No. 10-1322

In the Supreme Court of the United States

DIRECTV, INC. AND ECHOSTAR SATELLITE, L.L.C.,

Petitioners,

v.

JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a State, consistent with the Commerce Clause, tax satellite television services differently from cable broadcast services, given their different methods of operation and the different regulatory structure that applies to each?

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INTRODUCTION

This case does not warrant review because it involves the application of settled law to a particular set of facts. The Court has already held that States may tax different types of businesses, or those that use different "methods of operation" to provide similar products, without offending the "dormant" or "negative" aspect of the Commerce Clause. *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey*, 490 U.S. 66, 78 (1989); *Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 127 (1978).

Here, Ohio has done precisely that, as it taxes the satellite and cable industries differently. It does so partly by State legislative choice, but that choice was heavily shaped by a federally mandated framework. In the 1996 Telecommunications Act, Congress barred local governments from imposing local taxes or fees, including franchise fees, on satellite broadcasting—local governments, however, could continue imposing such fees on cable. But Congress expressly allowed States to charge *statewide* taxes on satellite.

Ohio, like several other States, chose to address this federally blessed local-fee disparity, and other differences between the two industries, by counterbalancing it at the State level. Ohio chose to allow its local governments to continue charging fees to cable companies, while imposing its general sales tax—which neither industry previously paid—on satellite, but not cable.

Petitioners DIRECTV and EchoStar (Dish TV) (together, "DIRECTV"), America's largest satellite broadcasting sellers, claim that Ohio's system violates the dormant Commerce Clause, and they claim that the Ohio Supreme Court decision rejecting their claim is part of a lower-court split needing this Court's attention. DIRECTV claims that Ohio unlawfully favors the cable industry because cable services, by their nature, involve more infrastructure in the State—namely, cables underground and aboveground, along with regional stations to convert signals—while satellite involves less terrestrial infrastructure. Thus, says DIRECTV, the "differential" tax at the statewide level amounts to impermissible discrimination favoring a type of business that builds in-state. Further, DIRECTV says that the Ohio Supreme Court's rejection of its claim exacerbates a purported split as to the framework for analyzing dormant Commerce Clause claims that involve either "methods of operation" or interstate entities on each side of the debate.

DIRECTV is wrong on all counts, as this case involves nothing more than the application of settled law to specific facts, and no splits exist.

First, the decision below is a routine application of this Court's precedents. The Ohio court followed this Court's "method of operation" cases, *Exxon* and *Amerada Hess,* holding here that "[d]ifferential tax treatment of two categories of companies resulting *solely* from differences between the nature of their businesses, not from the location of their activities, does not violate the Commerce Clause." *DIRECTV v. Levin,* 128 Ohio St. 3d 68 (2010), Pet. App. 20a (emphasis added). The court explained that the tax differences here were based solely on the technological differences between cable and satellite services, and not on location: A satellite company could move all of its operations to Ohio and would still have to pay the tax. *Id.* at 16a.

That latter point not only means that this case fits comfortably under *Exxon* and *Amerada Hess,* but also that the case in no way implicates the Court's "incentive to relocate" cases, which have invalidated laws "that imposed greater burdens on economic activities taking place outside the State than were placed on *similar activities* within the State." *Westinghouse Elec. Corp. v. Tully,* 466 U.S. 388, 404 (1984) (emphasis added) (citing *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977)). Nor does this case involve the use of a "methods" distinction as cover for unlawful, intentional discrimination. See *Bacchus Imports v. Dias,* 468 US 263 (1984). And critically, as the Ohio court noted, DIRECTV "failed to preserve [its] intentional-discrimination claim," so any issues regarding discriminatory purpose, rather than effect, are not properly raised here.

Further, in correctly applying this Court's precedents, the Ohio court did not adopt a "trump card" approach as DIRECTV claims. The court considered and rejected several possible theories of discrimination, without stopping its analysis prematurely, and it adopted no new rule, but merely applied settled rules and found that DIRECTV's claim fell short.

Second, far from breaking rank with other courts, the Ohio court joined a chorus of courts uniformly rejecting DIRECTV's similar claims regarding satellite and cable broadcasting. See *Directv, Inc. v. Treesh*, 487 F.3d 471 (6th Cir. 2007);

DIRECTV, Inc. v. North Carolina, 632 S.E.2d 543 (N.C. Ct. App. 2006).

Third, DIRECTV's "splits" do not exist. DIRECTV creates taxonomies of three purported "camps" regarding the "methods of operation" factor, and two "camps" regarding the "interstate businesses" factor. It says some courts find such factors conclusive, some find them irrelevant, and some find them relevant as part of a broader inquiry. But examined correctly, all courts take the latter path, measuring the factors in context. Those that seem to accord greater or lesser weight to these factors did so only because the *facts* of *those cases* raised or lowered the importance of those factors.

Finally, this case suffers numerous vehicle flaws, making it an improper candidate for addressing any dormant Commerce Clause issues. For instance, DIRECTV offers no theory of the case to support its claim, nor does it even ask this Court to reverse fully and invalidate Ohio's law. It asks only for another chance at meeting its burden, grumbling that the Ohio court's analysis was too cursory. That shows its quibble boils down to an exaggerated reading of what the Ohio Supreme Court said in reaching its conclusion, because the conclusion itself is unremarkable. Further, DIRECTV's claim here would fail on several independent grounds, so review would be pointless.

For these and the other reasons below, the Court should deny the Petition.

COUNTERSTATEMENT

Ohio's Tax Commissioner ("Ohio") offers these additional facts.

A. Satellite and cable broadcasting are different interstate businesses, subject to different regulatory and tax schemes.

1. Satellite and cable broadcasting use different technologies and business models.

Both satellite and cable broadcast providers deliver television programming to consumers, but each uses different technology. DIRECTV Supplement filed in Ohio Supreme Court ("Supp.") 351. Satellite companies send signals from orbiting satellites directly to a small "satellite dish" antenna mounted on the subscriber's house; the dish is connected by cable to the user's television. Supp. 2-3.

