

ORIGINAL

In the
Supreme Court of Ohio

DIRECTV, INC., <i>et al.</i> ,	:	Case No. 2009-0627
	:	
Plaintiffs/Appellants/Cross-Appellees,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
RICHARD A. LEVIN, Tax Commissioner of	:	
Ohio,	:	Court of Appeals Case
	:	No. 08AP-32
Defendant/Appellee/Cross-Appellant.	:	
	:	

**MEMORANDUM OF DEFENDANT APPELLEE/CROSS-APPELLANT
RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO, IN OPPOSITION TO
APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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INTRODUCTION

This case does not present any argument that rises to the level of a matter worthy of this Court's consideration. The narrow, factually driven argument of DIRECTV, Inc. and EchoStar Satellite Corporation (the "Satellite Companies") has no material relevance to any person other than the two competing video broadcasters involved in this case. The Satellite Companies' argument does not even present a clean constitutional issue, let alone one that has not been thoroughly resolved by the decisions of five state and federal courts that have found it totally without merit. It is nothing more than a failed equal protection claim that the Satellite Companies have masqueraded as a dormant Commerce Clause issue in hopes of receiving a competitive edge in their continued battle with their interstate competitors, companies providing cable broadcast services (the "Cable Companies").

The right of states to differentiate among taxpayers is one of the core tenets recognized by the U.S. Supreme Court. Ohio differentiates between satellite broadcasting services and cable broadcasting services by subjecting the former to state sales tax as compensation for local franchise taxes imposed on Cable Companies. Realizing that, under the Equal Protection Clause, this factor alone constitutes a rational basis, and therefore constitutionally sound reason for the disparate treatment (as the trial court itself recognized), the Satellite Companies have turned to the Commerce Clause. They have concocted the unique wild theory that the Cable Companies are a local protected business because they use in-ground cable to transmit the last leg of their programming signal while the Satellite Companies are an out-of-state business because they use an orbiting satellite and the airways to deliver the last leg of theirs. Based on this premise, they argue that any tax classification differentiating them from the Cable Companies is the equivalent of a protective tariff, and therefore discriminates "in practical effect" against interstate commerce under the dormant Commerce Clause.

But the Satellite Companies' "ground vs. outer-space" hypothesis ignores the fact that the U.S. Supreme Court has held many times that the dormant Commerce Clause does not protect one interstate business from another regardless of the technology utilized that may cause one business to have more infrastructure in one location than another. Here, both Satellite and Cable Companies are huge interstate players, each using their own different mode of operation in each jurisdiction in which they compete. It is this difference in modes of operation that differentiates Satellite Companies from Cable Companies in a tax context, not any attempt to protect a local business from the very interstate commerce in which both companies are engaged.

Because the Satellite Companies' argument is so outside mainstream Commerce Clause jurisprudence, they have shopped their "fool's gold" from one state and federal jurisdiction to another and found no buyers, including the Ohio Tenth District and the Sixth Circuit Court of Appeals. Even the trial court rejected the argument as illogical. There is no reason – let alone a compelling one - why this Court should give them any further deference in entertaining the argument yet again.

STATEMENT OF THE CASE AND FACTS

This matter was originally filed in the Franklin County Common Pleas Court challenging the constitutionality of current R.C. §§5739.01(B)(3)(p), 5739.01(XX), 5739.01(AA)(4), 5739.02 and 5741.02, which together impose sales and use tax on satellite broadcasting services while concomitantly excluding cable broadcasting services. R.C. §5739.01(XX). The complaint included both an equal protection claim and a dormant Commerce Clause claim. At an early stage in the process, the court granted summary judgment to Richard A. Levin, Tax Commissioner of Ohio (the "Tax Commissioner") on the Satellite Companies' equal protection claim and Commerce Clause facial discrimination claim, and these rulings have not been appealed. In so doing, the court found the Satellite Companies' "ground vs. outer-space"

