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.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This petition can be resolved on the basis of a simple, extraordinary concession. The Department of Revenue acknowledges that if DISH is right about what the Florida Supreme Court said, then the "serious Commerce Clause issues and divisions of authority [presented here] might justify the Court's attention." BIO 1. Resolving this petition therefore comes down to how to read the decision below.

But the brief in opposition whitewashes the decision. It claims that the decision did not *really* reject DISH's claim because the cable companies benefiting from the unequal tax are interstate (rather than purely in-state) enterprises. And the court did not *really* categorically disregard DISH's evidence of discriminatory purpose. If you squint just right, the Department insists, you'll see that the court meant something different from what it said.

The reality is that the Florida Supreme Court indeed analyzed discriminatory effects purely on the basis of domicile. This approach is flatly at odds with a majority of courts and precedents of this Court. Contrary to the decision below, unequal taxes discriminate against interstate commerce if they favor local activities and investments over non-local ones—and that is true regardless of where the affected actors happen to reside.

The evidence of discriminatory purpose only strengthens the case for review. The Florida Supreme Court sided with courts that categorically ignore evidence of discriminatory purpose—just as they might

do in interpreting statutory text. That approach is inconsistent with the prevailing view and with this Court's precedents.

The decision below is a green light to adopt protectionist measures encumbering the flow of commerce across state lines. Even though Commerce Clause doctrine is a morass—indeed, precisely *because* it is a morass—it is vital for the Court to step in.

ARGUMENT

I. Review Is Needed To Resolve Conflicting Authority Concerning Discriminatory Effects.

A. The split is real.

Courts are irretrievably divided over the constitutionality of state laws that differentiate between interstate competitors. Pet. 15-24. Most courts properly recognize that, when determining whether such a law discriminates against interstate commerce, the key question is this: Does the law favor local over non-local economic activities and investment? But other courts, including now the Florida Supreme Court, fixate on the location of the entities being taxed or regulated. They believe that favoring some interstate interests over others *cannot* amount to discrimination against interstate commerce. They reason that unless a law directly advantages a purely local company, it cannot impermissibly favor local "interests"—even if the law prefers local activity or investment.

1. The Department claims there is no division of authority, and DISH "misunderstand[s] … the decision below." BIO 13-14. According to the Department, the Florida Supreme Court did not "articulat[e] a per se rule" that differential treatment of interstate companies cannot discriminate against interstate commerce; rather, the decision below merely "conclu[ded] that cable's greater in-state expenditures, standing alone, are insufficient to show the [Communication Services Tax (CST)] discriminates in effect." BIO 14.

But the decision below is clear. As the court saw it, major cable companies are not distinctly Floridian, so the differential tax that favors them cannot be forbidden local favoritism. In the opinion's decisive section (revealingly titled "In-State Interests," Pet. App. 9a), the court repeatedly stressed that cable is "not a local business," that cable providers are not "headquartered in the state," and, accordingly, that cable is "not a local, in-state interest." Pet. App. 9a-11a. The absence of a local business drove the court's bottom line: "Because we find that cable is not an in-state interest, the satellite companies' discriminatory effect argument fails." Pet. App. 11a.

That is exactly the theory the Department and the Florida Cable and Telecommunications Association (FCTA) advocated. Their position, as the court itself recounted, was "that cable and satellite companies are both out-of-state interests because they each have

corporate headquarters and principal places of business located outside of Florida." Pet. App. 9a.[1]

The Department nevertheless insists the Florida Supreme Court merely rejected the view that cable's relatively larger presence in Florida, "standing alone," made the tax discriminatory. BIO 14. Those words do not appear in the decision—and for good reason: DISH's discriminatory-effects claim never "focused entirely" on cable's larger economic footprint in Florida. BIO 15. Rather, the constitutional challenge highlighted the fact that cable companies, by their nature, engage in critical local activities, and make massive infrastructure investments, that satellite providers do not. The inevitable *result* is that cable has an overwhelmingly larger Florida footprint than satellite, and that cable therefore generates more local commerce and revenue than satellite—which is why the legislature favored cable over satellite. But the key to the constitutional violation is that the legislature imposed a differential tax to favor companies that perform essential activities locally. And in so doing, it created just the sort of market-distorting effects that are the hallmark of dormant Commerce Clause violations.

