SC15-1249

In the Supreme Court of Florida

FLORIDA DEPARTMENT OF REVENUE, *et al.*,
Appellants,

v.

DIRECTV, INC., *et al.*,
Appellees.

INITIAL BRIEF OF APPELLANT FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL
Case Nos. 1D13-5444 & 1D14-0292 (consolidated)

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STATEMENT OF THE CASE AND FACTS

This case is about taxes on communications services. Like cable providers, satellite providers deliver television services subject to Florida's Communications Services Tax (CST). Some customers receive television signals through cables running into their homes; some receive television signals from small satellite dishes near or on their homes. But cable and satellite products differ greatly, and federal law treats them differently. Among other things, Congress has preempted local governments' authority to assess certain taxes on satellite, while allowing local taxes on cable. Based in part on Congress's different treatment of the two, Florida taxes cable and satellite services differently, with slightly higher average total taxes on cable than on satellite. The issue in this case is whether Florida's decision to do so violates the dormant Commerce Clause.

According to the First District's divided opinion, Florida's tax discriminates against interstate commerce by favoring one set of out-of-state companies (cable providers) over another set of out-of-state companies (satellite providers). In reaching that conclusion, the panel majority accepted arguments that appellate courts throughout the country have uniformly rejected. Indeed, other than the decision below, no appellate decision has found a Commerce Clause violation based on a State's decision to tax satellite and cable differently. This Court should reverse the district court's outlier decision.

Statement of Facts

A. Satellite and Cable Services Are Different.

Although customers can receive television signals through cable or satellite, the services (and their capabilities) are quite different. Cable systems have a "two-way architecture," which allows customers to transmit and receive data. R33:4549.[1] This means customers can use cable services not only to watch television, but also to access the Internet, talk on the telephone, and direct on-demand programming. R33:4503-07, 4513-14, 4544-46, 4555-56, 4566. Satellite service, on the other hand, involves only one-way transmission of identical television programs to all satellite customers in a viewing area. R35:4797. Satellite is therefore unable to provide video-on-demand in response to customer requests, *id.*, or to provide telephone or Internet service. R39:5503, 5516.[2]

Cable and satellite providers also face different regulatory burdens. For example, federal law imposes so-called "must carry" requirements, obligating cable providers (but not satellite providers) to carry certain local stations. *See Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 343 (4th Cir. 2001).

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[1] The record on appeal comprises 62 volumes and will be referred to as R#:*, with # standing for the volume number and * for the page number.

[2] Companies that provide satellite service may separately market Internet or telephone services through non-satellite means by "bundling" their satellite services with service of telecommunications companies that use cable networks. R34:4632-33, 4637-39.

Cable providers also face other requirements that do not fall equally on satellite. *See infra*, p.19.

Because of their differences, customers view the services differently. R36:5071-72. Cable and satellite are simply distinct products, each with certain advantages and disadvantages. Or as DISH Network's corporate representative acknowledged: "[T]hey're just different." R35:4809.

B. Both Satellite and Cable Industries Represent Out-of-State Economic Interests But Have Local Infrastructure in Florida.

Despite their many differences, satellite and cable providers are similar in that they are all out-of-state entities. For example, Bright House Networks, LLC, a cable provider, is a Delaware organization with its principal place of business in New York. R39:5531-32. Comcast Corporation, another cable provider, is a Pennsylvania corporation with a principal place of business in Pennsylvania. R39:5521. DISH Network is organized under Colorado law and has its principal place of business in Colorado, R39:5508, and DirecTV is organized under California law and has its principal place of business in California, R39:5495. Both satellite and cable providers depend on out-of-state activities to provide services in Florida. For example, they both receive video content from facilities outside Florida before transmitting those signals into Florida. R39:5499-5500, 5513, 5521, 5532.

Satellite and cable providers both have an in-state presence as well. As the district court recognized, cable providers rely on local infrastructure. Op. at 11 ("It is this local infrastructure and local employment that provides an in-state economic interest for the cable companies."). But satellite providers also have a significant economic footprint and a substantial local infrastructure in Florida. They lease fiber-optic cables from multiple providers to transmit local programming for distribution to customers. R39:5499, 5513. DISH Network transmits video programming "to uplink facilities located out of the state using cables buried in the ground in Florida." R39:5513. DISH Network and DirecTV have employees and independent contractors to provide sales, installation, service, maintenance, and repairs for their Florida subscribers, R39:5501, 5514, and spend hundreds of millions of dollars annually to compensate them, R57:8639-71 (¶¶ 25-26, 31-34 (citing Satellite Providers' Verified Confidential Stipulations)).

