ORIGINAL

No. 2009 – 0627

In the Supreme Court of Ohio

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

Plaintiffs – Appellants,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Defendant – Appellee.

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

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT – APPELLEE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of Defendant-Appellee, Ohio Tax Commissioner. The Multistate Tax Commission supports the view of the Tax Commissioner, and the Court of Appeals, that Ohio's imposition of its retail sales tax on the sale of direct-to-home satellite broadcasting services does not violate the Commerce Clause of the United States Constitution, Art. 1, §8, cl. 3.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum threshold of seven states enacted it.[1] Today, forty-seven states and the District of Columbia participate in the Commission. Twenty of those jurisdictions have adopted the Multistate Tax Compact by statute. Another twenty-eight have joined the Commission as either sovereignty or associate members.[2] The purposes of the Compact are to: (1) facilitate proper determination of State and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoid duplicative taxation.[3]

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[1] *See, United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), upholding the validity of the Compact.

[2] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Maryland, New Jersey, and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

[3] Multistate Tax Compact, Art. I.

These purposes are central to the very existence of the Compact, which was the States' answer to an urgent need for reform in state taxation of interstate commerce. *See e.g.*, H.R. Rep. No. 952, 89th Cong. 1st Sess., Pt. VI, at 1143 (1965). By the mid-1960's, substantial lack of uniformity had resulted in burdensome complexity and uncertainty, and an elevated risk of duplicate taxation or less than full apportionment of income. If the States failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate state taxation.[4]

The promise of increased uniformity established by the States' adoption of the Compact was critical to reducing the risk of duplicative taxation and preserving the recognized sovereignty the states enjoy with respect to taxation of interstate commerce. Preserving state tax sovereignty under our vibrant federalism remains a key purpose of the Commission.

The importance the Commission attaches to the present case, and our motivation for filing this brief today, lies in this goal of preserving States' sovereignty and protecting it from an erroneously expansive interpretation of federal limitations. The application of the dormant Commerce Clause suggested by the satellite broadcasters in this case would result in harmful and unfounded limitation on the State's sovereign authority to define its tax base based on a careful weighing of relevant policy determinations made by the peoples' representative, the Ohio legislature.

Most fundamentally, the Commission submits that this Court cannot reach the dormant Commerce Clause issue raised by the satellite broadcasters at all, because

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[4] The Willis Committee, a congressional study of state taxation mandated by TITLE II OF PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce. *See generally Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

Congress has acted pursuant to its affirmative commerce clause powers to explicitly authorize the specific tax scheme that Ohio has adopted – taxation of cable broadcasting at the local level and taxation of satellite broadcasting at the state level. 47 U.S.C. §542(b), Pub. L. No. 104 – 104, Title VI, §602(a) and (c) (reprinted at 47 U.S.C. §152, historical and statutory notes). Where Congress has spoken on an issue, there is no dormant Commerce Clause inquiry to be made. *Western & Southern Life Insurance Company v. State Board of Equalization,* 451 U.S. 648, 652 – 653 (1981), *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 154 – 155 (1982). The relative degree of local infrastructure standard proposed by the satellite broadcasters for determining whether an industry is interstate for purposes of the dormant Commerce Clause is entirely irrelevant and unworkable in practice. The Commission therefore files this brief in furtherance of the interest of its members that the dormant Commerce Clause not be erroneously extended to cases where Congress has explicitly approved the very tax structure that the satellite broadcasters challenge.

I.
Congress Explicitly Authorized the Tax Scheme Employed by Ohio and Other States to Tax Satellite at the State Level While Subjecting Cable to Local Franchise Fees

Section 602(a) of the Telecommunications Act of 1996 (hereafter, "the Act") provides;

> Preemption. A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

Pub. L. No. 104 – 104, Title VI, §602(a) (reprinted at 47 U.S.C. §152, historical and statutory notes).

The legislative history of Section 602(a) demonstrates that, in preempting the authority of local taxing jurisdictions to impose a tax or fee on satellite broadcasting, Congress recognized that satellite broadcasting did not require the use of public rights-of-way or the physical facilities of a community.[5] At its essence, this is the basis for the satellite broadcasters argument in this case – unlike cable, satellite does not require the use of extensive local infrastructure that burdens public facilities. Although Congress specifically noted this relative infrastructure rationale for preempting local taxes and fees, Congress, at the same time, explicitly allowed state taxation of satellite broadcasting. Section 602(c) of the Act provides:

> Preservation of State authority. This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed by a State.

Clearly, in preempting local authority to directly tax satellite broadcasting, Congress chose not to similarly preempt the states' authority to tax satellite broadcasting. Indeed, the statute explicitly permits state taxation of satellite service. Congress did not restrict this permission to situations where a state similarly taxes cable. In the absence of such a limitation, Congress's unqualified statement that the states are free to tax satellite broadcasting must be construed as not requiring the states to similarly tax cable.

