

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

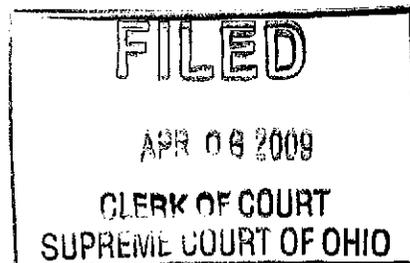
Court of Appeals
Case No. 08AP-32

**JURISDICTIONAL MEMORANDUM OF AMICUS CURIAE
NATIONAL TAXPAYERS UNION IN SUPPORT OF APPELLANTS**

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The constitutional significance and policy implications of this case extend far beyond the particular battle being waged between satellite and cable television providers. The National Taxpayers Union (“NTU”) submits this brief as amicus curiae to ensure that the real victims of the Court of Appeals’s decision – Ohio’s taxpayers and consumers who bear the brunt of the State’s discriminatory taxing scheme – have their voices heard in support of this Court accepting jurisdiction and addressing the merits of the case.¹

The Court of Appeals has blessed an illegal taxing scheme that runs afoul of a cardinal rule of constitutional law articulated three decades ago by this Court and the United States Supreme Court. As this Court explained in *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St.2d 465, 467, 12 O.O.3d 387, 391 N.E.2d 716, “a state may not impose a taxing scheme

¹ NTU was founded by concerned taxpayers in 1969. It is a nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state, and local taxpayers through public education, lobbying, and litigation on tax and spending issues. NTU represents over 362,000 members in all 50 states, with approximately 14,000 members in Ohio.

A fundamental purpose of NTU is challenging improper or illegal taxation on behalf of taxpayers who might otherwise face insurmountable hurdles in attempting to vindicate their legal and constitutional rights. NTU supports the rights of States to attract economic activity through the maintenance of low taxes, but is committed to ensuring that such tax policies treat businesses and consumers in an even-handed fashion. NTU has litigated against efforts by state and local authorities to erode constitutional restraints on their taxing authority, including restraints imposed by the “dormant” aspect of the Commerce Clause as defined by the United States Supreme Court. Representatives of NTU have testified before congressional committees and various state legislatures about the danger to the federalism balance struck by the Constitution that arises when state and local governments exercise unrestrained taxing authority. This experience places NTU in a unique position to advise this Court about the implications of the decision by the Court of Appeals to uphold Ohio’s unconstitutional and discriminatory tax on satellite television providers.

that discriminates against [interstate] commerce by establishing a direct advantage to its local economy.” See also *Boston Stock Exch. v. State Tax Comm’n* (1977), 429 U.S. 318, 329, 97 S.Ct. 599, 50 L.Ed.2d 514, quoting *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 457, 79 S.Ct. 357, 3 L.Ed.2d 421 (“No State, consistent with the Commerce Clause, may ‘impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.’”). This is precisely what the State of Ohio has done, however, through the imposition of a 5.5% sales tax that punishes satellite television providers that deliver multi-channel television signals via a technology that does not require substantial investments in infrastructure or manpower in Ohio and rewards cable operators that use a technology which, by contrast, requires vast investments on the ground (and, literally, in the ground) in Ohio through the laying of tens of thousands of miles of cable in the State and the employment of thousands of Ohio residents. Ultimately, it is the Ohio consumer who loses by having the State place its thumb on the scale in favor of the local business interest (here, the cable provider) by insulating it from taxes levied on the out-of-state satellite provider that, in turn, drive up the cost of satellite television for Ohio residents.

Even more troubling than the State’s use of its taxing power to influence consumer choice by placing satellite providers at a competitive disadvantage vis-à-vis cable providers, is the rationale the Court of Appeals employed in making an end-run around this Court’s and the United States Supreme Court’s Commerce Clause jurisprudence. The Court of Appeals found that the Ohio sales tax does not run afoul of the dormant Commerce Clause, because satellite television providers and cable television providers are both engaged in interstate commerce. *DIRECTV, Inc. v. Levin*, 10th Dist. No. 08AP-32, 2009-Ohio-636, at ¶ 24. As we show below, it

has never been the case that discriminatory taxing schemes can pass constitutional muster simply because the punished and rewarded companies both engage in interstate commerce. The U.S. Supreme Court made this clear in *Boston Stock Exchange*, when it ruled that discrimination between two types of interstate transactions in order to favor local commercial interests is constitutionally impermissible. 429 U.S. at 335, 97 S.Ct. 599, 50 L.Ed.2d 514. In fact, if the Court of Appeals's rationale were applied to many of this Court's and the U.S. Supreme Court's seminal dormant Commerce Clause cases, it would literally turn those decisions on their heads and gut the very protections those cases afford against discriminatory taxing schemes.

STATEMENT OF FACTS

NTU adopts by reference the Statement of Facts set forth in Appellants' Memorandum in Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law

Whether a state law discriminates against interstate commerce in violation of the dormant Commerce Clause turns on whether the law interferes with tax-neutral decision-making in the marketplace to the advantage of the local economy, not on the interstate nature of the businesses of the direct beneficiary and victim of the law. The Court of Appeals's contracted approach to the dormant Commerce Clause contravenes decades of Supreme Court jurisprudence and renders the Clause meaningless in today's economy.

