No. 10-1322

IN THE
Supreme Court of the United States

DIRECTV, INC. AND ECHOSTAR SATELLITE LLC,

Petitioners,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

BRIEF OF NATIONAL TAXPAYERS UNION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The National Taxpayers Union ("NTU") was founded by concerned taxpayers in 1969.[1] It is a nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state, and local taxpayers through public education, lobbying, and litigation on tax, spending, regulatory, and economic issues. The organization has actively participated in matters involving telecommunications policy such as video franchising reform, internet access taxation, and spectrum auctioning. NTU represents over 362,000 members in all fifty states, with approximately 14,000 members in Ohio.

A fundamental purpose of NTU is challenging improper or illegal taxation on behalf of taxpayers who might otherwise face insurmountable hurdles in attempting to vindicate their legal and constitutional rights. NTU has litigated against efforts by state and local authorities to erode constitutional restraints on their taxing authority, including the restraints imposed by the "dormant" aspect of the Commerce Clause as defined by this Court. Representatives of NTU have also testified before congressional committees and various state legislatures about the danger to the federalism balance struck by the Constitution that arises when state and local governments exercise unrestrained taxing authority.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than NTU, its members, or its counsel—made a monetary contribution specifically for the preparation or submission of this brief.

This experience places NTU in a unique position to advise this Court about the implications of the decision by the Supreme Court of Ohio upholding Ohio's unconstitutional and discriminatory tax on satellite television providers.

Based on NTU's experience in the area of taxation, it believes that the Supreme Court of Ohio's decision to uphold Ohio's tax scheme jeopardizes the Commerce Clause's protection of interstate commerce from discriminatory taxation. Specifically, Ohio's scheme is a tax in name and a tariff in effect. Similar—and similarly unconstitutional—schemes have already been imposed upon the multichannel video programming industry by the states of Florida, North Carolina, Kentucky, and Tennessee. By upholding Ohio's discriminatory tax scheme, the Supreme Court of Ohio has provided other states with a roadmap for circumventing the protections of the Commerce Clause. As a result, there is a significant danger not only that other states will impose similar tax schemes to discriminate against interstate competition in the multichannel video programming industry, but also that states will follow Ohio's lead to impose similar discriminatory tax schemes, providing an unconstitutional, competitive advantage to in-state operators in industries beyond multichannel video programming. NTU believes that such discriminatory taxation would be detrimental to the Constitution, to interstate commerce, and, most importantly, to the taxpayers whom the Constitution protects. As a result, NTU submits this brief as *amicus curiae* in support of Petitioners.

SUMMARY OF ARGUMENT

The constitutional significance and policy implications of this case extend far beyond the particular battle being waged between satellite and cable television providers. NTU submits this brief as *amicus curiae* to ensure that the real victims of the Supreme Court of Ohio's decision—Ohio's taxpayers and consumers who bear the brunt of the State's discriminatory taxing scheme—have their voices heard in support of this Court granting DIRECTV and Echostar's petition for a writ of certiorari and addressing the merits of the case.

The Supreme Court of Ohio has blessed an illegal taxing scheme that runs afoul of a cardinal rule of constitutional law consistently articulated by this Court. In *Boston Stock Exchange*, this Court explained: "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quoting *Nw. States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959)). This is precisely what the State of Ohio has done, however, through the imposition of a 5.5% sales tax that punishes satellite television providers that deliver multichannel television signals via a technology that does not require substantial investments in infrastructure or manpower in Ohio and rewards cable operators that use a technology which, by contrast, requires vast investments on the ground (and, literally, in the ground) in Ohio through the laying of tens of thousands of miles of cable in the State and the employ-

ment of thousands of Ohio residents. Ultimately, it is the Ohio consumer who loses by having the State place its thumb on the scale in favor of the local business interest (here, the cable provider) by insulating it from taxes levied on the out-of-state satellite provider, which in turn, drive up the cost of satellite television for Ohio residents.

Even more troubling than the State's use of its taxing power—which influences consumer choice by placing satellite providers at a competitive disadvantage vis-à-vis cable providers—is the rationale the Supreme Court of Ohio employed in making an end-run around this Court's Commerce Clause jurisprudence. The Supreme Court of Ohio found that the state sales tax does not run afoul of the dormant Commerce Clause, because satellite television providers and cable television providers are both engaged in interstate commerce. Pet. App. 2a, 8a, 17a. But it has never been the case that discriminatory taxing schemes can pass constitutional muster simply because the punished and rewarded companies both engage in interstate commerce. This Court made this clear in *Boston Stock Exchange*, when it ruled that it is constitutionally impermissible to discriminate between two types of interstate transactions in order to favor local commercial interests. 429 U.S. at 335. In fact, if the Supreme Court of Ohio's rationale were applied to many of this Court's seminal dormant Commerce Clause cases, it would turn those decisions on their heads and gut the very

protections those cases afford against discriminatory taxing schemes.[2]