C. Florida Taxes Satellite and Cable Differently, but Cable Customers Pay a Slightly Higher Rate on Average.

Florida imposes taxes on communications services, which include satellite services (like DISH Network and DirecTV) and cable services (like Comcast and Bright House). *See* § 202.12(1), Fla. Stat.[3] Like the state sales tax on goods, the

[3] All citations to Florida Statutes are to the 2002 version, unless otherwise indicated.

CST is imposed on the sale. The provider collects the tax and remits it, but the customer actually pays it. *Id.* § 202.16(1)(a).

Florida's CST includes two separate components—a statewide CST and a local CST—both of which treat cable and satellite services differently. *Id.* §§ 202.12(1), 202.19. The statewide CST applies to cable, satellite, and other communications services (including telephone), but is higher for satellite (10.8 percent) than for cable and other communications services (6.8 percent).[4] *Id.* § 202.12(1)(a) & (c).[5] The local CST, typically around five percent,[6] applies to

[4] The rates changed as of July 1, 2015 (9.07 percent for satellite and 4.92 percent for cable), Ch. 2015-221, §§ 2, 3, 8, 9, Laws of Fla., but still reflect a difference of approximately four percent. Also, although not pertinent to this appeal, Florida imposes a gross receipts tax of 2.37 percent on satellite and cable services, § 203.01(1)(a)-(b), Fla. Stat., which is part of the integrated tax on communications services, *id.* §§ 202.12, 203.01(2). In 2010, the Legislature increased that rate on cable by 0.15 percent to 2.52 percent and reduced the CST rate on cable by an equal 0.15 percent (from 6.8 percent to 6.65 percent). Ch. 2010-149, §§ 3, 5, 1320, 1321, Laws of Fla. Because the parties agreed to limit this case to the period ending in 2009, R28:3894 n.14, these amendments are not relevant here.

[5] Chapter 2005-187, Laws of Florida, redesignated section 202.12(1)(c), Florida Statutes, as section 202.12(1)(b), Florida Statutes, retroactively to October 1, 2001. Ch. 2005-187, §§ 2, 11, at 1837, 1840, Laws of Fla. From October 1, 2001 until then, the CST was imposed on Satellite Services pursuant to section 202.12(1)(c), Florida Statutes.

[6] The local CST rate varies depending on the taxing jurisdiction, *see* Dep't of Revenue, *Local Communications Services Tax Rate Table with Historical Data* (2014), *available at* http://dor.myflorida.com/dor/taxes/local_tax_rates.html, but "is typically in the neighborhood of 5 percent," R31:4292.

cable and other communications services except satellite. *Id.* § 202.19(6).[7] Thus, cable is subjected to the statewide CST in addition to the local CST; satellite is subjected to a higher statewide CST but no local CST. This structure meets federal requirements while preserving revenue sources for local governments. *Id.* § 202.105 (CST accounts for "federal regulations" and need for local governments to raise revenue). Federal law prohibits local governments from directly taxing satellite, but it explicitly allows States to share satellite tax revenue with local governments. Telecommunications Act of 1996, § 602(a), (c), Pub. L. No. 104-104, Title VI, 110 Stat. 144 (1996) (reprinted in historical notes of 47 U.S.C. § 152). One-third of the revenue generated by the statewide CST on satellite goes to local governments through the Local Government Half-cent Sales Tax Clearing Trust Fund. § 202.18(2), Fla. Stat.

Overall, the average combined statewide and local CST rate on cable exceeds the statewide CST rate on satellite. Based on tax return data from 2001-2009, "[i]n all samples and all years, the statewide effective tax rates paid by cable providers are statistically significantly larger than the 10.8 percent rates paid by satellite providers." R31:4298. Even under the most conservative reading of the

[7] The local CST rate is set by local governments, but it is collected and distributed by the Department. §§ 202.16, 202.19(3), 202.19, Fla. Stat.

data, "cable providers paid at least 0.5 percent more than satellite providers on a statewide basis." R31:4298; *see also* R:31:4316.

