No. 10-1322

In the Supreme Court of the United States

DIRECTV, INC., ET AL., PETITIONERS

v.

RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The State of Ohio imposes a state sales tax on satellite television services but not on cable television services. The question presented is whether imposition of the state sales tax on satellite television services violates the Commerce Clause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Petitioners are major satellite broadcasting companies. Pet. App. 3a. Under Ohio law, satellite broadcasting services are subject to state sales tax, but cable services are not. Petitioners contended that the state taxing scheme discriminates against interstate commerce in violation of the Commerce Clause. The trial court granted summary judgment in petitioners' favor, concluding that the sales tax discriminates in practical effect against interstate commerce. *Id.* at 59a-221a. The Ohio Court of Appeals reversed, *id.* at 35a-58a, and the

Ohio Supreme Court affirmed the intermediate appellate court, *id.* at 1a-34a.

1. Both satellite and cable companies provide pay television services to consumers. While satellite broadcast companies transmit signals from orbiting satellites directly to subscribers' homes, cable operators distribute signals from ground facilities to subscribers' homes through a network of coaxial or fiber optic cable. Pet. App. 3a-4a, 5a. None of the major satellite or cable companies operating in Ohio is headquartered in that State, and all serve an interstate market. *Id.* at 3a, 4a; see *id.* at 53a.

To provide service to subscribers, cable companies generally must obtain authorization from local governments to lay cable over local rights-of-way and through easements. Federal law permits local governments to impose franchise fees of up to 5% of the cable operator's gross revenues as a condition of such authorization. 47 U.S.C. 542(b). In the Telecommunications Act of 1996, Congress exempted satellite providers, which do not require use of local rights-of way, from "the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." Pub. L. No. 104-104, § 602(a), 110 Stat. 144 (47 U.S.C. 152 note). Congress provided, however, that this prohibition on local taxation "shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State." *Id.* § 602(c), 110 Stat. 145 (47 U.S.C. 152 note).

2. Since 1996, a number of States have imposed taxes on satellite broadcasting services. See Pet. 29. In 2003, Ohio enacted legislation that imposes the state sales tax—then 6%, now 5.5%, see Pet. App. 36a-37a; Pet. 7—on "satellite broadcasting services." 2003 Ohio

Laws p. 1996 (codified at Ohio Rev. Code Ann. § 5739.01(B)(3)(p) (LexisNexis Supp. 2012)); Ohio Rev. Code Ann. § 5739.02 (LexisNexis Supp. 2004); *id.* § 5739.02 (LexisNexis Supp. 2012). That legislation defined "[s]atellite broadcasting service" to mean, in pertinent part, "the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite." 2003 Ohio Laws pp. 2013-2014 (codified at Ohio Rev. Code Ann. 5739.01(XX) (LexisNexis Supp. 2012)). This definition of "satellite broadcasting service" excludes cable services from the reach of the State's sales tax. See Pet. App. 5a, 15a.

3. Petitioners filed suit in Ohio state court, alleging that Ohio had violated the Commerce Clause by imposing its sales tax on satellite broadcast services but not on cable services. Relying in part on statements made by cable-industry lobbyists who had urged that cable operators be exempted from the 2003 sales tax, petitioners argued, *inter alia*, that the tax reflected intentional discrimination against interstate commerce. See Pet. App. 261a-263a. They also argued that the sales tax has the effect of discriminating against interstate commerce because it favors cable operators, which make greater local investments in ground receiving and distribution equipment than satellite providers. See *id.* at 5a.

The trial court granted partial summary judgment in favor of petitioners, concluding that the effect of the sales tax's distinction between satellite and cable providers is to favor in-state economic interests and to burden out-of-state economic interests. Pet. App. 248a-288a; see *id.* at 268a-272a. The court explained that, "[g]iven

the technology used by cable operators to distribute their television programming after it has been gathered, they must locate substantial distribution equipment in Ohio," which "requires substantial investment and employment in Ohio." *Id.* at 268a. The trial court determined, however, that genuine issues of material fact existed about whether the legislature had enacted the sales tax law with a purpose to discriminate against interstate commerce, see *id.* at 266a-267a; whether cable and satellite providers are similarly situated for purposes of Commerce Clause analysis, see *id.* at 285a-286a; and whether any discrimination against interstate commerce was justified by legitimate local interests, see *ibid.*

The trial court subsequently resolved those issues in a decision granting petitioners' second motion for summary judgment. Pet. App. 59a-221a. The court concluded that satellite providers and cable operators are similarly situated, *id.* at 169a-201a, and that the State had not carried its burden to show that the discrimination was justified by legitimate local interests, *id.* at 213a-220a. The court accordingly declared the state sales tax unconstitutional insofar as it applies to satellite broadcasting services and not cable services. *Id.* at 220a-221a.

