No. 14-1499

In the Supreme Court of the United States

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

v.

COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF REVENUE,
Respondent

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below was correct when, joining every other U.S. Court of Appeals and state court of last resort that has considered the question, it rejected petitioners' claim that the dormant Commerce Clause precludes Massachusetts from taxing satellite-television and cable-television providers differently—a claim petitioners make despite the significant differences between the two industries' respective modes of operation and regulatory regimes, and despite the fact that none of the implicated large national companies, with their headquarters and principal places of operation in other states, is an "in-state" economic interest with respect to Massachusetts.

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BRIEF IN OPPOSITION

Petitioners, two satellite-television providers, have filed lawsuits in a number of states where petitioners operate, seeking to void taxes that treat satellite-television services differently from cable-television services. Petitioners have claimed in each suit that such taxes amount to unconstitutional discrimination against out-of-state economic interests in favor of similarly-situated in-state interests—notwithstanding the fact that both cable-television and satellite-television providers are large national concerns based in other states, and notwithstanding salient differences between the two industries.

The federal courts and the state courts of last resort have uniformly rejected petitioners' claims, in decisions consistent with this Court's dormant Commerce Clause precedents. There is thus no

conflict for this Court to resolve. Parsing these decisions, petitioners attempt to proffer a split regarding the meaning of "similarly situated." That supposed split is illusory. Moreover, an independent basis for affirming the judgment below renders this petition an unsuitable vehicle for revisiting the phrase's meaning. This Court should therefore deny the petition, leaving undisturbed the correct decision below.

STATEMENT

Petitioners filed suit in Massachusetts Superior Court against the respondent Commonwealth of Massachusetts Department of Revenue ("Commonwealth"), claiming, as relevant here, that a 5% excise tax on satellite-television services under Massachusetts General Laws chapter 64M violates the dormant Commerce Clause, because it does not also apply to cable-television services. Pet. App. 1a-2a; *see* U.S. Const. art. I, § 8, cl. 3.

The Pay-TV Market and Its Participants

Satellite-television providers ("satellite") participate in the pay-TV market by providing multi-channel video programming services throughout Massachusetts. Pet. 32a. In Massachusetts, satellite has two major competitors: cable-television providers ("cable"), including in particular Comcast Corporation and Charter Communications, Inc., and wire-line telephone companies, including in particular Verizon Communications Inc. *Id.* at 31a. As of December 2008, telephone companies provided competition for about 40% of Massachusetts households. Joint Appendix of the Record on Appeal, filed in the Massachusetts Supreme Judicial Court

("JA") 1609.[1] All the major participants in the pay-TV market are interstate concerns with principal places of business outside Massachusetts: DIRECTV, California; DISH Network, Colorado; Comcast, Pennsylvania; Charter, Missouri; and Verizon, New York. Pet. App. 36a-37a.

Satellite and Cable: Structures and Methods of Operation

Satellite and cable have different structures and methods of operation. "Cable provides television service through a 'closed transmission path,'" relying primarily upon physical wires to reach subscribers' homes, while satellite "suppl[ies] television service through an 'open transmission path,'" broadcasting via orbiting satellites to its subscribers. *Cox Cable Hampton Roads, Inc. v. Norfolk*, 439 S.E.2d 366, 368 (Va. 1994); *see* Pet. App. 32a-35a. A cable company assembles its programs at various local "head-end" facilities and then distributes them through fiber-optic and coaxial cable wire that is laid in trenches or hung from utility poles. *Id.* at 4a-5a, 35a. A satellite company, on the other hand, assembles its programs at large "up-link centers" in several western states and transmits them from those centers to its satellites, which then broadcast the programs back down to its subscribers' individual satellite dishes. *Id.* at 5a, 32a.

Satellite and cable similarly differ in how they have structured their businesses. For example, cable generally employs Massachusetts residents directly,

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[1] All citations to the Joint Appendix of the Record on Appeal are to undisputed facts from a statement the parties jointly submitted in the trial court.

while satellite relies more heavily on Massachusetts-based independent contractors and distributors for its operations within the Commonwealth. Pet. App. 37a-39a; *but see, e.g.*, *id.* at 34a (from 2006 to 2010, one satellite company had between 141 and 207 Massachusetts employees annually for distribution-related purposes). Satellite providers also contract for Massachusetts-based work—such as installation, maintenance, and repair services for its subscribers—with other out-of-state companies that have Massachusetts employees. *Id*. at 33a.

Satellite and Cable: Regulatory Status

Satellite and cable also diverge in their respective regulatory statuses, with cable being far more heavily regulated. This is because Congress itself differentiates between the two industries. Federal law generally requires a cable provider to acquire a franchise from each "host" municipality, 47 U.S.C. § 541(b)(1), and it allows the municipality to negotiate a "franchise fee" of up to 5% of the firm's local gross revenues, *id.* § 542(b); *see* Pet. App. 38a (typical local franchise fee in Massachusetts is 3-5%). In contrast, satellite companies do not have to procure local franchises, and Congress has largely exempted them from municipal taxes and fees. *See* Telecommunications Act of 1996, Pub. Law No. 104-104, § 602, 110 Stat. 56, 144 (note to 47 U.S.C. § 152). The statute expressly states, however, that it does *not* preclude taxes on satellite "by a *State*." *Id*. § 602(c), 110 Stat. at 145 (emphasis added).

