

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**

**BRIEF OF AMICUS CURIAE NATIONAL RURAL TELECOMMUNICATIONS
COOPERATIVE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

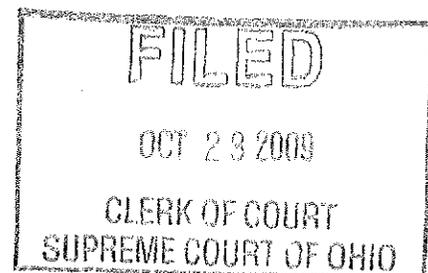
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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rural Telecommunications Cooperative (“NRTC”) is a non-profit cooperative¹ 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 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.

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.

ARGUMENT

Amicus agrees with and adopts Appellants' arguments on Propositions of Law Nos. 1, 2, and 3 as set forth in their Brief. Amicus, however, writes to embellish on Appellants' analysis of Proposition of Law No. 1.

THE UNCONSTITUTIONAL TAX IS HARMFUL TO THE PUBLIC INTEREST

A. The Importance of Satellite TV to Rural Ohioans

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 urban and suburban areas, such as Cleveland and Cincinnati take for granted. Many retailers and specialty stores deem it unprofitable to set up shop in sparsely-populated areas; services like high-speed broadband Internet service that have become essential to modern life 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 opens a channel to the wider world, just like the Sears Catalog did in the 1890s. The Court of Appeals' opinion in this case, however, sanctions discriminatory taxation of the sale 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 burden or constrict access to basic goods and services. NRTC urges this Court to overturn the appellate court decision and enjoin the inequitable tax on satellite TV.

The story of the development of satellite TV in Ohio demonstrates how rural Ohioans ultimately get access to vital services that companies already deliver in areas of denser population. Cable TV companies have deployed thousands of miles of cables to deliver pay TV to homes in Ohio cities and suburbs. But those companies have also concluded -- both in Ohio

and elsewhere – that it is simply not worth it to build the infrastructure necessary to deliver a robust pay TV service in many less populated rural areas. For decades, many rural families in Ohio depended entirely on “rabbit ears” or outdoor antennas to watch off-air TV – provided that broadcast signals could even reach them. For those Ohioans who lived 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, first with the large C-band dishes in the mid-1980’s and then in 1994 with small dish Ku-band services, such as those offered by the plaintiff-appellants, 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. In addition to bringing multichannel service where it not previously existed, it provided immediate competition to cable TV systems that previously enjoyed a monopoly and, in many cases, provided less than acceptable service.

Through innovation, satellite TV found a way to compete with the entrenched cable TV 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.

B. The Satellite-Only Sales Tax Is Discriminatory, Anticompetitive and Harmful to the Public

Rather than responding to satellite TV’s technological challenge with innovations to reduce delivery cost and reach more Ohio residents, cable TV turned to an army of lobbyists in Columbus to persuade the State to impose a 6% sales tax on pay TV services delivered to homes via satellite (later reduced to 5.5%). Cable TV 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 sales tax; they are part of cable TV's delivery cost – a form of rent that cable TV pays to municipalities for using rights of way to set up its ground distribution network. Cable TV 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 on utility poles.

The ground based public facilities that are essential to cable and which are paid for in the form of franchise fees are not a cost of satellite TV's business, because the satellite TV signal is received from orbiting satellites directly at the subscriber's home via customer premise equipment (CPE) that is, in most cases, paid for, owned and maintained by the individual subscriber. Thus, in an urban environment, the cable TV operator pays for the cost of public infrastructure to reach the subscriber's home through its franchise fees, while in rural markets it is the subscriber who bears the cost of the CPE – or the necessary "infrastructure" – to receive the content. Rather than "equalizing" the competitive environment for all pay TV services, the satellite-TV-only sales tax would impose an unjustified additional cost on rural subscribers who are, more often than not, more economically challenged than those living in urban and suburban markets. It should also be kept in mind that the satellite TV operators are not immune to infrastructure costs as they have made huge financial investments in the satellite technology needed to serve rural Americans. Both of the plaintiff-appellants operate multiple satellites and each such satellite can cost nearly a half-billion dollars to construct and launch.

Satellite TV is a very good thing for rural Ohio. By distributing their programming wirelessly from outer space, multiple satellite TV providers can reach Ohioans in rural areas that

cable TV may never serve. And in those markets where there is cable service, satellite TV has ushered in competition that has led to more choice and better prices for all subscribers.

Imposing a discriminatory 5.5% sales tax on satellite TV (but not other pay TV service) burdens satellite TV based on the very feature that is most beneficial to the public – the ability to deliver service anywhere, without having to first install a costly ground distribution network. It is precisely *because* satellite TV distributes programming using wireless technology that it can provide all Ohioans with pay TV service at a competitive price. A tax imposed uniquely on satellite TV harms all Ohioans because it drives up the cost of satellite TV relative to cable TV and reduces competitive pressure. If higher cost deters potential pay TV customers from subscribing to satellite TV service, the State's discriminatory tax will dictate the story of competition in the market for pay TV service – not the business' own costs or the quality of their service. And perhaps most importantly, the tax would impose a new financial burden on many living in rural communities at a time when they can least afford it and may force many subscribers to cancel satellite TV service, thus going back in time to when multichannel services were unavailable.

It should also be recognized that what satellite TV brings to the heretofore unserved rural markets is not simply entertainment. The multichannel service offered by satellite TV distributors brings access to critical weather information, news, educational content and even channels such as RFD-TV and Blue Highways that are specifically programmed for rural markets.