Cable companies receive signals from satellites at various stations, and they send the signals over a network of coaxial or fiber optic cable, usually underground or along utility poles. Supp. 8-9. Coaxial cables carry the signal to a user's home and television. *Id.*

These technological differences lead to different product offerings. For example, most cable companies offer "bundled" Internet access and phone services, while satellite typically does not, instead offering discounts on other services by partnering with phone and Internet providers. Ohio Second Supplement ("O.Supp.") 49. Cable also offers more interactive services and much greater capacity for "video on demand." O.Supp. 77-78.

Satellite and cable companies use different business models, resulting in different levels of facilities, employees, or contractors in the same state as subscribers or in other states.

DIRECTV and EchoStar, owner of DishTV, are the nation's two largest satellite companies, and are larger than all cable companies but one. O.Supp. 113. In 2006, DIRECTV had about 4,000 employees nationwide, and 15,000 contracted customer service representatives. O.Supp. 67. DIRECTV also uses over ten thousand non-employee contractors for installation and repairs, having them wear DIRECTV uniforms and drive DIRECTV-branded vans throughout Ohio and the nation. O.Supp. 120. EchoStar's Dish TV operation is similar but smaller. Both operate Ohio stations for receiving and sending signals. O.Supp. 1-2.

Cable companies also have employees, facilities, equipment, and cable lines throughout Ohio and the nation, but with different ratios of employees to contractors, and different levels of equipment locally. Supp. 13. The large cable companies that serve Ohioans are headquartered outside Ohio and serve customers nationwide. Most of their operations are organized interstate, through national operating divisions, not state-specific or locally-organized entities, and regional divisions cross state lines. Supp. 345.

2. Satellite and cable companies are subject to different regulatory and tax regimes at the federal, state, and local levels.

a. Federal law directly imposes different obligations on each.

Federal law imposes distinct regulatory regimes on satellite and cable companies. See, e.g., 47 U.S.C. §301, et seq. (satellite), and 47 U.S.C. §521, et seq. (cable).

Federal law requires the cable industry to perform more public services. For example, cable companies must carry, and include in basic service, all local television signals and all public, educational, or governmental channels requesting carriage. 47 U.S.C. §§534(b), 535(b), 543(b)(7); 47 C.F.R. 76.56. They must provide the information provided by the emergency broadcasting system. 47 U.S.C. §544(g). They must also meet customer service obligations and equipment and rate regulations. O.Supp. 87-89.

Satellite companies face fewer federal obligations. They need not carry local broadcast channels at all. 47 U.S.C. §338(a); 47 C.F.R. §76.66. They have fewer obligations regarding noncommercial programming, see 47 U.S.C. §335(b)(1), and no service or rate regulations.

b. Federal law governs state and local taxes and fees on satellite and cable.

For decades, local governments typically allowed cable companies to operate only after binding them to franchise agreements, which imposed fees and various obligations. Through the Telecommunications Act of 1996, Congress endorsed the existing local-franchise system, mandating that "a cable operator may not provide cable service without a franchise" from a local franchising authority ("LFA"). 47 U.S.C. §541(b)(1).

Congress built on the local-franchise system by regulating agreements' terms, such as their duration. 47 U.S.C. §541(a)(2). Congress also authorized LFAs to add other public service obligations to agreements, such as free or reduced-cost service to schools, libraries, and government buildings, and it allowed LFAs to add to the federal standards for noncommercial programming, customer service, and more. O.Supp. 80-81; Supp. 347-48.

Congress also expressly allowed franchise fees or local taxes, while capping such fees or taxes at 5% of a cable company's gross revenues derived from cable TV operations. 47 U.S.C. §542(a)-(b).

By contrast, satellite companies have no franchise requirements, so localities cannot use such agreements as a basis for other service requirements.

And in 1996, Congress granted the satellite industry special status by barring local governments from imposing any taxes or fees upon them. Pub. L. 104-104, Title VI, §602(a), 110 Stat. 144 (1996) (contained as note to 47 U.S.C.A. §152). However, Congress expressly authorized States to charge statewide taxes on satellite companies. 47 U.S.C. §602(c).

B. In 2003, Ohio imposed its general sales tax on satellite broadcasting, but not cable, while leaving in place local franchise fees on the cable industry.

Before 2003, Ohio did not apply its sales tax to either the satellite or cable industry. Cable companies paid franchise fees to LFAs. For example, most of Time Warner Cable Cincinnati Division's and Northeast Ohio Division's franchise agreements charged a 5% fee. Supp. 347, 45.

Thus, when Ohio's legislature began considering a sales tax on both satellite and cable, the local fee disparity was debated. Both sides appealed to parity. The satellite industry said that parity required equal statewide taxation; the effect of the local-fee disparity was irrelevant. Cable companies countered that local fees should be offset at the state level, whether through a state ban on local fees, or by taxing satellite and cable differently at the state level. Supp. 85-86.

Ohio's General Assembly eventually decided to impose the sales tax—then 6%, now 5.5%—upon satellite broadcasting only. An earlier bill had proposed to tax both, but the cable provision was removed. Supp. 68, 83. Along the way, as DIRECTV notes, some cable industry proponents also appealed to cable's purportedly superior contributions to Ohio's economy. Pet. at 6.

Ohio also adopted the federal distinction between the two industries, using the definition of "satellite broadcasting service" from the federal definition of "direct-to-home satellite service." Compare Ohio Rev. Code 5739.01(XX) and Pub. L.

104-104, Title VI, §602(b)(1), 110 Stat. 144 (1996) (set forth as a note to 47 U.S.C.A. §152) (emphasis added.) See also 47 U.S.C. §303(v) (enacted in Pub. L. 104-104, Title II, §205, 110 Stat. 114 (1996)).

C. DIRECTV sued Ohio over the sales tax, and the Ohio Supreme Court rejected its claim.

DIRECTV sued in June 2003, in state court. It claimed (along with claims no longer at issue) that the tax violates "dormant" Commerce Clause doctrine. DIRECTV initially alleged that the tax discriminates in both purpose and effect "by providing a direct commercial advantage to locally franchised cable television systems that is not provided to satellite television companies..." which "provide service from out-of-state facilities" and by providing "a significant cost advantage to local businesses not available to businesses providing service through out-of-state facilities." Supp. 36-37.

