No. 17-379

In the Supreme Court of the United States

ECHOSTAR SATELLITE L.L.C. N/K/A DISH NETWORK L.L.C.,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Except for satellite services, Florida's Communications Services Tax Simplification Law, Fla. Stat. § 202.10 *et seq.*, subjects communications services to state and local taxes. Under the federal Telecommunications Act of 1996, local governments cannot tax satellite service, but States may tax the service and share revenue with local governments. To accommodate this federal restriction on the form of satellite taxation, Florida imposes a higher state communications services tax on satellite service and shares those revenues with local governments. Taking the local communications services tax into account, the average satellite customer pays less tax than the average cable customer.

The questions presented are:

1. Whether Florida's decision to tax satellite differently from other communications services to accommodate federal preemption of local satellite taxation discriminates against interstate commerce in effect merely because cable providers spend more in-state than satellite providers.

2. Whether evidence that cable lobbyists supported Florida's Communications Services Tax Simplification Law forces the conclusion that the law was enacted to protect cable's in-state economic activity, not to effectuate the nondiscriminatory purposes avowed by the legislature and expressly codified in the statutory text.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions set out in the Petition, this case involves the following statutory provisions:

Telecommunications Act of 1996, § 602, Pub. L. No. 104-104, Title VI, 110 Stat. 144 (1996) (reprinted in notes to 47 U.S.C. § 152):

Preemption of Local Taxation With Respect to Direct-to-Home Services

(a) 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.

(b) Definitions.--For the purposes of this section--

(1) Direct-to-home satellite service.--The term 'direct-to-home satellite service' means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

(2) Provider of direct-to-home satellite service.--For purposes of this section, a 'provider of direct-to-home satellite service' means a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service.

(3) Local taxing jurisdiction.--The term 'local taxing jurisdiction' means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

(4) State.--The term 'State' means any of the several States, the District of Columbia, or any territory or possession of the United States.

(5) Tax or fee.--The terms 'tax' and 'fee' mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

(c) 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 and collected by a State.

Fla. Stat. § 202.105:

Legislative findings and intent.—

(1) It is declared to be a specific legislative finding that the creation of this chapter fulfills important state interests by reforming the tax laws to provide a fair, efficient, and uniform method for taxing communications services sold in this state. This chapter is essential to the continued economic vitality of this increasingly important industry because it restructures state and local taxes and fees to account for the impact of federal legislation, industry deregulation, and the convergence of service offerings that is now taking place among providers. This chapter promotes the increased competition that accompanies deregulation by embracing a competitively neutral tax policy that will free consumers to choose a provider based on tax-neutral considerations. This chapter further spurs new competition by simplifying an extremely complicated state and local tax and fee system. Simplification will lower the cost of collecting taxes and fees, increase service availability, and place downward pressure on price. Newfound administrative efficiency is demonstrated by a reduction in the number of returns that a provider must file each month. By restructuring separate taxes and fees into a revenue-neutral communications services tax centrally administered by the department, this chapter will ensure that the growth of the industry is unimpaired by excessive governmental regulation. The tax imposed pursuant to this chapter is a replacement for taxes and fees previously imposed and is not a new tax. The taxes imposed

and administered pursuant to this chapter are of general application and are imposed in a uniform, consistent, and nondiscriminatory manner.

(2) It is declared to be a specific legislative finding that this chapter will not reduce the authority that municipalities or counties had to raise revenue in the aggregate, as such authority existed on February 1, 1989.

INTRODUCTION

On petitioner's telling, the only difference between cable and satellite TV providers is their "very different relationships with the local economy": cable with its "legions of employees" and "huge sums" invested in infrastructure; satellite with "no comparable local presence." Worried that local cable jobs were at risk, Florida rushed to impose a "pay-TV sales tax" taxing satellite four percent—nearly two times—more than cable.

Then, according to the Petition, despite this Court's precedent invalidating taxes and other regulations that discriminate based on where economic activity takes place, the Florida Supreme Court applied a per se rule that discrimination against interstate commerce is fine, so long as the beneficiaries of the discrimination are not "purely in-state businesses." Finally, petitioner asserts, the court applied another per se rule that unless discrimination is apparent from the text of the statute or the official legislative history, there can be no finding of purposeful discrimination, no matter how strong other proffered evidence is—a rule that violates this Court's precedent and opens a chasm with other lower courts.

If the Petition were right about the purposes and effects of Florida's tax and the Florida Supreme Court's analysis, there would be serious Commerce Clause issues and divisions of authority that might justify the Court's attention. But the Petition overlooks basic facts about the challenged regime and the decision below.

To start, Florida does not have a "pay-TV sales tax." It has a Communications Services Tax, or "CST."

With limited exceptions, the CST applies to any method of communicating "voice, data, audio, video, or any other information" "now in existence or hereafter devised." Except for satellite, all taxed services are subject to a state and local CST. Thus, far from protecting cable, the CST taxes video-streaming services enabling viewers to cut the cord just as it taxes cable.

Florida law taxes satellite services differently because, as explained in the Legislature's express statement of "findings and intent," lawmakers sought to "account for the impact of federal legislation" on state tax policy. Fla. Stat. § 202.105(1).[1] In the Telecommunications Act of 1996, Congress prohibited local taxation of satellite service, so Florida could not tax satellite at the state and local level like other communications services. Congress expressly allowed States to tax satellite and share revenue with local governments, however, so that is what Florida does. Though the Petition nowhere acknowledges this statutory explanation of purpose, a satellite executive testifying on petitioner's behalf previously told Congress that accommodating preemption was the "express purpose" of the CST's design.

Not only does the Petition overlook the acknowledged reason to tax satellite differently, it fails to note that satellite's overall CST tax burden is *less* than cable's. In other words, petitioner claims to suffer discrimination from a tax regime that gives it a tax advantage over its pay-TV competitor, cable.

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[1] All citations are to 2005 statutes, unless otherwise noted.

This is the seventh case in which petitioner DISH Network, L.L.C. and its coplaintiff, DIRECTV, LLC, have attempted to use the Commerce Clause to secure tax advantages that they could not obtain through the legislative process. By the time the Florida Supreme Court decided this case, States had prevailed in the six other cases, and this Court had denied certiorari four times. The courts uniformly held that taxing cable less than satellite does not discriminate against interstate commerce, and the Florida Supreme Court adopted that rule in this case. Contrary to the Petition, the court did not apply a per se rule that discrimination among interstate companies can never violate the Commerce Clause. And even if it had, alternative bases fully justify the judgment—including the unique effect of Congressional regulation on the pay-TV industry and satellite's tax advantage under the CST.