Aside from taxes and fees, Congress imposes numerous regulatory requirements on cable, and it authorizes cities and towns to include additional

duties in their franchise agreements. *See, e.g.*, 47 U.S.C. §§ 531, 541, 544. Massachusetts municipalities have in fact done so. Pet. App. 38a. This hybrid blend of federal and municipal mandates has resulted in a host of obligations to the public that cable has and satellite does not. *Id.*[2]

Satellite, Cable, and Verizon: Local Economic Activity

Petitioners contend that cable is responsible for more local economic activity in Massachusetts than is satellite. Pet. 5-6. However, satellite's economic activity in Massachusetts is hardly small. *See* JA 1591-94. For example, the two satellite companies used numerous authorized local retailers to sell their products between 2006 and 2010, in addition to the Massachusetts branches of national "big-box" stores. Pet. App. 33a; JA 1591-92. Both firms also used

[2] These cable-only duties can include, among others: additional local exactions to provide financial support for public, educational, and government programming, *see* 47 U.S.C. § 541(a)(4)(B); special network connections between government buildings, *see id.* §§ 531, 541(b)(3)(D); customer-service standards regarding office hours, telephone responsiveness, and the like, *see id.* § 552; regulation of rates for basic-level service in certain instances, *id.* § 543(a)(2); geographic uniformity of rates, *see id.* § 543(d); compatibility between set-top boxes and televisions, *see id.* § 544a; subscriber capacity to block objectionable programming, *see id.* § 544(d); a prohibition on discrimination among subscribers, *see id.* § 543(e); and a ban on requiring subscription to any tier of cable programs other than basic (*e.g.*, a premium tier) as a condition of purchasing programs offered on a per-channel or per-program basis, *see id.* § 543(b)(8). *See also* Pet. App. 38a (Massachusetts municipalities impose on cable an average additional fee of 1.09%, on top of the franchise fee, for financial support of public, educational, and government programming).

independent contractors with in-state employees to help with product distribution by handling subscriber installation, maintenance, and repair issues. Pet. App. 33a. They additionally had seven "collection facilities" in the Commonwealth, maintained by their employees or contractors. *Id.* These facilities assisted in the production of programming by gathering content from local broadcast stations and transmitting it to the national uplink centers. *Id.* at 5a.

Moreover, the local economic activity of Verizon—the pay-TV market's other major competitor, and the target of a separate substantial tax increase in the same statute that enacted the challenged excise, *see infra* at 7-8—is even larger than cable's. For example, while cable has about 5,000 Massachusetts workers, Verizon employs more than 9,000. Pet. App. 29a.

The FY 2010 General Appropriation Act and the Excise

The Legislature enacted the challenged tax ("excise") as one of many provisions of the Act Making Appropriations for the Fiscal Year 2010, 2009 Mass. Acts ch. 27 ("FY 2010 Act"). *See id.* § 61 (enacting Mass. Gen. Laws ch. 64M). The Act came at a time of sharp fiscal constraint, when, "in the wake of the [2008] financial crisis, the State [had] reduced its tax revenue estimate by over $1.5 billion." *Finch v. Comm. Health Ins. Connector Auth.*, 595 N.E.2d 970, 977 (Mass. 2012). The 2009 contraction caused the Legislature to enact not only

spending cuts, but also revenue enhancements at both the state and local levels.[3]

The FY 2010 Act's Revenue Provisions

The new revenue measures were widely distributed, ranging from a 1.25 percentage-point increase in the sales tax rate to the authorization of local taxes on restaurant meals. 2009 Mass. Acts ch. 27, §§ 59-60 (codified at Mass. Gen. Laws ch. 64I, § 31A and ch. 64L). They included the excise as well, "in an amount equal to 5 per cent of the . . . satellite service provider's gross revenues . . . attributable to [its] . . . subscriber[s]" in Massachusetts. 2009 Mass. Acts ch. 27, § 61 (enacting Mass. Gen. Laws ch. 64M, § 2).[4]

Significantly, however, the FY 2010 Act also increased the local taxation of satellite's competitors Verizon and cable, by authorizing personal property taxes on their public-way poles and wires. 2009 Mass. Acts ch. 27, § 25 (codified at Mass. Gen. Laws ch. 59, § 18). The resulting municipal tax that cable has had to pay is about $5.1 million per year, in addition to its preexisting local franchise fees. Pet. App. 29a. Verizon's additional annual assessments

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[3] State and municipal finances are closely intertwined in Massachusetts, because the Commonwealth assumes responsibility for financing local governments through annual local-aid distributions. *See, e.g.*, 2009 Mass. Acts ch. 27, § 3, p. 487 ($4.3 billion in municipal aid appropriated for FY 2010).