ARGUMENT

I. THE OHIO SUPREME COURT'S DECISION VIOLATES THE COMMERCE CLAUSE BY UPHOLDING A STATE TAX THAT DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The "fundamental purpose" of the dormant Commerce Clause is "to assure that there be free trade among the several States." *Boston Stock Exch.*, 429 U.S. at 335. Tax neutrality is a critical component of this fundamental policy. *See id.* at 331. Free trade is hindered when state tax liabilities influence corporations' and consumers' decisions about where to do business. Thus, when a state places its thumb on the scale of competition in the marketplace by implementing a tax policy that rewards businesses that generate more economic activity in the state, the dormant Commerce Clause requires the invalidation of that tax. *See, e.g.*, *id.*; *Armco, Inc.* v. *Hardesty*, 467

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[2] In presenting this brief, NTU recognizes that states should have discretion to use their taxing authority in a manner that promotes business, attracts industry, and reduces the tax burden on residents. This Court has repeatedly emphasized, however, that there is a line between "tax systems [that] encourage the growth and development of intrastate commerce and industry" and tax systems that discriminate by giving in-state operators an unnatural advantage over their out-of-state rivals in the same industry. *See, e.g.*, *Boston Stock Exch.*, 429 U.S. at 336-337. This Court should grant certiorari in this case because the Ohio tax on satellite-only, multichannel video programming crosses this line to the detriment of taxpayers.

U.S. 638, 642–44 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 400–01 (1984).

By holding that Ohio's facially discriminatory, satellite-only tax does not violate the dormant Commerce Clause—because both cable and satellite providers engage in interstate commerce—the Supreme Court of Ohio ignored this Court's repeated admonition that prohibited discrimination occurs whenever there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *E.g.*, *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). This rule applies to all kinds of local investment, whether or not the favored in-state business is locally owned or locally headquartered. *See C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 392 (1994) ("Discrimination against interstate commerce in favor of local business *or investment* is *per se* invalid . . . .") (emphasis added); *Lewis* v. *BT Invest. Managers, Inc.*, 447 U.S. 27, 42 (1980) (prohibited "local favoritism or protectionism" includes "discriminat[ion] among affected business entities according to the extent of their contacts with the local economy"). By focusing its analysis on the fact that many of the cable companies that benefit from the tax are headquartered outside Ohio, Pet. App. 17a, the Supreme Court of Ohio failed to consider the manner in which the discriminatory tax benefits not just cable companies headquartered out of state, but also local Ohio interests—including the thousands of Ohio residents employed to lay cable and maintain cable networks and the Ohio local governments that receive cable franchise fees—all at the expense of television consumers. *See* Pet. App. 22a–23a (Brown, C.J., dissenting)

("States have an economic interest not only in 'mom and pop' businesses, but in all forms of local investment. So it ignores economic reality to focus narrowly on the location of ownership or headquarters. . . . This is common sense, and numerous cases confirm it.") (citing *C & A Carbone, Inc.*, 511 U.S. at 392; *Lewis*, 447 U.S. at 42; *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 344 (1996)).

If allowed to stand, the Supreme Court of Ohio's ruling will gut decades of constitutional jurisprudence and render the dormant Commerce Clause meaningless in today's interconnected economy. One need only apply the Supreme Court of Ohio's approach to foundational cases such as *Boston Stock Exchange* and *Armco* to understand how far afield the court strayed in holding that a dormant Commerce Clause violation can occur only when the state tax burdens purely out-of-state businesses and benefits solely companies that are local on an organizational level.

Boston Stock Exchange involved the State of New York's scheme for taxing the sale of stocks. To encourage sellers to run their trades through New York stock exchanges, the State amended its tax law to provide that nonresidents of New York who opted to sell through the New York exchanges would pay half the tax they otherwise would have paid if they traded stock with some nexus to New York on another state's exchange. 429 U.S. at 324. This Court struck the tax scheme on the ground that it "discriminates against interstate commerce." *Id.* at 329. The Court explained that, when the seller did not choose a stock exchange for a transaction "solely on

the basis of nontax criteria," the "obvious" and unlawful effect was "to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. It was illegal for New York to "us[e] its power to tax an in-state operation as a means of requiring [other] business operations to be performed in the home State." *Id.* at 336 (internal quotation marks omitted).