argument – the same one presented to this Court - to be illogical. See 10/21/05 Decision at 5-8. Ultimately, however, the trial court granted summary judgment to the Satellite Companies. Citing to such diverse authorities as the “Golden Rule,” the Gettysburg Address and the Declaration of Independence, the trial court held that the presence of discrimination was determined by examining each business’s relative physical presence within and without the state as well as the downstream employment opportunities generated by that respective presence. Based on its conclusions with respect to these criteria, the court found that the differential treatment of these two different kinds of broadcasting services was discriminatory against interstate commerce in practical effect. In so doing, the trial court rejected as “unpersuasive” the multiple holdings of all of the federal and state courts that had addressed the very same issue brought by the same litigants as here. See 10/21/05, 10/24/06, 12/14/06 and 10/17/07 Decisions, and 12/13/07 Final Judgment.

On appeal, the Tenth District reversed and granted summary judgment to the Tax Commissioner. The court found that both Cable and Satellite Companies have substantial physical presence both within and without Ohio, and actually rely heavily on the same types of equipment to operate. *DIRECTV, Inc. v. Levin*, 10th Dist. No. 08AP-32, 2009-Ohio-636, at ¶¶24-25. Adopting similar conclusions made by the Sixth Circuit and the North Carolina Courts of Appeal, the Tenth District concluded that the tax treated two kinds of interstate businesses differently based on their modes of operation, not geography. It, therefore, found the tax does not discriminate against interstate commerce in practical effect. *Id.*

**THIS CASE NEITHER PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION
NOR AN ISSUE OF PUBLIC AND GREAT GENERAL INTEREST.**

This case presents neither a substantial constitutional question nor an issue of public and great general interest. It is therefore not worthy of review for the reasons set forth below.

A. A merits determination by the Court would have little or no applicability outside the unique facts involving these two competing companies and the manner in which they deliver broadcasting services.

The Satellite Companies argue that this case will have great and widespread significance, but, as the Tenth District noted, just the opposite is true. The Satellite Companies argue that the taxation of satellite broadcasting services without also taxing the Cable Companies is obvious discrimination under the dormant Commerce Clause, but they abandoned their facial discrimination challenge when it was rejected at the trial court level and not appealed. As a challenge now limited to discrimination “in practical effect”, the issue is intensely fact driven. It has no greater precedent than the relationship between these two businesses. *Levin*, 2009-Ohio-636, at ¶19. The Satellite Companies’ own argument centers on the unique technologies each business uses to transmit its programming to its customers. This and the clear interstate nature of both businesses sets the case miles apart from the case law involving the dairy industry, the wine industry, the brokerage industry and the coal industry, and other decisions involving local businesses upon which the Satellite Companies seek to rely. As the Tenth District concluded “**The simple facts** of the type of commerce involved here must inevitably be distinguished from” cases in which discrimination has been found. *Id.* at ¶26 (emphasis added.)

B. The issue presented by this case is now settled law.

The pending petition by the Satellite Companies marks the tenth different court (not including a pending action in Florida) in which they have sought a determination that the differential tax treatment by states of satellite broadcasting services and cable broadcasting services constitutes discrimination in practical effect under the dormant Commerce Clause of the U.S. Constitution. With the sole exception of the trial court below, that quest has universally resulted in decisions being rendered against them, including merit rulings by the Ohio Tenth District, North Carolina trial and appellate courts, the federal Eastern District of Kentucky and

the Sixth Circuit Court of Appeals. See *Levin*, 2009-Ohio-636; *DIRECTV, Inc. v. North Carolina* (N.C. App. 2006), 632 S.E.2d 543; *Directv, Inc. v. Treesh* (6th Cir. 2007), 487 F.3d 471, *cert. denied*, (2008), 128 S. Ct. 1876, 170 L. Ed. 2d 746, *aff'g*, (E.D. Ky. 2006), 469 F. Supp. 2d 425. Still another federal court felt so strongly regarding the lack of merit of the Satellite Companies' argument that, while dismissing their case on comity grounds, concluded that even if it had jurisdiction, based on the amended complaint alone, it would "ultimately ... side with its brethren that have already ruled against plaintiffs." *DIRECTV, Inc. v. Tolson* (E.D.N.C. 2007), 498 F. Supp. 2d 784, 800, *aff'd*, (4th Cir. 2008), 513 F.3d 119. As the Tenth District observed, "the unanimous weight of precedent here lies on the side of taxing authorities." *Levin*, 2009-Ohio-636, at ¶19. The issue has therefore been thoroughly addressed and there is no need for further review.

