No. 17-______

IN THE
Supreme Court of the United States

ECHOSTAR SATELLITE L.L.C. N/K/A DISH NETWORK L.L.C.,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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

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

Counsel for Petitioner

QUESTIONS PRESENTED

The dormant Commerce Clause forbids States to enact laws that discriminate against interstate commerce purposefully or in practical effect. "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 v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (emphasis added; internal quotation marks omitted).

Here, the Florida Supreme Court reasoned that the only type of "economic interest[]" that matters is a purely in-state business. It held that a classification cannot be discriminatory if it benefits interstate (rather than purely in-state) enterprises—regardless of whether the statute differentiates between in-state and out-of-state economic *activity*. It further held that a court assessing a law's discriminatory purpose may not consult any evidence other than the statutory text and formal legislative history. The questions presented are:

1. Did the court below err in concluding that a law cannot discriminate against interstate commerce unless it benefits purely in-state companies and burdens purely out-of-state companies?

2. Is a court evaluating a law's discriminatory purpose forbidden from considering evidence other than the law's text and formal legislative history?

PARTIES TO THE PROCEEDINGS

Petitioner (plaintiff-appellee in the Florida Supreme Court) is EchoStar Satellite L.L.C. n/k/a DISH Network L.L.C. Respondents are the State of Florida Department of Revenue and the Florida Cable Telecommunications Association (defendants-appellants in the Florida Supreme Court).[1]

RULE 29.6 STATEMENT

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. Based solely on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no entity owns more than 10% of DISH Network Corporation's stock other than Putnam Investments, LLC, JPMorgan Chase & Co., and Centennial Fiduciary Management LLC.

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[1] DIRECTV, Inc. n/k/a DIRECTV, LLC was also a plaintiff-appellee in the Florida Supreme Court but is not party to this petition.

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INTRODUCTION

Floridians who watch pay-TV see the same shows on their screens whether they subscribe to a cable or a satellite provider. And, whichever one they choose, they used to pay the same state sales tax. Not anymore. Cable companies, which were losing market share to their satellite competitors, convinced the Florida legislature to put a thumb on the scale. Now the pay-TV sales tax has two tiers, and the sales tax on satellite is nearly double the rate for cable. Expert testimony confirmed what common sense would suggest—this increase caused satellite providers to lose thousands of customers.

What possessed the State to adopt this unequal excise on competing services? In a word, protectionism. Though cable and satellite may be interchangeable from the viewer's perspective, they have very different relationships with the local economy. Cable providers use extensive local infrastructure to assemble and deliver their programming packages. They have legions of employees at digital production facilities throughout Florida and invest huge sums in the State to build and maintain tens of thousands of miles of cable. Satellite providers have no comparable local presence. They assemble programming packages at out-of-state facilities and deliver that programming to customers without using local infrastructure.

As a result, for every customer who chooses cable over satellite, more dollars end up in the pockets of state and local government. The practical effect of Florida's unequal sales tax is to benefit local economic

interests associated with cable. That's why the legislature and cable lobbyists wanted to tax satellite more. Simply put, satellite service now faces a higher sales tax in Florida because satellite providers do less there.

This scheme is a quintessential violation of the dormant Commerce Clause. That fundamental protection against protectionism prohibits States from discriminating against interstate commerce either purposefully or in practical effect. In particular, it forbids a State from taxing or regulating differently on the basis of where a good is produced or a service is performed. That's exactly what the unequal Florida tax does. It puts a heavier duty on pay-TV programming that is assembled and delivered without using massive infrastructure within the State.

The Florida Court of Appeal recognized this, whereas the Florida Supreme Court's contrary decision deepened a division of authority and departed from this Court's precedents. It is simply not the case, as the Florida Supreme Court believed, that a law cannot be discriminatory if its mechanism for favoring local economic interests is to discriminate among interstate businesses. A purely in-state business is not the only kind of in-state economic interest that may be favored, as other courts properly have recognized.

That the unequal sales tax had an impermissible effect should come as no surprise; that was its purpose. The lower court concluded otherwise only by blinding itself to anything other than the law's *stated* purpose, as announced in the statutory text and the

official legislative record. The court simply ignored the evidence of protectionist motivations. In doing so, it joined some courts that have taken a similarly narrow view of discriminatory purpose—and widened a split with many others and with this Court.

This Court's review is vital, not just to resolve these divisions of authority, but because of the importance of these principles for the modern economy. On the Florida Supreme Court's antiquated view, discriminating in favor of the vanishingly few purely local enterprises—the local dairy producer or corner store—is all the dormant Commerce Clause forbids. This is a rule that throws open the door to all manner of protectionism. This Court never interpreted the Commerce Clause so narrowly—even before the Internet Age of infinitely connected businesses and supply chains—and it should grant review to resolve the substantial uncertainty created by the decision below and others like it.

OPINIONS AND ORDERS BELOW

The decision of the Florida Supreme Court is reported at 215 So.3d 46 (2017), and reprinted at App. 1a-17a. The decision of the Florida First District Court of Appeal was available at 218 So.3d 895 (2015) but has been withdrawn; it is reprinted at App. 18a-45a. The final summary judgment order of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, is available at 2013 WL 7868007 (Oct. 9, 2013), and reprinted at App. 46a-50a.

JURISDICTION

The Florida Supreme Court issued its decision on April 13, 2017. On July 3, 2017, Justice Thomas extended the deadline for filing this petition to and including September 10, 2017. 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.

Florida's Communications Services Tax is set forth at Fla. Stat. ch. 202. Relevant provisions are excerpted at App. 51a-56a.

STATEMENT OF THE CASE

A Primer on the Pay-TV Market

Floridians who want pay-TV service have two main options. They can buy from a cable provider, like Comcast, or from one of the country's two major direct broadcast satellite providers, Petitioner DISH Network and DIRECTV. Most cable and satellite providers are large interstate enterprises that operate regionally or nationally, with headquarters and principal places of business outside of Florida. App. 7a. In Florida and elsewhere, they "compete directly … for the same customers," offering "virtually identical

products at retail": an array of 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. App. 7a, 27a; VA35 8056.[2] As the Florida Supreme Court acknowledged, it is "uncontroverted … that cable and satellite TV are economic substitutes, such that an increase in the cost of one will cause consumers, on net, to shift to the other—i.e., that consumers see the services as fungible." App. 7a (internal quotation marks omitted).

While cable and satellite providers sell fungible pay-TV services, they differ in an important respect: They assemble and distribute TV programming packages differently, in different places. Cable companies assemble TV programming at dozens of "local distribution facilities"—called "headends"—which are spread throughout the State. App. 20a. Each headend is essentially a pay-TV factory, bustling with highly trained employees who assemble the programming into digital packages and insert local advertising. VA35 8057-58. Cable providers deliver these programming packages from their headends to their customers' homes using a vast in-state infrastructure: More than 90,000 miles of "coaxial or fiber optic cables

[2] We cite the Florida Supreme Court record using that court's convention: appendix volume (VA) followed by page number.

that are laid across the state in a ground-based network and usually utilize public rights-of-way." App. 20a.

In contrast, DISH and DIRECTV assemble TV programming into packages at digital production facilities located *outside of* Florida—in Wyoming, Arizona, Colorado, and California. App. 20a. In those out-of-state facilities, the satellite providers combine raw programming signals that the national networks beam in from around the country, as well as programming from local Florida TV stations that they harvest using small, unmanned, closet-sized rooms within the Florida stations' broadcast areas. VA55 8059, 8271-72. The satellite providers send the assembled packages to satellites orbiting the Earth, which bounce those signals to small satellite dishes at customers' homes. VA55 8060, 8271-72. Satellite providers "do not utilize local infrastructure" to transmit the programming from their out-of-state digital factories to subscribers' homes. App. 20a.

These differences in assembly and distribution don't matter much to Florida consumers, who see the same programs either way. But they matter a great deal to Florida and its local governments, which reap huge rewards when cable's in-state infrastructure is built and used. Cable providers spend billions of dollars in Florida to build, operate, and maintain their production facilities and ground-based web of cables, and they employ thousands of Floridians. VA55 8060-61. Cable's activities also generate significant revenue for Florida municipalities. After all, not just anyone may dig up public streets and lay cables. In order to "construct[] … a cable system over public rights-of-

way, and through easements," cable providers must obtain franchises from local governments. 47 U.S.C. § 541(a)(2), (b)(1); 1 *Telecommunications Regulation: Cable, Broadcasting, Satellite and the Internet* § 13.02(1) (Matthew Bender, rev. ed.). Traditionally, cable companies in Florida paid franchise fees to each locality—i.e., rent—of up to 5% of the gross revenue they earned there. App. VA55 8062-63.

Satellite providers have no comparable presence in Florida, because they rely on out-of-state infrastructure to assemble and distribute pay-TV. They can deliver service without "construct[ing] … a cable system over public rights-of-way, and through easements," and so do not need costly franchises from local governments. 47 U.S.C. §§ 541(a)(2), (b)(1), 542; *Communications Act of 1995*, H.R. Rep. No. 104-204, pt. 1, at 125 (July 24, 1995) ("[S]atellite service is a national rather than local service" and "do[es] not require the use of the public rights-of-way, or the physical facilities or services of a community."). Instead, satellite providers invest billions of dollars outside of Florida to build and launch their satellites, to operate their uplink centers, and to obtain rights from the Federal government to locate their satellites in outer space and use certain transmission frequencies. VA55 8064-65.

The Cable Industry Successfully Lobbies for Protectionist Legislation

In Florida, as elsewhere, cable companies dominated the pay-TV market for decades. By the late 1990s, however, satellite providers were gaining new

customers at a faster rate, thanks in part to their superior distribution technology. VA55 8065. Concerned about its eroding market share, the cable industry asked the Florida Legislature to put a thumb on the competitive scale. VA40 5708. At that time, all pay-TV service in Florida, whether delivered by cable or satellite, was subject to a uniform 6% sales tax. App. 20a. Cable proposed—and drafted the statutory text for—a new arrangement: a higher tax on any pay-TV service delivered to Floridians without using local wires. VA40 5784-94.

The cable industry offered a blatantly protectionist rationale. VA55 8065-70. It argued that satellite should be taxed more because cable alone made local economic contributions. VA55 8065-66. Cable lobbyists warned that Florida's economy would take a hit if cable lost market share, since that would mean cuts to local operations, job losses, and less franchise-fee revenue for localities. *Id*. Local governments, which were cable's "de facto business partners" thanks to their franchise relationships, amplified the cable industry's message. VA55 8066. Cable played a "make or break role" in putting an unequal pay-TV tax on the Legislature's agenda, and persuading the Legislature to enact it. *Id*.

Thus, in 2001, Florida jettisoned its uniform sales tax rate in favor of a two-tiered levy. Cable service—which the statute described as "communications service which … [o]riginates and terminates in this state"—became subject to a favorable 6.8% rate. Fla. Stat. § 202.12(1)(a) (2005); App. 4a. Meanwhile, service "by satellite directly to the subscriber's premises without the use of ground receiving or distribution

equipment" was hit with a 10.8% charge. *Id.* §§ 202.11(5) (incorporating 47 U.S.C. § 303(v)), 202.12(1)(b).[3] This new law—known as the "Communications Service Tax" or "CST"—also honored cable's request to create a substitute for traditional franchise fees. It authorized localities to "levy a discretionary communications services tax" (called the "local CST") on cable providers of up to 5.1% in lieu of charging them franchise fees. *Id.* § 202.19(2), (3)(a). The local CST would be collected by the State and remitted to the relevant municipality, thus easing the administrative burden on cable companies, which formerly had to pay franchise fees to jurisdictions throughout the state. *Id.* §§ 202.19(4)(a), (8), 202.18(3)(a).

Florida's unequal CST produced precisely the desired effect: Raising the price of satellite relative to cable service increased cable's share of the market. VA55 8070-71. Satellite providers lost approximately 200,000 customers due to the tax increase, while cable added subscribers. *Id.* The differential tax thereby boosted pay-TV providers that assemble and distribute their programming packages in Florida at the expense of providers that perform those same activities elsewhere.

Procedural Background

1. In 2005, DIRECTV and DISH Network challenged the unequal CST because it discriminates against interstate commerce in purpose and practical effect. The satellite providers gathered striking and

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[3] The legislature later changed those rates to 4.92% for cable and 9.07% for satellite. Fla. Stat. § 202.12(1) (2015).

largely uncontroverted evidence. As noted above, the evidence of a discriminatory purpose included testimony from cable's chief lobbyist to a legislative committee about cable's need for assistance, as well as affidavits and contemporaneous documentation from industry lobbyists and former legislators regarding cable's lobbying effort and protectionist messaging. VA40 5708, 5772-80, 5784-94; VA41 5803.

Ultimately, however, the trial court entered summary judgment for Florida and the Florida Cable Telecommunications Association (FCTA), which had intervened as a defendant. As relevant here, it reasoned that the CST was lawful because "both the satellite companies and the major cable companies are interstate companies" and thus the law "does not reward in-state companies or punish out of state companies." App. 49a.

2. The Florida Court of Appeal reversed, concluding that the CST unconstitutionally discriminates against interstate commerce.