4. The Ohio Court of Appeals reversed. Pet. App. 35a-58a. The court concluded that the state sales tax "does not discriminate against interstate commerce as a whole, but places a burden against one form of delivering pay television to consumers, and the burden would fall equally on a satellite provider headquartered in Ohio, having all program content, satellite uplink, account services, and customers in-state." *Id.* at 54a. "Discrimination between different forms of interstate

commerce," the court reasoned, "is not discrimination *against* interstate commerce." *Id.* at 55a. The court further held that the trial court had erred in denying respondent's motion for summary judgment on the issue of purposeful discrimination. *Id.* at 57a-58a.

5. The Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals. Pet. App. 1a-34a. The court began its analysis by noting that the Commerce Clause "'protects the interstate market, not particular interstate firms' or 'particular structure[s] or methods of operation in a retail market.'" *Id.* at 11a (brackets in original) (quoting *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127 (1978)). The court also observed that the differential treatment of companies "'result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities,' does not violate the dormant Commerce Clause." *Id.* at 11a-12a (brackets in original) (quoting *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66, 78 (1989)).

The Ohio Supreme Court explained that, based on these principles, "every state and federal court considering Commerce Clause challenges brought by the satellite industry arguing against state tax measures as favoring the cable industry has held that these taxes do not violate the dormant Commerce Clause because they do not discriminate against interstate commerce." Pet. App. 12a; see *id.* at 12a-15a. Agreeing with those decisions, the Ohio Supreme Court rejected petitioners' Commerce Clause challenge. The court explained that "[t]he statute's application depends on the technological mode of operation, not geographic location, and while it distinguishes between different types of interstate firms, it does not favor in-state interests at the expense of out-of-state enterprises." *Id.* at 15a.

The Ohio Supreme Court reasoned that the state legislature had defined the coverage of the sales-tax law to correspond with federal law permitting States to tax satellite providers, "not to protect companies that have invested in a ground distribution system or to encourage investment in such a system." Pet. App. 16a; see 47 U.S.C. 152 note. The court also noted that the sales tax applies "regardless of whether the [satellite] provider is an in-state or out-of-state business and without considering the amount of local economic activity or investment in facilities that the satellite companies bring to Ohio." Pet. App. 16a. Finally, the court observed that "the cable industry is not a local interest benefited at the expense of out-of-state competitors." *Id.* at 17a. The court explained that cable operators, like satellite providers, "are interstate companies selling an interstate product to an interstate market." *Ibid.*

Having concluded that the sales tax does not discriminate in its practical effect, the Ohio Supreme Court declined to consider whether, as petitioners argued, statements made by lobbyists for the cable industry demonstrated that the sales tax law was enacted with a purpose to discriminate against interstate commerce. The court explained that petitioners had failed to preserve their challenge to that aspect of the Ohio Court of Appeals' decision. Pet. App. 19a-20a.

Two justices dissented. Pet. App. 21a-32a. The dissenting justices would have held that the Ohio sales-tax law unconstitutionally promotes local investment by "favor[ing] the sellers who invest locally and burden[ing] the sellers who do not." *Id.* at 24a; see *id.* at 32a.

DISCUSSION

The Ohio Supreme Court's decision in this case does not conflict with any decision of this Court or of any lower appellate court. Every appellate court to consider the issue has rejected similar Commerce Clause challenges to state taxation of satellite broadcasting services, and the decisions of the lower courts do not reflect any broader disagreement about the issues raised in the petition for a writ of certiorari. Moreover, petitioners failed to preserve their claim that the state tax at issue was enacted with a discriminatory purpose. Challenges to similar state taxation schemes are currently pending in other appellate courts, and the decisions in those cases may produce a division of authority or sharpen the presentation of the disputed issues. In the present case, however, further review by this Court is unwarranted.