The trial court granted summary judgment to Ohio on the other counts, but ruled for DIRECTV on the dormant Commerce Clause claim. It found that cable companies had a stronger relative local presence than satellite companies, and therefore, "the tax provisions at issue benefit in-state economic interests and burden out-of-state economic interests." Pet. App. at 248a.

The appeals court reversed, Pet. App. at 35a, and the Ohio Supreme Court affirmed, finding no constitutional infirmity, *id.* at 1a. The court explained that the cable and satellite industries used different methods of operation, so they were not equivalent businesses being treated differently based on location. It concluded that "[d]ifferential tax treatment of two categories of companies resulting solely from differences between the nature of their businesses, not from the location of their activities, does not violate the Commerce Clause." Pet. App. at 20a.

Ohio's court also noted that the tax "does not protect local industries or treat in-state companies differently from out-of-state companies, nor does it provide a tax incentive for companies to move operations or direct business to Ohio." *Id.* at 18a. To demonstrate that the law did not incentivize any company to shift its existing activity into Ohio, the court noted that a satellite company would not gain by relocating to Ohio, as it would still owe the same tax. *Id.* at 16a.

The court also refused to address a state-law issue rejecting the admissibility of lobbyist statements purportedly showing a discriminatory intent behind the legislation. The court noted that "the satellite companies failed to preserve their intentional-discrimination claim for our review" and did not raise a purpose-based claim in the Ohio Supreme Court. *Id.* at 19a. Without a purpose-based claim, said the court, evidence for such a claim was irrelevant. *Id.*

DIRECTV now seeks review here.

REASONS TO DENY THE WRIT

Under the so-called "negative" or "dormant" aspect of the Commerce Clause, Congress's power to "[t]o regulate Commerce . . . among the several States" also operates as "an implicit restraint on state authority." *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 338 (2007). It restrains "economic protectionism" by barring "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Kentucky Dept. of Revenue v. Davis*, 553 U.S. 328, 337-338 (2008).

The Court has identified distinct forms of impermissible discrimination against interstate commerce: a regulation or tax is invalid "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess,* 490 U.S. at 75. Here, DIRECTV says its claim turns solely on alleged "effects." It abandoned earlier claims of facial discrimination and intentional discrimination.

DIRECTV presents no sound reason for review. First, the decision below correctly applied settled doctrine. Second, that result is confirmed by consensus, as other courts have uniformly rejected DIRECTV's similar claims. Third, the abstract "splits" that DIRECTV alleges do not exist. Finally, this case is a poor vehicle for addressing dormant Commerce Clause issues because DIRECTV's case is severely flawed on multiple grounds.

A. The decision below is an unremarkable application of this Court's precedents.

The Ohio Supreme Court's decision involved an unremarkable application of settled law and does not warrant this Court's review. As the Ohio court explained, this case is governed primarily by this Court's *Exxon* and *Amerada Hess* precedents, which rejected discrimination claims involving differently situated businesses. DIRECTV suggests that the court showed "confusion" about how to apply the different "methods of operation" rule, Pet. at 13, but that is not so. The relevant lines of this Court's jurisprudence are straightforward, and the Ohio Supreme Court correctly applied *Exxon/Amerada Hess,* and it correctly explained why other cases do not apply.

1. The Court has squarely held that the Commerce Clause is not implicated when differential treatment results solely from businesses' different methods of operation, and not from location alone.

The Court has held that a State does not violate dormant Commerce Clause principles when it applies differential tax treatment to "two categories of companies resulting solely from differences between the nature of their businesses, [and] not from the location of their activities." *Amerada Hess,* 490 U.S. at 78. See also *Exxon,* 437 U.S. at 127; *Kraft Gen. Foods v. Iowa Dept. of Revenue & Fin.,* 505 U.S. 71, 78 (1992).

In *Exxon,* the Court upheld a Maryland law that barred producers and refiners of petroleum products from owning or operating retail gasoline stations. The challengers claimed that it discriminated in favor of local, independent retailers, and against the large out-of-state businesses that both produced oil and ran retail stations. Rejecting that claim, the Court explained that the Commerce Clause "protects the interstate market, not particular interstate firms" or "the particular structure or methods of operation in a retail market." *Id.* The Court recognized that the law, by dictating which structures or methods would be used, meant that "[s]ome refiners may choose to withdraw entirely" from Maryland, with the business picked up by those who used the State's favored structure. *Id.* But that did not render the law invalid.

In *Amerada Hess,* the Court upheld a New Jersey tax formula that purportedly "discriminate[d] against oil producers who market their oil in favor of independent retailers who do not produce oil." 490 U.S. at 78. Discrimination allegedly occurred because New Jersey taxed a business's "unitary activity," thus reaching out-of-state oil-producing activity by integrated producer-retailers, while local non-producing retailers did not incur such tax because they did not engage in that activity. The Court, citing *Exxon,* explained that the different treatment arose "solely from differences between the nature of their businesses," i.e., that they operated as integrated oil producer-retailers rather than solely as independent retailers, and "not from the location of their activities." *Id.* The Court noted that both types of businesses "operate both in New Jersey and outside the State." *Id.*

This "different methods" rule is nothing more than one application of the broader principle that "any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). The *Tracy* Court noted that "this central assumption has more often than not itself remained dormant" in the Court's dormant Commerce Clause cases. *Id.* Nonetheless, "whether the companies are indeed similarly situated" is always a critical inquiry for constitutional purposes. *Id.*

Tracy teaches that a failure-of-similarity can arise from various types of differences. In *Tracy,* two types of natural-gas sellers (local utilities and interstate marketers) sold an identical commodity, but they sold it to different consumer markets, and they also were different types of entities operating under different regulatory frameworks. Thus, the Court rejected the challenger's claim that "differences in the *nature of the businesses* . . . . cannot justify Ohio's differential treatment of these in-state and out-of-state entities." *Id.* at 287-88 (emphasis added). In *Exxon* and *Amerada Hess,* the different types of gas stations actually sold the same product to the same customers, using the same technology—gas at gas stations—but they had different organizational structure.

In all cases, businesses that differ in any relevant way are not similar, and thus may be treated differently based on those non-geographic differences.