Before Florida enacted the CST in 2000, satellite enjoyed a significant tax advantage over cable. Cable and satellite were both subject to a six-percent sales tax, *see* § 212.05(e)1., Fla. Stat. (1999), but cable services had additional tax and administrative burdens from local taxes and franchise fees. §§ 212.054(2)(a)-(b)2., 212.055, 337.401, Fla. Stat. (1999); *see also* Fla. H.R. Comm. on Utils. & Comms., CS for CS for CS for SB 1338 (2000) Staff Analysis 8-9 (June 28, 2000); Fla. S. Comm. on Fiscal Resource, CS for CS for CS for SB 1338 (2000) Staff Analysis 8-9 (April 28, 2000). Because federal law exempted satellite services from these local fees and burdens, *see supra*, the total tax burden on cable services exceeded the total tax burden on satellite.

Florida's CST changed that. It provided a "competitively neutral tax policy" that would "free consumers to choose a [communications] provider based on tax-neutral considerations" and "simplify[] an extremely complicated state and local tax and fee system." § 202.105, Fla. Stat. The Communications Services Tax Simplification Law abolished local taxes, fees, and "other impositions" on communications services providers for using local rights of way, finding them inconsistent with the principle of tax neutrality. *Id.* § 202.24(1). At the same time, the Legislature sought to preserve local government revenue from communications

services. *Id.* § 202.105(2). The result was a two-tiered tax structure, with both statewide and local CST components—and with different application to cable and satellite. That different application led to this case.

Procedural History

DirecTV and DISH Network (collectively, the "Satellite Providers") sued the Department of Revenue to challenge the constitutionality of Florida's CST. R1:38-53; R4:673-94. Alleging that Florida's CST on satellite services violated the Equal Protection and Commerce Clauses of the United States Constitution, the Satellite Providers sought a declaratory judgment and tax refunds. *Id.* As to Equal Protection, they claimed that treating satellite and cable services differently advanced no legitimate purpose. R1:49; R4:692. As to the Commerce Clause, they claimed that the tax system favored in-state interests over out-of-state interests because one component of the tax is lower for cable, and cable providers have a greater infrastructure in Florida (even though cable providers, like the Satellite Providers, are out-of-state entities and transmit content from outside Florida). R1:45-49; R4:688-92; R33:4517-18, 4493-94. The trial court consolidated the case with a similar challenge from satellite customers, R4:647-48, and permitted the Florida Cable Telecommunications Association (FCTA) to intervene as an additional defendant, R6:1064-66.

After several years of discovery, the trial court granted the Department's and FCTA's summary judgment motions, rejecting all of the Satellite Providers' claims. R52:7532-35. The trial court found that there was "a rational basis to classify Satellite Service and Cable Service differently, because they are different. They are organized differently, have different modes of operation, use different technologies . . ., and they provide different services." R52:7533. The court also found that "unlike cable companies, satellite companies are exempt from the local CST." R52:7534. As a result, the challenged tax scheme "create[s] a roughly level playing field for the two industries" upon which "on average, it appears [satellite customers] pay *less* total tax." R52:7534 (emphasis added). Finally, the court found that the CST "does not reward in-state companies or punish out of state companies"; "the undisputed facts show that both the satellite companies and the major cable companies are interstate companies." R52:7534-35. Although the cable companies "may have more of a presence in the state," "the satellite companies have a significant presence in the state as well." R52:7435.

The Satellite Providers appealed to the First District (No. 1D13-5444),[8] which subsequently consolidated the case with a separate appeal concerning the

[8] In a consolidated case, satellite customers challenged the CST on similar grounds. They likewise appealed the trial court's order, but the First District dismissed because the customers failed to pursue their appeal. *See* Order, *Ogborn v. Zingale*, No. 1D13-5455 (March 12, 2014).

Department's motion for costs (No. 1D14-0292). On appeal, the Satellite Providers abandoned their Equal Protection claim, pursuing only the Commerce Clause challenge. *See* Appellants' Initial Br., *DIRECTV, Inc. v. State, Dep't of Revenue*, Nos. 1D13-5444 & 1D14-0292.

The First District reversed and held the tax scheme violated the dormant Commerce Clause because of discriminatory effects. Op. at 21. Specifically, the panel majority found that the statewide component of Florida's CST "is discriminatory in effect because it affects similarly-situated entities . . . by imposing a disproportionate burden on satellite service and conferring an advantage upon cable services, which use in-state infrastructure." Op. at 9. The majority acknowledged that its decision conflicted with numerous other courts' decisions considering the same issue, but it found all those other courts misapplied United States Supreme Court precedent. Op. at 14-18.

