

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.

09-0627

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

**AMICUS MEMORANDUM IN SUPPORT OF JURISDICTION
OF *AMICI CURIAE* SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION, SKYLINK, LTD.,
AND MARRIK DISH COMPANY**

Gerhardt A. Gosnell II (0064919)
Donald C. Brey (0021965)
CHESTER, WILLCOX & SAXBE LLP

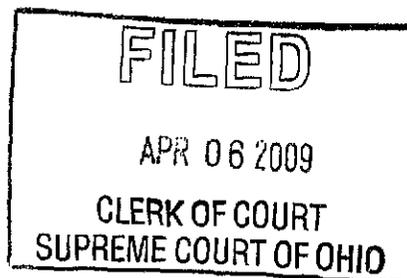
65 East State Street, Suite 1000
Columbus, Ohio 43215-3413
Telephone: (614) 221-4000
Facsimile: (614) 221-4012
e-mail: ggosnell@cwslaw.com
dbrey@cwslaw.com

*Attorneys for Amici Curiae Satellite
Broadcasting and Communications Association,
Skylink, Ltd., and Marrik Dish Company*

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

Lawrence Pratt (0021870)
Alan P. Schwepe (0012676)
Julie E. Bringer (0066367)
Damion M. Clifford (0077777)
Assistant Ohio Attorneys General
Taxation Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

Attorneys for Defendant-Appellees



Peter A. Rosato (0068026)
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State Street
Columbus, OH 43215
Phone: (614) 621-1500
Facsimile: (614) 621-0010
PRosato@Calfree.com

E. Joshua Rosenkranz (Pro Hac Vice pending)
New York Bar No. 2224889
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Phone: (212) 506-5000
Facsimile: (212) 506-5030
JRosenkranz@Orrick.com

Pantelis Michalopoulos (Pro Hac Vice pending)
District of Columbia Bar No. 453179
Mark F. Horning (Pro Hac Vice pending)
District of Columbia Bar No. 203323
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Phone: (202) 429-3000
Facsimile: (202) 429-3902
PMichalopoulos@steptoe.com
MHorning@steptoe.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

STATEMENT OF INTEREST OF THE AMICI CURIAE1

THIS CASE PRESENTS ISSUES OF GREAT PUBLIC AND GENERAL INTEREST2

STATEMENT OF THE CASE AND FACTS8

ARGUMENT8

PROPOSITION OF LAW NO. 18

 Even though both cable TV companies and satellite TV companies engage in interstate commerce, the satellite-only tax of R.C. 5739.01(XX) violates the Commerce Clause because the tax depends upon whether or not a business builds an infrastructure on the ground in Ohio

PROPOSITION OF LAW NO. 28

 The satellite-only tax of R.C. 5739.01(XX) cannot be saved from Commerce Clause challenge on the ground that the discrimination “results solely from differences between the nature of [two companies’] businesses, *not* from the location of their activities,” *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep’t of Treasury* (1980), 490 U.S. 66, 78 (emphasis added), because the discriminatory tax is inextricably tied to the *location* of a specified economic activity.

PROPOSITION OF LAW NO. 38

 In a Commerce Clause challenge to the “purpose” and “practical effect” of a discriminatory statute, evidence of what proponents communicated to the legislature as to the statute’s purpose and effect is relevant and admissible.

CONCLUSION9

CERTIFICATE OF SERVICE 10

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae Satellite Broadcasting and Communications Association (“SBCA”) is the national trade organization representing all segments of the satellite industry. It is committed to expanding the utilization of satellite technology for the broadcast delivery of video, audio, data, music, voice, interactive and broadband services. SBCA is composed of satellite service providers, equipment manufacturers, distributors, retailers, and national and regional distribution companies that make up the satellite services industry. Its members include amici curiae Skylink, Ltd. and Marrik Dish Company, (together with SBCA, “Amici”) who are just a few of the scores of retailers and installers of satellite television equipment who have operations in Ohio. Amici do not provide satellite TV service to consumers—that service is primarily offered by Appellants DISH Network and DIRECTV. Instead, Amici are responsible for selling this service to consumers, and for installing the small satellite dishes that satellite television subscribers use to receive programming from Appellants.

Amici’s interest in this lawsuit is plain: The success of the satellite television industry and their respective businesses is inextricably tied to demand for satellite television service in each of the respective states in which they operate their businesses. When demand for satellite television service falls, so does the need for the services they provide—regardless of whether those services consist of selling satellite television service to consumers or installing and/or repairing the dishes that are necessary for that service to work. Thus, when the General Assembly passed a bill in 2003 that subjected satellite television service—but not its competitor, cable—to a six percent sales tax, it did not take an economist to know that this tax would have a negative impact on Amici’s business.