Congress has created a limited immunity from tax for satellite broadcasters. The U.S. Supreme Court has held that where Congress creates a limited immunity from tax,

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[5] "The conference agreement adopts the House provisions with modifications. This section exempts DTH [direct-to-home] satellite service providers from collecting and remitting local taxes and fees on DTH satellite services. DTH satellite service is programming delivered directly to subscribers equipped with satellite receivers at their premises; it does not require the use of public rights-of-way or the physical facilities or services of a community. The conferees adopt the House language .... States are free to tax the sale of the service and they may rebate some or all of those monies to localities if they so desire." H.R. Conf. Rep. No. 104 – 458, at 201 – 202 (1996).

congressional silence as to a broader immunity indicates, by negative implication, that Congress created no such broader immunity. *Director of Revenue of Missouri v. CoBank ACB,* 531 U.S. 316, 323 – 325 (2001) (structure of Farm Credit Act granting state tax immunity to some Farm Credit institutions indicates by negative implication that other Farm Credit institutions not so immunized remain subject to state tax). *See also, Farm Credit Services of Mid-America v. Zaino,* 91 Ohio St. 3d 564, 2001 Ohio 113, 747 N.E. 2d 814 (2001) (same). *Cf., General Motors Corporation v. Tracy,* 519 U.S. 278, 291 – 294 (1997) (congressional exemption of local distribution of natural gas from federal regulation authorized Ohio to impose its sales tax on natural gas purchases from out-of-state independent marketers notwithstanding that purchases from in-state local gas distributors were exempt).[6] In this case, had Congress been ***silent*** as to state taxation of satellites, there would be a need to argue the negative inference is that there is no such immunity at the state level. But, in this case, Congress left no need for interpretation by negative inference. Congress ***explicitly*** stated that the immunity extends only to local taxes and that the States are free to tax.

In explicitly permitting states to tax satellite broadcasting, Congress exercised its affirmative authority under the Commerce Clause. This affirmative permission is in no way conditioned upon the states similarly taxing cable at the state level. Having exercised its ***affirmative*** commerce clause authority to grant states unqualified permission to tax, there is no basis for inferring qualifications through a ***dormant***

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[6] The State of Ohio has persuasively demonstrated that its tax structure does not discriminate against satellite broadcasting within the meaning of the dormant Commerce Clause. But even if Ohio's tax scheme were so construed, Congress in the exercise of its authority under the affirmative Commerce Clause may authorize discriminatory taxation, as long as its intention to do so is clearly expressed. *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946), *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91 – 92 (1984). By preempting state authority to impose a local tax or fee on satellite broadcasting, while at the same time both authorizing local taxation of cable and allowing state taxation of satellite, Congress has authorized precisely the taxing structure that Ohio has adopted.

commerce clause inquiry. Congress, through its affirmative commerce clause authority, has explicitly approved the very tax structure that the satellite broadcasters challenge.

II.

The Satellite Broadcasters Urge this Court to Use the Dormant Commerce Clause to Adopt a Rule That Will Inevitably Give Satellite An Unfair Competitive Advantage in Ohio, Contrary to the Purposes of the Clause and to the Purpose of Congress in Exercising its Authority under the Clause.

Where cable is concerned, however, Congress chose a very different approach. Rather than totally preempting local authority to levy a franchise fee on cable, Congress specifically authorized local franchising authorities to impose a cable franchise fee, subject to a maximum rate of no more than 5% of the cable operator's annual gross receipts. 47 U.S.C. §542(a) and (b). In doing so, Congress struck a balance in the tax treatment of cable and satellite, to reflect the different demands that the two broadcast formats make on local infrastructure -- satellite cannot be required to pay a local franchise fee while cable can.[7]

The satellite providers propose to upset the balance that Congress struck by seeking to obtain the very same competitively skewed tax advantage that Congress eschewed in Section 602 – relief from taxation at the state level unless cable is taxed as well, while maintaining its immunity from taxation at the local level. Clearly, in relieving satellite from a local tax burden, Congress did not intend to give satellite a competitive advantage by conditioning a state's ability to tax satellite on its willingness

[7] The satellite broadcasters would have this Court ignore the congressional preemption of state authority to impose a local franchise fee on satellite broadcasting while allowing such a fee to be imposed on cable. The satellite broadcasters assert that a franchise fee is somehow different than a tax. But Congress explicitly chose to preempt local authority to impose either a tax or fee on satellite broadcasting while allowing localities to impose a franchise fee on cable. Section 602(b) of the Act makes clear that the term "tax or fee" encompasses both a local sales or use tax and a franchise fee. Whatever differences may exist between a fee and a tax under state law, Congress in the exercise of its Commerce Clause authority has decreed that for purposes of the preemption, they are to be treated the same.

to create an uneven playing field by taxing only cable at the local level, and both cable and satellite (or neither) at the state level.

The Court should note that the satellite broadcasters are not seeking to level the playing field regarding the tax treatment of satellite and cable broadcasters in the State of Ohio. Cable TV providers in Ohio are subject to a franchise fee levied by each local franchising authority (LFA) in order to be granted a license to provide cable TV within that LFA.[8] Thus, the satellite providers' position, if accepted by this Court, would result in satellite providers having a competitive *advantage* over their cable competitors.