Although it did not change the outcome, the majority rejected the Satellite Providers' alternative claim of discriminatory *purpose* (separate from effects), finding the "trial court did not err when it found there was no evidence of a discriminatory purpose." Op. at 21.[9]

[9] The majority's introductory paragraph indicated the Satellite Providers "contend that the statute unconstitutionally discriminates against interstate commerce *in both effect and purpose*, which is in violation of the Commerce Clause. *We agree* and reverse." Op. at 2 (emphasis added). Despite the emphasized language, it is clear the majority rejected any purpose arguments. Op. at 21.

The Department and FCTA timely appealed to this Court, which has jurisdiction, *see* Fla. Const. art. V, § 3.

SUMMARY OF THE ARGUMENT

Florida's Communications Services Tax (CST), which recognizes differences between cable and satellite services, does not violate the dormant Commerce Clause. The dormant Commerce Clause serves to prohibit States from discriminating against interstate commerce—not to ensure that States identically tax services provided by out-of-state cable and satellite providers. That is why state and federal courts throughout the country have uniformly rejected the argument the Satellite Providers will make here. Indeed, until the First District's divided opinion below, no appellate court had found a Commerce Clause violation based on a State's differential taxation between cable and satellite. There are several reasons why the First District's outlier decision was wrong.

First, there can be no Commerce Clause discrimination claim when the alleged discrimination is between entities not similarly situated. Although cable and satellite both provide television programming, they are not similar services for Commerce Clause purposes. Cable employs a two-way communications technology that supports on-demand television programming, telephone services, and Internet services; satellite's one-way communications technology is more limited. Cable and satellite providers also face substantially different federal

regulations. Among other differences, federal law preempts local taxation of satellite service (but not cable services), and requires cable providers (but not satellite providers) to carry certain local and educational programming. This differing federal regulation reflects the differences between the services.

Second, even if cable and satellite were similarly situated for Commerce Clause purposes, the Commerce Clause does not prohibit their differential treatment. The Legislature had ample non-discriminatory reasons to enact the CST. It sought, for example, to provide a fair and efficient method for taxing communications services and to allow customers to choose services based on tax-neutral considerations. Before the Legislature adopted the CST, satellite providers had significant tax advantages because while their services were subjected to the same statewide tax as cable services, they were exempt from local taxes imposed on cable. The Legislature changed that by implementing a tax system that accounted for, among other things, federal preemption against local satellite taxes. And regardless of the Legislature's motivations, Congress has spoken in this area, allowing States to tax satellite services. Because Congress has not remained dormant—and has actively regulated interstate commerce in this area—Florida's law does not interfere with Congress's authority, and there is no Commerce Clause violation.

Third, even if the Commerce Clause prohibited States from imposing higher taxes on satellite than cable, Florida's CST actually imposes a *higher* total average tax on cable services than on satellite. The decision below all but ignored the local component of the CST (which applies to cable but not satellite), focusing solely on the statewide component. But any fair comparison must include the *total* tax.

Finally, even if the Satellite Providers' Commerce Clause theory were correct—and it is not—the providers are not entitled to any refund. It was their customers, not the providers themselves, who paid the tax. Moreover, the Satellite Providers did not exhaust administrative remedies, and the direct-file exception to the exhaustion of administrative remedies requirement applies only when a suit turns solely on a facial challenge. Because the challenged tax system could operate constitutionally in at least some circumstances, the providers cannot succeed on a facial challenge, and their failure to exhaust administrative remedies forecloses any refund.

The consistent state and federal decisions rejecting the claim presented here are correct. This Court should reverse the First District's outlier decision and uphold the legislation.

STANDARD OF REVIEW

This Court reviews de novo decisions evaluating a statute's constitutionality. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

Those challenging statutes face a heavy burden, because all statutes come "clothed with a presumption of constitutionality," *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008), and because this Court must indulge all reasonable presumptions in favor of its constitutionality, *see State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *Smithers v. N. St. Lucie River Drainage Dist.*, 73 So. 2d 235, 237 (Fla. 1954). This Court will invalidate a statute only if a challenger has shown its invalidity "beyond reasonable doubt." *Crist*, 978 So. 2d at 139 (quoting *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)) (internal marks omitted).