Petitioner's discriminatory-purpose argument failed not because the Florida Supreme Court blinded itself to important evidence, but because the court was not persuaded that it should impute discriminatory intent merely because cable lobbyists were among the CST's supporters. In fact, the reforms enjoyed broad support across the telecommunications industry, and the statute codifies Florida's nondiscriminatory goal of simplifying a complicated system of taxes and fees into a competitively neutral state and local tax regime. Under this Court's precedent, even lawmakers' own statements that a law should be passed because it would boost in-state industry haven't been enough to disregard an articulated, nondiscriminatory purpose; mere lobbyist support can hardly suffice. Even though petitioner's evidence included two affidavits from former legislators, there is no direct evidence that even

one lawmaker supported the CST to protect cable's in-state economic impact.

Setting aside the weakness of petitioner's claim and the absence of any conflict to resolve, granting certiorari here is particularly unwarranted because the lower-court decisions are consistent with the views of Congress, to which the Constitution entrusts the express authority to regulate interstate commerce. Congress has, at petitioner's urging, repeatedly considered legislation that would have preempted Florida's CST and other tax regimes petitioner has challenged. But time and again, Congress has declined to grant the relief petitioner seeks. This Court should do the same.

The Petition should be denied.

STATEMENT

1. In 2001, following years of study and two rounds of legislation, Florida replaced an "extremely complicated" tangle of state and local taxes and fees imposing different costs on different communications services with a single communications-services tax regime. Fla. Stat. § 202.105(1); Chs. 2000-260, 2001-140, Laws of Fla.; Fla. H.R. Comm. on Utils. & Telecomms., CS/CS/CS/SB 1338 (2000) Staff Analysis (*CST Staff Analysis*) 2-9 (June 28, 2000). The CST applies not just to the pay-TV services petitioner offers, but to any "transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals" by any "medium or method now in existence or hereafter devised." *Id.* § 202.11(2). The definition includes, for example, telephone service, along with increasingly popular video-streaming services. *See ibid.*; Fla. Dep't of Revenue Technical Assistance Advisement 14A-010

(Apr. 7, 2014). As innovation produces new means of communication, the CST will apply to those services, too. Fla. Stat. § 202.11(2).

The CST allows state and local governments to derive revenue from the sale of communications services.[2] All communications services other than the satellite services that petitioner offers are subject to a state CST of 6.8 percent and a local CST capped at 5.1 percent. Fla. Stat. §§ 202.12(1)(a), 202.19(2). Satellite is subject only to a statewide CST of 10.8 percent, which is split between state and local governments. *Id.* §§ 202.12(1)(b), 202.19(6).[3] Although communications service providers calculate and remit the tax, their customers pay the tax. *Id.* § 202.16(1)(a).

According to petitioner, the difference between cable and satellite is that cable providers spend more money, create more jobs, and maintain more infrastructure in Florida than satellite providers. Pet. 5-7. That difference is exaggerated, and in any event, it is not the only difference.

While cable outspends satellite, satellite providers spend hundreds of millions of dollars every year in Florida to deliver their services. R57:8639-71; *see also*

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[2] In addition to the cable franchise fees petitioner highlights (at 9), the local CST replaced three other local revenue sources: telephone franchise fees, the public service tax, and local-option sales surtaxes. *CST Staff Analysis* 6, 16-17. Local CST applies to all non-satellite communications services regardless whether or to what extent they occupy rights of way. Fla. Stat. § 202.19.

[3] These rates changed in 2010 and 2015, but the record is limited to 2009 and earlier. R27:3894 n.14.

Pet. App. 39a-40a, 42a. Although franchise fees on cable once provided "significant revenue for Florida municipalities," *see* Pet. 6, that is no longer the case. Florida preempted those fees when enacting the CST. Fla. Stat. § 202.24. Under the CST, sales of all communications services, including satellite, provide revenue to local governments. *Supra* at 5.

Nor is Florida spending the only difference between cable and satellite, much less the reason Florida taxes them differently.

Cable and satellite are different technologies subject to different federal regulatory regimes. Most obviously, cable reaches consumers' homes through a cable, while satellite arrives by satellite. (Both services use ground and satellite infrastructure to deliver service. Pet. App. 10a. It is the final leg of the trip that matters for tax purposes.) Cable infrastructure can offer a broader array of services, including telephone service and Internet. R33:4503-07, 4513-14, 4544-49, 4555-56, 4566; R35:4797; R38:5503, 5516. In addition, federal regulation treats cable and satellite differently. Requirements for emergency broadcasts, carrying local and educational programming, and customer service are higher for cable than for satellite. *Infra* at 22. As petitioner's corporate representative acknowledged, cable and satellite are "just different." R35:4809.

These differences, however, are not what drove satellite's different taxation. In Florida's view, the "convergence of service offerings" made all communications services providers part of the same "industry." Fla. Stat. § 202.105(1). "Although similar communications services may be provided by different means," the

Legislature explained, "the state seeks to treat dealers of communications services in a nondiscriminatory and competitively neutral manner," "free[ing] consumers to choose a provider based on tax-neutral considerations." *Id.* §§ 202.105(1), 202.24(1).

The different tax structure for satellite reflected efforts to "account for the impact of federal legislation." Fla. Stat. § 202.105(1). In the Telecommunications Act of 1996, Congress prohibited local governments from taxing satellite service, but it expressly allowed States to tax satellite and share the revenue with local governments—exactly what the CST does. Telecommunications Act of 1996, § 602(a), (c), Pub. L. No. 104-104, Title VI, 110 Stat. 144 (1996) (reprinted in notes to 47 U.S.C. § 152). As a DIRECTV executive testifying on petitioner's behalf told a Congressional subcommittee, accommodating preemption was Florida's "express purpose." *State Video Tax Fairness Act of 2007: Hearing on H.R. 3679 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary* (*2008 Hrg.*), 110th Cong. 14-15 (2008).

Satellite's CST was designed to approximate the total CST burden on other communications services. *See* Fla. Stat. § 202.12(1)(c) (2000). The portion of satellite CST equal to the state CST for other communications services was to be "allocated to the state," and the remainder would be distributed to local governments, consistent with federal structural limitations. *Id.* § 202.18(2). Because local governments set their own local CST rates, the statewide satellite CST cannot perfectly match the combined CST rates for other communications services. But in all nine years examined, the average satellite subscriber paid a lower

CST rate than the average cable subscriber, giving satellite a tax advantage every year. R31:4298.