In the six years since the enactment of the “satellite-only tax,” Amici have experienced a substantial slow down in their respective businesses—an experience that is consistent with what SBCA has heard from its other members in Ohio and in other states that have enacted a discriminatory tax against satellite television service. Compared to similar businesses in neighboring states like Indiana, Illinois, and Michigan—all states without discriminatory taxes on satellite television—Amici have hired fewer employees, purchased less new equipment, and have generally been less able to expand their operations. As an industry, satellite retailers and installers collectively employ thousands of people in this State, all of whom have been negatively affected by the satellite-only tax in some way.

Amici stand together to urge this court to grant review of this case, and remove the weight of this discriminatory and illegal tax from their collective shoulders. This case presents the Court with an important opportunity to remove an unfair and discriminatory tax that has artificially tilted the competitive playing field in the multichannel video programming market in favor of cable. Amici fear that if the Court does not grant Appellants’ motion for jurisdiction, it will only be a matter of time before a bill is passed—either in Ohio or another state—that calls for an even higher tax on satellite television service or any other service that does not have a substantial presence in the state or state legislature.

THIS CASE PRESENTS ISSUES OF GREAT PUBLIC AND GENERAL INTEREST¹

When times are tough and wallets are thin, TV is the entertainment of last resort for millions of Ohio families. They can cut out luxuries such as plays, movies, concerts, and sporting events. But when they do, they stay at home and click on the TV. The satellite-only

¹ Citations to affidavits and depositions—all of which are part of the record on appeal—are cited as “___ Aff.” or “___ Dep.,” according to the affiant’s or deponent’s surname.

tax— \$50 a year for the average subscriber—has put many Ohio families to an untenable choice between a tax they cannot afford to pay and a service they cannot afford to lose.

The impact of the tax on retailers and installers of satellite television equipment is no less significant. Fewer subscribers translates into fewer sales of satellite television packages for Ohio retailers and less work for the hundreds of individuals in Ohio who spend their days and nights installing satellite dishes on the roofs and in the backyards of Ohio families. Why is this so? Because contrary to the arguments raised by the Tax Commissioner in the courts below, satellite television service is not viewed by consumers as anything other than a form of pay television, or as it is referred to in the industry, multichannel video programming distribution (“MVPD”).

When it comes to multichannel video programming, Ohio residents have two options: cable television or satellite television service. While we believe there are measurable differences with respect to the quality and customer service offered by the respective services, the similarities between these two forms of MVPD services far outweigh their differences. A family in Dayton watching American Idol or the Ohio State game would see the same program at the same time on the same network regardless of whether they subscribed to cable or satellite television. As such, and despite the arguments raised by the State below, cable and satellite television are similarly situated businesses that compete for the same customers in the same market. And while that competition is based on a number of factors, including quality, customer service, and specific programming packages, it more often than not turns on the answer to a single question: How much will it cost?

In Ohio, the answer to this question turns, at least in part, on the fundamental difference between how cable and satellite deliver their programming to subscribers. Cable companies deliver their signals via wires that are buried in the ground or hung on utility poles that travel

from a central delivery center called a "headend" directly to the homes of their subscribers. This distribution mechanism translates into an enormous local footprint in the State. Local cable providers have laid enough cable in Ohio to wrap around the world more than twice. Those providers have invested billions of dollars in their network of ground equipment, and in related repair and maintenance facilities. They employ thousands of Ohio residents, most of them to construct, operate, and maintain those networks, and to connect the cables to their subscriber's homes.

It should come as no surprise then, that cable's footprint also extends into the hall of the General Assembly. In 2002, the year before the enactment of the discriminatory tax at issue in this litigation, the cable industry's trade association, the Ohio Cable and Telecommunications Association ("OCTA"), and Time Warner Cable, the largest cable provider in the State, had numerous registered lobbyists between them. At this same time, the satellite television industry (including Appellants) had only two registered lobbyists.

