ORIGINAL

IN THE SUPREME COURT OF OHIO

DIRECTV, INC., and ECHOSTAR SATELLITE L.L.C.,	:	
	:	**Case No. 2009-0627**
Plaintiffs-Appellants,	:	
	:	**On Appeal from the Court of Appeals, Tenth Appellate District Case No. 08AP-32**
v.	:	
RICHARD LEVIN, Tax Commissioner of Ohio,	:	
Defendant-Appellee.	:	

BRIEF OF AMICUS CURIAE INSTITUTE FOR POLICY INNOVATION IN SUPPORT OF DEFENDANT-APPELLEE RICHARD LEVIN, TAX COMMISSIONER OF OHIO

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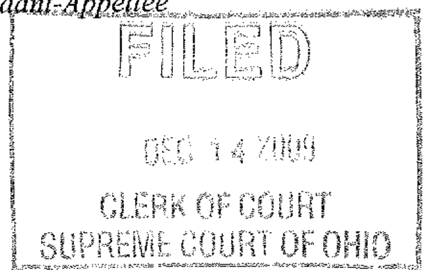

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STATEMENT OF AMICUS INTEREST

The Institute for Policy Innovation ("IPI") is a free-market "think tank" dedicated to promoting lower taxes, fewer regulations, and a smaller, less-intrusive federal government. Founded in 1987, IPI is a public foundation recognized by the IRS as a 501(c)(3) charitable organization, supported wholly by contributions from individuals, businesses and other non-profit foundations.

IPI understands that the principal legal issue raised in this case is whether Ohio's Satellite Equalization Tax ("SET") discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, Clause 3, Section 8, Article I, United States Constitution. IPI agrees that this issue was properly resolved in the decision issued by the Ohio Court of Appeals, Tenth Appellate District, and we concur in the legal analysis set forth in the brief of amici curiae Time Warner Cable, Comcast and Cox Communications in support of Defendant-Appellee. IPI's significant and tangible interest in the outcome of this case is based not only on the important legal issues, but also more critically on overarching matters of tax policy.

IPI has consistently argued against government's use of tax policy to attempt to encourage certain behaviors deemed desirable at the moment, and to discourage behaviors deemed undesirable. Moreover, IPI has been a long champion of the right of citizens to deploy their earnings in the way they see fit without having their decisions prejudiced by tax policy. Consistent with these fundamental principles, IPI believes that the most efficient way for government to raise necessary revenue while creating the fewest possible economic distortions would be to move to a tax code that:

- Is neutral, taxing all earned income once but only once and at the same rate, and not prejudicing through tax policy how people spend, save or invest their income after taxes;
- Is simple, cutting down not only on compliance costs, but also on taxpayer cynicism; and
- Is transparent, so that people not only know their true tax burden, but also are able to relate their tax burden as the price they are paying for their government.

Imposing a revenue-raising fee or tax on certain businesses but not on certain other competing businesses is inconsistent with IPI's core policy goals. Subjecting competitors to disparate state and local tax burdens skews the marketplace and distorts discretionary consumer expenditure decisions. Because the SET seeks to minimize such competitive imbalances and reduce adverse and extraneous influences on consumer spending habits, IPI submits this brief as amicus curiae urging affirmance of the decision below.

ARGUMENT

I. Cable And DBS Are Competing Interstate Businesses, And Consumers Deserve A Tax-Neutral Choice.

The cable television and direct broadcast satellite ("DBS") businesses at issue here are each equally and primarily engaged in interstate commerce. That DBS service is primarily interstate is conceded by all parties hereto. Cable service is likewise primarily interstate, and has long been considered as such. See *United States v. Southwestern Cable Co.* (1968), 392 U.S. 157, 168, 178, 88 S.Ct. 1994, 20 L.Ed.2d 1001, citing in part Section 152(a), Title 47, U.S. Code (finding that cable television systems "are engaged in interstate communication" and holding that the FCC's authority over "'all interstate * * * communication by wire or radio'" permits the regulation of cable systems); accord *Capital Cities Cable, Inc. v. Crisp* (1984), 467 U.S. 691, 699-700, 104 S.Ct. 2694, 81 L.Ed.2d 580 ("the Court [in *Southwestern Cable*] found that the

Commission had been given 'broad responsibilities' to regulate all aspects of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a), and that this comprehensive authority included power to regulate cable communications systems").

While the cable television and DBS businesses at issue here are directly engaged in interstate commerce, each business is also significantly engaged in substantial, albeit non-identical, in-state activities. Just as cable operators utilize local sales, repair and customer service employees and contractors, as well as distribution, installation and service facilities and fleets, DBS providers likewise utilize substantial local resources. For instance, the DBS providers maintain extensive local receiving equipment and lease capacity on local fiber lines for the retransmission of broadcasts of local broadcast television stations, employ thousands of Ohio-based independent repair and service contractors using conspicuous DIRECTV and Dish Network branded trucks, use local streets and alleyways for installations, repairs and to service customers, and partner with hundreds of in-state retailers to market their products and services. To the extent that cable service is incorrectly characterized as predominantly local by Plaintiffs-Appellants, the court should recognize that DBS providers also engage in substantial in-state activities.

