ORIGINAL

IN THE SUPREME COURT OF OHIO

DIRECTV INC., and ECHOSTAR SATELLITE, L.L.C.,	:	
Plaintiffs-Appellants,	:	Case No. 09-0627
v.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 08AP-32
RICHARD LEVIN, Tax Commissioner of Ohio,	:	
Defendant-Appellee.	:	

BRIEF OF AMICUS CURIAE NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF DEFENDANT-APPELLEE RICHARD LEVIN, TAX COMMISSIONER OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Regulations

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Conference of State Legislatures ("NCSL") is a bipartisan organization founded in 1975 to serve the legislators and staffs of the nation's 50 states, its commonwealths, and territories. One of NCSL's primary purposes is to improve the quality and effectiveness of state legislatures. NCSL is a frequent advocate for state interests in legislative and judicial proceedings. When appropriate, it also appears as *amicus curiae* to defend legislative prerogatives. NCSL's interest in this proceeding is in ensuring the continued ability of state legislatures to promote tax equalization and efficiency in the face of dynamic technologies offered nationally.

INTRODUCTION

State legislatures confront many challenges when they tackle the taxation of communications services—an evolving marketplace, new technologies, and a panoply of federal regulations. These challenges are exacerbated by the current economic climate in which states are faced with unprecedented revenue shortfalls. As reported by NCSL:

> Lawmakers in virtually every state scrambled to keep their fiscal year (FY) 2009 budgets balanced while at the same time struggling to enact new ones for FY 2010. Hemorrhaging revenues drove the massive difficulties they faced. No matter how pessimistic revenue forecasts were, actual collections seemed to come in lower * * *. The worsening revenue situation produced gaping budget holes. Lawmakers closed a cumulative shortfall that reached $113.2 billion for FY 2009. But as bad as that situation was, the circumstances for FY 2010 already are worse. As lawmakers assembled their FY 2010 budgets, they faced a staggering gap of more than $142.6 billion. That is the total shortfall states had to close as they enacted their new budgets. It does not include any new gaps that may open after the fiscal year begins.[1]

[1] State Budget Update, National Conference of State Legislatures, at 3 (available at http://www.ncsl.org/documents/fiscal/StateBudgetUpdateJulyFinal.pdf); see also The

(continued . . .)

In light of these challenges, state legislatures must be afforded maximum flexibility to devise fair and efficient tax structures to assure that taxes on communications services are levied in an equal, efficient, and competitively-neutral manner. Here, the Ohio General Assembly has done just that—it addressed a perceived inequity in the overall economic burden of taxes and fees imposed on consumers of cable and satellite services and, at the same time, tapped into a new and appropriate source of additional tax revenue. The success of this tax system is reflected in the tax-neutral choice confronting a consumer considering a purchase of cable or satellite service. No matter which service the consumer elects, he or she will pay a similar amount in government-imposed excise taxes or fees based on the gross receipts of the satellite or cable company.

The novel and formalistic interpretation of the dormant Commerce Clause advanced by the Appellants (collectively "Satellite Providers") would undermine the sovereign and Constitutional authority of state legislatures to determine tax policy by (1) preventing legislatures from using complementary state and local tax systems to achieve substantive tax equality, and (2) imposing an unworkable "comparative local presence" test that would effectively force state legislatures to weigh the respective in-

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Fiscal Survey of States, National Ass'n of Governors and National Ass'n of State Budget Officers (Dec. 2009), at vii ("States are currently facing one of the worst, if not the worst, fiscal periods since the Great Depression. Fiscal conditions significantly deteriorated for states during fiscal 2009, with the trend expected to continue through fiscal 2010 and even into 2011 and 2012. The severe national recession drastically reduced tax revenues from every revenue source during fiscal 2009 and revenue collections are expected to continue their decline in fiscal 2010.") (available at http://www.nasbo.org/Publications/PDFs/fsfall2009.pdf).

state activities, assets, contacts, and overall economic impact of competing enterprises when exercising their sovereign tax authority.

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I. STATE LEGISLATURES SHOULD BE AFFORDED WIDE DISCRETION IN FASHIONING EQUIVALENT TAX BURDENS ON CONSUMERS OF INTERSTATE CABLE AND SATELLITE SERVICES

A. Deference Is Due the General Assembly in the Design of Its Tax System

The sovereign right of states to design and administer systems of taxation is as old as the Republic. As reflected in The Federalist, the importance of protecting the states' sovereign right of taxation was foremost in the minds of our founders:

> I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

The Federalist, No. 32 (Hamilton).