[4] While the satellite provider pays the excise, Mass. Gen. Laws ch. 64M, § 2, its customers must "[r]eimburse[ ]" the provider for the "full amount," in a charge that is to be "added to the . . . customer's invoice." *Id.* § 3.

under the Act exceed $29 million—more than double the approximately $12 million generated yearly from the satellite excise. *Id.*; *see* JA 1588.

Cable's Lobbying for the Excise

Petitioners highlight certain statements that cable lobbyists made as supposedly engendering legislative sympathy toward cable as an "in-state" industry and hostility toward satellite as an "out-of-state" one. Pet. 8-9. However, the thrust of the cable lobbyists' statements was not satellite's relative lack of local economic presence. *See* Pet. App. 28-29; JA 1632-33. The thrust instead was revenue parity—rectifying the then-marked disparity between cable (which had to pay hefty local franchise fees) and satellite (which did not). Pet. App. 28a, 39a; *id.* at 58a (noting lobbyists "repeatedly intoned" theme of revenue parity, citing 16 examples); *see, e.g.*, JA 1573 ("legislation . . . would bring video broadcast industry fees and taxes into line"); JA 1577 ("Satellite TV companies for years have long enjoyed a special tax exemption").

Proceedings Below

The Superior Court entered summary judgment for the Commonwealth, because "there is no violation of the Commerce Clause when differential tax treatment has nothing to do with the geographical location of the companies or their economic activities, and everything to do with the manner by which they distribute programming." Pet. App. 54a. The court found that there could "be no suspicion that the tax in question was intended to protect local pay-TV providers from out of state competition; all of the competitors—satellite and cable—are large out-of-

state companies with regional or national footprints." *Id*. The court further found that, "although the satellite and cable companies offer much the same programming and thus compete for many of the same customers, they go about it with different modes of operation, using very different physical infrastructures, and operating in markedly different regulatory environments[.]" *Id*. at 54a-55a (footnote omitted).

Although noting that delving into the legislation's purpose was unnecessary given the lack of discrimination against interstate commerce, the Superior Court went on to examine petitioners' supposed evidence of discriminatory purpose, finding it "singularly unconvincing" and "exemplary of the problems" with relying on lobbyists' statements, which "can furnish only the most attenuated and unreliable evidence of legislative intent." Pet. App. 55a-56a (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001)).

The Supreme Judicial Court affirmed the trial court. Pet. App. 25a. The court found that "differences between the ways in which these two types of company do business" rendered them not similarly situated for dormant Commerce Clause purposes and explained "the divergence between the ways in which the cable and satellite companies are treated." *Id*. The court also agreed that "the excise tax was not intended to discriminate against interstate commerce, but rather was part of an effort to increase, across the board, the amount of tax revenue collected from the video programming industry." *Id*. at 29a.

ARGUMENT

I. Petitioners Fail To Allege A Split Warranting This Court's Attention

Petitioners' challenges to taxes on satellite, filed in multiple jurisdictions, have all ended in the same final result. In the litigations that have reached a conclusion, the courts have found that a state's taxing satellite and cable providers differently does not run afoul of the dormant Commerce Clause's bar on discrimination against out-of-state economic interests.

Lacking a split on the main question presented, petitioners attempt to delineate a split on a more abstract question: whether, for purposes of determining if a state law impermissibly discriminates in favor of an in-state entity and against a similarly-situated out-of-state entity, two entities are necessarily "similarly situated" because they compete in the same market, or whether the inquiry can also take account of differences between competing entities. This claimed split is illusory. Contrary to petitioners' suggestion, no court precludes considering any fact aside from entities' status as market competitors.

A. There Is No Split on Whether a State May Tax Cable and Satellite Companies Differently

Petitioners have litigated to conclusion dormant Commerce Clause challenges to state taxes on satellite in five different jurisdictions. *See DIRECTV, Inc. v. North Carolina*, 632 S.E.2d 543, 545 (N.C. Ct. App. 2006); *DIRECTV, Inc. v. Treesh*,

487 F.3d 471, 473 (6th Cir. 2007), *aff'g* 469 F. Supp. 2d 425 (E.D. Ky. 2006); *DIRECTV, Inc. v. Levin*, 941 N.E.2d 1187, 1190 (Ohio 2010); *DIRECTV, Inc. v. Roberts*, No. M2013–01673–COA–R3–CV, 2015 WL 899025, at *1 (Tenn. Ct. App. Feb. 27, 2015) (slip. op.), *review denied*, No. M2013-01673-SC-R11-CV (Tenn. 2015), *petition for cert. filed*, No. 14-1524 (U.S. June 23, 2015); Pet. App. 1a.