The Supreme Court has repeatedly rejected Commerce Clause challenges based on situations where competing interstate businesses are engaged in substantial, albeit non-identical, in-state activities. See, e.g., *Exxon Corp. v. Governor of Md.* (1978), 437 U.S. 117, 126-28, 98 S.Ct. 2207, 57 L.Ed.2d 91; *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of Treasury* (1989), 490 U.S. 66, 78, 109 S.Ct. 1617, 104 L.Ed.2d 58. This is in stark contrast to the Court's treatment of taxation or regulations that discriminate directly against out-of-state

businesses to the advantage of purely in-state businesses. In other words, it does not violate the Commerce Clause to impose differential tax treatment on different interstate businesses based on the way they conduct their operations, despite the fact that one category of interstate business may have a greater degree of in-state activities than the other.

As competing interstate businesses, consumer demand for satellite or cable television service should be based on market forces, not a tax or fee structure that discriminates unfairly against one class of competitors and in favor of another. With the enactment of the SET, both the local tax imposed on cable and the state tax imposed on satellite are assessed against gross receipts and collected through itemized charges on bills paid directly by consumers. This transparency on the customer's bill has the salutary effect of informing taxpayers regarding the price they are paying for their government, which is one of IPI's core principles for sound tax policy.

More importantly, by equalizing the state and local tax burden, the SET allows supply and demand to govern competition, rather than a discriminatory tax policy that imposes an obligation to fund general governmental coffers on a single class of competitors based on technology. By eliminating discriminatory tax policies that distort consumer behavior, satellite and cable companies are incentivized to attract and retain customers based on quality and service. Thus, the SET promotes competition between the satellite and cable industries and enhances consumer welfare.

II. The Ohio Sales Tax On DBS Service Is Not Discriminatory As It Properly Equalizes The Taxes And Fees Imposed On Cable And DBS, Thereby Giving Consumers A Neutral Choice Of Video Providers.

A. The SET Does Not Have A Discriminatory Purpose Or Effect.

Contrary to the assertion that the SET is intended to punish DBS providers to the benefit of competing cable operators, the SET is properly designed to equalize the tax and fee burden between the two competitors by taking into account all of the taxes and fees that both providers pay at the state as well as the local level. This purpose was entirely proper given the competitive inequity that disparate taxation of DBS and cable providers produces. Cable and DBS providers are direct competitors selling competing multichannel video service packages to consumers. DIRECTV and the Dish Network are the second and third largest video distributors in the United States with more than 30 million subscribers and nearly $29 billion in combined annual revenue.[1] They are larger than any cable operator in the state of Ohio. It is perfectly sensible that as direct competitive alternatives to one another, neither DBS nor cable service should hold a competitive advantage by bearing a lesser combined state and local tax burden than the other.

B. Franchise Fees Imposed On Cable Operators Must Be Taken Into Account When Comparing The Relative Tax Burden On Cable Operators And DBS Providers.

There is no rationale for excluding cable operator local franchise fees from a comparison of the relative tax burdens faced by cable and DBS providers. When the FCC initially adopted the limitation on local cable franchise fees back in 1972, it recognized the harmful effects of allowing such fees to be used for general revenue-raising purposes as opposed to the recoupment of legitimate local regulatory costs: "[M]any local authorities appear to have exacted high

[1] See DISH Network Corp., Annual Report (Form 10-K) at 1, 38 (Mar. 2, 2009); DIRECTV Group, Inc., Annual Report (Form 10-K) at 3, 49 (Feb. 27, 2009).

franchise fees more for revenue-raising than for regulatory purposes * * * The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers." *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems* (1972), Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 185.

Congress codified the FCC cable franchise fee cap in the Cable Communications Policy Act of 1984 ("1984 Cable Act"), which amended the Communications Act of 1934 to define cable franchise fees to include "any tax, fee or assessment of any kind imposed by a franchising authority or other government entity on a cable operator or cable subscriber, or both, solely because of their status as such." Cable Communications Act of 1984, Pub. L. No. 98-549, Title VI, Section 622(g)(1), 98 Stat. 2779 (1984), reprinted in Section 542(g)(1), Title 47, U.S. Code. As the legislative history to the 1984 Cable Act indicates: "The committee feels it necessary to impose such a franchise fee ceiling because the committee is concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors. This would clearly place cable operators at a competitive disadvantage and thus be detrimental to the public."[2]

Despite claims to the contrary, local cable franchise fees are a form of taxation to the extent they serve to fund general governmental activities. Franchise fees, which are charged to consumers in accordance with Federal law and are deposited in the general funds of local governments to support a wide range of government operations and services, typically bear only

[2] S. Rep. No. 98-67, 98th Cong., 1st Sess. 25 (1983); see also 129 Cong. Rec. S8253 (June 13, 1983) (statement of Sen. Goldwater) ("The overriding purpose * * * was to prevent local governments from taxing private cable operators to death as a means of raising local revenues for other concerns. This would be discriminatory and would place the private owners/operators at a disadvantage with respect to their competitors.").

a small relation to the actual costs incurred by the franchising authority. Thus, franchise fees are nothing more than a tax on cable service customers.