C. The Court of Appeals Decision Opens the Door to Further Anticompetitive Behavior that Will Be Particularly Damaging to Rural Ohioans

The Court of Appeals' 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 plaintiffs-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' ruling – that the General Assembly will not enact future measures that will have the same effect on rural Ohioans.

The next stop for the cable companies' lobbyists could easily be the next area where satellite's innovation poses a competitive threat – satellite Internet service. The Court of Appeals' ruling may encourage lobbying efforts in the state legislature to impose burdensome regulations on satellite Internet providers who are actively working to bring vital broadband Internet service to rural communities. The lobbyists would rely on the same faulty argument that these companies, although competing in the exact same markets and delivering the exact same product, use a different delivery technology and therefore can be discriminatorily taxed.

The adverse effects of reduced innovation and price competition will be particularly detrimental to rural residents who have traditionally not enjoyed the same levels of technology and competition found in urban markets. While many rural telephone and electric companies and cooperatives (many of which are members of NRTC) have made great strides in delivering advanced telecommunications in their markets, the high marginal costs associated with delivering goods and services to sparsely populated areas often impede the roll-out of new technologies. For instance, as pointed out in the briefs of other amici, the logic of the Court of Appeals' ruling would permit the General Assembly to eventually enact a higher tax on Internet retailers.² Much as cable TV has found it prohibitively expensive to lay cables in rural areas, it is

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' ruling. The threat to web-based businesses that serve rural communities, while perhaps not immediate, is nonetheless very real.

simply not feasible for major department stores to build outlets in rural areas where there is simply not enough population density to make such stores 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 have the opportunity to consider wider choices made available via the Internet. A discriminatory tax on retailers who use the Internet as their “mode of business” could threaten the supply chain on which rural Ohioans depend for many of their goods.

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 cities. That is the goal of NRTC, and it is also the intent of the Commerce Clause – to create a unified and open system of interstate commerce to the mutual benefit of all citizens, whether city-dwellers or farmers. A discriminatory tax, enacted to protect urban areas’ economic interests in their franchise deals with cable companies, and that impedes rural citizens’ access to interstate commerce and services is inimical to the Commerce Clause. *C.f. Maryland v. Louisiana* (1981), 451 U.S. 725, 754, 101 S.Ct. 2114, 68 L.Ed.2d 576 (the Commerce Clause’s “basic purpose” is “to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution.”) The Court of Appeals’ opinion missed the importance of the Commerce Clause’s protection.

D. The Tax Statute’s Discrimination Based On Use of Ground Distribution Equipment is Unconstitutional

Amicus does not mean to suggest that Ohio should not be concerned with the financial health of municipal governments. “It is only when the Means by which that legitimate purpose is to be accomplished flies in the face of the United States Constitution that the judicial branch must become involved.” *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St.2d 465, 477,

391 N.E.2d 716, 12 O.O.3d 387. The State may certainly impose even-handed taxes as it sees fit. Here, however, the tax discriminates between two groups of businesses that deliver the same pay TV service to consumers, and does so purely on the basis of whether or not the business performs a specific act in the State that has clear in-state economic benefits. The tax has an intended anticompetitive impact in that it raises the price of services purchased from businesses that do not undertake the act in the State that would benefit the local economy, while not taxing those competitors who act locally. Much like when this Court faced a taxation scheme that favored coal mined in Ohio over coal mined in other states, “[f]or this court to place a judicial stamp of approval on the statutory scheme of taxation now before [it] would be to shirk [its] own sworn duty, as members of the judicial branch of government, to support the Constitution of the United States.” *Id.*

To endorse the discrimination this tax reflects based on the difference in the way that satellite TV and cable TV each bring pay TV to subscriber homes would require this Court to stick its head in the sand. There can be no legitimate purpose to a tax that is assessed against pay TV unless it is delivered by ground distribution. Simply put, the Commerce Clause violation is made clear by the fact that “it is hard to understand [Ohio’s] motive” except in the context of the desire to aid cable because cable employs more Ohio residents and because various municipalities profit from franchise agreements they entered into with cable. *Maryland v. Louisiana* (1981), 451 U.S. 725, 756-60, 101 S.Ct. 2114, 68 L.Ed.2d 576 (invalidating a complex scheme of taxes and credits that interfered with interstate commerce and could only be explained by its desire to benefit local economic interests).

It must be conceded that there is a technical difference between delivering pay TV by wire and by satellite. However, that difference is not a legitimate basis for a discriminatory sales

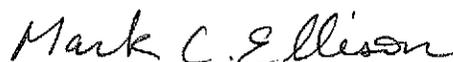
tax. The only possible motivation behind the favorable tax treatment for ground distribution versus satellite distribution is that ground distribution more heavily benefits the local economy because it *requires* hiring employees *in Ohio* and the purchase of rights-of-way *in Ohio*. Exempting cable from the state sales tax is no different than exempting one particular form of brandy from the sales tax because it necessarily involves the purchase of local ingredients.

CONCLUSION

The State and its amici may suggest that the concerns of rural citizens about this tax are better addressed to the legislature. They are wrong. Cable's lobbyists were successful in convincing the General Assembly to enact a tax to protect cable TV and the revenue municipalities derive from it at the expense of satellite TV and the rural Ohioans who rely on it. 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.

For all of the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of *Amicus Curiae* National Rural Telecommunications Cooperative In Support of Plaintiffs-Appellants was served by U.S. mail, postage prepaid, this 23rd day of October, 2009, upon the following:

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