In the North Carolina case, petitioners sued to block a 5% tax on satellite companies' gross receipts; the tax did not apply to cable. 632 S.E.2d at 546. In Kentucky, petitioners sought to enjoin a law that imposed 5.4% in total taxes on both cable and satellite alike, but also provided cable companies with tax credits for any local franchise fees paid (fees from which satellite providers are exempt by federal law). 487 F.3d at 475. In Ohio, petitioners filed suit to end a sales tax that applied only to satellite; an earlier version of the bill would have taxed both cable and satellite. 941 N.E.2d at 1190-91. In Tennessee, petitioners fought a tax that applied to both cable and satellite subscription fees, but exempted the first $15 of cable fees while taxing the full amount of satellite fees. 2015 WL 899025, at *1. And, as discussed, below, petitioners challenged Massachusetts' 5% excise tax that applies to satellite only. Pet. App. 1a.

Petitioners' challenges all failed. In each case, the court found that the tax on satellite did not constitute discrimination against a similarly-situated out-of-state economic interest. As the Ohio Supreme Court put it, "[t]he[se] 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." 941 N.E.2d at 1195; *accord North Carolina*, 632 S.E.2d at 545 (rejecting claim because "the differential tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses"). *See also Treesh*, 487 F.3d at 480-81 (rejecting challenge because, among other reasons, the Kentucky tax was not the "functional equivalent" of a protective tariff, and "[a]pplying the dormant Commerce Clause to invalidate [it] would dramatically increase the clause's scope"); *Roberts*, 2015 WL 899025, at *11 (upholding Tennessee tax because "satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause").

Although one intermediate appellate court in Florida recently ruled in favor of petitioners over a dissenting opinion, that case is currently being briefed on appeal before the Florida Supreme Court. *See DIRECTV, Inc. v. Florida*, Nos. 1D13-5444, 1D14-0292, 2015 WL 3622354, at *1 (Fla. Dist. Ct. App. June 11, 2015) (opinion not yet released for publication), *appeal docketed*, No. SC15-1249 (Fla. July 7, 2015); *id.* at *9-11 (Marstiller, J., dissenting).

Because the federal courts and the state courts of last resort have been unanimous in their rejection of petitioners' dormant Commerce Clause claims, there is no need for this Court to intervene.

B. Nor Are Courts Split on Whether the Similarly-Situated Inquiry Consists Solely of Determining Whether Entities Are Market Competitors

Tacitly acknowledging the lack of a split on the central question in this case, petitioners instead claim that the lower courts are divided over whether, for dormant Commerce Clause purposes, entities are necessarily "similarly situated" simply if they are "competitors," or whether the analysis can comprise a broader inquiry into whether two entities are indeed similarly situated. *See* Pet i. There is no such split. This Court has never suggested that the inquiry must be limited to whether entities are competitors, nor has any lower court adopted such a rule.

Under this Court's precedents, entities must be actual or potential competitors to be sufficiently similarly situated that a state's treating them differently *may* amount to unconstitutional discrimination against interstate commerce. As the Court observed in *General Motors Corp. v. Tracy*, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference . . . to which the dormant Commerce Clause may apply." 519 U.S. 278, 300 (1997).

As *Tracy* itself makes clear, however, determining that two entities compete in the same market does not necessarily mean that they *are* similarly situated for dormant Commerce Clause purposes and must be treated alike. In *Tracy*, this Court was presented with a challenge to a tax that applied to all sales of

natural gas, except sales by in-state regulated public utilities. *Id.* at 281-82. Unlike their sales on the open market, the utilities' sales of natural gas to local customers came "bundled with rights and benefits mandated by state regulators." *Id.* at 293. Notwithstanding the fact that the utilities and other sellers separately competed for larger customers on the open market, *see id.* at 302-03, the Court found that "the[se] opportunities for competition" did not "require[ ] treating marketers and utilities as alike for dormant Commerce Clause purposes," given "the local utilities' singular role" with respect to their local markets. *Id.* at 303-04.

Other cases from this Court further illustrate how entities may compete in a market yet still be sufficiently dissimilar that a state may treat them differently without implicating the Clause's ban on discrimination. In *Exxon Corp. v. Governor of Maryland*, a Maryland law prevented oil producers and refiners from competing with local gas stations, flatly prohibiting oil producers and refiners from operating retail gas stations in Maryland. 437 U.S. 117, 120-21 & n.1 (1978). While the statute's language was geographically neutral, "no petroleum products [we]re produced or refined in Maryland," *id.* at 123, leading the producers and refiners to argue that the law effectively discriminated on the basis of location, *id.* at 125. This Court rejected the claim, because out-of-state independent retailers remained free to compete with their in-state counterparts, and "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 126. *See also, e.g.*, *Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66, 78 (1989)

(similarly rejecting oil producers' claim that New Jersey's denial of a tax deduction to offset a federal tax on oil production unlawfully hampered the oil producers' ability to compete against independent retailers in the local gas market, because the "different effect . . . results solely from differences between the nature of their businesses, not from the location of their activities").