There are also many additional fees and taxes imposed on cable operators at the local level separate and apart from franchise fees that likewise have no link whatsoever to reasonable regulatory costs. These include not only local sales taxes and other locally imposed taxes, but also fees supporting public, educational, governmental channels and public institutional communications networks. These additional fees, which are not borne by DBS providers, can add many additional percentage points to the local tax obligations imposed on cable operators.

C. Congress Understood The Disparate Tax Burdens On Competing Cable And DBS Providers, And Properly Left To The States The Option To Equalize The Tax Treatment Of Those Firms.

Notably, Section 602(a) of the 1996 Telecommunications Act ("Act") exempts DBS operators from the obligation to remit taxes or fees to local governments. Telecommunications Act of 1996, Pub. L. No.104-104, Title VI, Section 602(a), 110 Stat. 56 (1996) reprinted in Section 152(a), Title 47, U.S. Code. This federal insulation from local tax obligations for DBS operators analogous to those imposed on cable television has led to an imbalanced competitive situation in many states that artificially skews consumer purchasing decisions. The SET in Ohio serves to address this disparity by imposing a state tax on DBS to compensate for the local taxes assessed against cable operators.

The SET is exactly the type of state tax expressly authorized by Congress in Section 602(c) of the Act. Id. at Section 602(c). Importantly, Congress did not preclude states from establishing tax parity between cable and DBS operators that takes account of the local taxes and fees that cable operators pay. In fact, a "tax or fee" is defined in Section 602(b)(5) to include taxes and fees imposed by local taxing jurisdictions, including "franchise fees." Id. at Section

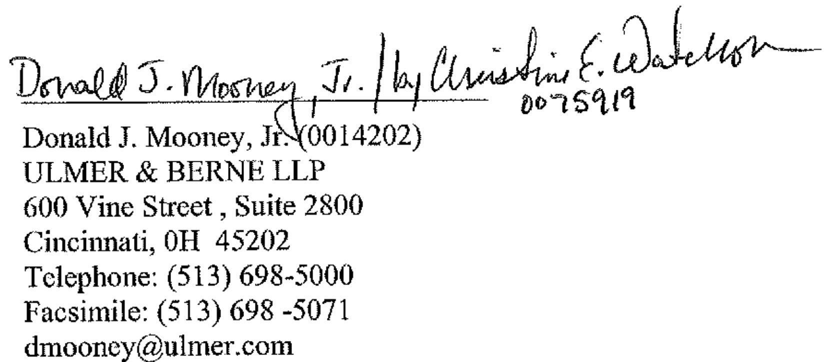
602(b)(5). Moreover, in Section 602(c), Congress specifically contemplated that states might remit DBS tax revenues to local governments as a means of achieving parity with local cable operators: "This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed by a State." Id. at Section 602(c).

Because, as explained above, the franchise fee on cable video services acts as a tax on consumers, the Ohio DBS sales tax merely equalizes the taxes on cable and satellite customers. Given that the SET is precisely the type of tax contemplated by Congress, and given Congress's grant to the states of the option to equalize the otherwise disparate tax burden on cable and DBS providers, the SET is entitled to a strong presumption of constitutionality. See, e.g., *State ex rel. Mack v. Guckenberger* (1942), 139 Ohio St. 273, 22 O.O. 311, 39 N.E.2d 840. More importantly, by equalizing tax treatment and leveling the playing field, the SET allows cable and DBS providers to compete for customers based on their pricing, quality of services and programming offered instead of what taxes and fees are passed through to consumers.

CONCLUSION

Cable television and DBS providers in Ohio are each subject to state and local fees and taxes that greatly exceed reasonable regulatory costs. While IPI would prefer that such sales taxes and franchise fees be strictly limited to the identified costs to government, the only way to provide consumers with a tax neutral choice of service provider (given the Federal preemption of local taxes on DBS) is to impose a state-level tax on DBS providers. Accordingly, for the foregoing reasons and also those submitted by Defendant-Appellee, amicus IPI respectfully requests that this court affirm the decision of the Court of Appeals and hold that the SET does not violate the Commerce Clause of the United States Constitution.

Respectfully submitted this 14th day of December 2009.



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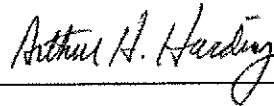

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