2. Alongside its litigation efforts in Florida and elsewhere, the satellite industry has lobbied Congress to preempt state taxation. Reminding Congress that it had "repeatedly intervened" to help satellite "compete effectively," a DIRECTV executive (testifying on petitioner's behalf, as well) urged Congress in 2008 to preempt taxes like the CST. *2008 Hrg.* 10, 12. The executive highlighted Florida's CST and five other "errant" States' taxes—each of which petitioner unsuccessfully challenged in court—as an "end run around congressional intent." *Id.* at 9, 14-15. Lamenting that "courts have been reluctant to invalidate" the taxes, the executive asserted that satellite providers "should not have to spend millions of dollars trying to persuade federal judges to do . . . what Congress obviously has intended all along." *Id.* at 6, 21. Given the States' actions, he urged, "Congress must act." *Id.* at 12. But Congress was unmoved. The State Video Tax Fairness Acts of 2007, 2008, 2009, and 2011 all failed to become law. *See* H.R. 1804, 112th Cong., 1st Sess. (2011); H.R. 1019, 111th Cong., 1st Sess. (2009); S. 3418, 110th Cong., 2d Sess. (2008); H.R. 3679, 110th Cong., 1st Sess. (2007).

3. Bypassing Florida's refund process, petitioner and DIRECTV sued the Florida Department of Revenue to invalidate the state CST on satellite, Fla. Stat. § 202.12(1)(b), and to seek a refund of the taxes their customers had paid. Pet. App. 21a-22a. Because they did not exhaust administrative remedies, they were limited to arguing that the satellite CST is facially unconstitutional—that is, that there is "no set of

circumstances . . . under which the statute would be valid." Pet. App. 23a.

On summary judgment, the trial court rejected petitioner's discriminatory-effects and discriminatory-purpose arguments. The court recognized that the CST created a "roughly level playing field" for cable and satellite—one that subjected satellite "on average" to "less total tax." Pet. App. 49a. Alternatively, the court rejected petitioner's argument that taxing cable less than satellite discriminated against interstate commerce merely because satellite providers spend less in Florida than cable providers. The law was facially neutral, and "the undisputed facts" demonstrated that cable and satellite companies are "interstate companies." *Ibid.* The court discounted the significance of cable companies' greater expenditures, noting that "satellite companies have a significant presence in the state as well." *Ibid.* Finally, the court concluded that Florida could treat cable and satellite "differently, because they are different." Pet. App. 48a. "They are organized differently, have different modes of operation, use different technologies in providing their services, and they provide different services." *Ibid.* In addition, "unlike cable companies, satellite companies are exempt from the local CST." *Ibid.* As to petitioner's claim of purposeful discrimination, the trial court recognized that the CST's purpose was to create a "'competitively neutral tax policy'" and "simplify 'an extremely complicated state and local tax and fee system.'" Pet. App. 48a-49a.[4]

[4] The trial court also rejected petitioner's equal-protection challenge, which petitioner abandoned on appeal. Pet. App. 48a.

On appeal, the First District Court of Appeal agreed that there was no discriminatory purpose, Pet. App. 35a-38a, but held 2-1 that taxing satellite more was discriminatory in effect. Relying heavily upon a case invalidating a facially discriminatory tax, the majority reasoned that the Commerce Clause forbids taxation that "favors communications services that use local infrastructure." Pet. App. 28a-29a. Notably, the majority acknowledged that the CST did not actually tax satellite more when considering the local CST. Pet. App. 30a. Nevertheless, the majority found discriminatory effects because there was "no guarantee" that local governments would set the local CST high enough to ensure cable would never be taxed less than satellite. Pet. App. 31a. The majority cited no precedent for this "guarantee" requirement, and petitioner did not defend it before the Florida Supreme Court. Pet. App. 31a.; Ans. Br. of Appellees (Pet'r FLSC Br.) 37-40, *Fla. Dep't of Revenue* v. *DIRECTV, Inc.*, No. SC15-1249 (Fla. filed Nov. 23, 2015).

By the time the Florida Supreme Court unanimously rejected petitioner's claim that the CST discriminated in effect and purpose, petitioner had lost all six of its Commerce Clause challenges to other States' taxes. Pet. App. 11a-12a nn.1-2. The court held that taxing satellite more does not constitute discrimination against interstate commerce, joining "every state and federal court considering Commerce Clause challenges brought by the satellite industry." Pet. App. 11a. Recognizing that courts had articulated different rationales, it explained that it "agree[d] with those decisions that find cable is not an in-state interest." Pet. App. 11a-12a. Although "cable employs more Florida residents and uses more local infrastructure to provide

its services," the court concluded that that difference was not sufficient to show discrimination. Pet. App. 10a. Under this Court's precedent, "a state may treat 'two categories of companies' differently so long as the discrimination is based on 'differences between the nature of their businesses' and not 'the location of their activities.'" Pet. App. 11a. (quoting *Amerada Hess Corp.* v. *Dir., Div. of Taxation*, 490 U.S. 66, 78 (1989)). That one set of competitors has a "greater presence in a state" does not automatically render a law favoring those competitors over the others discriminatory in effect. Pet. App. 10a. Other than declining to adopt the argument that cable and satellite were too different to merit any Commerce Clause scrutiny,[5] the court did not address any other arguments supporting the CST's constitutionality. *See* Pet. App. 6a-8a.

Like the lower courts, the Florida Supreme Court also rejected petitioner's discriminatory-purpose argument, which relied on evidence that cable lobbyists had supported the tax reforms. Pet. App. 12a-15a. None of that evidence—including the affidavits from two former legislators—showed that even one lawmaker voted for the CST to benefit cable, much less because of its relatively greater economic impact. Instead, the evidence showed only that cable lobbyists, along with many others, supported the tax reforms. Pet. App. 12a; R40:5785-93. Petitioner identified no other legislative history supporting its argument, and the statutorily codified purpose "showed no evidence of discriminatory purpose." Pet. App. 14a. Specifically, that articulated

[5] This discussion was not part of the holding. *But see* Pet. 12. The Florida Supreme Court treats analysis "not necessary for the holding" as dicta. *Puryear* v. *State*, 810 So. 2d 901, 905 (Fla. 2002).

purpose indicated a desire to "reform[] the tax laws to provide a fair, efficient, and uniform method for taxing communications services," "account[ing] for the impact of federal legislation, industry deregulation, and the multitude of providers offering functionally equivalent communications services in today's marketplace." Pet. App. 13a-14a (quoting Fla. Stat. § 202.105(1)). The reforms would "promote[] the increased competition that accompanies deregulation by embracing a competitively neutral tax policy that will free consumers to choose a provider based on tax-neutral considerations" and "spur[] new competition by simplifying an extremely complicated state and local tax and fee system." *Ibid.* Although the court considered petitioner's evidence as part of the "legislative history," it recognized that sources of evidence "outside the Legislature [are] significantly more problematic." Pet. App. 15a. Therefore, the court rejected the discriminatory-purpose argument.

REASONS FOR DENYING THE PETITION

"States have broad discretion to configure their systems of taxation as they deem appropriate." *Or. Waste Sys.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 108 (1994). Thus, while the Court's Commerce Clause cases seek to avoid "economic Balkanization," they also exhibit a concern for "federalism favoring a degree of local autonomy." *Dep't of Revenue* v. *Davis*, 553 U.S. 328, 338 (2008).