Recognizing that "[a]ny notion of discrimination assumes a comparison of substantially similar entities," *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997), the court first confirmed that cable and satellite providers are "similarly situated" because they "operate in the same market and are direct competitors within that market." App. 27a. It then rejected Respondents' argument that, "because satellite and cable companies are interstate companies with corporate headquarters and principal places of business located outside of Florida, no in-state interests are benefited [by the unequal tax] and the Commerce

Clause is not implicated." App. 28a. Rather, the court explained, the "Commerce Clause analysis focuses not on the domiciles of particular corporations, but on whether a law results in differential treatment of in-state and out-of-state economic interests." *Id.* And cable's "extensive local infrastructure" and army of workers within the State "provides an in-state economic interest for the cable companies." *Id.*; *see also* App. 34a (recognizing that a "[c]able provider's reliance on local rights-of-way transforms its interests into local interests").

Thus, the court concluded that there was a relevant in-state economic interest. And, it further determined, a boost for cable amounted to a local economic preference because of cable's massive local infrastructure and workforce. "Because the CST favors communications services that use local infrastructure, it has a discriminatory effect on interstate commerce." App. 30a; *see also* App. 28a-29a ("Because … the CST burdens interstate commerce by imposing a higher tax rate on those communication companies that do not invest in local economies, it violates the Commerce Clause."). In this regard, the court explained, Florida's unequal sales tax is "analogous" to "a number of other cases" in which this Court has "invalidated taxes that had the effect of favoring companies that performed their production activities locally or used local infrastructure for their production." App. 29a.

Judge Marstiller dissented with regard to discriminatory effects. She principally disagreed with the majority's conclusion that the CST's favoritism of cable constituted favoritism of in-state economic in-

terests. App. 39a-40a. In her view, "the type of economic protectionism the dormant Commerce Clause prohibits is not present in this situation where the state is not protecting local industry." App. 42a.

The court also considered discriminatory purpose. Drawing on statutory construction principles, the court restricted its inquiry to the CST's statutory text and legislative history, and found no expression of discriminatory purpose. App. 35a-38a. The court refused to consider additional evidence from former legislators and lobbyists involved in drafting the bill, which reflected that the bill was written by cable, to benefit cable, in light of cable's local infrastructure. App. 35a.

3. The Department and the FCTA appealed to the Florida Supreme Court, which held the tax constitutional.

The Florida Supreme Court began by holding that satellite and cable companies are similarly situated—"they both provide television service and compete directly in the pay-television market for the same customers." App. 7a. And the court did not dispute that the CST's unequal rates disfavor satellite relative to cable service.

The court ultimately concluded, however, that the CST's discrimination against satellite and in favor of cable does not amount to discrimination against interstate commerce. The reason, according to the court, is that "[c]able companies are not in-state interests for the purpose of the dormant Commerce Clause." App. 9a; *see also* App. 10a ("Cable is not a local, in-state interest any more than satellite."). There could be no

violation because "both businesses are interstate in nature." App. 9a. Both have "corporate headquarters and principal places of business located outside of Florida," and "employees and property both inside and outside of Florida to facilitate their operations and earn income." App. 9a-10a. The court did not dispute that "cable employs more Florida residents and uses more local infrastructure to provide its services," and that cable and satellite providers "have a different impact on local communities." Pet App. 10a-11a. But, because cable "is not a local business," the statutory preference for pay-TV service that "requires the employment of more people and the use of more infrastructure" within Florida was nonetheless permissible. App. 11a.

As to discriminatory purpose, the court restricted the inquiry to "the language and the legislative history of the statute." Pet App. 12a. Invoking "general rule[s] of statutory construction," the court refused to consider the substantial record evidence, including affidavits from lobbyists and former legislators, "to unmask the true purpose" of the CST. App. 13a. And, having thus blinkered itself, the court found no discriminatory purpose because it saw "no evidence from the text of the statute" or the relevant "Senate and House Journals." App. 14a.

REASONS FOR GRANTING THE PETITION

The antiquated rule adopted by the Florida Supreme Court (and other courts on Florida's side of a division of authority) is utterly at odds with the Internet Age. On the Florida Supreme Court's view of the world, the dormant Commerce Clause is relevant only

when a State discriminates in favor of an in-state business, and against an out-of-state business. But, the theory goes, when two *inter*state business are at issue—seemingly regardless of what they do or where they do it—the dormant Commerce Clause has nothing to say.

That never has been the rule, and it would make even less sense today. To be sure, in generations past, Commerce Clause litigation sometimes focused on schemes that protected purely local enterprises. *E.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (favoring local dairy farmers); *Walling v. Michigan*, 116 U.S. 446 (1886) (local liquor sellers). But that never has been the *sine qua non* of a dormant Commerce Clause violation. For decades, this Court has struck down laws benefiting businesses (regardless of domicile) that perform activities locally while disadvantaging competing businesses that do not. And in the age of multistate manufacturing and distribution chains, and internet marketing and sales, the Florida rule would be a nullity. Even small enterprises operate across state lines, whether to buy raw materials, to store data, or to sell goods over the Internet.

Nevertheless, when it comes to handling modern-day local favoritism, lower courts have divided into two diametrically opposed camps—including in the pay-TV context at issue here. The Court should grant review to resolve this persistent conflict. And in so doing, the Court should simultaneously address the evidence that a court may consider in assessing discriminatory purpose. On this question too, the Florida Supreme Court adopted an unyielding rule

that makes little sense and, more importantly, runs headlong into this Court's own precedents.

I. The Court Should Grant Review Because The Decision Below Widens A Division Of Authority, And Departs From The Court's Precedents.

A. The lower courts are divided over whether laws that differentiate among interstate companies can violate the dormant Commerce Clause.

The Commerce Clause grants to Congress the power "[t]o regulate Commerce … among the several States," U.S. Const. art. I, § 8, cl. 3, and impliedly protects interstate commerce from undue state interference—a principle known as the "dormant" or "negative" Commerce Clause. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (internal quotation marks omitted). In so doing, the dormant Commerce Clause prohibits States from discriminating in ways that amount to "economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). "In this context, 'discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (quoting *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). Thus, a State may not "distort[] … the geography of production" by differentiating between products or producers to give a competitive advantage to those with local ties. *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994).

Occasionally, forbidden protectionism is evident from a law's face. But "Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce." *Id.* at 201. Instead, the inquiry requires "a sensitive, case-by-case analysis of [an enactment's] purposes and effects." *Id.*

When it comes to handling local favoritism, however, many lower courts have adopted a wooden rule: that discrimination among interstate companies cannot violate the dormant Commerce Clause. That rule is at odds with the decisions of multiple other lower courts. Indeed, on this issue there are two diametrically opposed camps. Courts like the Florida Supreme Court inappropriately narrow the Commerce Clause's protections to situations in which a law favors purely in-state businesses. Courts in the second camp properly recognize that the Commerce Clause applies when laws favor in-state economic activity, even if the activity happens to be performed by an interstate enterprise.

Camp 1. In the decision below, the Florida Supreme Court held that the CST does not discriminate. It did so notwithstanding substantial and largely undisputed evidence that Florida's unequal tax has the practical effect of favoring local economic interests over nonlocal ones. The court reasoned that there is no need to look into a law's practical effects when a statute distinguishes among interstate rather than purely local businesses. *See supra* at 12-13.

Several other courts—sometimes over spirited dissents—agree that the dormant Commerce Clause's

anti-discrimination rule kicks in only when a State favors its homegrown businesses, and not when a State protects its economy by advantaging some interstate companies over others. This narrow view has especially taken hold in state courts, which is where much litigation over state taxes must be brought, and which have proven less willing to root out local economic favoritism.

The Florida Supreme Court aligned itself with two other state high court decisions that rejected challenges to unequal pay-TV taxes—*DIRECTV Inc. v. Levin*, 941 N.E.2d 1187 (Ohio 2010), and *DIRECTV v. Utah State Tax Comm'n*, 364 P.3d 1036 (Utah 2015). In *Levin*, the Ohio Supreme Court majority declared, like the Florida court here, that "the cable industry is not a local interest benefited at the expense of out-of-state competitors," and thus Ohio's unequal tax was not impermissible local favoritism. 941 N.E.2d at 1196. The major cable and satellite providers, the court wrote, are all "interstate companies selling an interstate product to an interstate market. Both … 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*.

Two dissenting justices strongly criticized the majority for fixating on the interstate character of cable and satellite providers: "[I]t ignores economic reality to focus narrowly on the location of ownership or headquarters." *Id*. at 1198. That is because "a business need not be locally owned or headquartered to benefit the local economy" and, accordingly, "[l]ocal

investment, not simply locally headquartered businesses, may not be promoted through discriminatory taxation." *Id*. The dissenters would have held that, by "favor[ing] the sellers who invest locally and burden[ing] the sellers who do not," Ohio's tax scheme impermissibly favored "in-state over out-of-state economic interests." *Id*. at 1199.

The Utah Supreme Court likewise stressed the need for a plaintiff alleging discrimination against interstate commerce to identify a direct beneficiary that has its "principal place of business" within the state. *Utah State Tax Comm'n*, 364 P.3d at 1046. That court acknowledged cable's extensive in-state activities, and also acknowledged that Utah's differential tax boosted cable at the expense of satellite—yet found it dispositive that the cable companies that do business in Utah have "their principal place of business … elsewhere." *Id*. at 1047. The court "dispose[d] of th[e] case at this threshold" without even considering the law's actual effects and purpose. *Id*.; *accord DIRECTV, Inc. v. State*, 632 S.E.2d 543, 548 (N.C. Ct. App. 2006) (holding that North Carolina's differential pay-TV tax was lawful because it did not discriminate against satellite providers "in favor of a local industry").

Two federal courts of appeals have adopted a similarly narrow view of local favoritism, equating "in-state interests" with local manufacturers or sellers. In *Freedom Holdings v. Spitzer*, the Second Circuit concluded that, unless a law advantages regulated parties that are "in-state," the dormant Commerce Clause is not implicated. 357 F.3d 205, 218 (2d Cir. 2004); *see also Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005). The Tenth

Circuit has similarly declared that "[t]he party claiming discrimination must show that the state law benefits local actors and burdens out-of-state actors, and the result must 'alter[] the competitive balance between in-state and out-of-state firms.'" *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129, 1142 (10th Cir. 2016) (second alteration in original) (quoting *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1041 (10th Cir. 2009)).

Camp 2. Numerous courts—including at least four federal courts of appeals—have rejected the approach exemplified by the Florida Supreme Court. In this second camp, courts recognize that a statute need not draw a line between purely in-state and purely out-of-state companies in order to discriminate against interstate *commerce*. That was the view of the Florida Court of Appeal in this case, before the Florida Supreme Court reversed it, *see supra* 10-12.

Significantly, Camp 2 includes the Eleventh Circuit, which means the Florida Supreme Court is now at odds with the very circuit in which Florida resides. Two related cases, *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008), and *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008), highlight the dispute. They involved a local ordinance in Florida that placed restrictions on "formula" (i.e., chain) stores and restaurants. The businesses benefited and burdened by the ordinance were not exclusively local and nonlocal. The disfavored businesses included national chains based outside of Florida as well as some Florida-based chains—and the national chains were by no means total outsiders to the state, since they had local facilities and employees. *Cachia*,

542 F.3d at 842. The law's beneficiaries, meanwhile, were not just mom-and-pop establishments, but also major companies domiciled outside Florida that ran local establishments without qualifying as formula retailers. *Id*. Despite the presence of interstate businesses on both sides of the ledger, the Eleventh Circuit held that the ordinance was subject to elevated scrutiny under the dormant Commerce Clause because, as a practical matter, it "favor[ed] in-state interests by eliminating the economic advantages of operating a national chain restaurant." *Id*.; *see also id*. at 843 (explaining that the ordinance was not "evenhanded in effect" since it distorted "competition in the local market" by restricting national chains).

The First, Third, and Sixth Circuits similarly focus on a law's local economic impact. Unlike the Florida Supreme Court, they do not curtail the analysis based on the residence of the favored businesses. Instead, they accept that a law may unconstitutionally benefit in-state interests even when the mechanism for doing so happens to benefit a company that is not purely in-state. The following cases are illustrative:

- *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). The court invalidated a Puerto Rico regulatory regime that precluded any business—whether a national chain or a purely local concern—from opening a pharmacy in Puerto Rico without obtaining a certificate from a government official. The court viewed the regulation as discriminatory even though the benefiting incumbent pharmacies included ones "owned by out-of-Commonwealth interests." *Id*. at 58. "Holding otherwise," the court

recognized, would have been "tantamount to saying that a favored group must be *entirely* in-state for a law to have a discriminatory effect on commerce"—a proposition unsupported by precedent. *Id.*; *see also Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 8-10 (1st Cir. 2010) (invalidating a law that granted preferential treatment to "small" wineries over "large" ones, even though many of the favored "small" wineries were out-of-state businesses).

- *Am. Trucking Ass'ns. v. Whitman*, 437 F.3d 313 (3d Cir. 2006). The Third Circuit struck down a New Jersey regulation that barred large trucks from using the state's local roads and highways unless the trucks had an origin or destination in the state. (Otherwise, those trucks were limited to interstate highways.) The court found a discriminatory effect because the regulation favored "[c]ommercial interests which rely on imports from and exports to New Jersey" over rivals "with no origin or destination" in the State. *Id.* at 322. It made no difference that many of the favored trucking businesses were based out of state. What mattered was that truckers who were performing a particular activity locally—picking up or delivering—were treated more favorably, regardless of domicile, than truckers who were not performing those activities in the State. *Id.* at 323; *see also Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 427-28 (3d Cir. 2011) (invalidating a Delaware law that gave preferential treat-

ment to contractors—including those headquartered out-of-state—that maintained a permanent in-state office).