Consistent with this historical principle, the Supreme Court has recognized, in a variety of tax contexts, that deference should be given to state legislatures to devise their own tax systems. See, e.g., *Allied Stores of Ohio, Inc. v. Bowers* (1959), 358 U.S. 522, 526-27 (describing the breadth of legislatures' "sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests"); *Dows v. City of Chicago* (1912), 78 U.S. 108, 110 ("It is upon taxation that the several states rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible"); *Gibbons v. Ogden* (1824), 22 U.S. 1, 76 ("Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time.").

The states' sovereignty, of course, is tempered by the Federal Constitution, including the dormant Commerce Clause. But even in such cases, courts are still careful to assure that the state's taxing power is not "unduly curtailed," see *American Trucking Ass'n v. Michigan PSC* (2005), 545 U.S. 429, 434, by requiring plaintiffs to "empirically" demonstrate discriminatory impact under the Commerce Clause. Id. at 436.

This Court, too, has recognized the importance of deferring to the sovereignty of the General Assembly's tax judgments in the face of Federal constitutional claims. Where, as here, a state tax is challenged under the dormant Commerce Clause, the constitutional violation must be established "beyond a reasonable doubt." *Columbia Gas Transm. v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, at ¶41.

B. The Ohio General Assembly Exercised Its Sovereign Right To Create a Non-Discriminatory Tax System that Equalizes the Overall Tax Burdens on Cable and Satellite Providers

In this case, the Ohio General Assembly exercised its sovereign right to create a complementary tax system for cable and satellite service that results in equivalent tax burdens on consumers. Tax parity among communications services is a fundamental policy goal of state legislatures. Indeed, in July 2008, NCSL passed a resolution encouraging state and local governments to simplify and modernize state and local telecommunications taxes in a manner that promoted efficiency, competitive neutrality, and tax equity. *See* Executive Committee Task Force on State and Local Taxation of Telecommunications and Electronic Commerce, July 19, 2008 (attached as Exhibit 1). The resolution also noted that, in pursuing these goals, states should take into account, as Ohio has done here, the overall combination of state and local taxes and fees that impact certain businesses. *Id.*

The Ohio General Assembly enacted a tax on satellite service ("Satellite Tax") to address what the General Assembly, in its discretion, perceived as an inequity in the taxation of consumers of cable and satellite service. Prior to the imposition of the Satellite Tax, cable television subscribers paid up to five percent in franchise fees levied by local governments on a cable operator's gross revenues, while satellite subscribers paid no such fees.[2] Although the cable franchise fee is levied at the local level, the assessment of local taxes and fees is subject to the authority of the General Assembly and is therefore a component of its overall tax and funding apparatus.[3] The General

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[2] In the Cable Act of 1984, Congress authorized state and local governments to impose franchise "fees" on cable systems. 47 U.S.C. § 542(a). "Fee" is defined broadly as any "tax," "fee," or "assessment of any kind" imposed by a franchising authority or any other governmental entity. Id. at § 542(g)(1). The franchise "fee" is effectively an excise tax imposed the cable system's "gross revenues" for the privilege of doing business within the franchise area. 47 U.S.C. § 542(b).

[3] See, e.g., Section 6, Article 13, Ohio Constitution ("The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power * * *."); Section 13, Article 18, Ohio Constitution ("Laws may be passed to limit the power of municipalities to levy
(continued . . .)

Assembly appropriately considered the economic impact of cable franchise fee on cable operators and consumers in determining to impose a complementary Satellite Tax. This is precisely the sort of determination that is entrusted to state legislatures.

Even apart from a state legislature's inherent authority to allocate its various tax resources to the overall advantage of the state, the General Assembly's decision to levy a new tax on satellite service was entirely consistent with the taxing system established by Congress. In the Telecommunications Act of 1996, Congress prohibited local governments from imposing a "tax" or "fee" on satellite service. But it specifically preserved the right of *states* to impose such taxes or fees in broad terms:

> 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 and collected by a State.

Section 602(c), Pub.L. 104-104, 110 Stat. 144 (reprinted at 47 U.S.C. § 152 note).