All seven of petitioner's attempts to invalidate taxes on satellite have ended the same. Courts have held that States may tax satellite more than cable without offending the Commerce Clause, even though

cable typically provides more jobs and spends more money in the local economy. These decisions have rested on a variety of factors. Some courts have emphasized the numerous nongeographic differences between cable and satellite that could justify different treatment—including that Congress limited satellite taxation in ways it did not limit cable taxation. Others have emphasized that neither cable nor satellite companies are meaningfully local interests. All reached the same outcome, although courts have invoked different rationales on the way to achieving this consensus.

The case for intervention here is particularly weak because Congress has already considered whether States should be permitted to tax satellite more than cable. In 2008, satellite providers encouraged Congress to enact legislation that would have preempted Florida's CST. That legislation failed to pass, and similar bills met the same fate in more recent years. Recognizing that Congress holds the expressly delegated authority to regulate interstate commerce, along with superior fact-gathering and policymaking capacity, this Court has frequently deferred to Congress's judgment in dormant Commerce Clause cases. That is the best course here.

The Petition should be denied.

I. The Discriminatory-Effects Analysis Does Not Implicate a Split of Authority Meriting Review.

No split exists about whether taxing satellite more than cable discriminates against interstate commerce in effect. Petitioner's claim of a conflict with other decisions flows from a misunderstanding of the decision

below, misreading it as articulating a per se rule plainly at odds with this Court's precedent, rather than a conclusion that cable's greater in-state expenditures, standing alone, are insufficient to show the CST discriminates in effect.

A. Petitioner's Discriminatory-Effects Theory Is Uniformly Rejected, and the Court Has Denied Certiorari Four Times.

Petitioner has argued that seven different State tax regimes are unconstitutional because the dormant Commerce Clause requires States to tax cable as much as or more than satellite. Contrary to its claim (at 38) that "no clarity has emerged," every one of those cases—including this one—has ended with a holding that taxing cable less than satellite does not amount to discrimination against interstate commerce. *DIRECTV, Inc.* v. *Treesh*, 487 F.3d 471 (6th Cir. 2007); *DIRECTV, LLC* v. *Utah State Tax Comm'n* (*DIRECTV Utah*), 364 P.3d 1036 (Utah 2015); *DIRECTV, LLC* v. *Dep't of Revenue* (*DIRECTV Mass.*), 26 N.E.3d 258 (Mass. 2015); *DIRECTV, Inc.* v. *Roberts*, 477 S.W.3d 293 (Tenn. Ct. App. 2015); *DIRECTV, Inc.* v. *Levin*, 941 N.E.2d 1187 (Ohio 2010); *DIRECTV, Inc.* v. *State*, 632 S.E.2d 543 (N.C. Ct. App. 2006); Pet. App. 11a. The Solicitor General has concluded that taxing cable less than satellite is consistent with the Court's Commerce Clause precedent. *See* Br. for the United States as Amicus Curiae (U.S. Br.), *DIRECTV, Inc.* v. *Levin*, No. 10-1322 (U.S. filed May 23, 2012). And the Court has denied all four petitions for certiorari. *DIRECTV, LLC* v. *Mass. Dep't of Revenue*, 136 S. Ct. 401 (2015); *DIRECTV, Inc.* v. *Roberts*, 136 S. Ct. 401 (2015);

DIRECTV, Inc. v. *Testa*, 567 U.S. 934 (2012); *DIRECTV, Inc.* v. *Treesh*, 552 U.S. 1311 (2008).

Petitioner characterizes the history of these seven cases as "lurching" and notes these courts have not agreed about the best rationale for rejecting petitioner's claim, but that falls far short of the kind of disagreement that justifies the Court's review. *See* S. Ct. R. 10. Courts have unanimously rejected petitioner's constitutional claim, so no review is necessary.

B. The Decision Below Did Not Apply a Per Se Rule That Taxes Affecting Only Interstate Businesses Are Never Discriminatory.

Absent a split about whether States may tax satellite more than cable, petitioner contends (at 16) that the court below applied a "wooden rule" that "discrimination among interstate companies cannot violate the dormant Commerce Clause," contrary to this and other courts' approaches. In other words, petitioner contends, the decision below reasons that unless a law benefits "purely in-state businesses," it cannot violate the Commerce Clause. Pet. 16. That is not, however, what the decision below says.

The extraordinary breadth petitioner attributes to the holding below is impossible to reconcile with the very narrow scope of the evidence supporting petitioner's discriminatory-effects claim. Petitioner's discriminatory-effects theory focused entirely on its observation that cable "employs more Florida residents and uses more local infrastructure to provide its services" than satellite does. *See* Pet. App. 9a.

The Florida Supreme Court rejected that argument because benefitting a set of companies with a "greater presence in a state" is not enough to show a facially nondiscriminatory law like the CST should be treated as discriminating in favor of in-state interests. *See* Pet. App. 10a. While the court recognized that cable spends more money in Florida, it concluded that "[c]able is not a local in-state interest any more than satellite." Pet. App. 10a. The court observed that both cable and satellite companies have a significant presence inside and outside of Florida. Indeed, the record discloses that satellite providers spend hundreds of millions of dollars in Florida *every year*. *Supra* at 5. Nowhere does the decision below say that discrimination between interstate companies can *never* offend the dormant Commerce Clause, as petitioner suggests. On the contrary, the opinion recognizes that States cannot treat businesses differently "based on . . . 'the location of their activities.'" Pet. App. 11a (quoting *Amerada Hess*, 490 U.S. at 78).

Not only does the text of the decision below fail to establish the per se rule that the Commerce Clause applies only when a law's beneficiaries are "purely in-state," such a rule would conflict with Florida Supreme Court precedent. In *Division of Alcoholic Beverages and Tobacco* v. *McKesson Corp.*, the court invalidated a tax preference that favored fruits grown not just in Florida, but also "in other areas of the United States and the world." 524 So. 2d 1000, 1006 (Fla. 1988), *rev'd on other grounds sub nom. McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). If there were a purely-in-state-beneficiary requirement, the tax in *McKesson* would have survived scrutiny. The Florida Supreme Court has cautioned that it does not

"intentionally overrule itself sub silentio," *Puryear*, 810 So. 2d at 905, but *McKesson* is impossible to reconcile with a rule that the Commerce Clause only prohibits discrimination in favor of "purely in-state businesses."