- In *Cuno v. DaimlerChrysler, Inc.*, the Sixth Circuit struck down an Ohio investment tax credit favoring businesses that installed new manufacturing equipment in the state. 386 F.3d 738, 741-42 (6th Cir. 2004), *vacated in part on other grounds*, 547 U.S. 332 (2006). The very point of the law was to induce interstate businesses—which clearly were not local Ohio enterprises, such as DaimlerChrysler—to locate their plants in Ohio. The nature or domicile of the favored companies did not matter to the Sixth Circuit's Commerce Clause analysis. Instead, the court focused on the law's effects on the local economy. *Id*. at 745-46.

These decisions stand in stark contrast with the decisions in Camp 1, which focus mostly if not exclusively on whether a statute distinguishes between in-state and out-of-state enterprises. Had the Florida Supreme Court taken the Camp 2 approach, it would have reached the opposite result. The First Circuit would have rejected the argument that "a favored group must be *entirely* in-state for a law to have a discriminatory effect on commerce." *Walgreen*, 405 F.3d at 58. And the Third Circuit would have focused on the fact that businesses were treated differently based on where they performed a particular activity. *Whitman*, 437 F.3d at 323.

Notably, the conflict extends to this precise context—differential pay-TV taxes. The Tennessee Court of Appeals' recent decision in *DIRECTV v. Roberts* offers an especially stark view of the divide. 477 S.W.3d 293 (Tenn. Ct. App. 2015). That court expressly rejected the Ohio and North Carolina position (now also Florida's position) that the Commerce Clause was not implicated because "cable providers are not in-state economic interests." *Id.* at 303. The Tennessee court instead sided with the Ohio Supreme Court dissenters, explaining that "the fact that the parties benefitting from a tax are themselves interstate companies does not shield the tax from negative Commerce Clause review." *Id.* The court concluded: "[D]espite any implication to the contrary in either *DIRECTV 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." *Id.*

The Massachusetts Supreme Judicial Court similarly declined to adopt the Ohio and North Carolina approach. *DIRECTV, LLC v. Dep't of Revenue*, 25 N.E.3d 258 (Mass. 2015). Instead, the court chose to "assume for purposes of [its] analysis … that the cable companies and the satellite companies represent in-State and out-of-State interests, respectively." *Id.* at 266. It adopted this approach despite what it called "weighty arguments to the contrary," *id.*, and in the course of so doing, specifically identified a division of authority—between the Second Circuit's decision in *Freedom Holdings* (discussed above at 18), and this Court's decisions in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403-04 (1984), and *Lewis v. BT*

Inv. Managers, Inc., 447 U.S. 27, 42 n.9 (1980). *See* 25 N.E.3d at 266 n.12.[4]

In the context of a constitutional provision meant to prevent "economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), this division of authority is intolerable.

B. The decision below conflicts with multiple decisions in which this Court has held that the Commerce Clause bars discrimination in favor of local economic activity, not just purely local companies.

The interpretation of the Commerce Clause adopted by the Florida Supreme Court (and the others like it) is not merely antiquated and cramped. It also disregards numerous of this Court's decisions. The Court has never made the domicile of a regulated business the linchpin of its analysis, and it certainly never has held that state laws get a free pass simply because their direct beneficiaries are not purely local enterprises. To the contrary, the Court has long forbidden States from favoring interstate businesses or transactions that generate desired local economic benefits by penalizing comparable businesses or

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[4] Ultimately, the Tennessee and Massachusetts courts ruled against the satellite providers, but on the distinct theory that satellite providers were not similarly situated to the favored cable providers. *Roberts*, 477 S.W.3d at 307; *Dep't of Revenue*, 25 N.E.3d at 266. Here, by contrast, the Florida Supreme Court expressly found that cable and satellite providers *are* similarly situated for Commerce Clause purposes. *See* Pet App. 7a. The courts' radically divergent approaches underscore the unsettled nature of Commerce Clause doctrine. *Infra* Part III.

transactions that do not. When the Court says that the Commerce Clause bars "differential treatment of in-state and out-of-state economic interests," *Oregon Waste Sys.*, 511 U.S. at 99, it is not equating "interests" with "companies."

After all, States can improperly advance their parochial interests at the expense of other States and the national market when they favor interstate businesses that invest, produce, or operate locally over those that do not. *See, e.g.*, *West Lynn Creamery*, 512 U.S. at 193 (emphasizing a law's "distorting effects on the geography of production" as the key consideration); *Lewis*, 447 U.S. at 42 n.9 ("[D]iscrimination based on the extent of local *operations* is itself enough to establish the kind of local protectionism" forbidden by the Commerce Clause. (emphasis added)). In other words, a State discriminates against interstate *commerce* when it advantages local *commerce* over nonlocal *commerce*. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 343 (1996) ("States may not impose discriminatory taxes on interstate commerce in the hopes of encouraging firms to do business within the State."); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("[T]he critical consideration is the overall effect of the statute on both local and interstate *activity*." (emphasis added)).

Thus, the Court long has invalidated laws that differentiate not between in-state and out-of-state businesses, but between interstate enterprises that build facilities or perform certain activities within the state, and competing enterprises that do so elsewhere:

- In *Westinghouse Electric Corp. v. Tully*, the Court invalidated a New York law that awarded tax credits based on the proportion of shipping activities that interstate companies (like Westinghouse) conducted in the state. 466 U.S. at 393-94. As a result, companies (whether or not based in New York) would have seen their tax bills reduced if they built or used a dock in New York City, for instance, but not if they used one across the river in New Jersey. *Id*. at 400 n.9. The law had nothing to do with where the affected companies were domiciled; it was invalid nonetheless.

- In *Armco Inc. v. Hardesty*, the Court struck down a West Virginia wholesale tax that exempted all businesses that performed manufacturing *in the State*, no matter their domicile. 467 U.S. 638, 640-41 (1984). As a practical matter, this meant that if two national companies sold ball bearings at wholesale in West Virginia, the company that manufactured them in Pittsburgh, PA, would be taxed, while the company that manufactured them in Wheeling, WV, would not. Such favoritism for in-state manufacturing, the Court held, amounted to unlawful discrimination. *See id*. at 642 ("[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."). Nothing in the decision turned on the domicile of the competitors.

- In *Boston Stock Exchange v. State Tax Commission*, the Court invalidated a New York law

> that taxed certain interstate stock transactions more favorably than others. 429 U.S. 318, 319 (1977). Nonresidents who transferred shares of stock in New York paid less tax for a stock sale transacted on a New York exchange than on an out-of-state exchange. Concluding that the tax was discriminatory, the Court rejected the view that the law was valid because its direct beneficiaries were taxpayers based out of state: "The fact that this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce … does not save [the law] from the restrictions of the Commerce Clause." *Id.* at 334. It is "constitutionally impermissible," the Court held, for a State to "tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests." *Id.* at 335; *see id.* at 332 n.12 ("[T]he tax may not discriminate between transactions on the basis of some interstate element.").

This authority makes clear that the decision below, and others like it, have mistaken what is *sufficient* to establish a Commerce Clause violation for what is *necessary*. Of course a law that discriminates based on domicile usually will be unconstitutional—but those are not the *only* laws that the dormant Commerce Clause forbids. In limiting the inquiry in this fashion, the Florida Supreme Court gutted the Commerce Clause's protections. Under its approach, even "[t]he paradigmatic example of a law discriminating against interstate commerce"—"the protective tariff or customs duty"—would be permissible if the relevant producers all were interstate companies. *West*

Lynn Creamery, 512 U.S. at 193. That cannot be right. A State cannot "advantage[] local production" in this way, no matter the domicile of the producer. *Id.* at 194.

Here, Florida's unequal CST does exactly what the Commerce Clause forbids. It differentiates between competing pay-TV providers based on whether they use local ground equipment to assemble and distribute programming. It creates an incentive for consumers to choose providers that invest heavily in the local economy, and penalizes providers that instead invest in out-of-state infrastructure. This differential treatment distorts the "geography of production" by increasing the demand for locally sourced pay-TV packages, and decreasing the demand for pay-TV packages that are assembled and distributed from out of state. States have long enacted laws to increase "in-state involvement" in producing and distributing goods and services, and such laws "have met the same fate as virtually all other measures designed to serve local interests at the expense of out-of-state enterprises—invalidation." Laurence H. Tribe, *American Constitutional Law* § 6-9, at 1080 (3d ed. 2000). The Florida Supreme Court's contrary rule departs from the Court's precedents.

II. The Decision Below Conflicts With Decisions Of This And Lower Courts About How To Assess Claims Of Discriminatory Purpose.

A. The lower courts are split on whether to consider evidence of the actual motives behind a law when assessing a claim of discriminatory purpose.

The Florida Supreme Court also deepened a second entrenched split—namely, how to assess discriminatory purpose. Recognizing that the Commerce Clause "forbids discrimination, whether forthright or ingenious," *Best & Co v. Maxwell*, 311 U.S. 454, 455 (1940), one set of courts—the larger group—do not fixate on the *self-stated* purpose of a challenged enactment, as announced in its text or official legislative history. Instead, these courts consider an array of evidentiary materials to discern the *real* purpose behind the law. In contrast, a second, smaller group of courts take the approach that the Florida Supreme Court adopted here. These courts treat a discriminatory-purpose claim as they would treat a question of state statutory interpretation and look exclusively at the text and (sometimes) the formal legislative history of the challenged law. This methodological difference is critically important, and often outcome-determinative; after all, few legislators are so brazen as to announce their illicit purpose in the formal legislative record.

Camp 1. At least five federal courts of appeals hold that discriminatory purpose "is not controll[ed]" by rules of "statutory construction." *Chambers Med.*

Techs. of S.C., Inc. v. Bryant, 52 F.3d 1252, 1259 n.10 (4th Cir. 1995). Instead, these courts properly recognize, the inquiry into purpose necessarily is more probing; otherwise, it would serve no different function than assessing a statute's facial invalidity. *See Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 75 (1989) ("[A] tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, *or* has the effect of unduly burdening interstate commerce." (emphasis added)). Accordingly, these courts routinely consider the full range of evidence, including evidence from those involved in the legislative process, when such materials cast light on the presence or absence of a purpose to discriminate:

- *Family Winemakers*, 592 F.3d at 7 n.4 (1st Cir.) (describing statements from individual legislators as "precisely the kind of evidence the Supreme Court has looked to in previous Commerce Clause cases challenging a statute as discriminatory in purpose," and treating such statements as relevant even if "not controlling").

- *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 48 (2d Cir. 2007) (examining "correspondence among Town officials" and finding no indications of "an improper purpose").

- *Chambers Med. Techs.*, 52 F.3d at 1259 & n.10 (4th Cir.) (finding it appropriate to examine statements from legislators; "such comments are no doubt relevant" to determining motivation).

- *E. Ky. Res. v. Fiscal Court of Magoffin Cty., Ky.*, 127 F.3d 532, 542 (6th Cir. 1997) ("[W]here other sources, other than the state's own self-serving statement of its legislative intent, indicate the presence of actual and discriminatory purposes, a state's discriminatory purpose can be ascertained from [those] sources.").

- *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2003) (relying on "evidence in the [litigation] record," including testimony and documents from individuals involved in the drafting process, to conclude that the challenged enactment "was motivated by a discriminatory purpose"); *Jones v. Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006) (considering content of television ads backing a voter initiative as evidence of discriminatory purpose).

- *Deere & Co. v. State*, 130 A.3d 1197, 1217 (N.H. 2015), *cert. denied*, 137 S. Ct. 38 (2016) (recognizing that "statements by a law's private-sector proponents sometimes can shed light on [a law's] purpose," even though their "probative value" may be limited).

Camp 2. In contrast, a handful of courts, now including the Florida Supreme Court, restrict their inquiry to the text of a challenged law and (sometimes) its official legislative history. This view has taken hold mainly in state courts, which tend to underenforce Commerce Clause protections. Some of these courts have a strict rule against using legislative history to interpret *state statutes*, contrary to how this Court has looked into discriminatory purpose as a

matter of federal constitutional law. *Infra* 33. These courts include the Massachusetts Supreme Judicial Court and Tennessee Court of Appeals, which addressed this issue in the same cable-satellite context as the Florida Supreme Court. Massachusetts analogized its inquiry to "statutory interpretation" and expressed skepticism about relying on cable industry "lobbying materials" to glean insight into purpose. *Dep't of Rev.*, 25 N.E.3d at 272. The Tennessee court similarly cited statutory interpretation precedents for the proposition that it is inappropriate to consult "sources outside of the Legislature" when addressing a discriminatory purpose challenge. *Roberts*, 477 S.W.3d at 305.

The Pennsylvania Supreme Court has held likewise in a discriminatory-purpose case outside of the pay-TV context. It announced that a court may not "'divine' a discriminatory legislative intent" from materials beyond statutory text—even *official* legislative history—if the statutory language is clear and does not itself reveal discrimination. *Am. Trucking Ass'ns, Inc. v. Scheiner*, 509 A.2d 838, 849-51 (Pa. 1986), *rev'd on other grounds*, 483 U.S. 266 (1987).[5] The Supreme Court of Puerto Rico has taken a similar position, giving decisive weight to formal legislative recitals of purpose, and refusing to entertain the possibility that "the legislature 'says one thing, but means another.'"