A. The Decision Below Is Consistent With This Court's Dormant Commerce Clause Precedents

1. This Court has long interpreted the Commerce Clause as implicitly restraining States from discriminating against interstate commerce. *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). This "dormant" aspect of the Commerce Clause "prohibits economic protectionism—that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Associated Indus.* v. *Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273-274 (1988)).

"A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citations

omitted). To evaluate the constitutionality of a state law under the dormant Commerce Clause, the Court first asks whether the law "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). A non-discriminatory statute that incidentally burdens interstate commerce —including a state tax law—will "be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see *Department of Revenue* v. *Davis*, 553 U.S. 328, 338-339 (2008). A state tax that discriminates against interstate commerce, by contrast, is presumptively invalid, *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994), although it may be sustained if a State demonstrates that it "has no other means to advance a legitimate local purpose," *United Haulers*, 550 U.S. at 338-339, or that the tax is a "compensatory tax" designed to balance a tax burden already imposed on local goods or businesses, see *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 331-332 (1996).

2. Petitioners contend (Pet. i, 1-12, 33-39) that the Ohio Supreme Court departed from these principles in upholding Ohio's sales tax on satellite broadcasting services. In particular, petitioners assert that the Ohio Supreme Court created "categorical exemptions from the standard Commerce Clause analysis" for state laws that either (a) distinguish between businesses on the basis of technological differences in supplying substantially similar products, or (b) apply exclusively to businesses that are headquartered out-of-state. Pet. 11-12. That approach, petitioners contend, conflicts with this Court's admonition that courts must engage in a "sensi-

tive, case-by-case analysis of purposes and effects" to determine whether a state law discriminates against interstate commerce. Pet. 33 (quoting *West Lynn Creamery, Inc.* v. *Healy,* 512 U.S. 186, 201 (1994)).

As the court below observed (Pet. App. 12a), both *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), and *Amerada Hess Corp.* v. *Director, Division of Taxation*, 490 U.S. 66 (1989), make clear that the dormant Commerce Clause "protects the interstate market, not particular firms" or "particular structure[s] or methods of operation in a retail market." *Exxon*, 437 U.S. at 127; see *Amerada Hess*, 490 U.S. at 78. But neither those decisions nor any other precedent of this Court holds that a state statute is immune from further dormant Commerce Clause inquiry simply because it differentiates on the basis of technological differences or because it distributes its benefits to firms with out-of-state headquarters. See *Exxon*, 437 U.S. at 125-127 (Maryland statute that prohibited oil producers and refiners from operating retail gasoline stations in Maryland did not discriminate against interstate commerce because it "creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market"); *Amerada Hess*, 490 U.S. at 78 (New Jersey tax law requiring that oil producers "add-back" their federally imposed windfall profit tax payments did not discriminate against interstate commerce). A state statute that differentiates between companies on the basis of their methods of operation, or that differentiates between interstate firms, may in some circumstances have a discriminatory purpose or effect that violates the dormant Commerce Clause.

The Ohio Supreme Court's decision is fully consistent with that principle because it does not establish any "categorical exemptions from the standard Commerce Clause analysis." Pet. 11-12. The court below recognized that the dormant Commerce Clause analysis requires "a sensitive, case-by-case analysis of purposes and effects." Pet. App. 9a (quoting *West Lynn Creamery*, 512 U.S. at 201). In concluding that the Ohio sales tax does not discriminate in effect against interstate commerce, the court did not rely solely on the fact that cable and satellite companies employ different technological means of providing pay television services, or that both are interstate businesses. Rather, the court also reasoned that the sales tax does not appear to reward greater investment in Ohio or to burden the decision not to invest in Ohio. See *id.* at 16a. On that basis, the court concluded that the law "does not favor in-state interests at the expense of out-of-state enterprises." *Id.* at 15a.

That holding does not conflict with this Court's precedents. In *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984) (see Pet. 33, 37; Reply Br. 11-12), the Court held that a West Virginia statute that imposed a gross receipts tax on sales of goods at wholesale, but exempted locally manufactured goods, violated the dormant Commerce Clause by conferring a direct advantage on companies that chose to manufacture goods in the State. See *Armco*, 467 U.S. at 642.[1] Similarly, *Westinghouse Elec-*