Nor should the decision below be read to bless taxes that discriminate based upon the amount of in-state economic activity. Although petitioner focuses heavily upon the different economic impacts of cable and satellite companies, those impacts are entirely incidental to the CST's application. Petitioner could launch its satellites from Cape Canaveral, house its executives in Miami high-rises, assemble its programming in Orlando, and outspend cable 10-to-1, but its service would still be taxed differently from cable and other non-satellite communications services. That is because the CST distinguishes solely upon how transmission "to the subscriber's premises" in Florida takes place. *See* 47 U.S.C § 303(v); Fla. Stat. §§ 202.11(5), 202.12(1)(b). The Florida Supreme Court has repeatedly invalidated taxes and fees that discriminate based on the location of economic activities without inquiring if the laws favored only "purely in-state" businesses. *Dep't of Revenue* v. *Kuhnlein*, 646 So. 2d 717, 722-24 (Fla. 1994); *Delta Air Lines, Inc.* v. *Dep't of Revenue*, 455 So. 2d 317, 319-20 (Fla. 1984). But that is not what the CST does.

Properly understood, the decision below is consistent with this Court's precedent. As the Florida Supreme Court recognized, nothing in this Court's precedent requires courts to treat a law as discriminatory just because companies with a "greater presence in a state" fare better under the law than their competitors. Pet. App. 10a. On the contrary, a law may

"cause[] some business to shift from a predominantly out-of-state industry to a predominantly in-state industry" without being treated as discriminatory. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). To be sure, laws "caus[ing] local goods to constitute a larger share . . . *may* have a discriminatory effect on interstate commerce," *Exxon Corp.* v. *Gov. of Md.*, 437 U.S. 117, 126 n.16 (1978) (emphasis added), but there is no per se rule that such an effect automatically renders a facially nondiscriminatory law discriminatory in effect. Only when such a law "'affirmatively' or 'clearly' discriminates against interstate commerce" will it be subject to the same requirements for facially discriminatory statutes. *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring in the judgment) (collecting cases).

Recognizing petitioner's misapprehension of the decision below causes the claimed conflict to evaporate. As *McKesson* demonstrates, the Florida Supreme Court would not hold "that a favored group must be *entirely* in-state for a law to have a discriminatory effect on commerce." *Walgreen Co.* v. *Rullan*, 405 F.3d 50, 58 (1st Cir. 2004); *see* Pet. 22. Every case petitioner cites (at 26-27) from this Court involved facial discrimination. *See Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984) (West Virginia tax break for products manufactured in West Virginia); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 393, 406-07 (1977) (New York tax break for shipping products from New York); *Bos. Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 319 (1977) (New York tax break for stock transactions in New York). This Court has rebuffed attempts to equate facially discriminatory and facially nondiscriminatory

laws like the CST. *E.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 579 n.13 (1997). Had this case involved a facially discriminatory law, it would not have survived scrutiny under the principles articulated by the Florida Supreme Court. *See Kuhnlein*, 646 So. 2d at 722-24; *Delta Air Lines*, 455 So. 2d at 319-20 (citing *Boston Stock Exchange*).

None of the other cases petitioner assigns to the same "camp" as the decision below applied a per se exemption for laws benefitting interstate businesses, either. As the Solicitor General has explained, *Levin* did not apply a "'categorical exemption[] from the standard Commerce Clause analysis' for state laws that . . . apply exclusively to businesses that are headquartered out-of-state" when encouraging the Court to deny certiorari in that case. U.S. Br. 8. Petitioner acknowledges (at 17) that *DIRECTV Utah* employed a similar rationale to *Levin* and the decision below. Petitioner previously acknowledged that *Freedom Holdings, Inc.* v. *Spitzer*, 357 F.3d 205 (2d Cir. 2004), "merely rejected the argument that a law was invalid when the favored entity was the state itself"—a very different issue than here. Reply Br. of Pls./Appellants DIRECTV, LLC & DISH Network L.L.C., *DIRECTV, LLC* v. *Commonwealth*, No. SJC-11658, 2014 WL 5420945, at *6 n.7 (Mass. filed Aug. 11, 2014); *accord Freedom Holdings*, 357 F.3d at 218 ("without more," favoring "the state itself" not "invalidly protectionist"). And the Tenth Circuit's reference to "in-state actors" and "out-of-state actors" does not suggest such a cramped analysis. *See Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1142 (10th Cir. 2016) (no discrimination where out-of-state sales subject to lower burden than in-state ones).

Finally, dicta in cases rejecting petitioner's discriminatory-effects theory do not evidence a conflict meriting review. *See* Pet. 23-24 & n.4. The careful language in a Tennessee intermediate-appellate-court opinion about *Levin*—disapproving "to the extent" it "can be read" in a particular way and rejecting "any implication" that *Levin* supports a rule that, as explained above, it does not support—shows that the court stopped short of accepting those characterizations. *Roberts*, 477 S.W.3d at 302-03; *see* U.S. Br. 8. Far from creating a conflict with *Levin*, the Massachusetts Supreme Judicial Court "follow[ed]" *Levin*. *DIRECTV Mass.*, 25 N.E.3d at 654. That it "assume[d]" *Levin*'s rationale to be incorrect for purposes of its decision while reaching the same outcome does not demonstrate a meaningful split of authority warranting this Court's review, *ibid.*; rather, it shows that more than one rationale supports the lower courts' unanimous rejection of petitioner's underlying constitutional claim.

In sum, petitioner's claimed split rests upon a misunderstanding of the decision below and other cases it contends articulate a per se rule that the Commerce Clause only prevents discrimination favoring "purely in-state businesses." Properly understood, there is no split of authority among the lower courts, and the decision below is consistent with this Court's cases.

C. Alternative Grounds Supporting the Judgment Make This Case a Bad Vehicle for Resolving Any Split.

Even if there were a split of authority and even if the decision below implicated that split, this case

would be a bad vehicle. At least three alternative grounds support the judgment.

1. Discrimination exists when a statute "favors in-state business over out-of-state business for no other reason than the location of its business." *Am. Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 286 (1987). But there are nongeographic reasons to tax cable and satellite differently.

The most significant nongeographic reason that a State might want to subject satellite to a higher state tax than cable is that federal law preempts local taxation of satellite. If a State taxes communications services at the state and local levels, as Florida does, the only way to ensure that the State receives the same revenue from satellite as other communications services while ensuring that local governments may also receive revenue is to tax satellite at a higher rate and share the revenue with local governments.

Notably, Congress expressly approved Florida's tax-and-share approach to satellite taxation when it preempted local satellite taxation. Congress explained that the preemption "shall not be construed to prevent taxation . . . 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." Telecomms. Act of 1996, § 602(c). Whereas federal law prohibits local satellite taxation, it allows local governments to tax cable. 47 U.S.C. § 542. Cable therefore can be taxed like other communications services. Florida's higher state CST and no local CST for satellite can be fully explained by federal preemption, not any difference in local economic activity. Indeed, a DIRECTV executive

testifying on petitioner's behalf told Congress that accommodating federal law was the "express purpose" of the higher state tax on satellite. *2008 Hrg.* 14.