2. The Court's incentive-to-relocate cases apply only when the same activity is treated differently based on location.

While the Court has found no discrimination when differential treatment was based on business differences rather than location, it has invalidated laws that offered more favorable treatment to in-state business, based solely on location—that is, when the same activity was at issue. See, e.g., *Armco Inc. v. Hardesty,* 467 U.S. 638 (1984); *Westinghouse,* 466 U.S. at 397, 404; *Boston Stock Exchange,* 429 U.S. at 328-29; *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 72 (1963).

The Court in *Westinghouse* explained that such laws improperly "imposed greater burdens on economic activities taking place outside the State than were placed on *similar activities* within the State." *Westinghouse,* 466 U.S. at 404 (emphasis added) (citing *Boston Stock Exchange,* 429 U.S. 318). Such "disparate treatment would be an incentive to locate within" the state at issue. *Halliburton Oil,* 373 U.S. at 72.

In all such cases, the challenged statute would have rewarded out-of-state companies if they merely shifted their activities into the State with the discriminatory law, whether by relocating manufacturing into West Virginia, *Armco,* 467 U.S. at 642, rerouting exports through New York ports, *Westinghouse,* 466 U.S. at 397, or conducting securities transactions in New York, *Boston Stock Exchange*, 429 U.S. at 328-329.

Therefore, this line of cases creates no tension with the *Exxon/Amerada Hess* "methods of operation" rule, but instead applies the same principle to the other side of the coin: No discrimination occurs when differential treatment is based on business differences, rather than geography, but discrimination might occur when the *same* activity is treated differently based solely on geography. *Amerada Hess* confirmed this distinction, explaining that the law there created no incentive for the challengers to relocate their existing activity into New Jersey. 490 U.S. at 77-78.

3. *Bacchus* rejected intentional discrimination that favored a State's unique natural resources.

In another distinct category, the Court has at least once invalidated a law that involves differential treatment of different products, but only where (1) the distinction was linked to a factor *inherently tied* to the protectionist state, namely, natural resources unique to the state, and (2) the law had no purpose other than to favor the local product or industry. See *Bacchus,* 468 U.S. at 269-70. In *Bacchus,* the Court invalidated Hawaii tax exemptions that favored pineapple wine and okoleaho, a liquor made from a shrub native only to Hawaii. That evidenced a discriminatory *purpose, id.* at 271, and indeed, Hawaii did not deny such a purpose, but instead argued (unsuccessfully) that such a purpose should be allowed when used to help a struggling domestic industry, *id.* at 273. The Court not only found a discriminatory purpose, but also concluded that the law's express reference to Hawaii-based products meant that the law "seem[ed] clearly to discriminate on its face against interstate commerce." *Id.* at 268.

Bacchus also creates no tension with the *Exxon/Amerada Hess* "methods of operation" rule. The Court in *Amerada Hess* distinguished *Bacchus* as an intentional discrimination case. *Amerada Hess,* 490 U.S. at 75-76. And *Amerada Hess's* own statement of the "methods" rule contrasts with any difference based on an inherent geographic tie, as *Amerada Hess* allows only differential treatment that "result[s] *solely* from differences between the nature of their businesses, [and] not from the location of their activities." *Id.* at 78.

Further, the Court in *Amerada Hess* confirmed *Bacchus's* meaning in rejecting an alternative argument that is strikingly similar to, if not identical to, DIRECTV's current claim. In *Amerada Hess,* the United States as amicus suggested that discrimination resulted from an incentive for businesses to shift operations from the *type of activity* that occurred out-of-state to a *different type of activity* that occurred in New Jersey. *Id.* at 78 n10. The Court rejected that claim, saying that such an alleged incentive was not invalid "in the absence of a discriminatory intent or a statute directed specifically at economic activity that occurs only in a particular location (as in *Bacchus Imports*)." *Id.*

Thus, the Court has never invalidated a law on discriminatory-*effect* grounds, absent *intentional* discrimination, based on a claim that a location-neutral distinction between business methods had a differential impact on businesses that had greater or lesser in-state presences. The Court has, in addition to invalidating the thinly-veiled intentional discrimination in *Bacchus,* also invalidated laws that *facially* discriminated against out-of-state activity.

See, e.g., *Granholm v. Heald,* 544 U.S. 460 (2005) (invalidating facial discrimination between in-state and out-of-state wine sellers); *Lewis v. BT Inv. Managers, Inc.,* 477 U.S. 27 (invalidating restriction on banks that had "principal place of business" outside Florida). But such facial discrimination is an even stronger version of discriminatory intent, and is distinct from discriminatory effect.

4. The Ohio Supreme Court faithfully applied *Amerada Hess* and *Exxon* and distinguished the inapplicable cases, as part of a comprehensive analysis of the law's effects.

The court below applied this Court's precedents in a routine matter, and nothing bespeaks "confusion" below or a need for review. The Ohio court did not venture into any waters left uncharted by this Court, nor did it contradict this Court's guidance in its framework or result.

First, the Ohio Supreme Court correctly noted all of the relevant doctrine and precedents, beginning with this Court's instruction to "eschew[] formalism for a sensitive, case-by-case analysis of purposes and effects." Pet. App. at 9a (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

Second, the Ohio court properly concluded that this case fit under the *Exxon/Amerada Hess* rule. The court below explained in detail the business differences between satellite and cable broadcasting services, and it contrasted how the satellite tax *does* result from a "technological mode of distribution," Pet. App. at 16a, but does "*not* depend on the geographic location of the programming provider," *id.* (emphasis added). In particular, the Ohio Supreme Court rightly observed that even if a satellite company relocated its operations to Ohio, it would still have to pay the disputed tax. *Id.* That showed that the differential treatment here arises "solely from differences in the nature of [the relevant] businesses, and not from the location of their activities." *Id.* at 21a; *Amerada Hess,* 490 U.S. at 78.