[1] Petitioners argue that the state tax at issue in *Armco* did not "reward[] out-of-state companies" for shifting their operations into West Virginia because the tax was designed to offset a tax on in-state manufacturers. Reply Br. 12 (internal quotation marks and citation omitted). This Court rejected that argument, however, explaining that "manufacturing and wholesaling are not 'substantially equivalent events' such

tric Corp. v. *Tully*, 466 U.S. 388 (1984), and *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977), concerned state laws that directly favored in-state production or transactions. See *Westinghouse,* 466 U.S. at 393, 400 (New York law providing tax credit for products shipped from a regular place of business within New York treated "differently parent corporations that are similarly situated in all respects except for the percentage of their [export businesses'] shipping activities conducted from New York"); *Boston Stock Exch.*, 429 U.S. at 327, 331 (New York law imposing a greater tax burden on securities transfers that included an out-of-state sale for explicit purpose of encouraging nonresidents to engage in in-state securities sales "foreclose[d] tax-neutral decisions and create[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States").

As the court below observed (Pet. App. 16a, 17a-18a), unlike the laws at issue in those cases, the state law at issue in this case does not confer a direct advantage on companies that choose to conduct their operations in the State rather than conducting them in another State. Rather, the Ohio sales tax law treats the taxed companies the same regardless of whether they conduct the bulk of their operations in the State or outside of it. See Pet. App. 16a. In concluding that the Ohio sales tax is

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that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Armco*, 467 U.S. at 643. The Court further explained that, even "when the two taxes are considered together, discrimination against interstate commerce persists" because any business with manufacturing operations in a State other than West Virginia might well be subject to *that State's* manufacturing tax, and would therefore be disadvantaged relative to its West Virginia competitors. *Id.* at 644.

not impermissibly discriminatory in its practical effect the court below created no conflict with *Armco* or other similar cases.

3. Petitioners contend (Reply Br. 1, 3) that the Ohio Supreme Court erred by failing to give due weight to the fact that cable operators generally make greater local investments than satellite providers. In petitioners' view, the dormant Commerce Clause prohibits any state law that has the effect of "favor[ing] a product that boosts the local economy—with buildings, infrastructure, jobs, and investment—over a competing product that does not." *Id.* at 3.

As petitioners explain (Reply Br. 11-12), this Court has invalidated particular state laws that conferred direct benefits on in-state production and transactions. See pp. 10-11, *supra*. Contrary to petitioners' contention, however, those decisions do not establish that state laws with a disparate effect on businesses that require fewer in-state infrastructural or other investments than their competitors are "almost * * * *per se*" discriminatory, Reply Br. 1. That proposed rule lacks standards capable of ready or consistent application. Petitioners do not explain how great a difference there must be between the relative local economic footprints of competing companies before courts must deem any differential treatment to be unconstitutional. Nor do petitioners explain how a court should weigh other factors that might explain differential taxation, such as, for example, different federal regulatory requirements applicable to different methods of operation. Under petitioners' analysis, moreover, the same tax might be valid in one State and unconstitutional in another, based on the relative local economic footprints of the particular businesses operating in the State.

B. The Decision Below Does Not Conflict With The Decisions Of Other Lower Courts

As petitioners acknowledge (Pet. 13-15), every appellate court to consider the question has rejected Commerce Clause challenges to state taxation schemes that differentiate between satellite and cable providers. *Directv, Inc.* v. *Treesh*, 487 F.3d 471, 480 (6th Cir. 2007), cert. denied, 552 U.S. 1311 (2008); *DIRECTV, Inc.* v. *State*, 632 S.E.2d 543 (N.C. Ct. App. 2006) (*North Carolina*). Petitioners nevertheless argue (Pet. 12) that the lower courts are "hopelessly split" on the proper mode of analyzing state regulations that (1) differentiate between competing companies based on their methods of operation, see Pet. 12-23, or (2) have as their main beneficiaries interstate businesses, rather than purely local enterprises, see Pet. 24-28. Petitioners identify no confusion on these points that warrants this Court's intervention.