Applying this Court's analyses in *Tracy*, *Exxon*, and *Amerada Hess*, courts regularly take account of differences in market competitors' circumstances, finding that such differences preclude a finding of impermissible discrimination. For example, in analyses following this Court's in *Tracy*, courts have upheld laws that differentiate between commercial opticians, who sell eyewear and are not medical providers, and ophthalmologists and optometrists, who compete with opticians but are also medical providers subject to extensive ethical, professional, and regulatory obligations. *See Nat'l Ass'n of Optometrists v. Brown*, 567 F.3d 521, 526-27 (9th Cir. 2009); *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 804 (6th Cir. 2005).

And in the mold of *Exxon* and *Amerada Hess*, courts have found no discrimination where, although a law in effect disadvantages certain categories of market competitors, the law applies alike to both in-state and out-of-state competitors of the disadvantaged type, with the disparate effect arising solely from the companies' specific mode of operation. *See, e.g.*, *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725-26 & n.9 (5th Cir. 2004) (upholding Texas law barring automobile manufacturers from operating their own retail dealerships—which would

compete with independent dealerships, including locally-owned dealerships—because the statute did "not discriminate between similarly situated in-state and out-of-state interests"); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 500-02 (5th Cir. 2001) (same); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209-16 (2d Cir. 2003) (upholding statute that prohibited shipment of cigarettes directly to New York customers but permitted brick-and-mortar stores to deliver limited quantities via delivery vans; the plaintiff out-of-state shippers' "in-state counterparts" were other shippers, not brick-and-mortar stores).[5]

The six cases cited in the petition as together creating a supposed split with *Tracy*, *Exxon*, *Amerada Hess*, and their progeny, *see* Pet. 16-20, do not, in fact, stand for the proposition that it is improper ever to take into account factors beyond entities' status as market competitors in determining whether the entities are similarly situated. No case so holds. (Indeed, such a holding would be surprising and untenable, given this Court's

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[5] Petitioners also cite *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010), as holding in the same vein that out-of-state wine retailers are not similarly situated to in-state wine retailers. Pet. 22. However, the analysis in that case turned directly on the interplay of the Twenty-first Amendment with the dormant Commerce Clause; the retailers were differently situated because, under this Court's Twenty-first Amendment cases, "[w]hen analyzing whether a State's alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that wholesalers and retailers may be required to be within the State." 612 F.3d at 820. "Starting at *that* point," the court could "see no discrimination in the Texas law." *Id.* (emphasis added).

decisions in *Tracy*, *Exxon*, *Amerada Hess*, and other cases. *See infra* Part III.)

First, in *Smith v. New Hampshire Department of Revenue Administration*, the New Hampshire Supreme Court affirmed a lower court's conclusion, following a six-day trial, that in-state banks and out-of-state non-bank investment firms were not similarly situated, because they sold distinct products serving distinct markets, such that a tax exemption for customers of in-state banks did not discriminate against out-of-state non-bank investment firms. 813 A.2d 372, 374-75 (N.H. 2002). Given its affirmance of the trial court's factual finding that the entities did not actually compete in the same market, the appellate court did not have before it any question regarding the propriety of considering, with respect to true market competitors, factors aside from the fact of their competition, and, indeed, the court did not engage in any such analysis. *See id*. at 376-81. Rather, the court simply heeded *Tracy*'s observation that, if entities sell different products and are *not* market competitors, no unlawful discrimination can take place. 813 A.2d at 376-77 (citing *Tracy*, 519 U.S. at 298-300).

Second, and similarly, in *In re CIG Field Services Co.*, the Kansas Supreme Court cited *Tracy* in recognizing that, to find discrimination in violation of the dormant Commerce Clause, "it is essential" that the entities compete. 112 P.3d 138, 146 (Kan. 2005). The court affirmed an agency's factual determination, following "a classic battle of the experts," that intracounty gas gathering systems did indeed compete with intercounty and interstate gas gathering systems. *Id*. at 147. As in the New

Hampshire case, it appears that the parties' dispute with respect to whether they were "similarly situated" centered solely on the liminal factual question whether the parties were in fact market competitors; so far as the opinion reveals, the parties did not debate any other basis for concluding that they were not similarly situated. *See id*. at 146-47. Thus, the court had no occasion to consider the propriety of taking into account factors beyond market competitor status—and it did not address that issue. *See id*.

Third, in *Government Suppliers Consolidating Services, Inc. v. Bayh*, the Seventh Circuit struck down Indiana statutes that imposed various restrictions on truckers' hauling municipal waste from the East Coast to Indiana landfills. 975 F.2d 1267, 1272, 1278-81 (7th Cir. 1992). Some of the offending Indiana provisions applied on their face solely to out-of-state truckers or out-of-state waste, *id*. at 1271-72; others, while facially neutral, "in effect erected an economic barrier against the importation of municipal waste," *id*. at 1279. The court engaged in no discussion regarding the similarly-situated inquiry as such, and certainly did not hold that entities are necessarily similarly situated for dormant Commerce Clause purposes simply because they are competitors. *See id*. at 1277-79.