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[5] Lower courts continue to treat this portion of *Scheiner* as good law, undisturbed by this Court's reversal. *See Commonwealth v. Comella*, 735 A.2d 738 (Pa. Commw. Ct. 1999); *Commonwealth v. Hake*, 738 A.2d 46, 47 n.5 (Pa. Commw. Ct. 1999).

Puerto Rico Ass'n of Beer Importers, Inc. v. Commonwealth, 2007 TSPR 92 (P.R. May 16, 2007).

B. The decision below conflicts with this Court's precedents, which examine actual motives, not formal recitations.

The Florida Supreme Court's narrow approach to discriminatory purpose flouts this Court's precedents and subverts the Commerce Clause's guarantee against protectionism.

As noted above (at 16), Commerce Clause cases have long "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201; *see also Lacoste v. La. Dep't of Conservation*, 263 U.S. 545, 550 (1924) ("Regard must be had to the substance of the measure rather than its form."). Accordingly, the Court long has made clear the need to consult a broad range of evidence to unmask an enactment's true purpose. *E.g., West Lynn Creamery*, 512 U.S. at 190 (citing proponent's declaration that "we must act on the state level to preserve our local industry"); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352 (1977) (relying on statements from state agriculture commission and an industry spokesperson to find discriminatory intent); *Boston Stock Exchange*, 429 U.S. at 327-28 (citing statements from the Governor at the time of enactment as evidence of discriminatory purpose). Nor is this approach limited to Commerce Clause cases. The Court conducts a similar inquiry in other constitutional contexts. *See, e.g.*, *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (Equal Protection).

The Florida Supreme Court's contrary approach invites evasion. It leaves States free to discriminate as long as they are careful about the packaging. The potential for such gamesmanship is why discriminatory-purpose analysis requires courts to consider a broader array of materials than in cases involving statutory interpretation. When the goal is to ascertain the meaning of statutory text, narrowing the universe of cognizable sources incentivizes clarity. When the goal is to root out discrimination, narrowing the universe of sources incentivizes subterfuge. *Cf. Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 211 (3d Cir. 2002) ("[A]ny protectionist law can be couched in non-protectionist terms … .).

Here, the evidence that the Florida Supreme Court refused to consider was more than sufficient to withstand summary judgment. As set forth above (at 8), the cable industry and its allies sold the unequal sales tax based on a protectionist pitch about the disparate in-state economic contributions of cable and satellite providers. The industry with the local infrastructure was favored in order to favor local economic interests. The evidence showed cable's critical role in passing this rent-seeking legislation, whose purpose precisely matched its effect—more heavily taxing the industry that performs key functions out of state, and thereby shifting thousands of jobs to the industry that performs those functions within the State.

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

The magnitude of these issues, and the extent of the conflict and confusion in the lower courts, make the Court's intervention vital. Florida's unequal pay-TV tax is not one-of-a-kind. Ever since satellite established itself as a viable alternative to cable in the 1990s, cable has been turning to state legislatures to roll back satellite's market gains. Leveraging its local economic ties, cable has managed to get differential tax schemes enacted in eight states, and cable lobbyists have gotten bills introduced in dozens more. This case thus has ramifications for the entire $100 billion pay-TV industry, the 100 million American households that subscribe to pay-TV service, and the state and local governments across the country that regulate pay-TV excise taxes and franchise fees.

But the questions presented here have far broader implications. The pay-TV industry is just one of many in which disruptive and innovative companies are using new technology to serve customers from afar, often more efficiently and with less local infrastructure than in the past. Online retailers enable consumers to purchase everything from bow ties to bow tie pasta without setting foot in a store. Companies allow consumers to access music and movies in ways that make in-person purchase or rental obsolete. Innovative car companies seek to sell cars without

setting up local dealerships.[6] These upstart companies create value through these innovations. But they also threaten established ways of doing business—which makes them a natural target for protectionist legislation sponsored by entrenched incumbents. In the past, States would enact measures to protect mom-and-pop establishments against the competitive threat of national chain stores. Today, they protect national chain stores (which at least build and employ locally) over online competitors (which do not). Yesterday's bogeyman may have been Wal-Mart; today it is Amazon. Regardless of the target, all of these protectionist laws threaten the national market for goods and services that the Commerce Clause is meant to protect.

Given the high stakes, doctrinal clarification is urgently needed. Lower courts frequently lament the confused state of the law and practically beg this Court for further guidance. They describe Commerce Clause doctrine as a worsening "quagmire" that offers "little in the way of precise guides to the States." *Utah State Tax Comm'n*, 364 P.3d at 1049 (internal quotation marks omitted). They note "criticism of the doctrine by current members of [this] Court." *Roberts*, 477 S.W.3d at 299. And they invoke scholarly assessments that the law is "'a horrid mess in application.'"

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[6] Lindsey Rupp et al., *America's Retailers Are Closing Stores Faster Than Ever*, Bloomberg, Apr. 7, 2017, https://tinyurl.com/krerf44; Brian Stelter, *Internet Kills the Video Store*, N.Y. Times, Nov. 6, 2013, https://tinyurl.com/yd3bffly; Jeffrey Dorfman, *Free Markets? Tesla Battles Car Dealers Over Right To Sell Cars*, Forbes, Mar. 22, 2014, https://tinyurl.com/ycfmagv5.

Id. (quoting Michael S. Greve, *The Dormant Coordination Clause*, 67 Vand. L. Rev. En Banc 269, 270 (2014)).

The lurching litigation over unequal pay-TV taxes well illustrates the doctrine's ambiguities and inconsistencies. Satellite providers have challenged each existing unequal pay-TV tax on Commerce Clause grounds, and in each case they have ultimately failed to win relief. Judges, however, have been all over the map, repeatedly dividing as to both result and reasoning. Here, the Florida appellate court invalidated the unequal CST, but was reversed by the Florida Supreme Court. Trial courts in Ohio and Tennessee likewise struck down those States' schemes, only to be reversed by higher courts—over a vigorous dissent from the Chief Justice of the Ohio Supreme Court. *See Levin*, 941 N.E.2d 1187; *DIRECTV, Inc. v. Roberts*, No. 03-2408-IV (Ch. Tenn. June 21, 2013); *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-7135 (Ohio Ct. Com. Pl., Franklin Cty., Oct. 17, 2007). Other courts have upheld the laws based on a mish-mash of conflicting rationales. *See DIRECTV, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007); *DIRECTV, Inc. v. State*, 632 S.E.2d 543 (N.C. Ct. App. 2006).

The question of how to assess discriminatory purpose has similarly broad importance. After all, "governmental purpose is a key element of a good deal of constitutional doctrine," including in Equal Protection, Free Exercise, and Establishment Clause cases. *See McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005). The Court is already poised to address a question of discriminatory purpose this Term in *Trump v. International Refugee Assistance Project*

and *Trump v. Hawaii*, Nos. 16-1436 & 16-1540 (cert. granted June 26, 2017). Granting review in this case will give the Court an important opportunity to consider the nature of discriminatory-purpose analysis across multiple contexts.

These issues need not percolate further. Over the past dozen years, at least 16 different courts have addressed Commerce Clause challenges to unequal pay-TV tax schemes, and no clarity has emerged. Outside the pay-TV context, state and federal courts hear a steady stream of Commerce Clause cases and have similar struggles. And legal uncertainty poses numerous difficulties. When it comes to taxes, state officials need clarity. If a State levies a tax that is later invalidated, it may face hefty refund claims, long after the money was spent. Businesses, meanwhile, need predictability as they decide whether and where to invest. The Commerce Clause is supposed to facilitate the smooth operation of the national market, and the Court should act to minimize the drags on interstate commerce caused by unpredictability and inconsistency. Yet, since 2008, this Court has decided only one major dormant Commerce Clause case, which involved a question very different from those presented here. *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787 (2015) (addressing the scope of the internal consistency test for state taxes). It is past time to hear another.

Finally, this case is an excellent vehicle. The decision below was rendered by a state high court on the basis of an extensive summary judgment record. The central facts are therefore not subject to dispute, and the questions of law are cleanly presented.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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: September 8, 2017

APPENDIX A

OPINION OF THE SUPREME COURT OF FLORIDA (APRIL 13, 2017)

SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE, et al.,,
Appellants,

v.

DIRECTV, INC., etc., et al.,,
Appellees.

No. SC15-1249

QUINCE, J.

This case is before the Court on appeal from the decision of the First District Court of Appeal in *DIRECTV, Inc. v. State, Department of Revenue*, 40 Fla. L. Weekly D1375 (Fla. 1st DCA June 11, 2015), where the district court expressly declared a state statute invalid. We have jurisdiction to review the decision. *See* art. V, § 3(b)(1), Fla. Const. Because we find that the statute involved does not violate the dormant Commerce Clause, we reverse the decision of the First District.

FACTS AND PROCEDURAL HISTORY

In 2005, DIRECTV, Inc. and Echostar, L.L.C. (the satellite companies) filed suit in the trial court, "seeking a declaratory judgment holding the sales tax provision in the [Communications Services Tax] unconstitutional, a permanent injunction against the enforcement of the provision, and a refund of the taxes paid pursuant to the provision." *DIRECTV, Inc.*, 40 Fla. L. Weekly at D1375. Enacted in 2001, the Communications Services Tax (CST) imposed a 6.8 percent tax rate on cable service and a 10.8 percent tax rate on satellite service. § 202.12(1), Fla. Stat. (2005). Presently, cable service is taxed at 4.92 percent and satellite is taxed at 9.07 percent. § 202.12(1), Fla. Stat. (2015). It is this difference, according to the satellite companies, that violates the dormant Commerce Clause. The trial court disagreed, and "[i]n ruling on cross-motions for summary judgment," found that section 202.12(1), Florida Statutes, does not violate the Commerce Clause "because it does not benefit in-state economic interests or similarly situated entities." *Id.*

The satellite companies appealed the decision to the First District, arguing that the statute unconstitutionally discriminates against interstate commerce in both its effect and purpose. *Id.* The First District agreed with the satellite companies and reversed the decision of the trial court. *Id.* at D1378-79. The district court noted that satellite companies and cable companies were similarly situated because they both "operate in the same market and are direct competitors within that market." *Id.* at D1376. Moreover, the

district court found cable companies to be in-state interests due to their local infrastructure and local employment. *Id.* at D1377. The district court held that "because the CST favors communications that use local infrastructure, it has a discriminatory effect on interstate commerce." *Id.* However, the court did not find that the statute was discriminatory in its purpose. *Id.* at D1378-79.

Now before this Court, Appellants Florida Department of Revenue and the Florida Cable Telecommunications Association, Inc. (FCTA) argue that section 202.12(1) of the CST does not discriminate in its effect or its purpose and the satellite companies are not entitled to a refund for the taxes paid. This Court reviews decisions evaluating a statute's constitutionality *de novo*. *Fla. Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). All statutes come "clothed in a presumption of constitutionality," and this Court will invalidate a statute only if a challenger has shown its invalidity "beyond reasonable doubt." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008).

ANALYSIS

The statute at issue in this case, section 202.12(1) of the Communications Services Tax Simplification Law, states in relevant part:

> The Legislature finds that every person who engages in the business of selling communications services at retail in this state is exercising a taxable

> privilege. It is the intent of the Legislature that the tax imposed by chapter 203 be administered as provided in this chapter.
>
> (1) For the exercise of such privilege, a tax is levied on each taxable transaction, and the tax is due and payable as follows:
>
> (a) Except as otherwise provided in this subsection, at a rate of 6.8 percent applied to the sales price of the communications service which:
>
> 1. Originates and terminates in this state, or
> 2. Originates or terminates in this state and is charged to a service address in this state,
>
> when sold at retail, computed on each taxable sale for the purpose of remitting the tax due....
>
> ....
>
> (c) At the rate of 10.8 percent on the retail sales price of any direct-to-home satellite service received in this state.

§ 202.12(1), Fla. Stat. (2005). The satellite companies contend that section 202.12(1) is facially unconstitutional. They argue that the text of the statute shows it was enacted with a discriminatory purpose and has a discriminatory effect, which violates the dormant

Commerce Clause. "A facial challenge to a legislative Act is … the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Commerce Clause

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." Article I, § 8, cl. 3, U.S. Const. The Supreme Court recognizes, in addition to the text's affirmative grant of authority, a further, negative command, known as the dormant Commerce Clause. This clause prohibits certain state taxation even when Congress has failed to legislate on the subject. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). A state tax is permissible under the dormant Commerce Clause only if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The satellite companies' challenge to the CST is limited to the third prong, namely the prohibition on discrimination against interstate commerce.

"[S]tatutes that openly discriminate against out-of-state economic interests in order to protect in-state interests are subject to a per se rule of invalidity." *Simmons v. State*, 944 So. 2d 317, 330 (Fla. 2006). A statute can discriminate against out-of-state interests

in one of three ways: (1) it may be facially discriminatory; (2) it may discriminate in its practical effect; or (3) it may have a discriminatory intent. *Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66, 75 (1989). In this case, the satellite companies argue that the sales tax portion of the CST discriminates in its effect and purpose.

I. Discriminatory Effect

A state law is discriminatory in effect if it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Appellants argue Appellees' discriminatory effect argument fails at the threshold level. According to Appellants, this Court does not need to examine whether the tax imposes disproportionate burdens because satellite and cable companies are not similarly situated.