Third, although the court found that the *Exxon/Amerada Hess* rule applied, it continued its analysis to consider and distinguish the other arguments and precedents that DIRECTV raised. See Pet. App. at 17a-18a (citing *Granholm, Bacchus, Armco, Westinghouse,* and *Boston Stock Exchange*). After distinguishing each case individually, the court summarized that in "those cases, the respective states acted to protect local interests at the expense of out-of-state competitors." *Id.* at 18a. It contrasted the Ohio tax with the types of laws this Court has invalidated: Ohio's tax "does not protect local industries or treat in-state companies differently from out-of-state companies," as did the laws in *Bacchus* and *Granholm,* "nor does it provide a tax incentive for companies to move operations or direct business to Ohio," as did the laws in *Armco, Westinghouse,* and *Boston Stock Exchange. Id.*

The Ohio Supreme Court's distinction of those other cases was correct, as was its application of *Exxon/Amerada Hess.* Indeed, DIRECTV offers no substantive critique on those points. That is, DIRECTV nowhere offers a theory for placing its claims under *Bacchus* or *Granholm*—nor could it, as those cases involved intentional discrimination (veiled or facial), and DIRECTV does not challenge the Ohio court's conclusion that its intentional-discrimination claim was abandoned below. See Pet. App. at 18a-20a. DIRECTV also does not explain how its case could fit under the *Armco* line of incentive-to-relocate cases—nor could it, for the reasons above.

Instead of asserting that the court below reached the wrong result, or applied the wrong body of law, DIRECTV quibbles that the court's analysis was not deep enough, or that it showed "confusion" about how to apply *Exxon/Amerada Hess.* As explained below, DIRECTV is wrong, and its claim is no cause for review.

5. The Ohio Supreme Court did not adopt a "trump card" rule or commit any of the errors that DIRECTV claims.

DIRECTV fails to offer an affirmative theory of the case under which it wins on the merits, but instead argues that the Ohio court's analysis was insufficient. Specifically, DIRECTV accuses the Ohio Supreme Court of using the "methods of operation" distinction as a "trump card" that precluded any further analysis. Pet. at 13-14. Curiously, it separately accuses the court of relying *solely* on a supposed rule that ignores all other theories of discrimination "simply because" the businesses are both interstate. *Id.* at 27.

For starters, those claims are internally inconsistent, as the Ohio court could not have used *two* independent "trump cards," with each precluding any other analysis, since either show-stopping point would have precluded reaching the other. But the court *did* reach both points, and more important, it also conducted a comprehensive analysis *beyond* those points, belying DIRECTV's "trump card" motif and the petition it has gilded around it.

The Ohio court did not invoke either point as an end to its analysis. It did not label either point as conclusive, and as detailed above, the court went on to consider and reject all of DIRECTV's claims. The court relied on the methods-of-operation distinction, of course. But it also explained how each other theory of discrimination fell short.

For example, in noting that both types of businesses here are interstate, the court was showing that Ohio did not commit the basic form of discrimination embodied by intentionally favoring local businesses, as in *Granholm* and *Bacchus*. Pet. App. at 17a. That did not preclude consideration of a separate *Armco*-style incentive-to-relocate claim, as such claims can surely exist where all parties are interstate; the point merely negated a *Granholm* or *Bacchus* claim. The court then rejected the *Armco* line on its own terms, and so on.

At the end of the day, DIRECTV's real complaint is that the court *rejected* its arguments. But unable to show how that rejection was wrong under this Court's precedents—and having abandoned its claims of facial and intentional discrimination even before the case reached the Ohio Supreme Court—it seeks to recast the case as an academic one about the methodology for addressing dormant Commerce Clause challenges. Indeed, a most telling point about DIRECTV's case (and further detailed in Part D below) is that DIRECTV does not even challenge the ultimate judgment below. That is, it does not ask this Court to find in its favor, but only to tell the Ohio court to give it another shot. But the Ohio court already did everything it was supposed to do; it weighed DIRECTV's claims and rightly found them wanting.

In sum, the Ohio Supreme Court followed this Court's precedents; it blazed no new trails and said nothing to warrant review.

B. Courts have uniformly rejected DIRECTV's similar claims alleging discrimination between satellite and cable broadcasting.

While DIRECTV claims a split on abstract issues about the framework for dormant Commerce Clause cases (discussed in Part C below), it downplays the more important point: that courts have uniformly rejected their specific claims about discrimination between the satellite and cable industries. Pet. App. at 5a (citing *Directv v. Treesh,* 487 F.3d 471 (6th Cir. 2007) and *DIRECTV v. North Carolina,* 632 S.E.2d 543 (N.C. Ct. App. 2006)). The Ohio Supreme Court simply joined that chorus.

Not only do these cases further demonstrate that no review is needed here, but DIRECTV's failure to address them on the merits—while invoking them for more abstract reasons—is telling.

1. The Sixth Circuit's decision directly supports the decision below.

In the Sixth Circuit, DIRECTV attacked Kentucky's system, raising essentially the same arguments as here. Kentucky, like Ohio, sought to address the disparity regarding the cable companies' obligation to pay local franchise fees. *Treesh,* 487 F.3d at 474-75. Instead of imposing an offsetting statewide tax on satellite services only, as Ohio did, Kentucky took a different, multi-pronged approach, but with a similar net effect. Kentucky (1) imposed the same statewide sales tax on both, (2) barred local franchise fees, and (3) in a belt-and-suspenders approach, complemented its ban on local fees by allowing cable companies to take a credit, against their statewide tax, for any fees nonetheless paid to local governments. *Id.*

At root, DIRECTV's attack on the Kentucky scheme was the same as its attack here. DIRECTV argued that local franchise fees were not taxes, but were merely a cost of doing business for cable companies. *Id.* at 478-79. Thus, by barring or offsetting those fees at the State level, Kentucky allegedly tilted the playing field unfairly in favor of cable. Even DIRECTV's amicus here describes the Ohio and Kentucky laws as "similar." National Taxpayers Union Amicus at 2.

