purposes when they compete against one another in the same market," 813 A.2d at 377, the court ultimately held that there was no discrimination against interstate commerce because there was no competition, 813 A.2d at 381. As the Tennessee Court of Appeals rightly observed, entities must be in competition "[*a*]*t the very least*" in order to be substantially similar entities. Pet. App. 28a (emphasis added).

This Court's precedents indicate that factors besides competition may be relevant to the inquiry whether two types of companies are similarly situated for purposes of the dormant Commerce Clause. In *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 119 (1978), for example, the challenged Maryland statute prohibited refiners of petroleum products from operating any retail service station within the state. Despite the fact that the out-of-state petroleum refiners who operated their own retail service stations directly competed with other in-state service stations, this Court upheld the law, reasoning that the Commerce Clause "protects the interstate market, not particular interstate firms" or "particular structure[s] or methods

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render regulation nondiscriminatory only if they represent substantive reasons to treat the entities differently, rather than proxies for geographical distinctions." 25 N.E.3d at 268 n.14.

of operation in a retail market." *Id.* at 127-28; *accord CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 93-94 (1987). In concluding that the law did not discriminate against interstate commerce, the Court focused on the differences in organizational structure of refinery-owned service stations versus independently owned service stations and not merely on whether they competed in the same market.

In *Tracy,* an Ohio statute required General Motors to pay sales taxes on its purchases of natural gas from out-of-state marketers. If GM had chosen instead to purchase natural gas from a local distribution company, its purchases would have been tax exempt. 519 U.S. at 282-83. Although GM could have purchased the same product from either type entity, this Court concluded that the two entities were not similarly situated. *Id.* at 310. In reaching this conclusion, the Court examined, *inter alia,* the specific regulatory burdens under which the local distribution companies operated. *Id.* at 295-97.

In both of these cases, therefore, this Court did not limit its inquiry to whether the two groups of entities competed in the same market. Rather, the Court engaged in the broader analysis of whether other differences in the taxpayer's "particular structure or methods of operation" could justify the differential treatment.

The ultimate conclusion reached by the Tennessee Court of Appeals in this case is consistent with this Court's jurisprudence. The Commerce Clause does not prohibit "all discriminatory treatment of competitors"; it prohibits only discrimination that draws "a distinction between in-state and out-of-state

competitors." *Kanza Rail-Trails*, 255 P.3d. at 1204. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994) ("'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). Tennessee's tax laws do "not favor in-state interests at the expense of out-of-state enterprises." *DIRECTV v. Levin,* 941 N.E.2d at 1195. The "economic footprint" theory that petitioners have advanced in this case is untenable. As the United States explained in *DIRECTV v. Levin,* 133 S. Ct. 51, this Court's decisions "do not establish that state laws with a disparate effect on businesses that require fewer in-state infrastructural or other investments than their competitors are 'almost . . . *per se*' discriminatory. That proposed rule lacks standards capable of ready or consistent application." Brief for United States as Amicus Curiae, *DIRECTV v. Levin,* 2012 WL 1883083, at *12 (U.S. May 23, 2012).

CONCLUSION

The petition for a writ of certiorari should be denied.

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