1. Petitioners assert (Pet. 12-23) that, in cases involving state laws that differentiate between competitors based on their methods of operation, (a) some courts regard operational differences as a "trump card" that automatically defeats a Commerce Clause challenge; (b) other courts treat such differences as irrelevant to Commerce Clause analysis; and (c) still other courts view operational differences as relevant but not dispositive.

a. The cases petitioners put in the first category all involve state taxes that fall more heavily on satellite television services than cable television services. Contrary to petitioners' argument (Pet. 13), none of these decisions has treated the operational differences between satellite and cable as a "trump card." Rather, the courts in these cases acknowledged that the dormant

Commerce Clause requires "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201; see Pet. App. 12a; *Treesh*, 487 F.3d at 478; see also *North Carolina*, 632 S.E.2d at 548. Each court determined on the basis of such analysis—including, but not limited to, their conclusions that the state statutes in question distinguished between companies that employ different methods of operation, and did not facially or otherwise distinguish between pay television providers on the basis of geography—that the challenged laws did not have the purpose or effect of discriminating against interstate commerce. See Pet. App. 15a-18a; *Treesh*, 487 F.3d at 478-481; *North Carolina*, 632 S.E.2d at 548-550.

b. Likewise, none of the decisions in petitioners' second category treated operational differences as categorically irrelevant to the dormant Commerce Clause inquiry. See Pet. 15. Rather, the court in each case determined, based on the particular circumstances involved, that a facially neutral operational distinction either served as a proxy for geographical discrimination between in-state and out-of-state commercial activity, or otherwise impeded the flow of commerce across state lines.

For example, the Massachusetts law at issue in *Family Winemakers* v. *Jenkins*, 592 F.3d 1 (1st Cir. 2010), restricted the ability of "large" wineries to distribute directly to consumers, while imposing no comparable restrictions on "small" wineries. See *id.* at 4, 8. The statute's definition of "small" wineries (which was based on a winery's annual gallonage) encompassed all Massachusetts wineries, while all "large" wineries subject to the restriction were located outside that State. *Id.* at 8, 10. The court concluded that this facially neutral distinction

had both the purpose and effect of "chang[ing] the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors." *Id*. at 5; see *id.* at 16 (noting that the Massachusetts law's "unusual regulatory features do track one thing precisely: the unique attributes of Massachusetts's own wine industry"). The First Circuit did not, as petitioners suggest (Pet. 16), hold that operational differences are "irrelevancies" as a general matter, but rather held that operational differences could not explain Massachusetts's differential treatment of "large" and "small" wineries under the particular circumstances of the case. See *Family Winemakers*, 592 F.3d at 11-12 (rejecting the State's argument that the law had the effect of leveling the playing field between large and small wineries, and noting that many of the wineries defined as "large" under Massachusetts's licensing scheme "in practice face the same difficulties in distributing most of their wines as the 'small' * * * wineries").

In *Cachia* v. *Islamorada*, 542 F.3d 839 (2008), the Eleventh Circuit similarly concluded that a local ordinance prohibiting operation of "formula" (*i.e.*, chain) restaurants "serve[d] as an explicit barrier to the presence of national chain restaurants, thus preventing the entry of such businesses into competition with independent local restaurants." *Id.* at 842. Like the First Circuit in *Family Winemakers*, the Eleventh Circuit did not suggest that operational differences are categorically irrelevant to dormant Commerce Clause analysis. Rather, the court concluded that, under the circumstances of the case, "the ordinance's complete prohibition of chain restaurants sharing certain characteristics amounts to more than the regulation of methods of operation, and

serves to exclude national chain restaurants from competition in the local market." *Id.* at 843.

In *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267 (1992), cert. denied, 506 U.S. 1053 (1993), the Seventh Circuit applied a similar approach in reviewing (and striking down) an Indiana statute that distinguished between different methods of waste disposal in an apparent effort to reduce the disposal of out-of-state waste. The court noted that the statute's prohibition on "backhauling" would have no effect on disposal of in-state waste but would significantly increase the costs of bringing out-of-state waste into Indiana. *Id.* at 1279. The court accordingly concluded that the statute "in effect erected an economic barrier against the importation of municipal waste." *Ibid.*[2]

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[2] Petitioners also cite (Pet. 17-18) *Waste Management Holdings, Inc.* v. *Gilmore*, 252 F.3d 316 (4th Cir. 2001), cert. denied, 535 U.S. 904 (2002). In that case, the Fourth Circuit concluded that genuine issues of material fact precluded entry of summary judgment on the question whether various Virginia restrictions on waste disposal had a discriminatory effect. *Id.* at 333-335. The court also determined, however, that "[n]o reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of [municipal solid waste] generated outside Virginia into Virginia for disposal." *Id.* at 340. In this case, by contrast, the Ohio Supreme Court had no occasion to consider whether Ohio's taxing scheme was motivated by a discriminatory purpose because petitioners failed to preserve that challenge. See Pet. App. 19a-20a.