Substantially Similar Entities

Appellant Department of Revenue argues that cable companies and satellite companies are not similarly situated entities. "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (footnote omitted). If the differences between the two companies render the entities not substantially similar, the Commerce Clause is not implicated. *See id*. Appellant contends that cable and satellite providers offer different communications services using different technologies and are subject to different

regulatory burdens. In response, Appellees argue that cable and satellite providers compete directly and offer virtually identical products, and consumers view their products as similar and substitutable.

What is required for entities to be considered "substantially similar" has not been extensively considered by the courts. *See Gen. Motors Corp.*, 519 U.S. at 299 ("[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 …"). It appears that at the very least, the entities must be in competition with one another. "[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." *Id.* at 300; *see also Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961) (refusing to compare freezership owners and local fish processors because "[t]he freezer ships do not compete with those who freeze fish for the retail market").

We find that cable and satellite providers are similarly situated because they both provide television service and compete directly in the pay-television market for the same customers. Appellant notes that cable offers Internet and phone service and satellite does not. While true, both satellite and cable offer television programming and compete for customers in that market. Appellees' expert offered uncontroverted testimony that cable and satellite TV "are economic substitutes," such that an increase in the cost of one "will cause consumers, on net, to shift" to the other—

i.e., that consumers see the services as fungible. Moreover, Appellant FCTA's president acknowledged in depositions that satellite is cable's direct competitor, "an alternative provider of multichannel video and another means for customers to get that particular product."

Appellant also states that cable is heavily regulated by the federal government and satellite is not. However, one may argue that because cable predates satellite by decades, Congress may have decided to limit federal regulation on what was a burgeoning industry in order to allow it to compete with cable. *See, e.g., DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 774 (9th Cir. Ct. 2011) (noting Congress passed the Satellite Home Viewer Improvement Act of 1999 "to better enable competition between satellite TV and cable TV"). The Florida Legislature also appears to view cable and satellite as competitors. In enacting the CST, the Legislature declared that it wanted to provide a "uniform method for taxing communications services sold in the state" in order to "free consumers to choose a provider based on tax-neutral considerations" and "spur[] new competition by simplifying an extremely complicated state and local tax and fee system." § 202.105(1), Fla. Stat. (2001).

Although Appellant argues that cable and satellite are not similarly situated because cable offers services that satellite does not and cable is regulated more heavily, they both compete in the same market for the same customers. Accordingly, we consider satellite and cable to be similarly situated for the purpose of the dormant Commerce Clause.

In-State Interests

Appellants Department of Revenue and FCTA both argue that cable is not an in-state interest. The Supreme Court has identified "in-state" and "out-of-state" businesses based on a distinct geographic connection, or lack thereof, to the home state. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286 (1987) ("[A] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause."); *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 28 (1980) (striking down a Florida statute prohibiting banks "with principal operations outside Florida" from operating investment subsidiaries or giving investment advice within the state). Appellants argue that cable and satellite companies are both out-of-state interests because they each have corporate headquarters and principal places of business located outside of Florida. Additionally, they each have employees and property in Florida and elsewhere that facilitate the provision of their services to customers. Appellees counter that cable companies are in-state interests because they employ more Florida residents and utilize local infrastructure to produce and distribute their programming.

Cable companies are not in-state interests for the purpose of the dormant Commerce Clause. Instead, we find that both businesses are interstate in nature. Florida's largest cable companies, Comcast Corporation, Coxcom, Inc., Cox Communications Gulf Coast, LLC, and Bright House Networks, LLC, have their headquarters in Pennsylvania, Georgia, Georgia, and

New York, respectively. Florida's largest satellite provider, DIRECTV, has its headquarters in California. Florida's second largest satellite provider, DISH, has its headquarters in Colorado. The cable and satellite companies have employees and property both inside and outside of Florida to facilitate their operations and earn income. They both employ Florida residents to sell, maintain, or repair their service to Florida customers. They also own and lease a significant amount of property in Florida.

Neither cable nor satellite "produce" anything in Florida. Instead, they are service providers that acquire video content from national and regional networks and local broadcasters and distribute that video content to their customers in Florida. To do this, they both employ the use of ground infrastructure. Cable uses headends to aggregate video content from the national and regional networks and process it for further downstream transmission to Florida customers. Satellite uses local collection facilities to receive off-air video content from local broadcast stations, encode the content, and prepare it for long-haul transmission back to their satellite uplink facilities outside of Florida. This local off-air video content is then transmitted over ground, using leased capacity on fiber or coaxial networks owned by telecommunications companies in Florida.

Cable is not a local, in-state interest any more than satellite. While it may be true that cable employs more Florida residents and uses more local infrastructure to provide its services, the Supreme Court has never found a company to be an in-state interest because it had a greater presence in a state. Instead,

the Supreme Court has affirmed the prerogative of state and local governments to treat different business models differently. *See Amerada Hess*, 490 U.S. 66; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978). According to these cases, a state may treat "two categories of companies" differently so long as the discrimination is based on "differences between the nature of their businesses" and not "the location of their activities." *Amerada Hess*, 490 U.S. at 78. Here, the difference between cable and satellite is not that one is located or primarily operates "in-state" and the other "out-of-state." Instead, it is that their different business models have a different impact on local communities. While cable's business model requires the employment of more people and the use of more infrastructure, it is not a local business. Neither cable nor satellite is produced in Florida, and neither business is headquartered in the state.

For these reasons, we do not consider cable an in-state interest for the purpose of the dormant Commerce Clause. Because we find that cable is not an in-state interest, the satellite companies' discriminatory effect argument fails. To date, every state and federal court considering Commerce Clause challenges brought by the satellite industry arguing against state tax measures as favoring the cable industry has held that these taxes do not violate the dormant Commerce Clause. They have found either that cable and satellite are not similarly situated[1] or that cable is not

[1] *DIRECTV, Inc. v. Treesh*, 487 F.3d 471, 480 (6th Cir. 2007) (finding that cable and satellite "are distinct, consisting of two very different means of delivering broadcasts"); *DIRECTV, LLC*

an in-state interest.[2] We agree with those decisions that find cable is not an in-state interest.

II. Discriminatory Purpose

A state law may also violate the dormant Commerce Clause if it has a discriminatory purpose. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977). To determine discriminatory purpose, courts look to the language and the legislative history of the statute in question. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-72 (1984). Appellees argue that affidavits from lobbyists and two former legislators, which stated that the cable lobbyists sought a differential tax rate for cable and satellite because satellite was beginning to take over market share, demonstrate that the Legislature acted with a discriminatory purpose. Moreover, they claim that the Supreme Court has made clear that courts

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v. Dep't of Revenue, 25 N.E.3d 258, 266-71 (Mass. 2012) (concluding that cable and satellite are not substantially similar for Commerce Clause purposes); *DIRECTV, Inc. v. Roberts*, 477 S.W.3d 293, 307 (Tenn. Ct. App. 2015) (determining that cable and satellite providers are not "substantially similar entities for purposes of the Commerce Clause").

[2] *DIRECTV, Inc. v. State*, 632 S.E.2d 543, 548 (N.C. Ct. App. 2006) (holding that cable providers are not "local" as compared to satellite providers); *DIRECTV Inc. v. Levin*, 941 N.E.2d 1187, 1196 (Ohio 2010) (explaining that "the cable industry is not a local interest benefited at the expense of out-of-state competitors"), *cert. denied*, *DIRECTV Inc. v. Testa*, 133 S. Ct. 51 (2012); *DIRECTV v. Utah State Tax Comm'n*, 364 P.3d 1036, 1046-47 (Utah 2015) (finding that cable providers are not "in-state" and satellite providers are not "out-of-state" for Commerce Clause purposes).

can and must consult a broad range of evidence—including statements by proponents and sponsors of suspect legislation—to unmask the true purpose for an alleged discriminatory enactment.

A general rule of statutory construction is that "legislative intent is determined from the statute's text." *Heart of Adoptions, Inc., v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007). In this case, section 202.105, Florida Statutes, provides the legislative intent of the CST:

> (1) It is declared to be a specific legislative finding that the creation of this chapter fulfills important state interests by reforming the tax laws to provide a fair, efficient, and uniform method for taxing communications services sold in this state. This chapter is essential to the continued economic vitality of this increasingly important industry because it restructures state and local taxes and fees to account for the impact of federal legislation, industry deregulation, and the convergence of service offerings that is now taking place among providers. This chapter promotes the increased competition that accompanies deregulation by embracing a competitively neutral tax policy that will free consumers to choose a provider based on tax-neutral considerations. This chapter further spurs new competition by simplifying an extremely complicated state and local tax and fee system. Simplification will

> lower the cost of collecting taxes and fees, increase service availability, and place downward pressure on price. Newfound administrative efficiency is demonstrated by a reduction in the number of returns that a provider must file each month. By restructuring separate taxes and fees into a revenue-neutral communications services tax centrally administered by the department, this chapter will ensure that the growth of the industry is unimpaired by excessive governmental regulation. The tax imposed pursuant to this chapter is a replacement for taxes and fees previously imposed and is not a new tax. The taxes imposed and administered pursuant to this chapter are of general application and are imposed in a uniform, consistent, and nondiscriminatory manner.

§ 202.105, Fla. Stat. (2001). There is no evidence from the text of the statute that it was enacted with a discriminatory purpose. As noted by the First District, an examination of the 2000 Senate and House Journals reveals that there was no intent to favor cable companies. *DIRECTV, Inc.*, 40 Fla. L. Weekly at D1378. Moreover, the 2000 Senate Staff Analysis and Economic Impact Statement shows that analysts believed the CST's impact would have the benefit of a simplified tax structure for all communication providers. *Id*.

Appellees argue that courts can and must consider other forms of evidence, such as the affidavits presented in this case. However, the Supreme Court has held that legislative history is far more problematic when sources outside of the Legislature are consulted, or when courts "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 those statements.").

Therefore, we do not find that the CST was enacted with a discriminatory purpose. Because the CST is not discriminatory in either its purpose or effect, the satellite companies' facial challenge fails. Consequently, Appellees are not entitled to a refund of the taxes paid pursuant to the statute.

CONCLUSION

For the reasons set forth above, we reverse the First District's decision holding that the statute is invalid. Section 202.12(1) is not discriminatory in either its purpose or its effect and therefore does not violate the dormant Commerce Clause.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and CANADY, JJ., concur.
POLSTON, J., concurs in result.

LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the District Court of Appeal — Statutory or Constitutional Invalidity

First District - Case Nos. 1D13-5444 & 1D14-292

(Leon County)

Pamela Jo Bondi, Attorney General, J. Clifton Cox, Special Counsel, and Rachel Nordby and Jonathan L. Williams, Deputy Solicitors General, Tallahassee, Florida,

for Appellant Florida Department of Revenue

Eric S. Tresh, Amelia Toy Rudolph, and Zachary T. Atkins of Eversheds Sutherland (US) LLP, Atlanta, Georgia; David A. Konuch, Tallahassee, Florida; and Walter Hellerstein, Athens, Georgia,

for Appellant Florida Cable Telecommunications Association, Inc.

Katherine E. Giddings and Kristen M. Fiore of Akerman LLP, Tallahassee, Florida; Peter O. Larsen and Timothy J. McDermott of Akerman LLP, Jacksonville, Florida; E. Joshua Rosenkranz, Jeremy N. Kudon, and Nicholas G. Green of Orrick, Herrington & Sutcliffe LLP, New York, New York; and Eric A.

Shumsky of Orrick, Herrington & Sutcliffe LLP, Washington, District of Columbia,

for Appellees

Gigi Rollini of Messer Caparello, P.A., Tallahassee, Florida,

for Amicus Curiae Public Knowledge

John S. Mills, Courtney R. Brewer, and Andrew D. Manko of The Mills Firm, P.A., Tallahassee, Florida,

for Amicus Curiae Satellite Broadcasting and Communications Association

John A. Hinman of Hinman Carmichael LLP, San Francisco, California; and Christine Davis Graves of Carlton Fields Jorden Burt, P.A., Tallahassee, Florida,

for Amicus Curiae National Association of Wine Retailers

APPENDIX B

OPINION OF THE FLORIDA FIRST DISCTRICT COURT OF APPEAL (JUNE 11, 2015)

DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

DIRECTV, INC., N/K/A DIRECTV, LLC, AND ECHOSTAR SATELLITE, L.L.C. N/K/A DISH NETWORK, L.L.C.

Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, MARCUS AND PATRICIA OGBORN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, JIM ZINGALE, ACTING IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE FLORIDA DEPARTMENT OF REVENUE, AND FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION,

Appellees.

Case Nos. 1D13-5444 & 1D14-0292

Opinion filed June 11, 2015

An appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

Katherine E. Giddings and Kristen M. Fiore of Akerman LLP, Tallahassee; Peter O. Larsen, Timothy J. McDermott, and Aleksas A. Barauskas of Akerman LLP, Jacksonville; E. Joshua Rosenkranz and Jeremy N. Kudon of Orrick, Herrington & Sutcliffe LLC, New York, N.Y., *pro hac vice*; and Eric A. Shumsky of Orrick, Herrington & Sutcliffe LLC, Washington, D.C., *pro hac vice*, for Appellants.

