No. 09-0627

In the Supreme Court of Ohio

DIRECTV, INC., and ECHOSTAR SATELLITE L.L.C.,

Plaintiffs-Appellants,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS,
TENTH APPELLATE DISTRICT
CASE NO. 08AP-32

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF FACTS 1

THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST 2

The Court of Appeals's ruling allows the State to discriminate against the only television service available to many rural Ohioans, and gives the General Assembly carte blanche to discriminate against companies whose innovation allows them to provide services that rural Ohioans need. 2

PROPOSITIONS OF LAW

Amicus Curiae National Rural Telecommunications Cooperative supports and adopts the propositions of law propounded by Appellants DIRECTV, Inc. and Echostar Satellite, L.L.C.

CONCLUSION 7

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rural Telecommunications Cooperative ("NRTC") is a non-profit cooperative[1] that has provided advanced telecommunications services to rural America since 1986. NRTC's mission is to lead and support its rural utility cooperative members by delivering telecommunications solutions to strengthen member businesses, promote economic development, and improve the quality of life in rural America. The essential goal of NRTC is to close the urban-rural gap, allowing Americans living in small towns, on farms and ranches, and in the most remote reaches of our nation to enjoy the same electric, phone, Internet and other essential technologies – including television programming – as are enjoyed by those in urban settings.

NRTC has particular experience working to bring satellite service to rural communities. As satellite television technology evolved, NRTC members led the launch of DIRECTV in rural America and were, at one time, the largest distributors of DIRECTV, with nearly two million customers nationwide in rural and underserved markets. In recent years, NRTC has been a pioneer in the delivery of broadband via satellite to bring faster Internet service to rural Americans, many of whom previously had no access other than dial-up service. These efforts have underscored NRTC's commitment to ensuring that multichannel television and high-speed Internet service are available to rural Americans on a nondiscriminatory basis.

STATEMENT OF FACTS

Amicus adopts and incorporates by reference the statement of facts provided by plaintiffs-appellants DIRECTV, Inc. and EchoStar Satellite, L.L.C.

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[1] NRTC and its member cooperatives are not-for-profit entities that are owned by the community of members they serve. NRTC was created to serve its members and bring advanced telecommunications services to rural America on this non-profit basis.

THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The Court of Appeals's ruling allows the State to discriminate against the only television service available to many rural Ohioans, and gives the General Assembly carte blanche to discriminate against companies whose innovation allows them to provide services that rural Ohioans need.

Agriculture is Ohio's largest industry, with nearly sixty percent of the state's land area used for crop production and pasture. Millions of Ohioans live in rural parts of the State, far away from the services that residents of Cleveland, Columbus or Cincinnati might take for granted. Many retailers and specialty stores deem it unprofitable to set up shop in sparsely-populated areas; services like high-speed Internet that become more essential to modern life every day still do not reach many areas of the State. When a company develops technology that allows it to provide these vital services cost effectively to rural areas, it is a welcome relief from the economic and cultural isolation that these rural residents might otherwise feel. The Court of Appeals's opinion in this case, however, sanctions discriminatory taxation of these essential goods and services when they are provided by companies that are viewed as less beneficial to municipal economies. Taxes that discriminate against these types of retailers disproportionately burden rural Ohioans, and may for many threaten their access to basic goods and services. NRTC urges this Court to accept jurisdiction of this appeal and enjoin the inequitable tax on satellite.

The story of the development of satellite service in Ohio demonstrates just how essential new companies can be to rural Ohioans' ability to access vital services. Cable companies have concluded – both in Ohio and elsewhere – that it is simply not worth the cost to lay the infrastructure necessary to deliver their television programming to less populated rural areas.

This meant that as recently as the early 1990s, rural families in Ohio depended entirely on "rabbit ears" to watch TV – assuming that broadcast signals could even reach them. For those Ohioans who live in areas beyond the reach of local broadcasting station signals, there was literally no way for them to access the television news, weather and other programming essential to connect them to events elsewhere in Ohio and beyond.

The advent of commercially-viable satellite TV in 1994 finally provided rural Ohioans with a bridge to the rest of the State and the world. Satellite TV is not dependent on an in-state ground infrastructure. Rather, it is a national service that is distributed directly from satellites in outer space to the receiving equipment of subscribers. It provided immediate relief to Ohioans who were tired of cable's monopoly prices and inadequate service – or, in the case of the rural communities NRTC strives to serve, the opportunity to subscribe to pay TV for the first time. As satellite Internet technology develops, rural Ohioans may also for the first time be able to access Internet services that most urban American take for granted – e-mail, Web browsing and e-commerce, to name a few – that are difficult, if not virtually impossible, to use via a dial-up connection. Through innovation, satellite companies found a way to compete with the entrenched cable monopoly and service the entire state – regardless of location or population density – without building an expensive infrastructure in Ohio or using public rights of way.

So what did the cable industry do in Ohio? Rather than responding to satellite's challenge by innovating its technology so that it could provide service to all residents of the State, cable used its army of lobbyists in Columbus to persuade the State to impose a 6% tax on satellite (later reduced to 5.5%). Cable claimed that the tax was necessary to "equalize" the amount that its subscribers paid to local governments in franchise fees. But franchise fees are not a tax; they are a form of rent that cable pays local towns and municipalities for using their

rights of way to lay their ground distribution equipment. Cable wants access to customers in Ohio's cities and suburbs, and as such needs – and has been willing and able to pay for – the right to lay its wires under and over Ohio's public roads and utility poles.