ARGUMENT

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Despite the text's affirmative grant of authority, the Supreme Court recognizes "a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other

laws that burdened interstate commerce." *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

The dormant Commerce Clause "protects the interstate market, not particular interstate firms" or "particular structure[s] or methods of operation in a retail market." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). Therefore, separate taxation of "two categories of companies result[ing] solely from differences between the nature of their businesses, not from the location of their activities," does not violate the Clause. *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of the Treasury*, 490 U.S. 66, 78 (1989).

Despite this clear distinction, the Satellite Providers have sought to lower satellite taxes through dormant Commerce Clause challenges in no fewer than six states based, primarily, on the fact that cable uses local rights of way. According to the Satellite Providers' claim, the CST benefits cable, therefore necessarily promoting in-state interests and discriminating against interstate commerce. That is so, they say, because out-of-state cable providers have a greater local economic presence than out-of-state satellite providers.

Until the First District's split decision, the Satellite Providers were unsuccessful with every challenge. *See DIRECTV, Inc. v. Roberts* (*DirecTV Tennessee*), No. M2013-01673-COA-R3-CV, 2015 WL 899025, at *11 (Tenn. Ct. App. Feb. 27, 2015) ("Because we find that satellite providers and cable providers

are not substantially similar entities for purposes of the Commerce Clause, we direct entry of summary judgment in favor of the Commissioner on the issue of discrimination."); *DIRECTV, LLC v. Dep't of Revenue* (*DirecTV Massachusetts*), 25 N.E. 3d 258, 269-70 (Mass. 2015) ("[E]ven if the satellite companies were able to show some discrepancy between the amounts charged to them and to the cable companies, respectively, this discrepancy would be permissibly attributable to important differences between the cable and satellite industries . . . ."); *DIRECTV, Inc. v. Utah State Tax Comm'n* (*DirecTV Utah*), No. 110402039, 2013 WL 9973019, at *5 (Utah Dist. Ct. June 27, 2013) (distinction between cable and satellite taxes "did not result from a geographic distinction, but rather from a difference in the mode of operation"); *DirecTV, Inc. v. Levin* (*DirecTV Ohio*), 941 N.E.2d 1187, 1196 (Ohio 2010) ("[W]e concur with those courts that have considered the merits of the satellite companies' dormant Commerce Clause claims and conclude that the Ohio sales tax on satellite broadcasting services does not discriminate against interstate commerce . . . ."), *cert. denied*, 133 S. Ct. 51 (2012); *Directv, Inc. v. Treesh* (*DirecTV Kentucky*), 487 F.3d 471, 480 (6th Cir. 2007) (recognizing that cable and satellite communications "are distinct, consisting of two very different means of delivering broadcasts" and rejecting challenge to Kentucky tax regime), *cert. denied*, 552 U.S. 1311 (2008); *DirecTV, Inc. v. State* (*DirecTV North Carolina*), 632 S.E.2d 543, 548 (N.C. Ct. App. 2006) ("cable

companies are no more 'local' in nature than are satellite companies," as "both utilize in-state and out-of-state equipment and facilities in providing service to North Carolina subscribers"); *see also* Br. for the U.S. as Amicus Curiae ("Solicitor General Br."), *DirecTV, Inc. v. Levin*, No. 10-1322, 2012 WL 1883083, at *12 (U.S. May 23, 2012) (Ohio Supreme Court's decision "does not conflict with any decision of [the Supreme] Court or of any lower appellate court").[10]

The panel majority below broke from this consistent authority, holding that Florida's law unconstitutionally favors in-state interests at the expense of out-of-state commerce. As explained below, the decision below misunderstands the dormant Commerce Clause and, if accepted, would represent a dramatic expansion of the narrowly applied doctrine.

I. THERE IS NO COMMERCE CLAUSE VIOLATION BECAUSE CABLE AND SATELLITE ARE NOT SIMILARLY SITUATED.

As a starting point, "any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (footnote omitted). For Commerce Clause purposes, satellite and cable providers are not similarly situated. *See DirecTV Massachusetts*, 25 N.E.3d at 266 ("[T]he excise tax is not discriminatory because the cable and satellite companies are not similarly situated."); *DirecTV Tennessee*, 2015 WL 899025, at *11

[10] Petitions for writs of *certiorari* are now before the United States Supreme Court in the Massachusetts and Tennessee cases. *See DirecTV v. Roberts*, No. 14-1524 (U.S.); *DirecTV v. Mass. Dep't of Revenue*, No. 14-1499 (U.S.).