Christine Davis Graves of Carlton Fields Jorden Burt, P.A., Tallahassee; John A. Hinman of Hinman & Carmichael, San Francisco, CA, *pro hac vice*, for Amicus Curiae National Association of Wine Retailers.

Joseph C. Mellichamp, III, and J. Clifton Cox, Assistant Attorneys General, Tallahassee, for Appellee State of Florida.

Amelia T. Rudolph, Eric S. Tresh, and Zachary T. Atkins of Sutherland Asbill & Brennan LLP, Atlanta, GA, *pro hac vice*; David Konuch, Tallahassee, for Appellee Florida Cable Telecommunications Association.

ROBERTS, J.

This appeal arises from a final summary judgment finding that section 202.12(1), Florida Statutes, which imposes a higher tax rate on satellite services than on cable services, is constitutional. The Appellants, Directv, Inc. and Echostar, L.L.C. ("the satellite companies"), contend that the statute unconstitutionally discriminates against interstate commerce in both effect and purpose, which is in violation of the Commerce Clause. We agree and reverse.

I. Factual background

A. Cable and satellite companies

The satellite companies provide multi-channel video programming to subscribers in Florida and nationwide by means of satellites stationed above the earth. These satellites gather and transmit the programming signals from uplink facilities located in Arizona, California, Colorado, and Wyoming. Subscribers in Florida receive programming by means of small satellite dishes mounted on or near their homes. As such, satellite companies do not utilize local infrastructure because they transmit their signals directly to their subscribers.

Cable companies, on the other hand, provide multi-channel video programming using local distribution facilities. Specifically, cable companies distribute their programming from headends spread throughout the state that compile the programming and deliver the packages to customers using coaxial or fiber optic cables that are laid across the state in a ground-based network and usually utilize public rights-of-way.

B. The Communications Services Tax

Before 2001, Florida's sales tax on television services was six percent for all subscribers regardless of whether the provider was a cable or satellite company. § 212.05, Fla. Stat. (1999). Cable companies were required to pay franchise fees or rent to local governments in order to use the local rights-of-way for their ground-based networks. However, in 2001, the

Florida Legislature passed the Communications Services Tax Simplification Law ("the CST"), which imposed a differential tax rate for cable and satellite services. § 202.12(1), Fla. Stat. (2001) (taxing cable service at 6.8 percent and satellite service at 10.8 percent). Currently, cable service is taxed at a rate of 6.65 percent, and satellite service is taxed at a rate of 10.8 percent. § 202.12(1), Fla. Stat. (2014). It is this difference in taxation rates that the satellite companies allege violates the dormant Commerce Clause.

II. Procedural background

The satellite companies filed suit in 2005 seeking a declaratory judgment holding the sales tax provision in the CST unconstitutional, a permanent injunction against the enforcement of the provision, and a refund of the taxes paid pursuant to the provision.[1] In ruling on cross-motions for summary judgment, the trial court held that section 202.12(1), Florida Statutes, does not violate the Commerce Clause because it does not benefit in-state economic interests or similarly-situated entities.

III. Standard of review

An order granting summary judgment is reviewed *de novo* to determine whether there are genuine issues of material fact and whether the trial court properly applied the correct rule of law. *Futch v. Wal-*

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[1] This suit was consolidated with another case filed by satellite customers that made substantially similar arguments. Those customers are named as Appellees in this appeal but do not appear to be participating.

Mart Stores, Inc., 988 So. 2d 687, 690 (Fla. 1st DCA 2008). "Summary judgment should be affirmed only if the movant has proven the nonexistence of any material factual dispute." *Auto-Owners Ins. Co. v. Young*, 978 So. 2d 850, 852 (Fla. 1st DCA 2008). In considering a motion for summary judgment, the court must draw all reasonable inferences from the evidence in favor of the non-moving party, and even the slightest doubt as to the existence of a disputed issue of material fact will preclude summary judgment. *See Laidlaw v. Krystal Co.*, 53 So. 3d 1128, 1129 (Fla. 1st DCA 2011).

IV. Tax refund - facial challenge

The Appellee, the Department of Revenue ("the Department"), argues that the satellite companies cannot seek a tax refund because they failed to exhaust the available administrative remedies. To receive a tax refund, a taxpayer must file a refund application with the Department. § 215.26(2), Fla. Stat. (2005). If the refund application is denied, the taxpayer can contest the denial in the circuit court. § 72.011(2)(a), Fla. Stat. (2005). Here, there is no evidence in the record that the satellite companies filed a refund application. As such, the Department is correct that the parties failed to exhaust the available administrative remedies.

However, there is an exception to the process required by Chapter 215. If a taxpayer is seeking a refund pursuant to section 215.26, Florida Statutes, and the sole basis for the refund is that the statute imposing the tax is facially unconstitutional, the circuit court will have jurisdiction despite the taxpayer's

failure to exhaust administrative remedies. *Sarnoff v. Fla. Dep't of Highway Safety & Motor Vehicles*, 825 So. 2d 351, 357 (Fla. 2002). This exception is known as the direct-file exception. *Id*.

The Department argues the direct-file exception is inapplicable here because this is not a facial challenge to the statute. This Court describes a facial challenge as follows:

> A facial challenge to a statute is more difficult than an "as applied" challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid. Except in a First Amendment challenge, the fact that the act might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face; such a challenge must fail unless no set of circumstances exists in which the statute can be constitutionally applied. A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards.

Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

Here, the satellite companies argue that there is no set of circumstances in which the CST would be valid because the text of the statute shows it was enacted with a discriminatory purpose and has a discriminatory effect, which violates the Commerce Clause. The Department counters that arguments regarding discriminatory purpose and effect cannot be facial challenges. For the basis of its argument, the Department references the following United States Supreme Court quote: "[A] tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury*, 490 U.S. 66, 75 (1989). The Department has interpreted this statement to mean that arguments regarding discriminatory intent or effect cannot be facial challenges. This is an incorrect interpretation of this statement. The Department is conflating a type of general constitutional challenge with a specific type of Commerce Clause challenge. A party can pose a facial challenge to a statute by arguing that there is no set of circumstances where it could apply constitutionally because of its discriminatory purpose or its discriminatory effect on interstate commerce. Because this is the satellite companies' argument, the direct-file exception applies, and this Court can properly consider the effect and purpose arguments.

V. Commerce Clause

The Commerce Clause states, "The Congress shall have power to … regulate Commerce with foreign Nations, and among the several states." Article I, § 8, cl. 3, U.S. Const. Attendant with this grant of authority

to Congress, the United States Supreme Court has recognized a dormant Commerce Clause, which limits the states' power to regulate interstate commerce. *Simmons v. State*, 944 So. 2d 317, 329 (Fla. 2006). A state or local regulation violates the dormant Commerce Clause if the regulation treats out-of-state commerce differently from in-state commerce. *Reinish v. Clark*, 765 So. 2d 197, 211 (Fla. 1st DCA 2000). To discriminate, the statute must place a greater economic burden on those industries or companies outside the state and give an economic advantage to those operating within the state. *Id.*; *see also Simmons*, 944 So. 2d at 330 ("[S]tatutes that openly discriminate against out-of-state economic interests in order to protect in-state interests are subject to a per se rule of invalidity."). Where a law is found to be discriminatory, it will be stricken as a violation of the Commerce Clause without any additional inquiry. *Reinish*, 765 So. 2d at 211.

There are three ways in which a statute can discriminate against out-of-state interests: (1) it may be facially discriminatory; (2) it may discriminate in its practical effect; or (3) it may have a discriminatory intent. *Amerada Hess*, 490 U.S. at 75. Here, the satellite companies argue that the sales tax portion of the CST is discriminatory in effect and purpose.

1. Discriminatory effect

A state law is discriminatory in effect if it affects similarly-situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests. *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 10

(1st Cir. 2010) (citing to *Or. Waste Sys., Inc., v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) & *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)). Here, the sales tax portion of the CST is discriminatory in effect because it affects similarly-situated entities, cable and satellite companies, by imposing a disproportionate burden on satellite service and conferring an advantage upon cable services, which use in-state infrastructure.

A. Substantially similar entities

The trial court below found that satellite and cable companies are inherently different entities, which took the CST out of the purview of the Commerce Clause. "Any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. As such, if the differences between two companies render the entities not substantially similar, the Commerce Clause is not implicated. *Id*. at 298-99 (holding that a statute did not discriminate in practical effect because the two entities in consideration were not similar markets and/or competitors and were not similarly situated). The United States Supreme Court further explained:

> This is so 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. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce

> Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.

Id. at 299.

Here, cable and satellite companies provide multichannel television programming to Florida subscribers. As such, they operate in the same market and are direct competitors within that market. They differ in the deployment of technology, the need for local infrastructure, and the additional services offered. However, 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.

B. In-state interests

In addition to a finding the companies at issue are similarly-situated entities, courts must also find in-state interests to be present in order for the Commerce Clause to be implicated. *Oregon Waste*, 511 U.S. at 99. If a tax discriminates against interstate commerce by providing a direct commercial advantage to local businesses, it violates the Commerce Clause. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977); *Maryland v. Louisiana*. 451 U.S. 725 (1981) (holding that the tax "unquestionably discriminates against interstate commerce in favor of local interests" because it provided an exemption for gas consumed within the state and provided a tax credit to encourage local mineral exploration). Here,

the Appellees contend that because satellite and cable companies are interstate companies with corporate headquarters and principal places of business located outside of Florida, no in-state interests are benefited and the Commerce Clause is not implicated. However, the interstate nature of the business does not necessarily preclude a finding of a local economic interest. Commerce Clause analysis focuses not on the domiciles of particular corporations, but on whether a law results in differential treatment of in-state and out-of-state economic interests.

The Florida Supreme Court examined a Commerce Clause challenge involving interstate businesses in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 317, 318 (Fla. 1984). *Delta* involved a tax credit that applied to air carriers with a corporate or business home office in Florida and maintained a workforce of more than 1200 employees in Florida. *Id*. Air carriers that did not meet these requirements would not receive the credit, which could amount to up to five million dollars. *Id*. The Florida Supreme Court held that the "corporate income tax credit provide[d] a direct commercial advantage to select Florida-based air carriers and thereby violate[d] the Commerce Clause." *Id*. at 321.

Like the air carriers in *Delta*, the satellite and cable companies are interstate in nature with local economic interests. While the cable companies do not have offices located within the state, they employ Florida workers and use extensive local infrastructure. It is this local infrastructure and local employment that provides an in-state economic interest for the cable companies. Because the sales tax portion of

the CST burdens interstate commerce by imposing a higher tax rate on those communication companies that do not invest in local economies, it violates the Commerce Clause.

C. Effect of CST

i. Effect case law

This case is similar to a number of other cases where the Supreme Court invalidated taxes that had the effect of favoring companies that performed their production activities locally or used local infrastructure for their production. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265-72 (1984); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 349-51 (1977) (finding that a North Carolina statute, which required all closed containers of apples sold in the state to bear the applicable U.S. grade or standard that was used by North Carolina apple producers, violated the dormant Commerce Clause because it discriminated against apples from other states that used a different grading system); *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390-91 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (striking down a city ordinance that required all milk sold in the city, from both in-state and out-of-state, to be pasteurized within five miles of the city lines). The situation here is analogous to this line of authority because the businesses receiving a benefit from the differential tax rate, the cable companies, "produce" their services locally by using local infrastructure. Because the CST favors communications services that use local infrastructure, it has a discriminatory effect on interstate commerce.

ii. Aggregate tax rate

The Department argues that there is no discrimination in practical effect because if this Court considers the entirety of the CST, cable and satellite are taxed roughly the same. The Florida Supreme Court has ruled that courts should consider an entire taxing scheme in its analysis of a certain section. *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 722 (Fla. 1994). In *Kuhnlein*, the court examined whether an act imposing an impact fee only on vehicles purchased or titled in other states violated the Commerce Clause. *Id*. at 719. The Department argued that the overall taxing scheme for vehicles needed to be considered. *Id*. at 722. The court agreed, finding that "reviewing courts must consider the actual effects of statutes, rather than isolated technicalities." *Id*. (internal citations omitted).

Here, cable and satellite services are taxed at different rates under section 202.12(1) of the CST, which results in a four-percent differential. *See* § 202.12(1), Fla. Stat. (2005) (providing that satellite service is taxed at 10.8 percent and cable service is taxed at 6.8 percent).[2] However, section 202.19 of the CST provides for the imposition of local CSTs for cable companies. § 202.19, Fla. Stat. (2005). Counties and municipalities may tax cable companies up to 5.1 percent. § 202.19(2)(a), Fla. Stat. (2005). Satellite companies are not subject to the local CST because federal law

[2] Cable and satellite services are also subject to a Gross Receipts Tax, which is equal for both types of services. § 203.01(2)(b), Fla. Stat. (2005) ("The rate applied to communications services shall be 2.37 percent.").

exempts satellite service from all local taxes and fees. 47 U.S.C. § 152 (1996). The Department concludes that in those municipalities where the local CST is four percent, the tax rate for cable and satellite services is roughly equal. However, this method of attaining a semblance of equality is untenable. There is no guarantee that the local governments charging four percent will continue to do so, and the Department fails to offer the number of counties that must charge the four percent in order for the tax rate to be considered equal between satellite and cable services. This is an insufficient method of ensuring equal treatment.

iii. Operational differences

The Department relies on two United States Supreme Court cases, *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978), and *Amerada Hess v. Division of Taxation*, 490 U.S. at 66, to argue that the differential tax rate is a result of the differences in the nature of cable and satellite services rather than the location of their activities and, as such, there is no discriminatory effect. The Department's analysis and reliance on these two cases is affirmed in the other appellate court decisions addressing this issue. *See Directv, Inc. v. Treesh*, 487 F.3d 471, 481 (6th Cir. 2007); *Directv, Inc. v. State*, 632 S.E.2d 543, 663-69 (N.C. Ct. App. 2006), *Directv, Inc. v. Levin*, 941 N.E.2d 1187, 1195 (Ohio 2010).