The Sixth Circuit rejected DIRECTV's claim, relying on both the legitimacy of the State's interest in offsetting local fees *and* the other differences between the two industries, such as their "means of operation" and their different federal regulatory obligations. *Id.* at 481. ("[B]ecause satellite and cable television differ significantly in their means of operation, Kentucky may have wished to remove any barriers it had put in place to the continued viability of cable for reasons entirely unrelated to geography—for example, that cable providers often provide internet access as well, that cable providers are more likely to provide public access channels, etc.") In short, the court noted multiple differences that apply equally in Ohio. The Sixth Circuit further explained that those legitimate interests justified the law, even if "*a* purpose of the [Kentucky law] might have been to aid the cable industry rather than the satellite industry because the former has a larger in-state presence than the latter." *Id.*; see Pet. App. at 13a.

The Ohio Supreme Court not only adopted the Sixth Circuit's reasoning, but it also cited the underlying federal district court opinion, which explained that "[t]he different effects of Kentucky's new tax provisions on Satellite Companies and Cable Companies are owed not to the geographic location of the companies, but to their different delivery mechanisms.'" Pet. App. at 13a (quoting *DIRECTV, Inc. v. Treesh*, 469 F. Supp. 2d 425, 437-38 (E. D. Ky. 2006)).

Against all this, DIRECTV says only that Kentucky had "a very different statutory scheme" from Ohio's, Pet. App. at 15a, but that superficial assertion of "difference" does not overcome the core similarities.

2. The North Carolina decision and others agree.

Likewise, the North Carolina Court of Appeals rejected DIRECTV's similar claims against North Carolina's law, which (at the relevant time), like Ohio's, taxed satellite but not cable services. *DIRECTV v. North Carolina,* 632 S.E.2d 543 (N.C. Ct. App. 2006). That court also reasoned that satellite companies were subject to North Carolina's tax only because of "how companies deliver television programming services to its subscribers, and not whether the delivery of the programming services occurs inside or outside the state of North Carolina." *Id.* at 549.

Because the North Carolina case involved a satellite-only tax, it does not even raise the superficial distinction that DIRECTV offers regarding the Sixth Circuit decision. See Pet. at 15. Yet DIRECTV fails entirely to acknowledge this decision on its merits, while nonetheless claiming that it adds to a purported "split" on nebulous framework issues. *Id.*

Federal courts also rejected DIRECTV's additional attacks on the North Carolina law. See Pet. App. at 6a (citing *DIRECTV, Inc. v. Tolson*, 498 F. Supp. 2d 784, 800 (E.D.N.C. 2007), and 513 F.3d 119 (4th Cir. 2008). The federal district court dismissed DIRECTV's claim on jurisdictional grounds. 498 F.Supp.2d at 795, 800. In an equal and alternative holding, the court held that "[e]ven if" the "jurisdictional barriers" were overcome, "ultimately, the court would side with its brethren that have already ruled against plaintiffs" on the merits. *Id.* at 800. The Fourth Circuit affirmed on comity grounds, holding that the local fees were a tax, thus rejecting the premise of DIRECTV's discrimination claim too. 513 F.3d at 126.

In sum, the decision below joined a unanimous consensus of decisions rejecting DIRECTV's precise claims, confirming that nothing here warrants review.

C. The courts are not split over the abstract issues that DIRECTV imagines.

Given the consensus of courts rejecting DIRECTV's actual claims, it is not surprising that it seeks refuge in two abstractions it calls "splits." But no splits exist.

1. Lower courts are not split regarding the role of different "methods of operation" in dormant Commerce Clause analysis.

DIRECTV claims that the lower courts are sharply split into three camps regarding the proper role of the "different methods of operation" factor in assessing dormant Commerce Clause challenges. DIRECTV claims that the first camp wields these differences as a trump card; the second camp regards them as irrelevant; and the third camp considers the differences as part of a broader analysis. Pet. at 13-23.

DIRECTV's "camps" are their invention alone, as all courts properly consider "methods of operation" as part of a broader analysis. No camp treats operational differences as either a "trump card" or as "irrelevant."

First, and most important, all of the courts that DIRECTV places in the "trump card" camp used the "methods" factor in context. All evaluated the differences between cable and satellite companies as part of the "sensitive, case-by-case analysis" that everyone agrees is required. See Pet. at 13, 15.

The Ohio Supreme Court, as shown above, did not confine its analysis to the "method of operation" point. Rather, it distinguished the Court's other precedents and explained why DIRECTV's claims did not implicate other theories of discrimination.

The Sixth Circuit, likewise, did not wield "operational differences" as a "trump card." To the contrary, the Sixth Circuit noted that the difference in methods meant that the companies were being treated differently for a reason other than *solely* geography. 487 F.3d at 480. It cited *several* valid motives supporting Kentucky's law and concluded, "[a]fter a 'sensitive . . . analysis of [the] purposes and effects' of the" Kentucky law, that it was "unable to find that such action 'will in . . . practical operation work discrimination against interstate commerce.'" *Id.* (quoting *West Lynn Creamery*, 512 U.S. at 201).

Similarly, the North Carolina appeals court properly included "methods of operation" as a factor within a "sensitive . . . analysis." It noted the operational difference and went on to look for *any* evidence of discriminatory effect, concluding that "the record is void of any evidence that this tax has created an undue burden on interstate commerce." 632 N.E.2d at 550. The court noted the motive of equalizing for local franchise fees, *id.*, distinguished other cases and theories of discrimination, *id.* at 549-550, and stopped only when it exhausted DIRECTV's claimed forms of discrimination, as after all, "[p]laintiffs bear the initial burden of showing that a statute has a discriminatory effect on interstate commerce." *Id.* at 548 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

All three courts in the purported "trump card" camp properly cited, and performed, the "sensitive analysis" that this Court requires. DIRECTV's real complaint, it seems, is not that those courts applied the wrong tests, but that those courts reached conclusions that DIRECTV dislikes. But DIRECTV is not willing to show that the results are wrong or to back up any such assertion with a persuasive showing, so it seeks refuge in claiming a non-existent framework error.

Second, there is no "camp" treating as "irrelevant" this Court's recognition in *Exxon* and *Amerada Hess* that states may regulate different business differently. Each case in this supposed camp simply decided that the differences in state-law treatment were not due *solely* to operational differences, but were instead related to a discriminatory purpose or otherwise tied to geography rather than methods.