C. The Satellite Companies' unique "the ground vs. outer-space" argument does not rise to even a colorable dormant Commerce Clause issue that would present the Court with a legitimate opportunity to further edify constitutional interpretation.

There is good reason why the Satellite Companies' dormant Commerce Clause theory has been so resoundingly rejected by the courts. In essence a disguised equal protection claim that the Satellite Companies raised, lost and abandoned at the trial court level, the Satellite Companies seek to use the dormant Commerce Clause to undermine the states' fundamental right to create tax classifications, a right that was affirmed by this Court just recently in *Columbia Gas Transmission v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, *cert. denied* (2009) 129 S. Ct. 896, 173 L. Ed. 2d 106. The Satellite Companies argue that the imposition of sales tax on satellite broadcasting services is unconstitutionally discriminatory because a similar sales tax is not imposed on their competing cable broadcasting services. But under the Commerce Clause, states are free to differentiate between interstate businesses such as Cable and Satellite Companies since the Commerce Clause is intended solely to protect the interstate market for a

particular product, not to guarantee even playing fields between competing businesses. *Exxon Corp. v. Gov. of Maryland* (1978), 437 U.S. 117, 127.

In order to establish discrimination under the dormant Commerce Clause, the Satellite Companies must show that Ohio's imposition of a sales and use tax on satellite broadcasting services constitutes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Ins. v. Dep't of Env. Quality* (1994) 511 U.S. 93, 99. In other words, they must show that the practical effect of the statute is to provide "a direct commercial advantage to **local business.**" *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458 (emphasis added).

The facts and law simply do not support their claim. Both the Satellite and Cable Companies are giant interstate businesses with substantial presence both within and without Ohio. In fact, both operate substantially the same in all states in which they do business. Neither can be considered a local business. Contrary to the Satellite Companies' argument, the fact that one business, as one facet of its operations, uses in-ground cable to distribute programming to customers, and the other uses outer-space/airspace to deliver its programming, does not make the former a local business and the latter an out-of-state business. This is true even if these technological differences result in more relative infrastructure created in each state by the Cable Companies than by the Satellite Companies. Under such a simplistic approach, the Satellite Companies would always remain the only out-of-state player, even in their home state, and no state could differentiate between the two businesses. By analogy, this argument would even preclude states from differentiating between such well recognized interstate businesses as railroads and airlines simply because the former uses the ground to move people and freight

while the latter uses the air. Nothing in Commerce Clause jurisprudence remotely suggests such a broad and over-reaching construction.

Moreover, a tax measure is not discriminatory under the dormant Commerce Clause unless it actually differentiates based upon geographical location rather than upon differences in modes of operation that happen to have a geographical relationship. *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey* (1989), 490 U.S. 66, 75; *Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.* (1992), 505 U.S. 71, 78; *Exxon Corp.*, 437 U.S. 117. Ohio's sales tax classifications differentiate between the two businesses based on their very distinct modes of operation, not on their geographical location. Stated another way, satellite broadcasting services are taxable whether the Satellite Companies locate a substantial infrastructure in Ohio or not, and cable broadcasting services are excluded from taxation regardless of in which state the Cable Companies choose to locate the equipment from where they originate their signal to customers.

D. A disposition of the merits in favor of the Satellite Companies would not resolve all of the outstanding issues essential to final disposition of the constitutional question.