Cable's vast ground network also translates into substantial revenues for local municipalities: The cables that distribute television programming to subscribers typically run through local rights-of-way. Thus, obtaining access rights to these rights-of-way is an essential requirement for any company that provides cable television service. To obtain this access, a cable company must enter into a franchise agreement with a local municipality or county. A near universal condition of any franchise agreement is that the cable company must pay the local government a franchise fee in consideration for the valuable property rights granted to the company by the local government. This fee is typically five percent of the company's gross revenues derived from its activities in the franchise areas. In this sense, local governments are cable's business partners. They grant cable companies valuable (and essential) property rights in

exchange for a cut of the revenues. And those revenues are not insignificant. As such, the State and local governments have a vested interest in cable's success: The more people subscribe to cable, the more money local governments and the State reap in the form of franchise fees, investment in ground distribution equipment, and jobs for state residents. Conversely, fewer cable subscribers means less revenue for local municipalities and the State.

In contrast, satellite television providers do not use local distribution equipment to deliver programming to their customers. Instead, they deliver their programming directly to subscribers from satellites located in outer space. This means that they do not need to hire armies of Ohio residents to lay and maintain cable. Nor do they need access to local rights-of-way to deliver their programming to subscribers. As such, satellite television providers do not pay fees or any other obligations to local municipalities—in fact, because satellite television service does not use public rights-of-way, Congress barred local governments from imposing franchise fees or any other obligations on satellite television providers.

The difference between how cable and satellite television providers distribute their programming is only meaningful when put in proper historical context. Satellite television was first available to Ohio consumers in 1994. In a six year span, the number of satellite television subscribers in the United States grew from less than two million subscribers in December 1995 to more than 16 million subscribers in December 2001. This meteoric rise presented the first real threat to the cable industry's 20-year monopoly over the pay TV market. It also presented two major issues for cable, and its business partners, the State and local municipalities. As an initial matter, as more people switched from cable to satellite television, Ohio municipalities were receiving less revenue in franchise fee payments. It also raised the possibility that as more subscribers chose satellite television, cable companies would be less inclined to develop

infrastructure in Ohio, which would translate into less revenue for the State, and fewer jobs for Ohio residents.

In response to this new competitive threat the cable industry turned to the General Assembly. In 2003, Governor Taft introduced a bill that was intended to cover the State's budget shortfall by extending Ohio's sales tax to a number of "untaxed" goods and services, including cable and satellite television. In response, the OCTA engaged in a massive lobbying effort to persuade the state legislature to drop cable from the bill, and enact a satellite-only sales tax.

OCTA's message was unmistakably clear: "[C]able operators . . . must make and maintain a significant investment in Ohio in terms of tangible property, equipment and employees, whereas . . . satellite companies require virtually no investment in Ohio in order to compete." Kozelek Dep., Exh. 10 at 1, 2. The cable lobbyists' advocacy focused on the fact that satellite TV "[p]rovides Ohioans with very few job opportunities, [d]oesn't pay an appreciable tax of any kind anywhere in Ohio . . . , [and h]as not done much of anything to support local communities." Id., Exh. 14 at OCTA0021, Exh. 32. As the lobbyists put it, the satellite industry "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state.*" Cable Association Press Release (June 2, 2003) (Green Aff., Exh. F) (emphasis added).

This protectionist message found a receptive audience in the General Assembly. On June 20, 2003, the legislature passed a bill that imposed a 6 percent sales tax on only one of Ohio's two forms of multichannel video programming—satellite television service. That this tax was a protectionist measure is evident from the history of bill alone, but the plain language of the statute imposing the tax drives the point home. The General Assembly defined "satellite broadcasting service" as:

the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment *without the use of ground receiving or distribution equipment*, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite

R.C. 5739.01(XX) (emphasis added). Put simply, the General Assembly chose to impose a six percent sales tax on those pay TV services that did not perform a specific economic activity in the State—i.e., use “ground . . . distribution equipment” to deliver programming to customers. And, it did so knowing full well the consequences of its decision: Tom Zaino, then the state's Tax Commissioner, warned the General Assembly that satellite TV companies would have a “significant chance of success” in challenging the constitutionality of the tax. Green Aff., Exh. I. The discriminatory effect of this tax was not an oversight or unintended consequence. When the General Assembly passed the bill on June 20, 2003, it knew that the bill favored an industry (cable) that performed an important economic activity in the State at the expense of an industry (satellite television) that does not.