("[S]atellite providers and cable providers are not substantially similar entities."). Because satellite and cable providers are not substantially similar entities, there is no Commerce Clause violation, and the Court should proceed no further.

A. Cable and Satellite Providers Offer Different Communications Services.

Cable and satellite providers offer different communications services using different technologies. As detailed in the statement of facts, cable offers simultaneous two-way communications technology that can vary as to each user, but satellite technology affords only a one-way broadcast signal that is the same for every user receiving it. R33:4549, R35:4797. As a result, cable can provide Internet, television, and telephone services using its infrastructure. R33:4503-07, 4513-14, 4544-46, 4555-56, 4566. The satellite networks offer only television service. R39:5503, 5516. And even as to television services, cable and satellite services are not similarly situated. As the Satellite Providers' own witnesses acknowledged, their one-way satellite technology limits their ability to provide interactive on-demand programming to the extent cable does. R35:4808-09. It is no surprise, then, that the Satellite Providers' expert agreed that "consumers perceive [cable and satellite TV] as different services." R36:5071-72; *see also DirecTV Tennessee*, 2015 WL 899025, at *11; *DirecTV Massachusetts*, 25 N.E.3d at 268; *DirecTV Utah*, 2013 WL 9973019, at *4 (cable and satellite television are "distinct goods").

B. Cable and Satellite Providers Face Dissimilar Regulatory Burdens.

Beyond technical and practical distinctions, satellite and cable providers face distinct regulatory burdens. "Cable providers are heavily regulated by the federal government, while satellite providers are minimally regulated." *DirecTV Tennessee*, 2015 WL 899025, at *10 (quotation marks omitted). Federal law imposes on cable providers so-called "must carry" requirements, obligating them to carry local broadcast and educational stations.[11] *See Satellite Broad. & Commc'ns Ass'n*, 275 F.3d at 343 (comparing cable and satellite obligations); *see also* § 610.109, Fla. Stat. Federal law also allows local governments to prohibit obscene content on cable, 47 U.S.C. § 544(d)(1), and requires that cable providers allow customers to block obscene content, *id.* § 544(d)(2). Cable must also provide greater emergency alert system capabilities than satellite, *id.* § 544(g); 47 C.F.R. § 11.51, and fulfill minimum standards for office hours, telephone availability, installation, service outage, repair times, and billing, 47 U.S.C. § 552(b); 47 C.F.R. § 76.309; § 610.108, Fla. Stat. Federal law also provides for regulation of cable rates, 47 U.S.C. § 543(b), (d), franchise acquisition, *id.* § 547, and the transfer of cable television systems, 47 C.F.R. § 76.502.

[11] The Florida Channel (which carries this Court's proceedings) "airs on public, educational and government access channels across the state," including on a number of Bright House and Comcast cable channels. *See* The Florida Channel, Where to Watch, *available at* http://thefloridachannel.org/about-tfc/where-to-watch/.

The disparity in federal regulation between satellite and cable was no accident, and it had nothing to do with geography. "When the technology for satellite provision of video programming became available in the 1980s, the Federal government 'concluded that the public interest is best served by a flexible regulatory approach.'" *DirecTV Massachusetts*, 25 N.E.3d at 270 (quoting 2 D.L. Brenner *et al.*, *Cable Television & Other Nonbroadcast Video, Law and Policy*, § 15:5 (2014)). Accordingly, the federal government did not burden the emerging industry with substantial regulation. *Id.* The cable industry, on the other hand, predated satellite by decades, was "a veteran industry with well-established methods of operation" by the time satellite emerged, and "has long been subject to an extensive scheme of Federal regulation." *Id.* Based on their differences, the federal government saw fit to treat them differently. And based on these differences, they are not similarly situated for Commerce Clause purposes. *See id.* (another justification for differential tax between cable and satellite "lies in the respective regulatory regimes to which the two types of company are subject"); *DirecTV Tennessee*, 2015 WL 899025, at *11 ("satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause").