This express authorization for the Satellite Tax was without condition or limitation, and it omitted any maximum rate to ensure that the tax would not exceed the cable franchise fee. That omission, coupled with the express authorization of the tax, makes it "unmistakably clear" that Congress authorized states to tax satellite services in

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taxes and incur debts for local purposes."); Section 1, Article 10, Ohio Constitution ("The General Assembly shall provide by general law for the organization and government of counties * * *."); see also *Noll v. Nezbeth* (1989), 63 Ohio App.3d 46, 50, 577 N.E.2d 1137, 1139 ("Counties, as creatures of statute, possess only those powers and duties imposed upon them by statute"); *State v. Smith*, 6th Dist. No. WM-08-016, 2009-Ohio-2292, at ¶11 ("Ohio municipalities have the power to levy and collect income taxes subject to the power of the General Assembly to limit the power of municipalities to levy taxes under [the Ohio Constitution].") (citing *Angell v. Toledo* (1950), 153 Ohio St. 179, 91 N.E.2d 250).

excess of five percent without running afoul of the Commerce Clause. See *South-Central Timber Dev., Inc. v. Wunnicke* (1984), 467 U.S. 82, 91 (Congressional authorization to impose discriminatory tax must be "unmistakably clear"); *Western & Southern Life Ins. Co. v. State Bd. of Equalization* (1981), 451 U.S. 648, 652-53 ("If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."); see also *Hillside Dairy, Inc. v. Lyons* (2003), 539 U.S. 59, 66 (Congress "unambiguously expressed" its intent to insulate state regulation of milk composition and labeling laws through a savings clause similar to Section 602(c)).

Notwithstanding that broad grant of taxing authority, the General Assembly elected to implement a tax system to *equalize* the overall tax burdens borne by consumers of multi-channel video services and restore competitive neutrality. It accomplished that goal in several ways.

First, the effective rate of the two tax burdens is similar. Although the local franchise fee is capped at five percent by federal law, the effective rate of the franchise fee is higher because it is calculated on a broader base of gross revenues that includes the collected franchise fee and revenue derived from advertising and other sources. Indeed, at least one study found that the true effective rate of the franchise fee in Columbus, Ohio is 6.35 percent. *See* Tuerck, et al., Taxes and Fees on Communication Services (2007), The Heartland Institute, at 8 (available at http://www.heartland.org/custom/semod_policybot/pdf/21104.pdf). When the true substance and practical effect of the cable franchise fee is examined, the 5.5 percent Satellite Tax is equivalent to the effective rate of the cable tax. See *Railway Express Agency v. Commonwealth* (1959), 358 U.S.

434, 436 ("While the tax is in lieu of other property taxes which Virginia can legally assess and should be their just equivalent in amount, we will not inquire into the exactitudes of the formula where appellant has not shown it to be so baseless as to violate due process"); cf. *Lunding v. New York Tax Appeals Tribunal* (1998), 522 U.S. 287, 297 ("When the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, * * * [w]e must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state") (quoting *St. Louis Southwestern R. Co. v. Arkansas* (1914), 235 U.S. 350, 362).

Second, the General Assembly structured the Satellite Tax to operate in a manner that is substantively similar to the cable franchise fee. Like the franchise fee, the Satellite Tax operates as a sales or excise tax imposed on the gross revenues of satellite providers for the privilege of doing business within the state. Perhaps most importantly, both taxes have an identical impact on the consumer who ultimately pays the tax as a line item on its bill—freeing consumers to make tax-neutral decisions when choosing a cable or satellite service. The nomenclature used to describe the governmental obligation—a "tax" or a "fee"—is of no constitutional significance, and even federal law uses the terms interchangeably to describe the obligation. *See, e.g.*, 47 U.S.C. § 542(g)(1) (defining "franchise fee" to include a "tax"); 47 U.S.C. § 152 note (authorizing a "tax or fee" and defining "tax or fee" under a single definition).

Third, The General Assembly's decision to allow local governments to continue to impose a local franchise fee on cable service while it imposed the Satellite Tax at the state level was well within its sovereign discretion. There is no practical or constitutional distinction between a state that imposes a uniform state tax on satellite and cable service that reimburses funds back to local governments (as North Carolina has done) and a state that imposes a state tax on satellite service while permitting an equivalent local assessment on cable service (as Ohio has done).[4] In either case, the state has made a judgment about how to most efficiently allocate and administer its overall tax apparatus. This judgment is exactly the sort of judgment entrusted to state legislatures and not the courts.