Fourth, in *Family Winemakers of California v. Jenkins*, the First Circuit struck down a Massachusetts statute that imposed more onerous restrictions on distribution of wine to consumers by "large wineries" than on distribution by "small wineries"; under the Massachusetts definition, all

wineries located within Massachusetts qualified as "small." 592 F.3d 1, 4-5 (1st Cir. 2010). The parties do not appear to have disputed that "[w]ines from 'small' Massachusetts wineries compete with wines from 'large' wineries[.]" *Id.* at 4; *see also id.* at 5 (noting material facts were not in dispute). The First Circuit did not engage in any explicit discussion of whether these competitors were "similarly situated" for dormant Commerce Clause purposes; it seems to have taken for granted that they were. *See id.* at 9-13. And, far from decreeing that it would be impermissible to consider differences between competitors, the court instead itself implicitly engaged in an assessment of that type, concluding that "[t]he advantages afforded to 'small' wineries by [the statute] bear little relation to the market challenges caused by the relative sizes of the wineries." *Id.* at 5.

Fifth, in *Cachia v. Islamorada*, the Eleventh Circuit concluded that a zoning ordinance that prohibited chain restaurants and restricted the size of chain retailers "ha[d] the practical effect of discriminating against interstate commerce." 542 F.3d 839, 843 (11th Cir. 2008). The opinion engaged in no discussion regarding whether any particular entities were similarly situated for dormant Commerce Clause purposes (let alone what factors should be considered in such an analysis). *See id.* at 842-43. Rather, its brief analysis consisted of rejecting the defendant's reliance on *Exxon*; such reliance was misplaced since, unlike in *Exxon*, "the ordinance's complete prohibition of chain restaurants sharing certain characteristics amount[ed] to *more than* the regulation of methods of operation, and serve[d] to exclude national chain restaurants from

competition in the local market." *Id.* at 843 (emphasis added).[6]

Finally, in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, the Florida Supreme Court struck down a Florida statute that gave tax advantages to beverages manufactured using certain crops commonly grown in Florida. 524 So. 2d 1000, 1002 (Fla. 1988), *rev'd on other grounds*, 496 U.S. 18 (1990). The Florida court, too, did not mention and engaged in no discussion of the meaning of the phrase "similarly situated," instead merely noting in passing that it was "undisputed that manufacturers and distributors of beverages which qualif[ied] for preferential treatment under this scheme [we]re in direct competition with manufacturers and distributors of alcoholic beverages which d[id] not." *Id.* at 1008.

In sum, the purported split outlined by petitioners does not exist. Guided by this Court's precedents, courts regularly engage in context-dependent analyses of whether entities are similarly situated for dormant Commerce Clause purposes. In some cases, such disputes center on the factual question whether the entities actually compete at all. In others, questions arise as to whether entities that do compete, like those in *Tracy*, *Exxon*, and *Amerada Hess*, are sufficiently differently situated that differential treatment does not constitute discrimination. No court has held the latter line of inquiry to be inappropriate.

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[6] *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008), decided the same day as *Cachia* and concerning the same ordinance, likewise contains no discussion regarding "similarly situated." 542 F.3d at 846-47.

II. Regardless Of This Petition's Outcome, Petitioners' Suit Will Fail Because The Tax At Issue Does Not Discriminate Between In-State And Out-of-State Interests

If this Court did wish to delve into the criteria by which courts should determine whether entities are similarly situated for dormant Commerce Clause purposes, the instant petition presents a poor candidate for doing so. Even if the Court were to disagree with the decision below and find the two industries to be similarly situated, petitioners' constitutional claim would still fail. In Massachusetts, neither cable nor satellite providers represent an "in-state" economic interest, and thus no unlawful discrimination against out-of-state providers takes place under the statute.

"Discrimination" under the Commerce Clause requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Petitioners contend that satellite is an "out-of-state" economic interest and cable an "in-state" one, simply because cable's production and distribution system has a greater physical presence in Massachusetts, and, as a result, cable generates a greater amount of local economic activity. *See* Pet. 4-6.

This purported distinction is unfounded, for the reason identified by the Superior Court below: "the cable companies are no more local Massachusetts concerns than the satellite companies are." Pet. App. 56a n.15. Instead, what the Ohio Supreme Court said for Ohio applies equally in Massachusetts:

> [T]he cable industry is not a local interest benefited 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 be considered more local than any other.