Even if the Satellite Companies were successful in demonstrating that, when viewed in isolation, the challenged tax classification results in discrimination in practical effect, the constitutional issue would remain unresolved. Ultimate disposition of the case would still require a determination as to whether the sales tax differentiation is actually a "compensatory tax" to help level the tax playing field between the Cable Companies that must pay local franchise taxes and the Satellite Companies that are exempted from such taxation under federal law. The U.S. Supreme Court has long applied the "compensatory tax" doctrine to validate what would otherwise constitute discriminatory tax measures under the dormant Commerce Clause. *Fulton Corp. v. Faulkner* (1996), 516 U.S. 325, 331, fn. 2. This is an issue that the Tenth District saw no need to even address in light of the total lack of merit of the discrimination claim.

E. The Satellite Companies' Second Proposition of Law adds little independent basis for accepting this case for review.

As a secondary argument, the Satellite Companies submit that the Court needs to take the case in order to reject its long-standing position that courts should not consider parol evidence in determining legislative intent, in favor of a new rule that would allow lobbyists' positions to be considered in federal constitutional cases. As the Tenth District noted in its decision, a lobbyist's selfish goals add little value to reading a legislator's mind. *Levin*, 2009-Ohio-636, at ¶¶32-33. But even if it had any merit, it has little to do with the disposition of the Satellite Companies' Commerce Clause claim. The latter rises and falls independently on the "ground vs. outer-space" hypothesis regardless of the influence of lobbyists. The issue is basically a "red herring" that does not support any basis for accepting jurisdiction.

This case simply does not rise to the level of a case of public and great general interest nor one of constitutional significance. The Satellite Companies continue to insist that their unique "ground vs. outer-space" argument presents a case for discrimination under the dormant Commerce Clause. But having taken it to court after court and lost, it should now be put to rest.

ARGUMENT

The Tax Commissioner's Proposition of Law:

The imposition of Ohio's sales and use tax on satellite broadcasting services and not on cable broadcasting services does not violate the dormant Commerce Clause of the United States Constitution.

A. The dormant Commerce Clause prohibits discrimination *against* interstate commerce, not alleged discrimination between different forms of interstate commerce.

As the U.S. Supreme Court has made clear, unlike an equal protection claim, the dormant Commerce Clause does not focus on alleged discrimination between two competing interstate businesses. Instead, it is directed at prohibiting individual States from enacting laws that favor

local enterprises at the expense of out-of-state businesses that would have the result of creating a multiplicity of preferential trade areas destructive of the free trade which the Clause protects. *Northwestern States Portland Cement Co.*, 358 U.S. at 458; *Boston Stock Exchange v. State Tax Comm.* (1977), 429 U.S. 318, 329. Thus, a dormant Commerce Clause violation only occurs if there is “differential treatment of **in-state** and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems, Inc.*, 511 U.S. at 99 (emphasis added). Or, stated another way, a law is discriminatory if it “tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.” *Chemical Waste Mgt. v. Hunt* (1992), 504 U.S. 334, 342.

With the sole exception of the trial court’s decision in this case, the dormant Commerce Clause, as interpreted, has not been applied to prohibit the disparate state treatment of two interstate businesses and their interstate activities. See *Exxon Corp.*, 437 U.S. at 127. “The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Id.* “[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.” *Id.* And even if the disparate treatment of interstate businesses is unfriendly to consumers, these results “relate to the wisdom of the statute, not its burden on commerce.” *Id.* at 128.

Thus, the dormant Commerce Clause analysis with respect to the Satellite and Cable Companies need not go beyond a fact that all involved in this case concede - both are interstate businesses engaged in interstate commerce with respect to their Ohio subscribers. The Satellite Companies go to great lengths in their Memorandum in Support of Jurisdiction to trivialize their physical presence in Ohio and maximize that of the Cable Companies. (Sat. memo at 5). But the

facts do not support them. Both transmit programming signals across state lines. Both utilize in-state and out-of state equipment and facilities to provide service to Ohio subscribers and both own property within and without the state. Both have employees within and without Ohio. Both clearly engage in the economic activity of selling video programming in Ohio and elsewhere. Neither business is indigenous to Ohio nor conducts commerce wholly within the borders of Ohio. *Levin*, 2009-Ohio-636, at ¶¶24-25. As the Tenth District observed, “[b]efore us are two modes of **interstate** business.” *Id.* at ¶24 (emphasis added). The state and federal courts of Kentucky and North Carolina have unanimously agreed. See *North Carolina*, 632 S.E.2d at 548 (“cable companies are no more ‘local’ in nature than are satellite companies. Indeed, the record reveals that both businesses are interstate in nature.”); *Treesh*, 469 F. Supp. 2d at 437.