Should the satellite providers prevail in this case, one of two results will flow from that outcome. Either the State will extend the sales tax to cable, or the State will repeal the sales tax on satellite broadcasting. In either event, cable will remain subject to the local franchise fees authorized by Congress in 47 U.S.C §542. As Congress has also preempted the authority of local franchising authorities to impose franchise fees on satellite providers, the effect of a ruling in favor of the satellite broadcasters will be to grant them a tax advantage in Ohio over cable providers.[9] This would be contrary to the taxation scheme for cable and satellite expressly established by Congress, in the exercise of its plenary authority under the affirmative Commerce Clause.

Ohio's current tax scheme – taxing satellite broadcasting at the state level and subjecting cable broadcasting to local franchise fees -- assures that Ohio's tax structure does not create an unfair competitive advantage for either cable or satellite broadcasting,

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[8] The majority of Ohio cable franchise agreements provide for a 5% franchise fee. Since July 1, 2005, the Ohio retail sales tax rate has been 5.5% of the gross receipts from each sale. The overall tax treatment of satellite and cable in Ohio is therefore substantially equivalent.

[9] This issue is not confined to Ohio. The satellite broadcasters have challenged, or are planning to challenge, the imposition of state sales tax on satellite broadcasting in at least six other states -- Florida, Kentucky, Massachusetts, North Carolina, Tennessee and Utah. See the satellite providers' website, Stop Satellite Tax, at http://stopsatellitetax.com (last visited on November 24, 2009).

both of whom compete for essentially the same market. It is the satellite providers that seek to take advantage of the federal preemption on the imposition of local taxes or fees on satellite broadcasting to create a tax *advantaged* position for themselves, contrary to the intent of Congress in specifically allowing for the state-level taxation of satellite providers.

III.

The Specific Dormant Commerce Clause Analysis Proposed By the Satellite Broadcasters in this Case is Fundamentally Flawed.

The dormant Commerce Clause protects competitive national markets by prohibiting discrimination against interstate commerce in favor of instate or local commerce. The test urged by the satellite broadcasters for determining whether an industry is an instate or inter-state industry for purposes of applying the dormant commerce clause analysis would require this Court to weigh the relative degree of infrastructure both cable and satellite maintain within and without the State. There are two major problems with this proposed relative infrastructure test.

First, comparing the level of two industries' infrastructure in a state tells us nothing about whether the markets served by those industries are instate or interstate markets.[10]

Second, even if relative infrastructure were relevant to the dormant commerce clause, there is no principled basis to determine how much infrastructure variance between competitors is enough to trigger discrimination – must one competitor have

[10] The Tax Commissioner's analysis of this issue in his Merits Brief cogently explains why the relative degree of infrastructure in the taxing state of two competitors in the same market is irrelevant in determining whether those competitors serve an instate or interstate market. Merit Brief of Defendant-Appellee of Richard A. Levin, Tax Commissioner of Ohio, at 23 – 30. There is no need for the Commission to repeat or augment the Tax Commissioner's argument here.

100% of its infrastructure within the state while the other has none? Or is a 75% - 25% variance enough? What about 60% -- 40%? Or is it more appropriate to determine the variance by the relative value of the infrastructure as opposed to percentages? If so, what is the measure of value – original cost, or fair market value? Should depreciation be factored in and, if so, what depreciation method should be used? Finally, whatever yardstick is used the infrastructure variance is highly unlikely to remain constant over time. Would a variance that met the test initially eventually be considered discriminatory as the two competitors compete for market share? Is it not more likely that the changing nature of local infrastructure is a function of the success – or failure – of the competitors to build market share and the degree of productivity efficiencies each competitor has achieved than it is due to state tax policy? Local infrastructure can vary widely due to fluctuations in market share and changes in the labor/capital ratio. For example, the infrastructure required to support the domestic American automobile industry has fallen rapidly in recent years. This is most likely due to competition from foreign carmakers and technological innovations that have reduced the manual labor required to produce cars. Whether that infrastructure is properly considered as "local" to a particular state or "interstate" has had nothing to do with its decline.

This case presents no occasion for the Court to enter the morass of weighing the relative degree of local infrastructure required by satellite and cable broadcasting as urged by the satellite broadcasters. Instead, this Court must sustain Ohio's tax scheme because Congress, in the exercise of its affirmative Commerce Clause power, has authorized that precise tax scheme. The dormant Commerce Clause therefore has no role whatsoever to play in this case.

CONCLUSION

Your *amicus* therefore respectfully urges this Court to affirm the decision of the Tenth District sustaining Ohio's sales and use taxation of satellite broadcasting services, while excluding cable broadcasting services, on the ground that Congress, in the exercise of its affirmative Commerce Clause power, has explicitly approved the tax scheme that Ohio has adopted.

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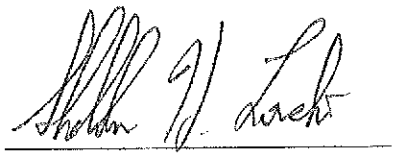

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