Levin, 941 N.E.2d at 1196.[7]

Although petitioners claim that cable's relatively greater local economic activity makes it the "local" concern, *see* Pet. 5-6, 8-9, neither this Court nor any other court has ever held that relative economic impact is the governing standard. *See Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987) (noting same and rejecting similar argument).[8]

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[7] Contrary to petitioners' suggestion, the Supreme Judicial Court below did not "acknowledge[ ] . . . 'that the cable companies and the satellite companies represent in-State and out-of-State interests, respectively.'" Pet. 26 (quoting Pet. App. 13a). Rather, as the full text of the quoted passage makes plain, the court simply "assume[d] for purposes of [its] analysis, *while appreciating the weighty arguments to the contrary*, that the cable companies and the satellite companies represent in-State and out-of-State interests, respectively." Pet. App. 13a (emphasis added). Reaching the in-state versus out-of-state issue was unnecessary once the court concluded that the Commonwealth was entitled to judgment as a matter of law on the ground that the industries were not similarly situated for dormant Commerce Clause purposes. *See id.* at 12a-13a, 25a.

[8] A similar contrast in relative local economic activity could indeed be drawn in any other state where cable and satellite compete, except perhaps in the very few where a satellite

Petitioners' economic-impact argument is inconsistent with the settled understanding of "economic interests" and does not serve the dormant Commerce Clause's principal aim. "For dormant Commerce Clause purposes, the relevant 'economic interests,' both in-state and out-of-state, are parties using the stream of commerce, not th[e interests] of the state itself." *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004). Such is plain from this Court's decisions. *See, e.g.*, *Dep't of Revenue v. Davis,* 553 U.S. 328, 338 (2008) (discussing constitutional prohibition on "regulatory measures designed to benefit in-state economic interests by burdening out-of-state *competitors*" (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988) (emphasis added))). Thus, in rejecting a challenge to a law prohibiting the sale of milk in nonreturnable plastic containers in *Minnesota v. Clover Leaf Creamery Co.*, the Court noted that, "[w]ithin Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bottles, and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota *firms*, or the losers out-of-state *firms*." 449 U.S. 456, 472-73 (1981) (emphasis added).

This understanding of "economic interests" serves the dormant Commerce Clause's core purpose of avoiding the escalating economic retaliation among states that occurred under the Articles of Confederation. *See C & A Carbone, Inc. v. Town of*

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provider has an "uplink" facility. Petitioners' attempted dichotomy thus conveniently serves its roving campaign of Commerce Clause lawsuits, since it makes cable always "in-state" and satellite always "out-of-state."

Clarkstown, 511 U.S. 384, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state . . . laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." (citing *The Federalist No. 22*, at 143-45 (Alexander Hamilton) (Clinton Rossiter ed. 1961))); *see generally* Laurence H. Tribe, *American Constitutional Law* §§ 6-2, 6-3, at 1041-45 (3d ed. 2000). When a state enacts a statute that favors local companies and disfavors competing firms in another state, that other state has an incentive to respond with a law that helps its companies while harming those in the original state. Defining in-state economic interests to include firms favored in this way thus advances the Commerce Clause's anti-retaliation purpose.

Adopting a broader, amorphous definition of in-state economic interests would sever the link between the phrase and the Clause's underlying purpose, as this case well demonstrates. No state can be identified that is likely to "retaliate" against Massachusetts because of its enactment of this excise tax. The excise's net result instead is that one set of Massachusetts residents (satellite subscribers) have had to bear a price increase that another set (cable subscribers) have not, such that some of the price-affected Massachusetts residents may shift their business from one type of interstate company to another. This impact does not have Commerce Clause implications. *See Exxon*, 437 U.S. at 128 ("It may be true that the consuming public [in the local state] will be injured by the loss of the . . . low-priced stations operated by the independent refiners, but . . . that argument relates to the wisdom of the

statute, not to its burden on commerce."); *id.* at 126 ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").[9]

Thus, because the excise at issue here does not impose "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," it cannot violate the dormant Commerce Clause. *Or. Waste*, 511 U.S. at 99. It is therefore immaterial to this case's ultimate outcome whether cable and satellite are "similarly-situated" for dormant Commerce Clause purposes.

III. This Court's Intervention Is Further Unwarranted Because The Court Below Correctly Held That Cable And Satellite Companies Are Not Similarly Situated

Given the lack of a split on the question presented, as well as the existence of independent grounds for rejecting petitioners' dormant Commerce Clause claim, this petition should be denied. In any event, however, the court below was correct to conclude that the excise on satellite companies does not run afoul of the dormant Commerce Clause, because satellite and cable companies are not

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[9] Restricting such "interests" to actual local companies also is consistent with the dormant Commerce Clause's related concern about local economic elites persuading home-state legislators to disadvantage politically unrepresented out-of-state competitors. *See, e.g.*, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 & n.7 (2007); Tribe, *supra*, § 6-5, at 1051-53. Here, the allegedly favored cable "locals" are headquartered in Pennsylvania and Missouri, not in Massachusetts. Pet. App. 36a-37a.

"similarly situated for constitutional purposes." *Tracy*, 519 U.S. at 299.