In the First Circuit case, the court invalidated a Massachusetts law regarding winery sizes based on a discriminatory *purpose*. See *Family Winemakers v. Jenkins,* 592 F.3d 1, 5 (1st Cir. 2010). As explained above, intentional discrimination is categorically different, and is not at issue here. Further, no court has held that size differences alone, with no difference in technological method or business structure, amount to a relevant operational difference to begin with.

In both Eleventh Circuit cases, the challenged laws exceeded permissible regulation of relevant business differences because the laws *banned* national chains. *Cachia v. Islamorada,* 542 F.3d 839, 843 (11th Cir. 2008)("complete prohibition of chain restaurants . . . amounts to more than the regulation of methods of operation"); *Island Silver & Spice, Inc. v. Islamorada,* 542 F.3d 844, 846-47 (11th

Cir. 2008)(finding law banned, and did not merely regulate, chain retailers).

The Seventh Circuit likewise rejected a method-of-operations argument where the law amounted to a complete ban on the interstate activity at issue. See *Gov't Suppliers Consolidating Servs. v. Bayh*, 975 F.2d 1267, 1270-71 (7th Cir. 1992). The court distinguished *Exxon* on that basis, noting this Court's comment in *Exxon* that out-of-state refiners would remain in the market. *Id.* at 1279. The court did not treat *Exxon* as "irrelevant," but found that a ban exceeded the permissible accounting of differences recognized in *Exxon* and *Amerada Hess.*

Nor is the Fourth Circuit part of a camp stating that methods of operation are irrelevant. See Pet. at 17-18 (citing *Waste Mgmt. Holdings v. Gilmore,* 252 F.3d 316, 335 (4th Cir. 2001). That decision did not even cite *Exxon,* as DIRECTV notes—let alone proclaim its irrelevance—nor did it refer to "methods of operation" or any similar principle. To DIRECTV, that shows that the court affirmatively found the principle "irrelevant." To Ohio, that absence means that the court did not address an issue no one raised, so the court is not part of any percolating split.

Finally, the Florida case was overruled by this Court on other grounds, so it has no force, and in any event, it did not involve a methods-of-operation issue. See Pet. at 19 (citing *Div. of Alcoholic Beverages v. McKesson Corp.,* 524 So.2d 1000, 1002 (Fla. 1988), rev'd on other grounds, 496 U.S. 18 (1990)). Instead it involved the type of inherent geographic favoritism disallowed under the distinct *Bacchus* theory. The challenged law there favored liquor made from products native to Florida, so the differences were connected to geography.

Thus, neither of DIRECTV's two "extreme" camps exists. All courts consider the methods-of-operation factor, if it is relevant.

The lack of any split is confirmed by the near-absence of cross-citation among the supposedly divergent cases, showing that the courts did not perceive themselves as grappling with each other. Yes, sometimes there may be a split with no cross-citations. But here, the silence is telling, since DIRECTV invokes *thirteen* cases as part of its purported "split" theory. All cited this Court's precedents, but none cited each other (with two insignificant exceptions, both minimal citations on settled points, see *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200, 216 (2d Cir. 2003) (citing *Ford Motor Co. v. Texas Dep't of Transp.,* 264 F.3d 493, 500 (5th Cir. 2001)); *DIRECTV v. North Carolina*, 632 S.E.2d at 549 (citing *Brown & Williamson* for the *Exxon* rule)). Thus, the courts cannot be said to have disagreed with each other at all, let alone as having reached the "fully percolated" split that DIRECTV peddles. Pet. at 6.

2. Lower courts are not split over the significance assigned to the fact that businesses on both sides of a dormant Commerce Clause challenge are both interstate.

DIRECTV's other claimed split fails for similar reasons. DIRECTV claims a split over the importance that courts assign to the fact that business on both sides of a dormant Commerce Clause challenge are interstate businesses.

But neither the Ohio Supreme Court nor the North Carolina appeals court applied any bright-line rule precluding a challenge when interstate companies are on both sides. To the contrary, both noted that the point defeated any claim premised on favoring a local-only business, *but both went on to examine alternate claims*, such as whether interstate companies faced an impermissible incentive to relocate certain economic activity. Pet. App. at 17a-18a; *DIRECTV,* 632 S.E.2d at 549-50.

That leaves the Ninth Circuit as the sole occupant on one side of the purported split, Pet. at 26-27, and it, too, used no categorical rule in *Black Star Farms v. Oliver,* 600 F.3d 1225 (9th Cir. 2010). Instead, the court expressly noted that the plaintiff simply failed to meet its evidentiary burden of showing discriminatory effects, offering speculation instead. *Id.* at 1228. Far from *splitting* with the First Circuit, as DIRECTV says, Pet. at 26-27, the Ninth Circuit contrasted the plaintiff's evidentiary showing there with the better showing the plaintiff made in the First Circuit case, 600 F.3d at 1228 (citing *Family Wineries*). This pair of cases shows no disagreement about the applicable doctrine, but only different results stemming from different evidentiary showings.

In sum, no splits exist.

D. This case is not a good vehicle for reviewing any dormant Commerce Clause issues because DIRECTV's case is severely flawed on other grounds.

Finally, for numerous reasons, this case is an unsuitable vehicle for reviewing any dormant Commerce Clause issues.

1. DIRECTV's minimal request for a remand does not allow for any significant doctrinal guidance, and in fact, the case does not even raise the Questions Presented.

For all its insistence that the Court should provide guidance here, DIRECTV's limited Petition does not even ask the Court to do much. Specifically, DIRECTV does not ask this Court to find discrimination and rule in its favor, but only to order the Ohio court to give it another chance to prove its case applying whatever DIRECTV sees as the "proper test." Both the Questions Presented and the Petition overall seem to ask only for a remand—indeed, the Questions Presented are asked in terms of whether the court "erred in concluding that no examination of effects is necessary . . . ." Pet. App. at 1. But, as shown above, the Ohio court did not conclude that no examination of effects was needed; rather, it found that DIRECTV failed to *show* discriminatory effects. So this case does not even raise the Questions Presented.

Moreover, even if this Court reviewed the case and remanded for a "full" "examination of effects," the Ohio Supreme Court would have nothing to do other than restate its conclusion that DIRECTV has not shown discrimination.