To draw any constitutional difference between the Satellite Tax and the cable franchise fee in this case would reflect a highly formalistic approach to tax policy—one that would undermine the wide discretion afforded to state legislatures to craft overall tax schemes that impose consistent and substantively equivalent tax burdens on consumers. State legislatures need the flexibility to determine whether, and how, to complement a federal tax, local tax, or different form of state tax so that the taxes serve as substantive proxies for one another. This may include, among other things, an assessment of the overall effective rate of the taxes, the practical operation of the tax, the mode of administration of the tax (i.e., as a pass-through to the consumer), or other characteristics that allow the legislature to devise a system that creates equivalent tax burdens—

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[4] Indeed, the North Carolina General Assembly, at various times, has adopted both approaches, and each approach has been sustained against identical constitutional challenges to those brought by the Satellite Providers in this case. See N.C. Sess. Law 2001-424, § 34.17 (establishing five percent sales tax on satellite service but not on cable service), aff'd *DIRECTV v. State* (N.C. Ct. App. 2006), 632 S.E.2d 543; N.C. Sess. Law 2006-151, §§ 1, 10-13 (amending N.C. Gen. Stat. §§ 105-164.4(a)(6) and -164.441) (imposing uniform tax at state level on both cable and satellite and remitting portion to local governments), aff'd, *DIRECTV v. Tolson* (C.A.4, 2008), 513 F.3d 119.

regardless of the names used to describe the tax or the governmental authority that ultimately imposes or administers it.

As state legislatures struggle to plug budget shortfalls and address the ever-changing telecommunications marketplace, they should be given wider—not stricter—flexibility to make careful tax policy judgments. Any approach short of that goal will ultimately prevent legislatures from modernizing their tax systems by plugging loopholes, responding to changes in technologies, or counterbalancing similar taxes imposed by federal, state, or local governments.

II. THE SATELLITE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

Commerce clause challenges to Ohio statutes must be established "beyond a reasonable doubt," and the state statute is entitled to a "strong presumption of constitutionality." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, at ¶41.

Under that rigorous standard, even if there are distinctions between the Satellite Tax and the cable franchise fee, there is no indicia of discrimination against interstate commerce in this case. Both cable and satellite companies operate in interstate commerce.[5] Both use in-state components to deliver the services to their subscribers. And both are subject to taxes or fees on their gross revenues that are passed along to

[5] The U.S. Supreme Court has explicitly held that cable television is an interstate business. *United States v. Southwestern Cable* (1968), 392 U.S. 157, 168-69. This decision provided the basis by which Congress asserted jurisdiction over the cable industry, enacted a comprehensive regulatory system for cable, and authorized the FCC to issue rules and regulations on virtually every aspect of the cable industry. See generally 47 U.S.C. § 521, et seq.; 47 C.F.R. Parts 11, 17, 76 and 78.

consumers.[6] The Satellite Tax is geographically-neutral because it applies without regard to the location of any specific economic activity. In the face of these undisputed facts, there is no work for the dormant Commerce Clause to do.

The Satellite Providers nonetheless advance the novel and unprecedented contention that the Satellite Tax discriminates against interstate commerce because satellite service is an interstate service and cable service is a "local" service based upon its degree of "local presence" within Ohio. This theory would require legislatures to compare cable's in-state interests to satellite's in-state interests. According to this "comparative local presence" theory, there is presumably a tipping point where a sufficient difference in the amount of in-state interests between competing enterprises can cause a differential tax to violate the dormant Commerce Clause. But such a "comparative local presence" paradigm is deeply flawed, both factually and legally, and would produce a wholly unworkable result for state legislatures working to institute fair and equitable tax systems.

To begin with, this "comparative local presence" theory has no support in the case law. See *American Trucking Ass'n*, 545 U.S. at 436 (rejecting as impractical an argument that intrastate trucking fee should be based on a per-miles-traveled basis rather than a per-truck basis). There is no applicable "test" that sets forth any quantifiable basis for

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[6] Satellite's local components include physical facilities for the receiving of off-air television signals and associated fiber transport and use of public rights-of-way from those facilities; ownership of an undetermined number of satellite dishes, down-converters, set-top boxes, and access cards leased to subscribers in Ohio; employment of a legion of company and independent contractors that sell, install and maintain satellite services and equipment; and associated subscriber contracts, vendor contracts, and other intangible property. See, e.g., Compl. ¶¶14-16; Aff. of Virgil Reed, ¶14; The DIRECTV Group, Inc., Form 10-K at 9 (Feb. 27, 2009).

evaluating which interstate businesses qualify as "local" or "in-state" businesses for purposes of the dormant Commerce Clause. And certainly there is no test to weigh the *comparative* local presence of two competing interests to determine which businesses fall into the "local" side of the ledger and which remain "interstate."