Petitioners take the position that entities competing in the same market are necessarily similarly situated. *See* Pet. i. They are mistaken. As discussed above, decisions from this Court make clear that, although at least some actual or potential competition between the entities is logically a requisite to finding unlawful discrimination, *see Tracy*, 519 U.S. at 300, the mere fact of competition does not necessarily compel the further conclusion that entities are so similarly situated that they *must* be treated alike, regardless of any and all differences between them. In addition to this Court's decisions in *Tracy*, *Exxon*, and *Amerada Hess* demonstrating this principle, *see supra* Part I.B at 13-15, this Court has also twice recently found public entities to be not "similarly situated" with private entities despite directly competing with them in the same market. *Davis,* 553 U.S. at 342-43 & n.13 (public and private issuers in the bond market); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (public and private waste processors); *see also Davis*, 553 U.S. at 342 (noting "this emphasis on the public character of the enterprise . . . is just a step in addressing . . . the principle that 'any notion of discrimination assumes a comparison of substantially similar entities'" (quoting *United Haulers*, 550 U.S. at 342)).

With direct competition not automatically satisfying the "similarly situated" requirement, "a sensitive, case-by-case analysis" is instead necessary. *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). As the Supreme Judicial Court below rightly

stated, "[d]ifferences between entities render regulation nondiscriminatory only if they represent substantive reasons to treat the entities differently, rather than proxies for geographical distinctions." Pet. App. 18a n.14 (citing *West Lynn Creamery*, 512 U.S. at 201).

Here, two factors make satellite and cable not similarly situated.

First, satellite and cable are different industries, comprising different businesses. "[T]he Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results solely from differences between the nature of their businesses, not from the location of their activities.'" *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 78 (1992) (quoting *Amerada Hess*, 490 U.S. at 78). As a result, an "entity's structure is a material characteristic for determining if entities are similarly situated." *Nat'l Ass'n of Optometrists*, 567 F.3d at 527.

Accordingly, this Court and the lower courts have allowed states to distinguish between, for example, independent gas stations and oil producers who wish to sell gas directly to consumers (*Exxon*, 437 U.S. at 125-26; *Amerada Hess*, 490 U.S. at 78); stand-alone automobile repair shops and automobile insurers who wish to operate repair shops (*Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 & n.44 (5th Cir. 2007)); car dealerships and automobile manufacturers who wish to sell cars directly to the public (*Int'l Truck & Engine*, 372 F.3d at 725-26; *Ford Motor*, 264 F.3d at 500-02); and opticians and their medical-provider counterparts, ophthalmologists and optometrists

(*Nat'l Ass'n of Optometrists*, 567 F.3d at 526-27; *Lenscrafters*, 403 F.3d at 804).

The cable and satellite industries likewise have distinct structures and modes of operation, from the industries' respective physical means of assembling and distributing programming, to their comparative use of employees and independent contractors. *See supra* at 3-4. It is thus hardly surprising that the other final decisions regarding the differential tax treatment of satellite and cable have reached the same result. *Treesh*, 487 F.3d at 480 ("the two 'goods' are distinct, consisting of two very different means of delivering broadcasts"); *Levin*, 941 N.E.2d at 1193-96 (following *Exxon* and *Amerada Hess*); *North Carolina*, 632 S.E.2d at 548-50 (same). Just as automobile insurers offering repair services are not similarly situated with independent mechanics because they are a different type of business, so too satellite is not similarly situated with cable.

The second basis for concluding that the cable and satellite industries are not similarly situated is their divergent regulatory obligations. As in *Tracy*, 519 U.S. at 310, where public utilities' regulatory duties "distinguishe[d them] from independent marketers to the point that the enterprises should not be considered 'similarly situated,'" here, too, cable is subject to far greater public responsibilities—by federal, state, and local law—than satellite. *See supra* at 4-5 & n.2. *See also*, *e.g.*, *Nat'l Ass'n of Optometrists*, 567 F.3d at 525-27 (finding optometrists' significant public duties distinguish them from opticians; "[a]s health care

providers, optometrists . . . clearly have special responsibilities that opticians do not").[10]

These regulatory distinctions ultimately trace back to Congress' decisions about how and to what extent the two industries should be regulated. "Prudence . . . counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection recognized by Congress" with a constitutional ruling that decrees to be similar two industries that Congress has treated as different. *Tracy*, 519 U.S. at 309. When the industries' contrasting regulatory duties are considered in conjunction with their operational differences, satellite and cable are not similarly situated—a second reason, in addition to the fact that neither set of national companies is an in-state interest, why Massachusetts' excise does not discriminate against interstate commerce.

CONCLUSION

The petition for writ of certiorari should be denied.

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[10] The suggestion by the *amici* law professors, Br. 23-24, that a state would impose a new onerous regulatory regime on a *favored* in-state industry—simply to justify the industry's lesser tax rate in potential litigation—is on its face implausible. (It also elides the fact that, here, the U.S. Congress, not Massachusetts, is principally responsible for the difference between the two industries' respective regulatory burdens.)

Respectfully submitted,

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