Franchise fees are certainly not a cost of satellite's business, because satellite companies found a way around building a costly in-ground distribution network. This may not have been a good thing for the State or the municipalities, which reap hundreds of millions of dollars annually from cable's vast infrastructure in the form of jobs, construction, permits, and franchise fees. But it is a very good thing for rural Ohio. By distributing their programming directly from outer space, satellite TV providers are able to charge the same price and offer the same basic service in Cleveland as they do in Eaton. Additionally, they are able to reach Ohioans in rural areas who cable has found too unprofitable to be worth serving.

Imposing a discriminatory 5.5% tax on satellite TV penalizes rural Ohioans for subscribing to the only service that is available to them, and punishes the companies who provide this service by making it less competitive in those areas where it does compete with cable. It is precisely *because* satellite TV providers can distribute their programming more efficiently using technology that is based outside of the state that they are able to provide rural Ohioans with pay TV service. A tax on their services disproportionately burdens rural Ohioans, and for some cash-strapped and price-sensitive rural residents may make multichannel TV programming cost prohibitive.

The Court of Appeals's opinion sends a clear message to the General Assembly: It is alright to enact protectionist measures, even if those measures hurt a small and specifically defined portion of the State's residents. In the tax being challenged by Appellants, this discrimination has been limited to pay TV. But there is no reason – particularly in light of the

rationale behind the Court of Appeals's ruling – that the General Assembly will not enact future measures that will have the same affect on rural Ohioans.

For instance, as pointed out in the briefs of other amici, the logic of the Court of Appeals's ruling would permit the General Assembly to eventually enact a higher tax on Internet retailers.[2] Much as cable providers have found it prohibitively expensive to lay cables in rural areas, it is very expensive for major department stores to build outlets in rural areas. There are simply not enough people to visit those stores to make them profitable. Thus, rural Ohioans often have two choices: pay higher prices for a smaller selection of goods (whether it be electronics, clothes, books, or furniture) at a local store, or pay the lowest available price for the most expansive selection on the Internet. A discriminatory tax on retailers who use the Internet as their "mode of business," rather than building facilities and employing Ohioans in state, could threaten the supply chain on which rural Ohioans depend for many of their goods.

The Court of Appeals's opinion would not only sanction but actually encourage lobbyists to pursue enactment of such a tax, which would drive up costs for retailers using innovative technology to reach rural residents in order to benefit companies that build brick-and-mortar retail facilities in more populous parts of the State. In addition, the Court of Appeals's ruling would encourage the cable and telecommunications industries to lobby state legislatures to impose burdensome regulations on satellite Internet providers and other companies who are actively working to bring vital broadband Internet service to rural communities, simply because

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[2] There is currently a federal moratorium on discriminatory taxation of e-commerce that is set to expire in November 2014. See Internet Tax Freedom Act Amendments of 2007 § 1101(a)(2), Pub. L. No. 110-108, § 2, 121 Stat. 1024, 1024 (2007) (codified at 47 U.S.C. § 151 note). However, were this federal prohibition to be repealed, or upon its expiration, Ohio could readily impose discriminatory taxes on Internet sales under the Court of Appeals's ruling. The threat to web-based businesses that serve rural communities, while perhaps not immediate, is nonetheless very real.

these companies use technology that does not require constructing expensive infrastructure in Ohio.

Rural Ohioans should have the same opportunities to purchase goods and services, to watch TV, and to use the Internet as do residents of Ohio's larger cities. That is the goal of NRTC, and it is also the intent of the Commerce Clause – to create a unified system of interstate commerce. That unified system was not supposed to benefit only those living in urban areas; it was meant to benefit all Americans, regardless of what part of a state they live in or how much they make. The Court of Appeals's opinion missed the importance of this protection.

The State and its amici may suggest that these concerns are better addressed to the legislature. They are wrong. Cable's lobbyists were successful in convincing the General Assembly to enact a protectionist measure that benefits cable and municipalities at the expense of emerging satellite technology and the rural Ohioans who rely on it. Rural Ohioans must look to this Court to protect their interests against discriminatory legislation that benefits the populous areas of the state at the expense of smaller and less powerful voting blocks. This Court can and should scrutinize the constitutionality of the satellite-only tax, and should strike the tax because it discriminates against satellite companies because they do not invest in a massive infrastructure in Ohio that yields revenue streams for Ohio's populous cities and suburbs.

In sum, the Court of Appeals's opinion gives the State a license to discriminate against innovation and to keep rural Ohioans decades behind the remainder of the State. It is an issue of tremendous importance for the tens of thousands of rural Ohioans on whose behalf NRTC regularly advocates, who look to satellite service as their bridge to the rest of the world. The discriminatory satellite-only tax, with its disproportionate effect on rural Ohioans, should be enjoined.

CONCLUSION

Because this case involves a matter of great and general public interest for Amici and other rural Ohioans, this Court should grant review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Certificate of Service

This is to certify that the undersigned mailed a copy of this Memorandum in Support of Jurisdiction by ordinary U.S. mail to counsel listed below on April 6, 2009.

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