2. The Florida Supreme Court conspicuously parted ways with numerous other courts, including

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[1] *See also* Transcript of oral argument at 10, *Fla. Dep't of Revenue et al. v. DIRECTV et al.*, No. SC15-1249, (Fla. Apr. 6, 2016), https://tinyurl.com/yahcopd2 (statement of counsel for FCTA) ("[A]s a matter of law … cable has no local interest which is being benefited[,] and that is the test under the Commerce Clause.").

this Court, when it short circuited the discriminatory effects inquiry by improperly fixating on the fact that cable and satellite are both interstate businesses. *See* Pet. 15-28.

The Department downplays the conflict (BIO 18-19), but several courts—like the decision below—indeed have held that laws favor in-state interests only when the direct beneficiaries are purely local businesses. Pet. 16-19. The Florida Supreme Court expressly took this to be the position of the Ohio and Utah Supreme Courts. Pet. App. 12a n.2. So did the Ohio dissenters, who criticized their colleagues for "focus[ing] narrowly on the location of ownership or headquarters." *DIRECTV v. Levin*, 941 N.E.2d 1187, 1198 (Ohio 2010) (Brown, C.J., dissenting). So did the Massachusetts Supreme Judicial Court and the Tennessee Court of Appeals, which declined to follow Ohio and Utah's exclusive focus on domicile. Pet. 23.

It is telling that here, too, the Department contradicts its previous position. Until now, the Department (and the FCTA) invoked the Ohio and Utah decisions to argue that the differential tax cannot discriminate because cable companies are not purely local entities.[2] Those decisions' preoccupation with corporate domicile and the existence (or not) of purely local beneficiaries sharply diverges from the

[2] *See* Department Opening Br. at 23-24 (filed Sept. 25, 2015); FCTA Opening Br. at 29-30 (Sept. 25, 2015); FCTA Reply Br. at 10-11 (Jan. 20, 2016), *all filed in Fla. Dep't of Revenue v. DIRECTV*, No. SC15-1249 (Fla.).

numerous other courts that properly focus on local economic activity and investment. Pet. 19-22.

The Department also quibbles about the significance of the issue, offering a few cherry-picked examples of States accommodating new market entrants to suggest that concerns about local protectionism may be overblown. BIO 33. But for every such example, there are numerous more counterexamples of protectionism involving automobiles, travel services, optical services, alcoholic beverages—even coffins. *See* Pet. 15-36; Br. of Amicus Wine Retailers in Support of Certiorari; Asheesh Agarwal & Jerry Ellig, *Buried Online: States Laws that Limit E-Commerce in Caskets*, 14 Elder L.J. 283 (2006); Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 Iowa L. Rev. 573 (2016).

3. Perhaps strangest of all, the Department insists that the decision below cannot mean what it says because that "would conflict with Florida Supreme Court precedent." BIO 16 (citing *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000 (Fla. 1988), *rev'd on other grounds* 496 U.S. 18 (1990)). Indeed. DISH explained below that a decision for the Department would run afoul of *McKesson*. *McKesson* invalidated a state-law preference for beverages derived from certain crops that grew prevalently (but not exclusively) in Florida. *McKesson*, 524 So. 2d at 1002. Thus, DISH has explained, *McKesson* should have made clear that laws can have discriminatory effects even if drafted in ostensibly neutral terms, and even if purely in-state actors are not the sole beneficiaries. The Florida Supreme Court was unswayed. It apparently believed its decisions could be squared,

though it failed to explain how—indeed, it did not mention *McKesson* at all. The deepening doctrinal quagmire simply confirms the need for this Court's review.