In *Exxon*, the Maryland Legislature, responding to evidence that oil producers were favoring company-operated gasoline stations, enacted a statute prohibiting oil producers or refiners from operating retail

service stations in the state. 437 U.S. at 117. The oil producers filed suit arguing that the statute violated the Commerce Clause because it interfered with the functioning of the interstate market. *Id*. at 127. The court rejected the appellants' argument, finding that the Commerce Clause does not protect a particular structure or method of operation in a retail market. *Id*. As such, the court held the statute did not violate the Commerce Clause. *Id*. at 127-28.

Following *Exxon*, the *Amerada Hess* court examined the dormant Commerce Clause's application to a state tax law. 490 U.S. at 68-69. In 1980, Congress had enacted the Crude Oil Windfall Profit Tax Act, which imposed a tax on the "windfall" profit that crude-oil producers receive from the oil they produce. *Id*. at 69 (citing to 26 U.S.C. §§ 4986-4998 (1980)). The Act provided that, for federal income tax purposes, the windfall profit tax would be deductible. *Id*. In 1986, New Jersey passed its Corporation Business Tax Act, which imposed a tax on a portion of the entire net income of a corporation for the privilege of doing business within the state. *Id*. (citing to N.J. Stat. § 54:10A-1 (1986)). Under the New Jersey Act, a corporation's entire net income must be determined without the exclusion, deduction, or credit of taxes paid or accrued to the federal government. *Id*. The appellants argued that the add-back provision, by denying a deduction for windfall profit tax payments, discriminated against oil producers who sold their own oil in favor of independent retailers who did not produce oil. *Id*. at 78. The court held that "[w]hatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses,

not from the location of their activities." *Id*. As such, the court found no violation of the Commerce Clause. *Id*. at 79.

Other jurisdictions have examined these two cases and misapplied their holdings to differential taxes on satellite and cable. In *Directv v. State*, the Court of Appeals of North Carolina examined a North Carolina statute that imposed a sales tax on "direct-to-home satellite service," but not on cable service. 632 S.E.2d at 660 (citing to N.C. Stat. § 105-164.4(a)(6), (2001)). The court applied *Exxon* and *Amerada Hess* and found that even if satellite companies were able to establish an in-state distribution system, the tax would still be imposed "because of the means that they use to deliver" their services. *Id*. at 667-68. Similarly, the court found that cable companies with out-of-state distribution systems would still be exempt from the tax imposed because of how they deliver their services. *Id*. at 668. The court concluded that the differential tax rate was the result of operational differences in the delivery of cable and satellite and not from the geographical location of the businesses and, as such, it did not have a discriminatory effect in violation of the Commerce Clause. *Id*. at 668.

Similarly, in *Directv v. Treesh*, the Sixth Circuit Court of Appeals examined a Kentucky taxing scheme that taxed cable and satellite at the same rate but prohibited local government from levying franchise fees and taxes on cable companies. 487 F.3d at 475. Relying on *Exxon* and *Amerada Hess*, the court found that cable and satellite services were "distinct" and "relied upon two very different means of delivering broadcasts." *Id*. at 480. Because the "dormant Commerce

Clause is intended to protect interstate commerce, and not particular firms engaged in interstate commerce, or the modes of operation used by those firms," the court found it was not violated by the taxing scheme. *Id*. at 480-81.

Finally, in *Directv v. Levin*, the Ohio Supreme Court considered an Ohio statute that imposed a sales tax on satellite service, but not on cable service. 941 N.E.2d at 1191 (citing to R.C. 5739.01 (2003)). The Ohio Supreme Court, relying on *Exxon* and *Amerada Hess*, as well as *State* and *Treesh*, found that the tax did not discriminate based on geography and that the cable industry was not a local interest. *Id*. at 1195-96.

Exxon and *Amerada Hess* are clearly distinguishable from this case because the statute at issue in *Exxon* and the tax at issue in *Amerada Hess* had no effect on the interstate flow of goods and did not give local interests a competitive advantage over out-of-state interests. Here, it is undisputed that cable and satellite television programmers provide programming using different methods. However, one important facet of that difference is that cable providers utilize local infrastructure to provide their services. Cable provider's reliance on local rights-of-way transforms its interests into local interests. The sales tax portion of the CST gives a competitive advantage to television programming providers that use local rights-of-way. This shows the CST has a discriminatory effect. The operational differences present in this case do not shield the CST from Commerce Clause scrutiny.

Because the CST has a discriminatory effect on satellite companies, it violates the Commerce Clause, and the trial court erred in finding otherwise.

2. Discriminatory purpose

A finding that state legislation constitutes economic protectionism may be made on the basis of discriminatory purpose. *Bacchus*, 468 U.S. at 270 (citing to *Hunt*, 432 U.S. at 352-353). To determine whether there is discriminatory purpose, courts look to the language and the legislative history of the statute in question. *Bacchus*, 468 U.S. at 270-72. For example, in *Bacchus*, the court looked at the legislative history of the statute that exempted Hawaiian-produced fruit wine and okolehao liquor from an alcohol tax. *Id.* at 270-71. In Senate Committee reports, the Hawaii Legislature stated that the exemption of the okolehao from the alcohol tax was to encourage and promote the establishment of the okolehao liquor industry. *Id.* at 270 (citing to *In re Bacchus Imports, Ltd.*, 656 P.2d 724, 730 (Haw. 1982)). The reports also provided that the exemption of fruit wine manufactured in Hawaii with Hawaiian products was intended to help stimulate the local fruit wine industry. *Bacchus*, 468 U.S. at 270-71 (citing to *In re Bacchus*, 656 P.2d at 730).

The Appellants provided the trial court with affidavits from lobbyists and two former legislators, which stated that the cable lobbyists sought a differential tax rate for cable and satellite because satellite was beginning to take over some of cable's market share. The trial court did not err in refusing to consider these affidavits. The intent of the Legislature in enacting a statute is "best revealed through the actual

language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation." *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 150 (Fla. 2013) (citing to *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (stating the general principle of statutory construction that "legislative intent is determined primarily from the statute's text")). Here, section 202.105, Florida Statutes, provides the legislative findings and intent of the CST:

> (1) It is declared to be a specific legislative finding that the creation of this chapter fulfills important state interests by reforming the tax laws to provide a fair, efficient, and uniform method for taxing communications services sold in this state. This chapter is essential to the continued economic vitality of this increasingly important industry because it restructures state and local taxes and fees to account for the impact of federal legislation, industry deregulation, and the convergence of service offerings that is now taking place among providers. This chapter promotes the increased competition that accompanies deregulation by embracing a competitively neutral tax policy that will free consumers to choose a provider based on tax-neutral considerations. This chapter further spurs new competition by simplifying an extremely complicated

> state and local tax and fee system. Simplification will lower the cost of collecting taxes and fees, increase service availability, and place downward pressure on price. Newfound administrative efficiency is demonstrated by a reduction in the number of returns that a provider must file each month. By restructuring separate taxes and fees into a revenue-neutral communications services tax centrally administered by the department, this chapter will ensure that the growth of the industry is unimpaired by excessive governmental regulation. The tax imposed pursuant to this chapter is a replacement for taxes and fees previously imposed and is not a new tax. The taxes imposed and administered pursuant to this chapter are of general application and are imposed in a uniform, consistent, and nondiscriminatory manner.

§ 202.105, Fla. Stat., (2001). There is nothing in the language of the chapter implementing the CST that shows a discriminatory purpose.

The specific statutory section at issue, section 202.12, Florida Statutes, was first enacted on October 1, 2001. There was no mention of an intent to favor cable companies in any of the 2000 Senate and House Journals. Additionally, in the April 14, 2000, Senate Staff Analysis and Economic Impact Statement, the analysts found that the CST's impact would provide the benefit of a simplified tax structure for all

communication service providers. Senate Staff Analysis and Economic Impact Statement, Senate Bill 1338 (April 14, 2000). Unlike the Senate Committee reports in *Bacchus*, there is no evidence that the Legislature sought to favor the cable providers.

Therefore, the trial court did not err when it found there was no evidence of a discriminatory purpose.

VII. Conclusion

Because the sales tax portion of the CST violates the Commerce Clause due to its discriminatory effect, this Court REVERSES the trial court's order granting summary judgment and order awarding costs and REMANDS to the trial court to determine the refund amount.

SWANSON, J., CONCURS; MARSTILLER, J., DISSENTS with opinion.

MARSTILLER, J., dissenting.

For the following reasons, I respectfully dissent from the majority decision and would affirm the summary final judgment ruling that the CST does not violate the dormant Commerce Clause.

I do not agree the satellite and cable providers are similarly situated entities for purposes of dormant Commerce Clause analysis; in my view, the majority opinion fails to fully consider all the differences between the two.[3] Mainly, however, I disagree with the majority's characterizing the cable providers' use of local infrastructure, reliance on local rights-of-way and employment of Florida workers as in-state economic interests giving rise to the proscriptions of the dormant Commerce Clause. As the trial court found based on the undisputed facts brought out below, "[t]he cable companies may have more of a presence in the state because of the nature of the technology they utilize in providing their services, but the satellite companies have a significant presence in the state as well." Indeed, DirecTV and Echostar filed verified statements below averring that each has employees based in Florida—DirecTV has independent contractors here, as well—who are responsible for "sale of its services and installation, servicing, and/or maintenance of its property." I do not believe we can properly ignore or discount these facts. Inasmuch as the cable providers and the satellite providers both have human and physical assets in Florida *which they use to provide services* to their customers, they both have

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[3] 3 *See infra* n.3.

significant in-state economic interests. I fail to see how, under these facts, the cable providers have local economic interests, but the satellite providers do not. And I find nothing in dormant Commerce Clause jurisprudence that would justify invalidating Florida's CST based on one group's comparatively greater economic investment in the state where *both groups* have economic investment here.[4]

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[4] *But cf. DirecTV, Inc. v. Roberts*, No. M2013-01673-COA-R3-CV, slip op. (Tenn. Ct. App. Feb. 27, 2015), and *DirecTV, LLC v. Dep't of Revenue*, 25 N.E.3d 259 (Mass. 2015). The Tennessee court in *Roberts*, although ultimately finding the state sales tax law challenged by satellite TV providers not in violation of the dormant Commerce Clause, *see infra*. n.3, found the law impermissibly discriminated based on the extent of "use of infrastructure," citing *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984). *DirecTV v. Roberts*, slip op. at 11. But *Bacchus* did not involve comparative local "use of infrastructure" or local "investment" by otherwise non-state-based companies. Rather *Bacchus* involved a clear-cut case of economic protectionism for a home-grown liquor industry against out-of-state producers. Thus, in my view, *Bacchus* provides no jurisprudential support for the approach taken by either the Tennessee court or the majority in this case. Notably, the Tennessee court recognized:

> [N]egative Commerce Clause precedent does not explain [ ] how state legislatures are to weigh variances in investment in order to avoid favoritism. … 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.

Roberts, slip op. at 12. I submit the reason such explanation has not been forthcoming is because the dormant Commerce Clause does not apply where the taxpayers involved all have *some* in-

The majority opinion analogizes the situation here to *Delta Air Lines*, but that case is, in fact, inapposite. There, the state law at issue "provide[d] a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state." 455 So. 2d at 319. The credit would offset up to half of an air carrier's fuel tax bill. *Id*. The Florida Supreme Court held the tax credit discriminated against interstate commerce by giving commercial advantage "to Florida-based air common carriers over non-Florida-based carriers." *Id*. at 320. The distinction drawn in *Delta Air Lines* does not exist in the case before us because none of the companies are Florida based. None have corporate headquarters or business home offices here. And the fact that the cable providers, because of the technology they use, have more infrastructure and assets in Florida than do the satellite providers does not

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state investment. The Massachusetts court in *Revenue* simply assumed, without explanation, that the cable providers and satellite providers represent in-state and out-of-state interests, respectively, and cited *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980), for support. *DirecTV v. Dep't of Revenue*, 25 N.E.3d at 654-55, 655 n.12. However, *Lewis*, like *Bacchus*, did not deal with comparative local investment by two groups of industry participants. Rather, the state law at issue in *Lewis* prohibited banks, bank holding companies and trust companies with principal operations outside the state from establishing local operations. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. at 42. Thus, there too, economic protectionism of local business was the impermissible objective of the statute; it was not a case of the state choosing to favor two industry groups, both with some quantum of local investment, as we have here.

make this a case of Florida-based interests versus non-Florida-based interests.