The "fundamental purpose" of the dormant Commerce Clause is "to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n* (1977), 429 U.S. 318, 335. Tax neutrality is a critical component of this fundamental policy. See *id.* at 331, 97 S.Ct. 599, 50 L.Ed.2d 514. Free trade is hindered when state tax liabilities influence corporations' and consumers' decisions about where to do business. Thus, when a state places

businesses and benefits solely companies that are local “[o]n an organizational level.”

DIRECTV, Inc., 2009-Ohio-636, at ¶ 24.

Boston Stock Exchange involved the State of New York’s scheme for taxing the sale of stocks. To encourage sellers to run their trades through New York stock exchanges, the State amended its tax law to provide that nonresidents of New York who opted to sell through the New York exchanges would pay half the tax they otherwise would have paid if they traded stock with some nexus to New York on another state’s exchange. 429 U.S. at 324, 97 S.Ct. 599, 50 L.Ed.2d 514. The U.S. Supreme Court struck the tax scheme on the ground that it “discriminates against interstate commerce.” *Id.* at 329, 97 S.Ct. 599, 50 L.Ed.2d 514. The Court explained that, when the seller did not choose a stock exchange for a transaction “solely on the basis of nontax criteria,” the “obvious” and unlawful effect was “to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges.” *Id.* at 331, 97 S.Ct. 599, 50 L.Ed.2d 514. It was illegal for New York to “us[e] its power to tax an in-state operation as a means of requiring [other] business operations to be performed in the home State.” *Id.* at 336, 97 S.Ct. 599, 50 L.Ed.2d 514 (internal quotation marks omitted).

If the Court of Appeals’s contracted approach to the dormant Commerce Clause were the law, *Boston Stock Exchange* would be flipped on its head. The New York Stock Exchange, like the cable companies involved in this case, is not a purely local enterprise with no interstate footprint. Indeed, the very tax at issue in *Boston Stock Exchange* benefited New York exchanges by encouraging *more interstate transactions*—that is, it gave out-of-state residents a strong tax-based incentive to conduct any stock trade with any link to New York through a New York exchange. See 429 U.S. at 331, 97 S.Ct. 599, 50 L.Ed.2d 514. Under the Ohio Court of

Appeals's reasoning, the higher tax on transactions not conducted through a New York exchange would not violate the dormant Commerce Clause because the beneficiary of the tax is not purely local. It would not matter that sellers were placed in the unfair position of choosing to trade through New York exchanges to reduce their tax liability, even if it were less efficient than trading through another state's exchange. Nor would it matter that the New York Stock Exchange benefited because the law funneled business into the local economy and diverted business from other states, even though the Supreme Court viewed this as a matter that "lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 337, 97 S.Ct. 599, 50 L.Ed.2d 514. Under the Court of Appeals's approach, tax neutrality and free trade policy are supplanted by the question of whether the beneficiary and victim of the tax scheme are both "modes of interstate business." *DIRECTV, Inc.*, 2009-Ohio-636, at ¶ 24. If they are, then the Clause is inapplicable.

The Court of Appeals's approach also is impossible to square with the Supreme Court's decision in *Armco*, which invalidated a West Virginia tax that burdened companies that conducted business both inside and outside the state. At issue in *Armco* was a gross receipts tax on "companies selling tangible property at wholesale in West Virginia." 467 U.S. at 643, 104 S.Ct. 2620, 81 L.Ed.2d 540. Sales of property manufactured in West Virginia were exempt from the tax. *Id.* Thus, for example, if a company based in West Virginia sold its products at wholesale in West Virginia, the sale might or might not be taxed, depending on whether the products were manufactured in West Virginia or in Ohio. The Supreme Court held that the scheme unlawfully discriminated against interstate commerce. *Id.* at 645-46, 104 S.Ct. 2620, 81 L.Ed.2d 540.

The discriminatory tax struck down in *Armco* would have been upheld under the Court of Appeals's analysis. In *Armco*, the wholesalers who were the victims of the discriminatory tax were not outsiders to West Virginia; to the contrary, it was their significant presence in the state that subjected them to the tax on wholesale transactions and led them to sue to challenge that tax. *Id.* at 639, 641, 104 S.Ct. 2620, 81 L.Ed.2d 540. Under the Court of Appeals's rationale, the plaintiffs' in-state presence likely would have precluded them from challenging the discriminatory tax, notwithstanding the fact that the tax interfered with free trade by favoring products manufactured and sold in West Virginia and penalizing those sold in West Virginia but manufactured elsewhere.