Federal preemption is not the only non-geographic difference. For example, cable allows two-way communications, whereas petitioner's satellite communications are one-way. That means cable infrastructure permits Internet and telephone services, which satellite cannot. *Treesh*, 487 F.3d at 481; *supra* at 6. Federal law imposes various obligations on cable but not satellite. Those obligations include customer-service obligations, pricing controls, and emergency-broadcast requirements that other courts have relied upon in rejecting petitioner's theory. *DIRECTV Mass.*, 25 N.E.3d at 270-71; *Roberts*, 477 S.W.3d at 306-07. Based on these differences, a State might prefer cable to satellite for "reasons entirely unrelated to geography." *Treesh*, 487 F.3d at 481.

2. An additional flaw with petitioner's argument is its exclusive focus on cable and satellite TV, when the CST applies broadly to all communications services. Do the other services taxed the same as cable have greater in-state investment than satellite? Less? The same? Petitioner does not say. The Commerce Clause "protects the interstate market, not particular interstate firms," such as satellite providers. *Exxon*, 437 U.S. at 127. If communications services with less in-state investment are taxed the same as cable, then the notion that the CST favors in-state investment fades away. Because no other communications service is taxed the same as satellite, video-streaming services and even services not yet dreamed of will be taxed the same as cable. Fla. Stat. §§ 202.11(2), 202.12, 202.19.

Petitioner fails to account for the CST's deliberately open-ended design, undermining its claim of geographic discrimination.

3. Even assuming that the CST would be discriminatory if it taxed cable customers less than satellite customers, it is undisputed that, taking local CST into account, the average cable customer pays *more* CST than the average satellite customer. That was true in each of the nine years reviewed in this case. R31:4298.

When a state tax allegedly discriminates against interstate commerce, local taxes cannot be disregarded simply because they are imposed at the local level. *Assoc. Indus. of Mo.* v. *Lohman*, 511 U.S. 641, 654-56 (1994); *see also W. Lynn Creamery* v. *Healy*, 512 U.S. 186, 201 (1994) (declining to "analyze separately two parts of an integrated regulation"); Pet. App. 30a. The local CST is integral to Florida's "competitively neutral tax policy" that "account[s] for the impact of federal legislation"—that is, federal preemption of local satellite taxes. *See* Fla. Stat. § 202.105(1). Florida arrived at the satellite CST rate after directing Florida's Revenue Estimating Conference to calculate a satellite CST that would subject satellite to the same tax rate as other communications services' combined state and local CST. Fla. Stat. § 202.12(1)(c) (2000). And as the intermediate appellate court recognized, it was only "because federal law exempts satellite service from all local taxes and fees" that the local CST did not apply to satellite." Pet. App. 30a-31a. It is therefore improper to reject the CST "*in toto* as facially discriminatory" by

ignoring local CST just because local governments set the rates. *Lohman*, 511 U.S. at 655.[6]

Despite *Lohman*'s rejection of a slice-and-dice approach to assessing discrimination and despite the local CST's integral role in Florida's tax regime, petitioner has argued that the local portion of the CST must be ignored. Invoking the compensatory tax doctrine,[7] petitioner argues that the state and local CST are not taxes on "substantially equivalent events." *Or. Waste Sys.*, 511 U.S. at 503; Pet'r FLSC Br. 38. In its view, local CST taxes the use of local rights of way, whereas state CSTs on satellite and non-satellite communications services tax the privilege of selling communication services. In support of its characterization of the local CST, petitioner cited only a statutory explanation that the local CST is "in lieu of any fee or other consideration . . . to which the municipality is otherwise entitled for granting permission to dealers of communications services . . . to use or occupy roads or

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[6] The intermediate appellate court acknowledged that it had to consider local CST, but noted that there was "no guarantee" that local governments would not lower rates. Pet. App. 30a-31a. That rationale squarely contradicts the rule that the mere "potential for discrimination in every locality" does not violate the dormant Commerce Clause. *Lohman*, 511 U.S. at 654. Petitioner did not defend that rationale before the Florida Supreme Court. *See* Pet'r FLSC Br. 37-40.

[7] The compensatory tax doctrine is a "specific way of justifying a facially discriminatory tax." *Or. Waste Sys.*, 511 U.S. at 103. The Department is not aware of any case applying the requirements of the compensatory tax doctrine to taxes that, like the CST, are not facially discriminatory. As explained in the main text, even if the compensatory tax doctrine applies, the CST satisfies its requirements for purposes of a facial challenge.

rights of way." Pet'r FLSC Br. 38 (citing Fla. Stat. § 202.19(3)(a)).

Petitioner's claim is incorrect for two reasons. First, the CST identifies only one "taxable privilege": "the business of selling communications services at retail." *Id.* § 202.12. Second, if the local CST were a tax on the right to "use or occupy roads or rights of way," *see* Fla. Stat. § 202.19(3)(a), it would apply only if the communications dealer used or occupied local rights of way. But the local CST applies to "all [non-satellite] communications services subject to" state CST other than satellite, regardless whether the communications service's "dealer . . . use[s] or occup[ies] roads or rights of way." *Id.* § 202.19(3)(a), (4)(a)1. The text petitioner cites merely reflects that one function of the local CST was to replace revenue local governments derived from charging for right-of-way use—a revenue source Florida eliminated when enacting the CST. *See* Fla. Stat. § 202.24.

Whether the CST discriminates as applied to jurisdictions where the satellite CST exceeds the state and local CST on cable is not at issue in this case. Petitioner's challenge is a facial one, meaning that it must show there is "no set of circumstances where [the satellite CST] could apply constitutionally." Pet. App. 23a. Even if it were unconstitutional to tax satellite more than cable—as explained above, it is not—the CST would apply constitutionally in every local jurisdiction where cable's tax burden exceeds satellite's. Thus, there is a "set of circumstances where [the CST] could apply constitutionally." Considering an as-applied challenge now would violate Florida tax law, which

generally requires exhaustion of refund procedures before challenging a tax in court. Pet. App. 22a-23a. Accordingly, satellite's tax advantage over cable when local CST is considered furnishes an additional basis to affirm the judgment.

II. CONSISTENT WITH ESTABLISHED RULES FOR ASSESSING DISCRIMINATORY INTENT, THE DECISION BELOW CONSIDERED PETITIONER'S EVIDENCE BUT FOUND IT INSUFFICIENT TO DISREGARD THE CST'S ARTICULATED PURPOSE.

Petitioner and DIRECTV have unsuccessfully argued that cable support for tax reforms shows a discriminatory legislative purpose in cases in which they petitioned for *certiorari*, but they have never asked the Court to review the issue. *E.g.*, *DIRECTV Mass.*, 25 N.E. 3d at 271-73. Even now, petitioner does not suggest that the issue merits review on its own. *See* Pet. 14. Contrary to the Petition's claim (at 3), the Florida Supreme Court did not "simply ignore[]" petitioner's evidence of discrimination. Instead, it correctly recognized that evidence of cable providers' support for the CST was not enough to show that Florida acted with discriminatory purpose, rather than the nondiscriminatory purpose codified in Fla. Stat. § 202.105(1).