I also believe the majority opinion, in focusing solely on the extent of in-state economic investment by cable providers and disregarding in-state investment by satellite providers, misapprehends the purpose of the dormant Commerce Clause. Relying primarily on the fact that the cable providers use local rights-of-way, the majority opinion discounts the decisions of the Sixth Circuit Court of Appeals, the Ohio Supreme Court and the North Carolina Court of Appeals holding that the pertinent distinction between satellite providers and cable providers is operational and not geographical. But those courts correctly recognized that the type of economic protectionism the dormant Commerce Clause prohibits is not present in this situation where the state is not protecting local industry. "[C]able companies are no more 'local' in nature than are satellite companies." *DirecTV, Inc. v. State*, 632 S.E.2d at 548. Moreover, application of the CST "does not depend on the geographic location of the programming provider. Rather, the sale of satellite broadcasting services is subject to [the higher] tax regardless of whether the provider is an in-state or out-of-state business[.]" *DirecTV v. Levin*, 941 N.E.2d at 1195. In other words, if any of the satellite TV providers were to headquarter itself in Florida, the CST would operate no differently as to that provider. As such, the CST does not offend the policy advanced by

the dormant Commerce Clause, and the summary final judgment should be affirmed.[5]

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[5] *But cf. DirecTV, Inc. v. Roberts* and *DirecTV, LLC v. Dep't of Revenue*, *supra* n.2, the two most recent decisions (as of this writing) in the apparently growing line of these cases. Although the Tennessee and Massachusetts courts found their states' taxing schemes discriminated against out-of-state interests, they nevertheless upheld the statutes against the satellite providers' dormant Commerce Clause challenge because the satellite providers and cable providers are not substantially similar entities as a threshold matter. *See Roberts*, slip op. at 17; *Revenue*, N.E.3d at 266-68; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) ("Any notion of discrimination assumes a comparison of substantially similar entities.); *Colgate-Palmolive Co. v. Fla. Dep't of Revenue*, 988 So. 2d 1212, 1216 (Fla. 1st DCA 2008) ("In considering whether facial discrimination exists in a taxing scheme, courts must look to the treatment applied to similarly situated taxpayers.") (citing *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81 n.12 (1992)).

> The difference in [federal] 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. … [T]he 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. There-

Assuming *arguendo* the CST does discriminate against out-of-state interests, as asserted by the satellite providers, to the extent there *is* a set of circumstances, as just stated, under which the statute clearly would not have such discriminatory effect, the facial challenge to the statute fails. "A facial challenge to a legislative act is … the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which [the tax] would be valid." *State*, 632 S.E.2d at 547 (quotations and citations omitted). The satellite providers have not satisfied their very high burden in this constitutional challenge, and the summary final judgment can be upheld on this basis, as well.

The bottom line is that the dormant Commerce Clause does not protect satellite TV providers from differential tax treatment simply because their technology is not land based. It does not protect "the particular structure or methods of operation in a retail market." *Exxon Corp.*, 437 U.S. at 127. The majority's decision to invalidate Florida's CST is inconsistent with this principle and contrary to dormant Commerce Clause jurisprudence. I understand the concern over a taxing scheme that appears to favor one group of industry competitors over another. But "'applying the dormant Commerce Clause in cases that do not present the equivalent of a protective tariff'—*i.e.*, where the tax does not draw geographic lines, favor

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> fore the disparate tax treatment of satellite providers and cable providers does not constitute discrimination.

Roberts, slip op. at 17.

local products, or promote local companies—[ ] 'dramatically increase[s] the clause's scope.'" *Levin*, 941 N.E.2d at 1194 (quoting *Treesh*, 487 F.3d at 481). The majority's decision takes that dramatic step, and I am not prepared to follow.

For the foregoing reasons, I respectfully dissent from the decision to invalidate the CST. I note, however, "a facially discriminatory tax may still survive Commerce Clause scrutiny if it is a truly 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647 (1994)). Having concluded the CST facially discriminates against interstate commerce, the majority should not stop there, but should remand the cause for further consideration by the trial court.

APPENDIX C

SUMMARY JUDGMENT ORDER OF THE CIR-CUIT COURT OF THE SECOND JUDICIAL CIRCUIT FOR LEON COUNTY, FLORIDA (OCTOBER 9, 2013)

THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

DIRECTV, INC. and ECHOSTAR SATELLITE, L.L.C., n/k/a DISH NETWORK, LLC,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE AND THE FLORIDA CABLE TELCOMMUNICATIONS ASSOCIATION,

Defendants,

MARCUS and PATRICIA OGBORN, on behalf of themselves and others similarly situated,,

Plaintiffs,

v.

JIM ZINGALE, acting in his official capacity as the Director of the FLORIDA DEPARTMENT OF REVENUE,

Defendant.

Case Nos. 05-CA-1037, 05-CA-1354 General Civil Division

SUMMARY FINAL JUDGMENT FOR DEFENDANTS

THIS CASE is before me on cross motions for summary judgment submitted by DirecTV and Dish Network ("Satellite Providers"), the Florida Cable Telecommunications Association ("FCTA"), and the Department of Revenue ("DOR"). The Plaintiffs have brought a facial challenge to section 202.12(1)(b), Florida Statutes, arguing that it violates the Commerce Clause and the Equal Protection Clause of the U.S. Constitution. The DOR and FCTA respond that the Legislature had a rational basis for treating Satellite Service and Cable Service differently and that the statutes do not discriminate against interstate commerce.

It appears that the material facts are not in dispute and summary judgment is appropriate. Because I find legislation constitutionally sound, I deny the Plaintiffs' motion and grant summary judgement in favor of DOR and FCTA. Counsel for the parties have done an excellent job of briefing and arguing the motions. I will not discuss at length the authorities cited or arguments advance, but will set forth briefly my reasoning or analysis.

I start with the accepted principle of construction that I must presume a statute to be constitutional and

that those who bring a facial challenge to the statute bear the heavy burden of demonstrating that no set of circumstances exist under which the statute would be valid. At the core of the Plaintiffs' attempt to do this is their complaint that under the taxing scheme of section 202.12, Fla. Stat., they are charged a higher rate for the state-wide communications services tax (CST) than the cable companies. They argue that this runs afoul of the Equal Protection Clause and the Commerce Clause because there is no rational basis for the distinction and because it discriminates against interstate commerce. I cannot agree with them, however, for several reasons.

First, the Legislature had a rational basis to classify Satellite Service and Cable Service differently, because they are different. They are organized differently, have different modes of operation, use different technologies in providing their services, and they provide different services. Satellite Service only permits one-way transmissions of programming from satellites to customers. All Satellite Service customers in the same viewing area receive the same transmissions at the same time; Cable Service, in contrast, permits two-way interactive communications over fiber optic cable networks, by which Cable customers can transmit information and receive unique programming that is not simultaneously transmitted to other customers in the same viewing area.

They are also different because, unlike cable companies, satellite companies are exempt from the local CST. The stated legislative intent for the integrated and comprehensive taxing scheme in section 202.105 was to embrace "a competitively neutral tax policy

that will free consumers to choose a provider based on tax-neutral considerations," and simplify "an extremely complicated state and local tax and fee system." Section 202.105(1), Fla. Stat.

The result was a taxing scheme that, rather than discriminating against interstate commerce or Plaintiffs, created a roughly level playing field for the two industries. Indeed, on average, it appears that the Plaintiffs pay less total tax under the statute. The Plaintiffs argue that each component of tax in the law must be viewed independently and parity must be obtained in each in order to comply with the Commerce Clause. I disagree, finding that the taxing scheme in the law, which balances the state-wide and local CST so that the total CST rate is roughly equal, is properly considered as a whole.

The law is on its face neutral as to in-state versus interstate business. The tax applies regardless of the location of a Satellite Service or Cable Service provider or the point of origin of Satellite Service or Cable Service. It does not reward in-state companies or punish out of state companies. Indeed, the undisputed facts show that both the satellite companies and the major cable companies are interstate companies. The cable companies may have more of a presence in the state because of the nature of the technology they utilize in providing their services, but the satellite companies have a significant presence in the state as well.

Accordingly, it is **Ordered and Adjudged** as follows:

The Amended Motion for Summary Final Judgment submitted by the DOR and the Motion for Summary Judgment submitted by FCTA are **GRANTED**. The Motion for Summary Judgment submitted by Plaintiffs is **DENIED**.

Final Judgment is hereby entered in favor of the DOR and FCTA and against the Plaintiffs, determining that Florida's Communications Services Tax is facially constitutional and that it does not violate the Commerce Clause or Equal Protection Clause. The Court reserves jurisdiction over any collateral matters, including the issues of taxable costs.

ORDERED and ADJUDGED in chambers, in Tallahassee, Leon County, Florida 32301 this 9th day of October, 2013.

By /s/ Terry P. Lewis
Circuit Court Judge

Copies furnished by e-mail to all counsel

APPENDIX D

THE 2005 FLORIDA CODE

CHAPTER 202

Communications Services Tax Simplification Law

202.11 **Definitions.--**As used in this chapter:

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(5) "Direct-to-home satellite service" has the meaning ascribed in the Communications Act of 1934, 47 U.S.C. s. 303(v).

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[1]202.12 **Sales of communications services**.--The Legislature finds that every person who engages in

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[1] **Note**.—

A. Section 11, ch. 2005-187, provides that provides that "[s]ections 1 through 10 of this act shall take effect [June 10, 2005,] and shall apply retroactively to October 1, 2001."

B. Section 9, ch. 2005-187, provides that "[t]he retroactive application of the provisions of this act are remedial in nature and shall not be construed to create a right to a refund or to require a refund by any governmental entity of any tax, penalty, or interest remitted to the Department of Revenue on substitute communications systems prior to the effective date of this act." Section 20, ch. 2005-187, provides an effective date of July 1, 2005, for ch. 2005-187. Section 11, ch. 2005-187, provides that ss. 1-10 take effect upon becoming law; the Governor approved ch. 2005-187 on June 10, 2005.

the business of selling communications services at retail in this state is exercising a taxable privilege. It is the intent of the Legislature that the tax imposed by chapter 203 be administered as provided in this chapter.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction, and the tax is due and payable as follows:

(a) Except as otherwise provided in this subsection, at a rate of 6.8 percent applied to the sales price of the communications service which:

1. Originates and terminates in this state, or

2. Originates or terminates in this state and is charged to a service address in this state, when sold at retail, computed on each taxable sale for the purpose of remitting the tax due. The gross receipts tax imposed by chapter 203 shall be collected on the same taxable transactions and remitted with the tax imposed by this paragraph. If no tax is imposed by this paragraph by reason of s. 202.125(1), the tax imposed by chapter 203 shall nevertheless be collected and remitted in the manner and at the time prescribed for tax collections and remittances under this chapter.

C. Section 12, ch. 2005-187, provides that:

"(1) The Communications Service Tax Task Force is created and housed for administrative purposes within the Department of Revenue. The task force shall operate independently of the department."

(b) At the rate of 10.8 percent on the retail sales price of any direct-to-home satellite service received in this state. The proceeds of the tax imposed under this paragraph shall be accounted for and distributed in accordance with s. 202.18(2). The gross receipts tax imposed by chapter 203 shall be collected on the same taxable transactions and remitted with the tax imposed by this paragraph.

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202.18 **Allocation and disposition of tax proceeds**.--The proceeds of the communications services taxes remitted under this chapter shall be treated as follows:

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(3)(a) Notwithstanding any law to the contrary, the proceeds of each local communications services tax levied by a municipality or county pursuant to s. 202.19(1) or s. 202.20(1), less the department's costs of administration, shall be transferred to the Local Communications Services Tax Clearing Trust Fund and held there to be distributed to such municipality or county. However, the proceeds of any communications services tax imposed pursuant to s. 202.19(5) shall be deposited and disbursed in accordance with ss. 212.054 and 212.055. For purposes of this section, the proceeds of any tax levied by a municipality, county, or school board under s. 202.19(1) or s. 202.20(1) are all funds collected and received by the department pursuant to a specific levy authorized by such sections, including any interest and penalties attributable to the tax levy.

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202.19 **Authorization to impose local communications services tax**.—

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(2)(a) Charter counties and municipalities may levy the tax authorized by subsection (1) at a rate of up to 5.1 percent for municipalities and charter counties that have not chosen to levy permit fees, and at a rate of up to 4.98 percent for municipalities and charter counties that have chosen to levy permit fees.

(b) Noncharter counties may levy the tax authorized by subsection (1) at a rate of up to 1.6 percent.

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(3)(a) The tax authorized under this section includes and is in lieu of any fee or other consideration, including, but not limited to, application fees, transfer fees, renewal fees, or claims for related costs, to which the municipality or county is otherwise entitled for granting permission to dealers of communications services, including, but not limited to, providers of cable television services, as authorized in 47 U.S.C. s. 542, to use or occupy its roads or rights-of-way for the placement, construction, and maintenance of poles, wires, and other fixtures used in the provision of communications services.

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(4)(a)1. Except as otherwise provided in this section, the tax imposed by any municipality shall be on all

communications services subject to tax under s. 202.12 which:

a. Originate or terminate in this state; and

b. Are charged to a service address in the municipality.

***

(8) The revenues raised by any tax imposed under subsection (1) or s. 202.20(1), or distributed to a local government pursuant to s. 202.18, may be used by a municipality or county for any public purpose, including, but not limited to, pledging such revenues for the repayment of current or future bonded indebtedness. Revenues raised by a tax imposed under subsection (5) shall be used for the same purposes as the underlying discretionary sales surtax imposed by the county or school board under s. 212.055.

APPENDIX E

47 U.S.C. § 303

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

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(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term "direct-to-home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.