In light of the overwhelming facts and law, the Satellite Companies’ strained attempt to characterize cable broadcasting services as a “local” business simply because cable is laid in the ground, and satellite broadcasting services as an “out-of-state” business simply because it broadcasts from a satellite in outer-space, reaches a nonsensical level. First, it constitutes factual gerrymandering, focusing on only one aspect of what each business does in Ohio and elsewhere, and totally ignoring the millions of dollars in infrastructure that the Satellite Companies have invested in Ohio and that the Cable Companies have invested in other states. Second, as the Tenth District correctly noted, even if the consideration is confined to those aspects of each business involved in gathering and transmitting programming signals, each has significant involvement with technology both on the ground and in outer-space. *Levin*, 2009-Ohio-636, at ¶¶24-25. Cable companies gather signals from “outer-space” satellites which transmit their programming to a “head-end”, which can be located “out-of-state” for distribution by cable to a customer’s decoder box. Satellite Companies use Ohio “ground” cable lines to gather signals

which they transmit to a satellite that in turn transmits a signal through the air to another Ohio ground-based device, the satellite dish, which is also often owned by the Satellite Company.

The Satellite Companies' attempt to diminish the significance of the interstate nature of each business by citing to *Boston Stock Exchange* is equally strained (Sat. memo at 9). The Satellite Companies cite it as "evidence" that the Commerce Clause protects against discrimination even amongst interstate companies, but the case is readily distinguishable. While the "local enterprise" in that case, the New York Stock Exchange, was engaged in interstate commerce, there was no issue that the stock exchange itself was truly a New York local business or that the tax measure in question was designed to force customers to use the local stock exchange rather than "out-of-state" stock exchanges. *Boston Stock Exchange*, 429 U.S. at 328. The case therefore involved a classic example of economic protectionism. In contrast, there is nothing "local" about a cable industry that operates at the same relative level and in the same fashion in all states in which it does business. The Satellite and Cable Companies are both equally situated on the intrastate and interstate planes, and any disparate treatment amongst them is simply not within the scope of a dormant Commerce Clause violation.

B. Differential tax treatment of two categories of businesses providing broadcasting services, resulting from differences between their modes of operation, regardless of geographic location, is not unlawfully discriminatory under the dormant Commerce Clause.

The U.S. Supreme Court has clearly stated that the dormant Commerce Clause protects the interstate market for a particular product, but it does not protect "the particular structure or methods of operation in a retail market." *Exxon*, 437 U.S. at 127. Thus, "the Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results solely from differences between the nature of their businesses, not from the location of their activities.'" *Kraft Gen. Foods*, 505 U.S. at 78 (quoting *Amerada Hess*, 490 U.S. at 78).

The *Exxon* case involved a Maryland law that prohibited oil producers or refiners from operating retail service stations within the state. The law was designed to address inequities in the distribution and pricing of gasoline between the big oil producers running gas stations and independent retailers arising during the 1970's oil crisis. Since there were no oil refineries in Maryland that would cause the big oil producers to be located in that state, the oil producers argued that the law had the practical effect of favoring in-state retailers while burdening interstate retailers that also refined and produced gasoline. Nevertheless, the Supreme Court found the law to be constitutional under the Commerce Clause because independent dealers were both local and interstate and, therefore, the "burden" and "benefit" was due solely to differences in how the two interstate businesses operated, not to their locations. *Exxon*, 437 U.S. at 125-128. See also *Levin*, 2009-Ohio-636, at ¶15.