In *Division of Alcoholic Beverages & Tobacco* v. *McKesson Corp.*, 524 So. 2d 1000 (1988), rev'd on other grounds, 496 U.S. 18 (1990), the Florida Supreme Court concluded that the State's alcoholic beverage tax scheme, which granted preferential treatment to beverages made from base crops "adapted to growing in Florida," effectively burdened interstate commerce by advantaging local goods relative to out-of-state goods. *Id.* at 1008; cf. *Bacchus*, *supra*. The court did not hold, however,

In none of these cases did the court consider a statute like the one at issue here, in which the challenged statutory distinction based on methods of operation neither serves as a clear proxy for discrimination against out-of-state businesses nor erects an effective barrier against the flow of interstate commerce. See Pet. App. 16a, 18a. There is consequently no sound basis for petitioners' assertion (Pet. 23) that the Ohio sales tax "would most assuredly be struck" by the courts in their second category.

c. The cases in petitioners' third category likewise do not reflect any general disagreement about the role of operational differences in dormant Commerce Clause analysis. In *National Ass'n of Optometrists & Opticians LensCrafters, Inc.* v. *Brown*, 567 F.3d 521 (2009), for example, the Ninth Circuit rejected a Commerce Clause challenge to California laws that prohibited opticians from offering services in the same location as licensed optometrists and ophthalmologists. *Id.* at 522. The apparent purpose of those laws was to "protect optometrists and opthalmologists as health care professionals from being affected by subtle pressures from commercial interests." *Id.* at 526. The court held that optometrists and opthalmologists, as health care providers bound by ethical and professional standards set by the State and their respective professions, are not similarly situated to opticians, which are not health care providers and may be owned and operated by commercial concerns. *Id.* at 526-527. Petitioners offer no reason to think that other courts would regard these dissimilarities as irrelevant to dormant Commerce Clause analysis,

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that differences in methods of operation are categorically irrelevant to the inquiry.

or would invalidate comparable statutes simply because opticians are more likely than optometrists and opthalmologists to be headquartered out of State. See Pet. 20; cf. *Exxon*, 437 U.S. at 126 ("[T]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

In each of the two Fifth Circuit cases on which petitioners rely (Pet. 21-22), the court followed this Court's decision in *Exxon* in concluding that certain state restrictions on vertical integration did not discriminate against interstate commerce. See *Allstate Ins. Co.* v. *Abbott*, 495 F.3d 151, 160-163 (2007) (restriction on ownership of auto body shops by automobile insurers not discriminatory in purpose or effect since, "as with the provision upheld in *Exxon*, similarly situated in-state and out-of-state companies are treated identically"), cert. denied, 552 U.S. 1184 (2008); *Ford Motor Co.* v. *Texas Dep't of Transp.*, 264 F.3d 493, 498, 502 (2001) (restriction on operation of car dealerships by car manufacturers was not discriminatory in purpose or effect, even though "the burden of a state regulation falls on some interstate companies") (quoting *Exxon*, 437 U.S. at 126).

In *Brown & Williamson Tobacco Corp.* v. *Pataki*, 320 F.3d 200 (2003), the Second Circuit upheld a New York statute that restricted the direct shipping of cigarettes to consumers but permitted the delivery of small quantities by means other than common or contract carriage. The court concluded that the restrictions, which applied equally to in-state and out-of-state direct shippers, did not in purpose or effect discriminate against out-of-state interests or impede interstate commerce. *Id.* at 212-216; see *id.* at 216 (finding that, to the extent out-of-state

direct shippers are compared to in-state brick-and-mortar sellers able to take advantage of the delivery exception, the "de minimis advantage to in-state brick-and-mortar retail sellers [is] insufficient to establish a discriminatory effect"). Petitioners offer no reason to think that other courts would reach a different conclusion based on their approach to operational differences.

d. That different courts have reached different conclusions about the constitutional status of different statutory schemes is unsurprising, given the context-specific nature of the dormant Commerce Clause inquiry. See *West Lynn Creamery*, 512 U.S. at 201. The cases petitioners cite do not reflect any general confusion about the role of regulatory distinctions based on operational differences—either as "trump card" or "irrelevancy"—that warrants this Court's intervention.