Not even the Satellite Providers suggest any workable standard that state legislatures can apply to engage in this kind of line-drawing exercise. A state legislature has no practicable way to *quantify* an interstate business's local presence. There is no measurable benchmark to evaluate and weigh the number of employees resident within the state, the size and nature of the company's in-state physical plant, the percentage of the company's revenues derived from within the state, or a combination of some or all of these factors, to determine whether an interstate company has created or maintained a sufficient "local presence." Similarly, a legislature has no way to *qualify* the extent and significance of a company's contribution to the local community or economy, the nature and extent of the company's profile or presence within the state, the value of the jobs the company creates within the state, or the extent or importance of the company's intrastate operations.

If the Satellite Providers' novel "comparative local presence" test were the standard for legislative compliance with the dormant Commerce Clause, state legislatures would be forced to assess every potential new tax based on vague notions of "local presence," without any concrete, discernable, objective factors to guide the consistent application of such a test across different industries. For example, how would the same local presence test be administered among competing telecommunications providers' relative use of wireline versus wireless methodologies, among competing industries' uses of broadcast, print, direct mail, telephone, in-person, and web-based advertising, or among interstate transportation service providers who rely on rail, air, road, or sea transport systems to deliver competing products or services. The legislative task that the Satellite Providers' "comparative local presence" test would demand would be an impossible and fruitless exercise in finely-milled line-drawing—and the result would virtually hamstring state tax policymakers and chill the states' taxation of interstate services.

Any doubt about the feasibility of the Satellite Providers' proposed test is answered plainly by this very case: Application of the "local presence" test to these facts makes clear that the distinctions the Satellite Providers would draw (and, more importantly, would require state legislatures to draw) are unsupportable. Both cable and satellite bring programming to their subscribers via some physical infrastructure within the state (including wires, satellites, receiver boxes, and the other technological components necessary to the transmission of programming), both employ sales and service personnel and equipment (or utilize contractors within the state), both collect and transmit (via some combination of antenna, wire, and/or satellite) local programming that originates within the state, and both otherwise maintain an in-state presence by the use of state roads, resources, and local advertising. If cable providers are "locally present" because of the physical and personnel infrastructure they necessarily maintain in-state, then satellite providers are likewise "present" for precisely the same reasons.[7]

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[7] In any event, the Satellite Providers' focus on physical and personnel "presence" within the State misses the point. The tax at issue, like the local franchise tax imposed on cable providers, is not imposed on the companies directly or upon their equipment located within the State but instead on *the services they provide to customers within the State*. In enacting the Satellite Tax, the Ohio General Assembly sought only to

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CONCLUSION

Ohio's imposition of a tax on satellite service for the purpose of equalizing the overall tax burden on consumers of like services was a rational regulatory response to a state legislature's assessment of the overall tax burdens imposed on consumers, consistent with the relevant statutory system established by Congress, and geographically neutral. In essence, the Satellite Providers' claims distill to an assertion that the Commerce Clause either immunizes satellite customers from any state taxation at all—a notion that flies in the face of the explicit Congressional authorization—or that it compels that satellite service be taxed at a lesser rate than cable service. While the Satellite Providers may wish this from a competitive standpoint, the Commerce Clause cannot be said to compel this result, and state legislatures should not be forced to become embroiled in such intra-industry tugs-of-war under the guise of the Commerce Clause.

The Court should affirm the decision of the Court of Appeals.

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equalize the tax burden borne by both cable and satellite providers (and, ultimately, by their customers): Because cable providers are taxed at the municipal level (but satellite providers cannot be), the General Assembly elected to impose a comparable tax on satellite providers at the state level. But the key point is this: Both taxes are premised on the gross receipts from the furnishing of a *service* to customers within Ohio, not on any aspect of the physical or personnel infrastructure used to provide that service.

Respectfully submitted this 14th day of December 2009.

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