In *Amerada Hess*, the Supreme Court reviewed a New Jersey franchise tax provision that denied oil producers a state tax deduction for the federal "windfall profit tax" imposed on producers of crude oil. The Court, relying on *Exxon*, found that the tax provision did not discriminate against interstate commerce simply because independent dealers, who did not produce oil and were therefore not adversely impacted by the state tax treatment, happened to be more local. Noting that each business operated both in New Jersey and outside the state, the Court concluded that the effect the tax measure "may have on these two categories of companies results solely from the differences between the nature of their businesses, not from the location of their activities." *Amerada Hess*, 490 U.S. at 78. See also *Brown & Williamson Tobacco Corp. v. Pataki* (2nd Cir. 2003), 320 F.3d 200; *Levin*, 2009-Ohio-636, at ¶16.

If applicable to the local independent dealers in *Exxon* and *Amerada Hess*, this principle is all the more applicable to the two interstate businesses under consideration in the instant case. It

is undisputed that Satellite and Cable Companies deliver their broadcasting services by significantly different technologies. It is this difference, and not the geographic location of the businesses, that drives whether or not a particular service is taxable. Whether or not greater physical presence exists in one state versus another or, more accurately, between the two businesses in all states, is again due to the differences in mode of operation and not to whether or not one business is local and the other business is interstate. Contrary to the Satellite Companies' continued assertion that the taxation of broadcasting services is tied to geography, i.e. "the ground", satellite broadcasting services are taxable regardless of where the equipment and employees necessary to run that equipment are located and cable service is not taxable regardless of where it locates its equipment and employees. *Levin*, 2009-Ohio-636, at ¶25; *North Carolina*, 632 S.E.2d at 550. The dormant Commerce Clause prohibits discrimination against the interstate market for broadcasting services, but does not prohibit different treatment of broadcasters who deliver their programming by satellite as opposed to cable. *Levin*, 2009-Ohio-636, at ¶27; *North Carolina*, 632 S.E.2d at 549-550; *Treesh*, 487 F.3d at 481; *Tolson*, 498 F. Supp. 2d at 800.

The Satellite Companies' citation to *Dayton Power & Light v. Lindley* (1979), 58 Ohio St. 2d 465 (Sat. memo at 13), to argue that a geographical requirement can be disguised as a mode of operation is totally misdirected. *DP&L* had nothing to do with alleged mode of operation. Instead, it again involved a classic protective tariff where Ohio imposed a lower use tax rate on the purchase of the variety of coal indigenous to Ohio than a foreign variety in order to protect the local product. In the present case, there is nothing indigenous to Ohio regarding cable lines. The Cable Companies use the same type of cable lines and technology to deliver their programming signals to their customers throughout the country.

The Satellite Companies' reliance on *Armco Inc. v. Hardesty* (1984), 467 U.S. 638; *Westinghouse v. Tully* (1984), 466 U.S. 388; and *Granholm v. Heald* (2005), 544 U.S. 460, is equally misplaced (Sat. memo at 7-8). Each of these decisions concerned tax structures that were designed to force businesses to locate part of their infrastructure in one state versus another. They were designed to force businesses to make decisions on **where** they located their business, not **how** they conducted business. These cases are, therefore, totally inapposite to those of the instant case. Ohio's imposition of sales and use tax on satellite broadcasting services is not going to force the Satellite Companies to become local businesses. Satellite broadcasting services are taxable regardless of the location of the infrastructure. Moreover, under the Satellite Companies' argument, they are inherently out-of-state businesses because they use satellites located in "outer-space" to deliver their services to their customers, and no tax inducement, let alone Ohio's sales and use tax provisions, will bring those satellites any closer to Ohio. "Given this fact, 'it is difficult to see how [the statute] unconstitutionally discriminates against interstate commerce.'" *North Carolina*, 632 S.E.2d at 549-550.¹

C. The taxation of satellite broadcasting services is a compensatory tax.

Although the Tenth District found it unnecessary to address the compensatory tax doctrine in light of the Satellite Companies' failure to show discrimination, *Levin*, 2009-Ohio-636, at ¶28, any reversal of the latter would, of necessity, invoke the need to address the former. Under the jurisprudence that defines the doctrine, it is readily apparent that it represents an independent