Were the Court of Appeals's decision law, it also would undercut fundamental principles this Court articulated in *Dayton Power & Light Co. v. Lindley*. *Dayton Power* involved a coal tax imposed by the State of Ohio. The rate of tax increased as the relative sulphur content of the coal decreased, so that low-sulphur coal was taxed at a higher rate than high-sulphur coal. 58 Ohio St.2d at 472, 12 O.O.3d 387, 391 N.E.2d 716. In fact, Ohio's coal reserves were concentrated in the high-sulphur category, and most of the low-sulphur coal for sale in Ohio came from other states. 58 Ohio St.2d at 473, 12 O.O.3d 387, 391 N.E.2d 716. Considering the "economic reality" of the coal industry and the "geographic location" of the coal, this Court held the tax was discriminatory in effect because it rewarded individuals who purchased Ohio high-sulphur coal and burdened those who purchased low-sulphur coal from other states, thus advantaging the local economy. *Id.* This result would not hold under the Court of Appeals's approach. In *Dayton Power*, some of the high-sulphur coal used in Ohio came from other states, so some out-of-state individuals benefited from the tax scheme. Likewise, some of the low-

sulphur coal used in Ohio came from Ohio, so some in-state individuals were burdened by the tax. 58 Ohio St.2d at 473, 12 O.O.3d 387, 391 N.E.2d 716. Under the Court of Appeals’s formalistic, “organizational” focus on the headquarters of the beneficiary and victim of the tax, *DIRECTV, Inc.*, 2009-Ohio-636, at ¶ 24, the lack of a purely local beneficiary and a purely foreign victim would preclude the finding of a dormant Commerce Clause violation—even though the practical effect of the tax was to divert business to the local Ohio economy and away from foreign coal producers, the very type of interference with the marketplace against which the dormant Commerce Clause is supposed to guard. 58 Ohio St.2d at 474, 468, 12 O.O.3d 387, 391 N.E.2d 716.

By focusing on where the satellite and cable providers are headquartered rather than examining the practical effect of the satellite-only tax on free trade and competition in the Ohio marketplace, the Court of Appeals disregarded the fundamental concerns underlying decades of dormant Commerce Clause jurisprudence. Ohio’s satellite-only tax unabashedly places its thumb on the scale of consumers’ decisions about who will be their television provider. If they purchase satellite service, consumers pay a tax that does not appear on a cable bill. Their decision is not based solely on nontax criteria, and the tax-based incentive to choose cable works to the “direct advantage [of Ohio’s] local economy,” in contravention of the dormant Commerce Clause. *Dayton Power & Light Co.*, 58 Ohio St.2d at 467, 12 O.O.3d 387, 391 N.E.2d 716. This is precisely the kind of unfair choice that led the Supreme Court to strike down New York’s tax as unconstitutional in *Boston Stock Exchange*. 429 U.S. at 331, 97 S.Ct. 599, 50 L.Ed.2d 514 (a law that “forecloses tax-neutral decisions” places a discriminatory burden on interstate commerce).

The decision below is particularly troubling in light of the interconnected nature of our modern economy. Today, it is extremely rare to find a business that is purely local or purely foreign. With the advent of the internet and other advances in technology, nearly every business, large or small, has an interstate footprint, regardless of which state happens to host its headquarters. If a court insists that the beneficiary of a state tax must be a commercial hermit and the victim a complete outsider for the protections of the dormant Commerce Clause to apply, the Clause will become a relic of the past.

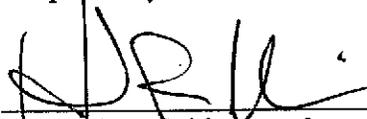
The Supreme Court has made clear that the dormant Commerce Clause should not be applied in such a constrained manner. The “diversion of interstate commerce and diminution of free competition . . . are wholly inconsistent with the free trade purpose of the Commerce Clause.” *Boston Stock Exch.*, 429 U.S. at 336, 97 S.Ct. 599, 50 L.Ed.2d 514. When a state imposes a tax that burdens the performance of a specified activity outside the state and benefits the performance of that activity within the state, thereby advantaging local interests, the tax unfairly discriminates against interstate commerce, regardless of whether the direct beneficiary is a local company and the victim is from out of state. See, e.g., *id.* at 331, 97 S.Ct. 559, 50 L.Ed.2d 514; *Armco Inc.*, 467 U.S. at 642, 104 S.Ct. 2620, 81 L.Ed.2d 540; *Westinghouse Elec. Corp.*, 466 U.S. at 400-01, 104 S.Ct. 1856, 80 L.Ed.2d 388; see also *Dayton Power & Light Co.*, 58 Ohio St.2d at 474, 12 O.O.3d 387, 391 N.E.2d, 716. Ohio’s satellite-only tax has this effect and should be invalidated, lest the Court of Appeals’s decision stand as the beginning of the end of meaningful dormant Commerce Clause protections for businesses and consumers of all types.

CONCLUSION

For the reasons discussed above and in the Appellants' Memorandum in Support of Jurisdiction, this case involves matters of public and great general interest and a substantial constitutional question. Amicus curiae National Taxpayers Union requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Dated: April 3, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2009, a copy of the foregoing Jurisdictional Memorandum of Amicus Curiae National Taxpayers Union in Support of Appellants was served via first-class mail, postage prepaid, to each of the following:

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