2. There is no division in the lower courts on the question whether the dormant Commerce Clause applies "where the main beneficiaries are interstate businesses, some of them domiciled out-of-state, rather than purely local enterprises." Pet. 24. As noted above, see p. 10, *supra*, the Ohio Supreme Court did not hold that the dormant Commerce Clause is categorically inapplicable in such circumstances. It instead treated the interstate nature of the major cable and satellite companies operating in Ohio as a relevant factor tending to show that the tax does not benefit in-state economic interests at the expense of out-of-state economic interests. See Pet. App. 17a.

Similarly in *Black Star Farms LLC* v. *Oliver*, 600 F.3d 1225 (2010), the Ninth Circuit considered an Arizona law that allowed wineries to make direct shipments of wine to consumers only if the wineries produced less than 20,000 gallons per year or if the consumer was

physically present at the point of sale. *Id.* at 1228. In rejecting a dormant Commerce Clause challenge to the small-winery provision, the court did not, as petitioners suggest (Pet. 27), find it "dispositive that the universe of beneficiaries—small wineries—encompassed both in-state and out-of-state enterprises." Rather, the court concluded that the plaintiffs in that case, unlike the plaintiffs in *Family Winemakers*, *supra*, had failed to demonstrate that the provision conferred a competitive advantage on in-state wineries versus out-of-state wineries. *Black Star Farms*, 600 F.3d at 1231-1234.

C. Further Review In This Case Is Not Warranted

1. Petitioners contend (Pet. 28-29) that the Ohio Supreme Court's decision has important ramifications for congressional policy regarding satellite broadcasting. As petitioners correctly note, Congress has repeatedly taken steps to foster competition in the multichannel video programming market, including competition from satellite broadcasting companies. See, *e.g.*, Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, Div. B, § 1000(a)(9), 113 Stat. 1536; *Satellite Broad. & Comm'cns Ass'n* v. *FCC*, 275 F.3d 337, 347-349 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002). But while Congress has barred local governments from taxing satellite providers, it has made clear that the ban does not extend to state taxation. 47 U.S.C. 152 note.

To be sure, Congress has not specifically authorized States to enact the sort of differential taxing scheme that Ohio has adopted, under which satellite providers are subject to a statewide sales or similar tax, while cable companies are not. By the same token, however, Congress has not prohibited the enactment of such a regime. Thus, while competition in the pay television

market is a matter of congressional concern, the current federal regime neither clearly condones nor clearly precludes the taxing scheme that Ohio has adopted.[3]

2. This case would not permit the Court to address the full range of issues that might bear on the constitutionality of Ohio's tax on satellite broadcasting services. Petitioners failed to preserve their claim that the tax purposefully discriminates against interstate commerce. See Pet. App. 19a-20a; cf. Reply Br. 12 (disclaiming reliance on "concepts of intentional discrimination") (quoting Br. in Opp. 34). If the Court granted certiorari in this case, it therefore would have no occasion to address the types of evidence that might demonstrate a legislative intent to favor in-state commerce at the expense of out-of-state competitors.

A number of similar suits, in which satellite providers challenge the constitutionality of state tax laws that distinguish between cable and satellite television services, have been filed in other state courts. See *Aycock* v. *Utah State Tax Comm'n,* No. 110402039 (Utah Jud. Dist. Ct. filed Dec. 15, 2010); *DIRECTV, Inc.* v. *Commonwealth Dep't of Revenue*, No. 10-0323 (Mass. Super. Ct. filed Jan. 20, 2010); *DIRECTV, Inc.* v. *Florida*, No. 05-CA-10357 (Fla. Cir. Ct. filed May 4, 2005) (amended complaint filed Oct. 31, 2008); *DIRECTV, Inc.* v. *Chumley*, No. 03-2408-IV (Tenn. Ch. Ct. filed Aug. 19, 2003); see also Pet. for a Writ of Cert. at 7 n.1, *DIRECTV* v. *Treesh*, 552 U.S. 1311 (2008) (No. 07-1004). Decisions in other cases may produce a division of au-

[3] A bill currently pending before a congressional committee would prohibit States from imposing a net tax rate on one form of multichannel video programming (*e.g.*, satellite) that is higher than the net tax rate applicable to any other form (*e.g.*, cable). H.R. 1804, 112th Cong., 1st Sess. (2011).

thority or sharpen the presentation of the relevant issues. Further review in this case, however, is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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