If the Supreme Court of Ohio's constrained approach to the dormant Commerce Clause were the law, *Boston Stock Exchange* would be flipped on its head. The New York Stock Exchange—like the cable companies involved in this case—is not a purely local enterprise with no interstate footprint. Indeed, the very tax at issue in *Boston Stock Exchange* benefited New York exchanges by encouraging *more interstate transactions*—that is, it gave out-of-state residents a strong tax-based incentive to conduct any stock trade with any link to New York through a New York exchange. *See id.* at 331. Under the Supreme Court of Ohio's reasoning, the higher tax on transactions not conducted through a New York exchange would not violate the dormant Commerce Clause because the beneficiary of the tax is not purely local. It would not matter that sellers were placed in the unfair position of choosing to trade through New York exchanges to reduce their tax liability, even if it were less efficient than trading through another state's exchange. Nor would it matter that the New York Stock Exchange benefited because the law funneled business into the local economy and diverted business from other states, even though the Supreme Court viewed this as a matter that "lies at the heart of a free trade policy." *Id.* at 337. Under the Su-

preme Court of Ohio's approach, tax neutrality and free trade policy are supplanted by the question of whether the beneficiary and victim of the tax scheme are both "interstate companies selling an interstate product to an interstate market." Pet. App. 17a. If they are, then, under the Supreme Court of Ohio's rationale, the Clause is inapplicable.

The Supreme Court of Ohio's approach is also impossible to square with this Court's decision in *Armco*, which invalidated a West Virginia tax that burdened companies that conducted business both inside and outside the state. At issue in *Armco* was a gross receipts tax on "companies selling tangible property at wholesale in West Virginia." 467 U.S. at 643. Sales of property manufactured in West Virginia were exempt from the tax. *Id.* Thus, for example, if a company based in West Virginia sold its products at wholesale in West Virginia, the sale might or might not be taxed, depending on whether the products were manufactured in West Virginia or out of state. This Court held that the scheme unlawfully discriminated against interstate commerce. *Id.* at 645–46.

The discriminatory tax struck down in *Armco* would have been upheld under the Supreme Court of Ohio's analysis. In *Armco*, the wholesalers who were the victims of the discriminatory tax were not outsiders to West Virginia; to the contrary, it was their significant presence in the state that subjected them to the tax on wholesale transactions and led them to sue to challenge that tax. *Id.* at 639, 641. Under the Supreme Court of Ohio's rationale, the plaintiffs' in-state presence would have precluded them from chal-

lenging the discriminatory tax, notwithstanding the fact that the tax interfered with free trade by favoring products manufactured and sold in West Virginia and penalizing those sold in West Virginia but manufactured elsewhere.

By focusing on where the satellite and cable providers are headquartered rather than examining the practical effect of the satellite-only tax on free trade and competition in the Ohio marketplace, the Supreme Court of Ohio disregarded the fundamental concerns underlying decades of dormant Commerce Clause jurisprudence. Ohio's satellite-only tax unabashedly places its thumb on the scale of consumers' decisions about who will be their television provider. If they purchase satellite service, consumers pay a tax that does not appear on a cable bill. Their decision is not based solely on nontax criteria, and the tax-based incentive to choose cable works to the direct advantage of Ohio's local economy, in contravention of the dormant Commerce Clause. This is precisely the kind of unfair choice that led this Court to strike down New York's tax as unconstitutional in *Boston Stock Exchange*. 429 U.S. at 331 (a law that "forecloses tax-neutral decisions" places a discriminatory burden on interstate commerce); *see also West Lynn Creamery* v. *Healy*, 512 U.S. 186, 194–95 (1994) (striking down Massachusetts tax-and-subsidy scheme which artificially inflated the price of milk produced out of state relative to domestically produced milk). And it is precisely the kind of tax that this Court should exercise its discretion to review and invalidate here.

The Supreme Court of Ohio's decision below is particularly troubling in light of the interconnected nature of our modern economy. Today, it is extremely rare to find a business that is purely local or purely foreign. With the advent of the internet and other advances in technology, nearly every business, large or small, has some interstate footprint, regardless of which state happens to host its headquarters. If a court insists that the beneficiary of a state tax must be a commercial hermit and the victim a complete outsider for the protections of the dormant Commerce Clause to apply, the Clause will become a relic of the past.

This Court has made clear that the dormant Commerce Clause should not be applied in such a constrained manner. The "diversion of interstate commerce and diminution of free competition . . . are wholly inconsistent with the free trade purpose of the Commerce Clause." *Boston Stock Exch.*, 429 U.S. at 336. When a state imposes a tax that burdens the performance of a specified activity outside the state and benefits the performance of that activity within the state, thereby advantaging local interests, the tax unfairly discriminates against interstate commerce, regardless of whether the direct beneficiary is a local company and the victim is from out of state. *See, e.g.*, *id.* at 331; *Armco Inc.*, 467 U.S. at 642; *Westinghouse Elec. Corp.*, 466 U.S. at 400–01. Ohio's satellite-only tax has this effect and should be invalidated, lest the Supreme Court of Ohio's decision stand as the beginning of the end of meaningful dormant Commerce Clause protections for businesses and consumers of all types.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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