¹ To the extent the trial court's relative presence analysis retains any viability, an examination of whether discrimination exists under such analysis cannot be made without a fully developed trial record of the total presence of Satellite Companies and Cable Companies within and without Ohio, an opportunity improperly denied by the trial court. See 12/19/06 Prot. Order. Even the Satellite Companies decline to advance the trial court approach in their briefing, and the Tenth District found it unnecessary to address this issue in the light of proper Commerce Clause analysis. *Id.* at ¶30. The right to raise this error is merely preserved here in the event that this flawed analysis should be resurrected.

basis for affirming the constitutionality of the statute. Specifically, if a challenged tax statute, when viewed in isolation, operates “in practical effect” to discriminate against interstate commerce, the tax, nonetheless, may be properly sustained as “compensatory” or “complementary” if it imposes a tax on interstate commerce that is “similar to” or “in lieu of” a tax already imposed on intrastate commerce. *Fulton Corp.*, 516 U.S. at 331, fn.2. This is precisely the case with local franchise taxes that municipalities impose on Cable Companies and deposit in their general revenue funds, R.C. §5705.10, R.C. Chapter 4939, but are precluded from assessing on Satellite Companies under federal law that instead allows the taxation of Satellite Companies at the state level. Pub. L. 104-104, Title VI, §602(c), 110 Stat. 144 (codified as note to 47 U.S.C. §152). It is a federally recognized compensatory tax scheme that validates any discrimination otherwise present.

D. In Ohio, the use of arguments presented by lobbyists as evidence of the intent behind legislation is improper.

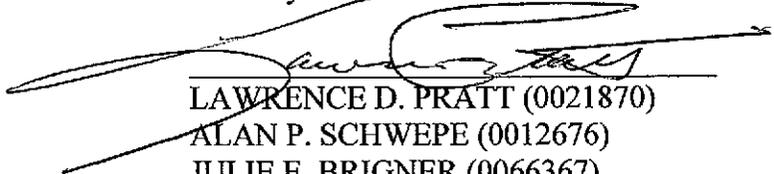
As the Tenth District properly concluded, in Ohio, lobbying efforts on behalf of legislation are not probative of the intent of the legislature in enacting it, and are therefore improperly relied upon for such purpose. *Levin*, 2009-Ohio-636, at ¶¶31-33. See *Glick v. Sokol*, 149 Ohio App.3d 344, 2002-Ohio-4731, at ¶10; *State v. Toney* (1909), 81 Ohio St. 130, 150. The Satellite Companies argue a different standard for constitutional challenges but offer not a single Ohio authority to support their position. Moreover, the cases to which they cite either do not stand for the proposition espoused or represent situations where, unlike Ohio, such evidence is generically allowed within the confines of that particular jurisdiction.

CONCLUSION

For all the reasons stated above, the Tax Commissioner respectfully requests the Court to decline jurisdiction over the Satellite Companies’ appeal.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Lawrence D. Pratt", is written over a horizontal line. The signature is fluid and cursive, extending to the right of the line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Defendant/Appellee/Cross-Appellant Richard A. Levin, Tax Commissioner of Ohio, in Opposition to Appellants' Memorandum in Support of Jurisdiction was served by regular U.S. Mail, postage prepaid, this 6th day of May upon:

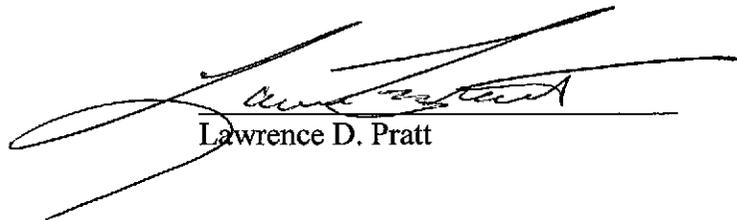
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I also sent courtesy copies to counsel of record for all known amici curiae on the 6th day of May, 2009.



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