4. Finally, the Department contends that no split exists because DISH's dormant Commerce Clause claims have not succeeded. BIO 14-15. But the Department acknowledges that beneath this superficial consensus lie "different rationales." *Id.* at 13. The theory adopted by the Florida Supreme Court in this case has been rejected by numerous judges in these cases, including by a majority of judges in the Florida Court of Appeal. Pet. 23, 37; Pet. App. 27a-29a. The conflicting analysis in these cases creates uncertainty for litigants, courts, and legislatures, and merits review.

The Department adds (BIO 14) that the Court denied review in prior cable-satellite cases. But only one of those petitions—filed in 2011—raised the discriminatory-effects question presented here, and none of the prior petitions raised discriminatory purpose. This Court CVSG'd that one discriminatory-effects petition, and the Solicitor General's recommendation to deny review rested partly on the absence of a purpose claim and partly on the fact that several cable-satellite cases remained in the pipeline. Brief for the U.S. as Amicus Curiae at 21-22, *DIRECTV, Inc. v. Levin*, No. 10-1322 (U.S. May 23, 2012). This petition includes a purpose claim; the conflict and confusion in the lower courts has only deepened; and no additional cases remain pending.

B. The Department's merits arguments are unavailing.

The Department also proposes various alternate bases for upholding the unequal pay-TV tax. If these theories were correct, then perhaps the Department might win on remand. But they are not, and certainly none of them justifies denying review.

First, the Department asserts that the unequal tax cannot violate the dormant Commerce Clause because federal law authorizes it. BIO 6, 13, 21. But federal authorization is a *defense* to a discriminatory tax, and the question here is the antecedent one—whether the tax is discriminatory. Moreover, to authorize what the Commerce Clause "would otherwise forbid," Congress must be "unmistakably clear." *Maine v. Taylor*, 477 U.S. 131, 139 (1986). And Congress has never authorized this discrimination, which is why no court (including the court below) has found it did. Congress preempted local taxation of satellite in the Telecommunications Act of 1996 because satellite is a "national rather than local service" that "do[es] not require the use of the public rights-of-way." H.R. Rep. No. 104-204, pt. 1, at 125 (1995). True, Congress clarified that States remain free to share revenue from state-level satellite taxes with localities. But Congress surely did not intend to abandon the background anti-protectionism rule and authorize States to tax satellite into oblivion.

Paradoxically, the Department also argues that congressional *in*action—a failure to enact legislation preempting laws like this one—means that Congress ratified them. BIO 32. But "we walk on quicksand

when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940). Congressional paralysis is not ratification, and it certainly is not a clear statement.

Second, the Department briefly suggests that technological differences between cable and satellite might offer a nondiscriminatory basis for differential tax treatment. BIO 6, 22. But the Department admits that "[t]hese differences … are not what drove satellite's different taxation." BIO 6. Enough said.

Third, the Department contends that the unequal tax is not location-based discrimination because other communications services are treated like cable. BIO 22-23. But never having raised this argument below, the Department cannot do so now. Moreover, the Communications Services Tax was broadened to include services like video-streaming *after* the period at issue here (specifically, through 2009). And for both of those reasons, the Department never has shown that these services compete with satellite as cable does.

Fourth, the Department says the unequal tax is valid because satellite's state tax burden is, on average, less than cable's combined state/local tax burden. BIO 2, 7-8, 23. But an offsetting levy excuses a discriminatory tax only under narrow circumstances. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 344 (1996); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 649-50 (1994). Among other things, the two taxes must be levied on the same event. Here, the state tax is imposed for the "privilege" of selling pay-TV "at re-

tail," Fla. Stat. § 202.12(1), whereas the section authorizing local taxes does not mention this "privilege" and instead describes the levy as a substitute for fees that localities had previously charged for the use of local infrastructure, *id.* § 202.19.[3]

Florida may pursue this argument on remand. But the idea that Florida's tax scheme favors satellite is absurd. Cable providers paid local franchise fees (and now the local CST) in exchange for access to public rights of way. Satellite providers do not need such access and instead pay federal fees for the right to locate satellites in space and use certain transmission frequencies. These are their respective costs of doing business. Charging satellite companies higher state taxes because they do not pay this local levy—for rights-of-way they don't use—is like imposing a special tax on non-smokers since they do not pay cigarette taxes.