C. Competition Between Cable and Satellite Is Not Dispositive.

Disregarding these acknowledged differences, the panel majority found cable and satellite providers similarly situated for Commerce Clause purposes because they are "direct competitors" in Florida's "multichannel television programming" market. Op. at 10. But merely "competing in the same market is not sufficient to conclude that entities are similarly situated." *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009) (opticians not similarly situated to optometrists and opthamologists, notwithstanding that all "sell eyewear") (citing *Tracy*, 519 U.S. at 299); *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 804 (6th Cir. 2005) ("In our view, dispensing optometrists and optical stores are not similarly situated for Commerce Clause purposes."). Accordingly, the Supreme Court has rejected claims that public entities were "similarly situated" with private entities, even though the entities directly competed with one another. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 342-43 & n.13 (2008) (competing issuers in bond market); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (competing waste processors). Regardless of competition, when the different

treatment "results solely from the differences between the nature of their businesses," there is no discrimination. *Amerada Hess*, 490 U.S. at 78.[12]

II. EVEN IF THEY ARE SIMILARLY SITUATED, THE COMMERCE CLAUSE PERMITS DIFFERENTIAL TREATMENT OF CABLE AND SATELLITE SERVICES.

Even if cable and satellite providers were similarly situated, the law is still valid because the CST does not discriminate against interstate commerce. A state tax violates the Commerce Clause if (i) it is facially discriminatory, (ii) has a discriminatory purpose, or (iii) has discriminatory effects. *Amerada Hess*, 40 U.S. at 75; *DirecTV North Carolina*, 632 S.E.2d at 547. Florida's law is valid under each of these.

A. The CST Is Not Facially Discriminatory.

A statute is facially discriminatory if it expressly favors in-state commerce. For example, this Court found a Florida tax credit facially discriminatory because it applied only to airlines with a principal place of business and more than 1200 employees in Florida. *Delta Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 317, 319 (Fla. 1984); *see also Lewis v. BT Inv. Managers*, 447 U.S. 27, 39 (1980)

[12] The panel majority offered no authority for the proposition that entities' competition necessarily made them similarly situated. The only case it cited in its discussion—*Tracy*—found the relevant entities *not* similarly situated. 519 U.S. at 310. *Cf. also* Op. at 22 (Marstiller, J., dissenting) ("I do not agree the satellite and cable providers are similarly situated entities for purposes of dormant Commerce Clause analysis; in my view, the majority opinion fails to fully consider all the differences between the two.").

(invalidating Florida law that made "out-of-state location" of a holding company's principal place of business an "explicit barrier"). The law challenged here makes no facial distinction between in-state and out-of-state commerce or activities, and the Satellite Providers have never contended otherwise. Indeed, even if the Satellite Providers relocated to Florida and increased their Florida "footprint," the tax on their services would not change. The law is not facially discriminatory.

B. The CST Has No Discriminatory Purpose.

The district court correctly rejected the Satellite Providers' argument about discriminatory purpose. Op. at 18-21. "To determine whether there is discriminatory purpose, courts look to the language and the legislative history of the statute in question." Op. at 18. After evaluating the law and its history, the court found "no evidence that the Legislature sought to favor the cable providers." Op. at 21. On this point, the district court was correct.

C. The CST Has No Discriminatory Effect.

The panel majority went wrong with its conclusions about discriminatory effects, concluding that cable's higher in-state economic impact shows discriminatory effects. But notwithstanding economic "footprints," neither cable nor satellite providers are properly considered in-state interests. *See, e.g., DirecTV Ohio*, 941 N.E.2d at 1196 ("[T]he cable industry is not a local interest benefitted at the expense of out-of-state competitors. Like the satellite companies, the major

cable providers are interstate companies selling an interstate product to an interstate market."); *DirecTV North Carolina*, 632 S.E.2d at 546-57 ("cable companies are no more 'local' in nature than are satellite companies"); *DirecTV, Inc. v. Treesh*, 469 F. Supp. 2d 425, 437 (E.D. Ky. 2006) ("Cable Companies are no more a 'resident,' 'local,' or 'in-state' business than the Satellite Companies."). Therefore, the CST does not discriminate in favor of in-state interests and against out-of-state interests.

But more importantly, the district court ignored the distinction between laws that "effectuate a legitimate local public interest" with only "incidental" effects on interstate commerce, and those that impermissibly discriminate against interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Nearly any law can have some effects on interstate commerce, yet "[n]umerous decisions have recognized and approved of a state's regulation of matters of local concern even though interstate commerce may be incidentally affected." *Dep't of Banking & Fin. v. Credicorp, Inc.*, 684 So. 2d 746, 753 (Fla. 1996). There is often "no clear line" between laws with only incidental effects on interstate commerce and those that actually discriminate, *Tracy*, 519 U.S. at 299 n.12, but the difference is critical: Statutes that only incidentally burden interstate commerce are presumptively valid, and those that actually discriminate against interstate commerce are presumptively invalid. *See Maine v. Taylor*, 477 U.S. 131, 138

(1986); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1149 (9th Cir. 2012).