Consistent with its failure to ask for reversal, DIRECTV identifies no certworthy theory of the case that would even put it on the path to victory on remand. It does not assert, let alone show persuasively, that its case does *not* fall under *Amerada Hess,* or that it *does* fall under *Westinghouse* or *Bacchus* or any category of discrimination that this Court has described and condemned. DIRECTV merely grumbles that it wants a more searching inquiry.

2. DIRECTV is plainly invoking intentional-discrimination concepts, but no such claims are before the Court.

Throughout its Petition, DIRECTV invokes concepts of intentional discrimination—indeed, that is the heart of its dramatic storytelling about lobbyists appealing to protectionist impulses. And although its Questions Presented reference the "effects" test, the Petition refers again and again to the need to examine "effects *and purposes*," Pet. at 12, 33, 34, 35, 36 (emphasis added). Of course, DIRECTV, shies away from openly making an intentional discrimination claim, because it knows it no longer has one. DIRECTV does not—and cannot—challenge the Ohio court's finding that it waived all claims of facial or intentional discrimination and it nowhere expressly claims to have a purpose-based claim. Yet DIRECTV also does not expressly state that it does *not* raise such a claim. That flaw is fatal because *Bacchus,* the Court's sole case dealing with a product difference that was "inherently" tied to geography, was a "purpose" case. Indeed, DIRECTV's academic amici focus even more heavily on the *Bacchus*-type claim, and their arguments show that such claims involve an alleged cover-up for *intentional discrimination*.

All of this shows that DIRECTV's arguments are steeped in *purpose*-based concepts. See Constitutional Law Professors Amicus at 15 ("fig leaf covering the state's attempt to favor in-state activities); 17 ("mask seeking to hide a state's discrimination"); 18 ("proxy for location-based discrimination").

But without a purpose-based claim—and none exists—this case cannot be a vehicle to address those issues.

3. DIRECTV has no other viable theory of the case to justify remand.

Without a purpose-based case, DIRECTV has no other viable theory of the case. DIRECTV says that a more searching inquiry "would focus intensely, as the dissent below did, on how much more economic benefit cable brings to Ohio than satellite TV." Pet. at 38. But DIRECTV does not link that "focus" to a theory of the case or an outcome.

That focus on benefits suggests intentional discrimination, on the idea that anything with such an allegedly strong local payoff must have been intended—but again, no such claim survives. Indeed, the dissent below, which DIRECTV invokes, appealed essentially to intent-based concerns. Pet. App. at 28a.

Absent an intent claim, the "effect" of "favoring" cable's local infrastructure—or "relative local presence," or differential impact—is essentially the type of novel claim that this Court has noted does not exist. *Amerada Hess,* 490 U.S. at 78 n10. Moreover, the alleged "local" preference here, for an infrastructure of cables, is not inextricably tied to a state-specific feature, as with pineapples or a certain type of coal. See Constitutional Law Professors Amicus at 16-17 (comparing *Bacchus* and *Dayton Power & Light v. Lindley,* 58 Ohio St. 2d 465 (1978) (invalidating facial preference for the type of coal mined in Ohio)). Every state has dirt to bury cables in, so every state could equally "favor" cable if it wished, without producing any "economic balkanization" or "economic isolation." *See Kentucky Dept. of Revenue*, 553 U.S. at 333. Thus, such nationwide "discrimination" would not favor any state's businesses interests over other states', but would globally "favor" cable over satellite. And that non-state-based favoritism is, it seems, the real nature of the challenge here: a flawed (and unappealed) equal protection challenge pretending to be a dormant Commerce Clause claim.

4. The federal regulatory and tax distinctions between the cable and satellite industries doom DIRECTV's case.

Finally, the many federal regulatory and tax distinctions that govern here independently undermine DIRECTV's case, both on the merits and its claim that this case could offer guidance for cases involving other industries.

First, federal law places these two industries under such different legal frameworks that they are not similarly situated under *Tracy.* In particular, the local-franchise-fee issue—which is the core federally-mandated distinction creating the motivation for an offsetting tax at the state level—can be viewed as part of the "similarly situated" analysis, because the federal government requires cable companies to obtain local franchises. That is so independent of whether such fees are "taxes" (though they are), because Congress's *regulatory* requirement to *have a franchise at all* is the type of differential obligation that the Court found significant in *Tracy.* 519 U.S. at 278 (noting local gas companies' distinct obligations).

Indeed, the framework here also includes such obligations aside from the franchise fees themselves, such as the channel-content requirements. Further still, the resulting differences—different channel offerings, different interactive services, different bundled services, and different consumer protections—all raise the question whether these are even the same "product" after all, despite the seeming similarities.

Second, even if DIRECTV could make an initial showing of discrimination, the franchise fee issue dooms it again, because it shows that the statewide sales tax validly compensates for the local taxes. See *Fulton Corp. v. Faulkner,* 516 U.S. 325, 331 n.2 (1996).

Third, the federal framework, by recognizing satellite and cable as different industries and by authorizing statewide satellite taxes, would trigger the bright-line rule that Congressionally-authorized state taxation is immune from dormant Commerce Clause challenges. See *Tracy,* 519 U.S. at 305 n.13 (citation omitted).

Indeed, to the extent the satellite companies' complaints ultimate originate with Congress, that is where their remedy lies too. Congress is the appropriate body to weigh the competing claims to parity that are at the heart of DIRECTV's case. *Id.* at 309-10. To their credit, the satellite companies are pursuing that path, as they have lobbied to reconsider how states may tax them. See "STATEMENT from DIRECTV and DISH NETWORK in support of H.R. 1804, the State Video Tax Fairness Act of 2011," available at http://stopsatellitetax.com/downloads/DIRECTV_DISH_Video_Tax_bill_statement_11May11.pdf (visited Aug. 12, 2011).

Finally, the federal framework here makes this an especially poor vehicle for offering guidance that would govern the many other businesses that DIRECTV cites. Those businesses have either no overarching federal regulatory structure, as with restaurants or bookstores, or they have other industry-specific rules, as with liquor.

In sum, this case raises no legal issues worthy of certiorari, and additionally, the case is an unsuitable vehicle for review because it is flawed in numerous respects.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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