Finally, the Department suggests that discriminatory-effects claims are disfavored and that "facially discriminatory and facially nondiscriminatory laws like the CST" cannot be equated. BIO 18-19. But this Court long has held that discrimination is discrimination, "whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). The very point of the discriminatory-effects doctrine is to stamp out protectionism, not just when States draw geographic

[3] The Department also suggests that this compensatory-tax doctrine applies only to facially discriminatory laws. BIO 24 n.7. *Maryland v. Louisiana*, 451 U.S. 725, 756-59 (1981) applied the doctrine in a discriminatory-effects case.

distinctions, but when they use facially neutral means to achieve that end.

Indeed, the Department acknowledges that, "[h]ad this case involved a facially discriminatory law, it would not have survived scrutiny." BIO 19. That acknowledgement is fatal, because "Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce." *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). If Florida admittedly could not impose a higher tax on, say, pay-TV "produced at facilities outside Florida and delivered to consumers without using ground-based infrastructure in the State," it cannot accomplish the same thing using different words. Here, of course, the words are not even that different. Fla. Stat. §§ 202.11(5), 202.12(1)(b) (disfavoring pay-TV delivered "by satellite directly to the subscriber's premises *without the use of ground receiving or distribution equipment*" (emphasis added) (incorporating 47 U.S.C. § 303(v)).

II. The Discriminatory-Purpose Question Likewise Merits Review.

DISH's claims of discriminatory effect and purpose go hand in hand. The protectionist arguments for the tax reflect the reality that the tax favors local economic interests, and the local benefits generated by the tax illuminate its proponents' protectionist purposes. The conflict of authority underlying the discriminatory-purpose claim only reinforces the need for review.

On this issue too, the Department minimizes the split by mischaracterizing the decision below. It asserts that the Florida Supreme Court did not categorically refuse to consider evidence outside the formal legislative record, but merely found the evidence unpersuasive. BIO 26-28. On the contrary, the court said explicitly and categorically that discriminatory purpose is determined by "look[ing] to the language and the legislative history of the statute." Pet. App. 12a. The court then ignored the evidence here entirely, without analysis. *Id*. at 15a.

The Department does not deny that other courts circumscribe their analysis in this same way. BIO 30; Pet. 31-33. It does not dispute that most courts, by contrast, consider a broader array of evidence in order to identify a law's real purposes. Pet. 29-31. And it does not deny that this question matters in high-stakes litigation beyond the Commerce Clause, and that further guidance is warranted. Pet. 37-38. Instead, the Department nibbles around the edges. It says, for instance, that no case in the majority camp "holds that evidence of an industry's support, standing alone, forces a conclusion that a legislative statement of nondiscriminatory purpose is false." BIO 28. But the question is not what's "forced"; it is whether this evidence is categorically irrelevant.[4]

[4] The Department is wrong to assert that no case finding purposeful discrimination "involv[ed] a statute with an articulated purpose." BIO 28. To take one example, the law invalidated in *Family Winemakers* declared that its purpose was

Under a proper analysis, summary judgment could not have been granted. The evidence was not merely lobbying materials conveying a protectionist pitch and testimony from lobbyists about their pivotal role; it also included testimony from former legislators on the receiving end of the lobbying blitz.[5] And the implausibility of the law's purported neutral justification strengthens the inference of discrimination that much more. One does not "simplify[] a complicated system of taxes" (BIO 3) by creating an unequal rate structure. And the notion that favoring one pay-TV provider over another advanced "competitive[] neutral[ity]," *id.*, is nonsense. *Supra* at 9-10.

"to authorize forthwith the direct shipment of wine." Mass. Sess. Laws ch. 33 (2006).

[5] The Department points to legislative testimony from a satellite executive "that accommodating federal law was the 'express purpose' of the higher state tax on satellite." BIO 22. But the executive's position was that this was *not* the true purpose and that cable and its supporters were merely gilding their unequal tax schemes "by applying a pale patina of parity." *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* 110th Cong. 14 (2008) (statement of Mike Palkovic).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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