Under this Court's Commerce Clause precedent, a statute's "articulated purpose" must be treated as the "actual purpose," unless the record "forces" a conclusion that it "could not have been a goal of the legislation." *Clover Leaf Creamery*, 449 U.S. at 463 n.7, 471 n.15. *Clover Leaf Creamery* illustrates how formidable that burden is. Minnesota banned plastic milk

containers, with the stated goal of environmental protection. *Id.* at 458-59. The challengers contended that the real purpose was to support Minnesota's pulpwood industry—pulpwood being the raw material for cardboard milk containers. *Id.* at 463 n.7. As evidence, they pointed out that "some legislators sought to obtain votes" based on the law's benefits to the state's pulpwood industry. *Ibid.* Even though legislators themselves urged colleagues to vote for the measure based on benefits to Minnesota industry, that evidence was insufficient to negate the law's articulated purpose. Thus, while the Petition asserts (at 29) that "few legislators are so brazen as to announce their illicit purpose in the formal legislative record," even that evidence may not be enough to show discriminatory purpose under the Court's precedent.

Here, there is no evidence that even one legislator voted for the CST because of cable's greater economic presence in Florida, much less evidence that any legislator sought to rally support on that basis. This shortcoming is particularly remarkable because two of petitioner's affiants are former legislators. Neither claims that he or even one other colleague supported the CST because of cable's Florida presence. They merely identify the factor as part of cable's pitch. R40:5772-82. Finding discriminatory purpose on this record would fail to heed the presumption that legislatures act in good faith. *Cf. Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). After all, absent some stronger indication of intent, lawmakers should not be presumed to share the wishes of industry lobbyists. That is all the more true here, because satellite enjoys a *tax advantage* over cable under the CST.

Despite the high burden and the weakness of its evidence, petitioner fails to show that the Florida Supreme Court's decision should be viewed as "simply ignor[ing]" evidence before it. *See* Pet. 3. The decision below discusses petitioner's evidence, explaining that, in contrast to statements by the Legislature, "sources outside the legislature" are "far more problematic" indicators of legislative intent. Pet. App. 15a. That is not the language of categorical exclusion. Indeed, the court has been willing to consider extralegislative evidence of intent in other cases. *See, e.g.*, *League of Women Voters of Fla.* v. *Detzner*, 172 So. 3d 363, 378-86 (Fla. 2015) (finding forbidden intent to gerrymander based in part upon evidence of political consultants' actions). Understood in context, the decision below simply determined that the extralegislative evidence was not sufficient to show discriminatory purpose given the CST's articulated purpose.[8]

None of the purportedly conflicting cases (at 30-31) holds that evidence of an industry's support, standing alone, forces a conclusion that a legislative statement of nondiscriminatory purpose is false. On the contrary, every case involving a statute with an articulated purpose rejected the discriminatory-purpose argument. One case explained that there is "no more persuasive evidence of the purpose of a statute" than statutory text. *E. Ky. Res.* v. *Fiscal Ct.*, 127 F.3d 532, 542 (6th

[8] To the extent petitioner contends (at 34) that the Florida Supreme Court misapplied Florida's summary-judgment standard, that is a state-law procedural issue not subject to review. *See MacDonald, Sommer & Frates* v. *Yolo Cty.*, 477 U.S. 340, 352 n.8 (1986) (state-court determination that allegations were insufficiently specific to survive demurrer was "authoritative[]").

Cir. 1997). Another likewise credited an articulated purpose, rejecting reliance upon a lobbyist's statement as having "little (if any) probative value," even when considered together with a similar statement from the law's sponsor during a floor debate. *Deere & Co.* v. *State*, 130 A.3d 1197, 1217 (N.H. 2015). A third observed that the absence of an articulated purpose made the court's discriminatory-purpose inquiry harder, since *Clover Leaf Creamery* requires courts to "defer" to statutes' articulated purposes. *Chambers Med. Techs. of S.C., Inc.* v. *Bryant*, 52 F.3d 1252, 1259 (4th Cir. 1995) (remanding to allow district court to clarify its analysis). A fourth simply noted that local lawmakers' correspondence "confirm[ed]" the articulated purpose. *Town of Southold* v. *Town of E. Hampton*, 477 F.3d 38, 48 (2d Cir. 2007).

None of the laws found purposefully discriminatory had legislative statements of purpose. Not only did the law in *Family Winemakers of California* v. *Jenkins* have "no stated statutory purpose," but multiple lawmakers cited the need to protect Massachusetts vintners during floor debates and the law also discriminated in effect. 592 F.3d 1, 14-15 (1st Cir. 2010). The Eighth Circuit cases involved voter initiatives, both of which advertised their discriminatory intent in official information presented to voters. *Jones* v. *Gale*, 470 F.3d 1261, 1269-70 (8th Cir. 2006); *S.D. Farm Bureau* v. *Hazeltine*, 340 F.3d 583, 594 (8th Cir. 2003).

Regardless whether any case petitioner cites erects the categorical bar for which petitioner faults the decision below, this case would be a bad vehicle to address any such split, because it does not turn on any

such categorical rule. In any event, there is little reason to believe that courts are ignoring persuasive extralegislative evidence of discriminatory intent, as petitioner suggests. The cases involving satellite taxation merely noted that building a discriminatory-effects case on lobbyist statements is "problematic" and "does not suffice to carry th[e] burden." *DIRECTV Mass.*, 25 N.E.3d at 272; *Roberts*, 477 S.W.3d at 305. To the extent a reversed Pennsylvania Supreme Court decision and a Puerto Rico decision—both arising in very different factual contexts—might reflect a categorical refusal to consider extralegislative evidence, petitioner fails to show their analysis has influenced other courts to do the same, even within their own jurisdictions.[9]

In sum, the Florida Supreme Court correctly rejected petitioner's discriminatory-purpose argument in a way that does not implicate any split of lower-court authority.

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[9] The cases petitioner cites (at 32 n.5) for the continuing vitality of the discriminatory-purpose holding in *American Trucking Associations, Inc.* v. *Scheiner*, 509 A.2d 838 (Pa. 1986), involved construction of a statute about dangerous dogs, not discriminatory-purpose assessments. *Commonwealth* v. *Comella*, 735 A.2d 738, 740 (Pa. Commw. Ct. 1999) (considering the meaning of "domestic animal"); *Commonwealth* v. *Hake*, 738 A.2d 46, 49 (Pa. Commw. Ct. 1999) (dangerous dog statute could be violated with a single bite).