Six year later, the intended effect of this discriminatory tax has been realized: Satellite TV is a less attractive option for Ohio residents than it is in other states. As a result, every retailer that feeds his family by selling the equipment necessary to receive and decode satellite signals has seen his business slow. And every installer that earns a living by attaching the dishes necessary to receive satellite signals to the roofs of houses spends more and more of his day waiting for the phone to ring. But the impact of this protectionist tax measure does not stop there. Indeed, every citizen in Ohio feels its effects. When the legislature picks winners and losers in the marketplace by imposing discriminatory taxes, all of the benefits that accompany fair competition vanish. Since satellite TV service emerged as a viable competitor to the cable industry in the late 1990s, programming options have increased, the quality of service has improved, constant rate hikes have been checked, new technologies like digital TV have become

commonplace, and the number of available channels and programming packages has skyrocketed. Regardless of whether a citizen chooses cable or satellite as its method of service, they get more value for every dollar they spend on subscription TV service now than they did a decade ago. Competition in the marketplace benefits every citizen of the State.

This Court stands at the precipice of a very slippery slope, the bottom of which is a state where competition is waged by lobbyists in the halls of the legislature rather than among businesses in the marketplace. This case presents the Court with the opportunity to ensure that every citizen of Ohio enjoys the benefits of fair competition by staking a stand against discriminatory and protectionist legislation.

STATEMENT OF THE CASE AND FACTS

Amici adopt and incorporate by reference the Statement of the Case and Facts set forth in Appellants' Memorandum in Support of Jurisdiction.

ARGUMENT

Proposition Of Law No. 1: Even though both cable TV companies and satellite TV companies engage in interstate commerce, the satellite-only tax of R.C. 5739.01(XX) violates the Commerce Clause because the tax depends upon whether or not a business builds an infrastructure on the ground in Ohio.

Proposition Of Law No. 2: The satellite-only tax of R.C. 5739.01(XX) cannot be saved from Commerce Clause challenge on the ground that the discrimination "results solely from differences between the nature of [two companies'] businesses, *not* from the location of their activities," *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of Treasury* (1980), 490 U.S. 66, 78 (emphasis added), because the discriminatory tax is inextricably tied to the *location* of a specified economic activity.

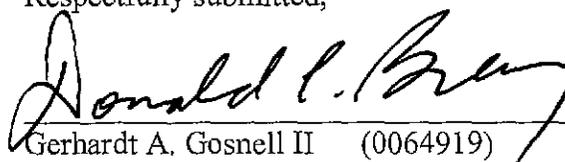
Proposition Of Law No. 3: In a Commerce Clause challenge to the "purpose" and "practical effect" of a discriminatory statute, evidence of what proponents communicated to the legislature as to the statute's purpose and effect is relevant and admissible.

Amici adopt and incorporate by reference the Argument and Propositions of Law set forth in Appellants' Memorandum in Support of Jurisdiction.

CONCLUSION

The discriminatory tax involved in this case has substantial importance for those Ohioans who make their living selling or installing satellite TV signal receiving equipment, but it also impacts every citizen of the State. Thus, this is a case that involves a matter of great and general public interest. For all the reasons stated above, this Court should grant the Appellants' Motion for Jurisdiction.

Respectfully submitted,



Gerhardt A. Gosnell II (0064919)
Donald C. Brey (0021965)
CHESTER, WILLCOX & SAXBE LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-3413
Telephone: (614) 221-4000
Facsimile: (614) 221-4012
e-mail: ggosnell@cwslaw.com
dbrey@cwslaw.com

*Attorneys for Amici Curiae Satellite Broadcasting
and Communications Association, Skylink, Ltd.,
and Marrik Dish Company*

CERTIFICATE OF SERVICE

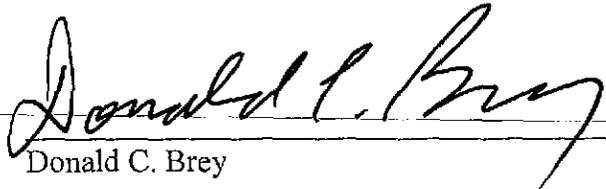
I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of *Amicus Curiae* was served by U.S. mail, postage prepaid, this 6th day of April, 2009, upon the following:

Lawrence Pratt
Alan P. Schwepe
Julie E. Bringer
Damion M. Clifford
OFFICE OF RICHARD CORDRAY
OHIO ATTORNEY GENERAL
Assistant Ohio Attorneys General
Taxation Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Attorneys for Defendant-Appellees

Peter A. Rosato (0068026)
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State Street
Columbus, OH 43215
Attorneys for Plaintiffs-Appellants

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Attorneys for Plaintiffs-Appellants

Pantelis Michalopoulos
Mark F. Horning
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Attorneys for Plaintiffs-Appellants


Donald C. Brey