III. CONGRESS HAS DECLINED TO EXERCISE ITS COMMERCE CLAUSE AUTHORITY TO PREEMPT FLORIDA'S CST.

The satellite industry's efforts to invalidate state taxes on satellite have extended beyond the courts. It has asked Congress to use its express Commerce Clause authority to preempt Florida's CST and other taxes the satellite industry has challenged in court. That Congress has refused to exercise its express Commerce Clause power to invalidate taxes like the CST provides a further reason for the Court not to consider doing so under the dormant Commerce Clause.

In 2008, a DIRECTV executive testified before Congress on petitioner's behalf, encouraging Congress to enact a law that would have preempted Florida's CST. Lamenting that "courts have been reluctant to invalidate" the "discriminatory laws" of "errant states," the executive told a congressional subcommittee that "Congress must act." *2008 Hrg.* 12, 14, 21. But Congress did not. The State Video Tax Fairness Acts of 2007, 2008, 2009, and 2011 all failed to become law. *Supra* at 8. It is not as if Congress is unwilling to address competition between cable and satellite. As the DIRECTV executive acknowledged, "Congress has repeatedly intervened to enable satellite TV to compete effectively with cable." *2008 Hrg.* 12; U.S. Br. 20. Indeed, it was the Telecommunications Act of 1996's local satellite-taxation ban that led Florida to structure the CST on satellite differently from the CST on all other communications services. Pet. App. 30a-31a. If Congress believed Florida's and other States' responses were undesirable, it could have accepted satellite's invitation to regulate again.

The Court has cited "Congress's own power and institutional competence to decide upon and evaluate any desirable changes" as a reason not to invalidate State tax regimes under the dormant Commerce Clause. *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 309 (1997); *accord Davis*, 553 U.S. at 355-56 (2008). And when Congress has considered an issue and declined to act, the Court has repeatedly decided to "respect [Congress's] judgment" and not use the dormant Commerce Clause to reach a different result. *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 319 (1992); *e.g.*, *Tracy*, 519 U.S. at 304-05; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 637 (1991) (White, J., concurring). That impulse should be still stronger when a petitioner asks the Court to diminish State taxation authority in a way the lower courts have uniformly rejected. *See Davis*, 553 U.S. at 338 (indicating that dormant Commerce Clause jurisprudence must "respect . . . federalism").

Congress's rejection of the satellite industry's efforts to invalidate the CST furnishes an additional reason to deny certiorari.

IV. USING THIS CASE TO ADDRESS ISSUES IN OTHER INDUSTRIES WOULD BE CONTRARY TO THE CASE-BY-CASE APPROACH UNDER THE COURT'S COMMERCE CLAUSE PRECEDENT.

Finally, petitioner argues (at 35-38) that this case is an "ideal vehicle" for resolving issues "affecting many industries" in which innovative companies are challenging established actors. There are three problems with this argument.

First, petitioner's premise that States are eager to harm new market entrants offering lower prices and better service is questionable, at best. Consumers are voters, too, and any attempt to raise businesses' costs would likely be passed along to customers. That alone is a check on market incumbents' ability to secure protective legislation. *See United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (that local businesses and citizens "bear the costs" of regulation limits concern for protectionism"); *Clover Leaf Creamery*, 449 U.S. at 473 n.17 ("in-state interests" are "a powerful safeguard against legislative abuse").

Consider the Petition's most pertinent example: the potential that States would hobble video-streaming services with discriminatory taxation. Pet. 35. Through the CST, Florida enacted precisely the opposite policy. All non-satellite communications services, including emerging ones like video streaming and ones not yet invented, are subject to the same state and local CST as cable. *Supra* at 4-5. This policy choice flowed from Florida's desire to "spur[] new competition" and "free consumers to choose a provider based on tax-neutral considerations," not to protect incumbent providers. Fla. Stat. § 202.105(1). Similarly, regulatory changes to permit ride-sharing apps show a willingness to change regulations to facilitate innovation, not stifle it. *E.g.*, Ch. 2017-12, Laws of Fla. (codified as Fla. Stat. § 627.748) (preempting local regulation of ride-sharing services, such as Uber and Lyft). In any event, the Commerce Clause does not protect innovative businesses qua innovators; it prohibits only discrimination against interstate commerce. *See Exxon*, 437 U.S. at 127-28.

Second, to the extent governments are inclined to harm new market entrants, it is doubtful that accepting this case would affect the practice. Whatever the Court might ultimately conclude about the specific regime at issue here, the case-by-case nature of the dormant Commerce Clause inquiry makes it unlikely to yield far-reaching guidance. *See W. Lynn Creamery*, 512 U.S. at 186 (prescribing a "sensitive, case-by-case analysis of purposes and effects"). Significant case-specific factors, such as federal preemption and regulations and the higher CST tax burden on cable, will likely limit the case's impact on other industries. If Tesla's treatment is a concern, Pet. 35-36 & n.6, the best way to address it is in a Tesla case. *E.g.*, Compl., *Tesla Motors, Inc.* v. *Johnson*, No. 16-cv-1158 (W.D. Mich. filed Sept. 22, 2016). Dealership protections have their own issues and have generated their own case law. *E.g.*, *Ford Motor Co.* v. *Tex. Dep't of Transp.*, 264 F.3d 493, 499-505 (5th Cir. 2001) (rejecting Commerce Clause challenge to dealership protections).

Third, to the extent that petitioner believes this case is an opportunity to clean up Commerce Clause doctrine, it is short on ideas to help. Florida already knows that it cannot purposefully discriminate or discriminate in effect against interstate commerce. The only question here is whether, on this record, the CST does so. Case-by-case analyses are difficult and one case will yield limited insight into another. As long as Commerce Clause doctrine allows courts to reweigh States' assessments of costs and benefits of laws that do not discriminate on their face, courts will have difficulty drawing the line between permissible and impermissible regulation. *See W. Lynn Creamery*, 512

U.S. at 210 (Scalia, J., concurring) (describing cases involving facially nondiscriminatory statutes as a "quagmire"); *Tracy*, 519 U.S. at 298 n.12 ("no clear line" separating discriminatory and nondiscriminatory laws). Pending petitions present far more momentous issues, such as whether the Court should revisit *Quill*'s physical-presence requirement. Pet. for Writ of Cert., *South Dakota* v. *Wayfair*, No. 17-494 (U.S. filed Oct. 3, 2017). If the Court believes it is time to take a significant Commerce Clause case, it can do better than a fact-bound issue on which all lower courts agree.

Like the best policy for satellite taxation, determining whether and what rules are necessary to address potential risks to the interstate market as e-commerce rapidly evolves is a job best suited for Congress. Rather than using a case that does not otherwise merit review to fashion broad rules with unforeseeable consequences, the Court should do what it ordinarily does: wait for a case that satisfies the usual factors for granting certiorari.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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NOVEMBER 13, 2017