Because of courts' general reluctance to invalidate state laws, all doubts about where a particular statute falls are resolved in the State's favor; courts may find discrimination only when it is *clear* that effects on interstate commerce are discriminatory and not merely incidental. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 402 (1994) (test is whether "regulation 'affirmatively' or 'clearly' discriminates against interstate commerce"); *see also Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)); *see also Fla. Ass'n of Criminal Def. Lawyers*, 978 So. 2d at 139 (noting statutes' strong presumption of validity can be overcome only with a showing of invalidity "beyond reasonable doubt" (quotation marks omitted)).

Rather than apply the deferential standard the cases require—and rather than searching for clear evidence of discrimination—the panel majority casually held that "[b]ecause the CST favors communications services that use local infrastructure, it has a discriminatory effect on interstate commerce." Op. at 12. It

did so without even considering whether any effects on interstate commerce were incidental.[13]

1. The CST Law Promotes a Legitimate Public Interest.

To start, the district court ignored the "legitimate local public interest" underlying the CST. *See Pike*, 397 U.S. at 142; *Winshare Club of Can. v. Dep't of Legal Affairs*, 542 So. 2d 974, 975 (Fla. 1989) (finding no Commerce Clause violation where statute served legitimate purpose with only incidental effects on interstate commerce). Specifically, the Legislature sought to promote "important state interests" by creating a "fair, efficient, and uniform method for taxing communications services sold in this state." § 202.105(1), Fla. Stat. It sought to "free consumers to choose a provider based on tax-neutral considerations," "lower the cost of collecting taxes and fees, increase service availability, and place downward pressure on price." *Id.*; *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (recognizing States' "right to experiment with different incentives to business"); *DirecTV Kentucky*, 487 F.3d at 481 ("States must be allowed, and even encouraged, 'to work to attract business by creating an environment conducive to economic activity.'").

[13] In this case, the Satellite Providers have not advanced any claim based on the *Pike* balancing test, so this Court need not consider it. *Cf. Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005) (Plaintiff did not pursue "any theory of liability premised on the *Pike* balancing test; instead, it has gambled on its theory that the [challenged law] triggers strict scrutiny (and, thus, is per se invalid). Accordingly, we leave *Pike* to one side.") (citation omitted).

Although the Legislature sought to streamline and equalize communications services taxation—not specifically to benefit cable—it would have been well within its rights had it chosen to favor cable over satellite. The technological and regulatory differences between cable and satellite, *supra* Part I.A, B, also justify favoring cable. Thus, when Kentucky reformed its communications tax to place cable and satellite on a level playing field, the Sixth Circuit recognized many reasons for the state to "remove any barriers it had put in place to the continued viability of cable for reasons entirely unrelated to geography." *DirecTV Kentucky*, 487 F.3d at 481. Those reasons included "that cable providers often provide internet access as well, [and] that cable providers are more likely to provide public access channels." *Id.* Likewise, after cataloging the differences between satellite and cable, the Massachusetts Supreme Judicial Court concluded that the "Legislature also permissibly may wish to support the provision of cable services, in order to ensure that this regulated product remains available to Massachusetts consumers." *DirecTV Massachusetts*, 25 N.E.3d at 271.

In light of the Legislature's legitimate purposes, the relative levels of in-state investment are incidental concerns, at best. When Minnesota banned milk sales in nonreturnable plastic containers (thus "favoring" cardboard cartons), the Court rejected the claim that Minnesota pulpwood producers would benefit significantly while the out-of-state plastics industry might be "burdened relatively more."

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981). Finding the burdens on the plastics industry not clearly excessive in relation to legitimate purpose of environmental protection, the Court upheld the law, despite any incidental effects on commerce. *Id.*

Here, the panel majority recognized that the Legislature acted with nondiscriminatory purpose when it rejected the Satellite Providers' discriminatory purpose argument, Op. at 18-21, but it failed to consider the State's legitimate purposes in determining whether the CST is discriminatory in effect. Had it done so, it would have recognized that the CST does not discriminate against interstate commerce.

2. The CST Permissibly Distinguishes Between Modes of Operation, Not Location.

Florida's CST does not favor in-state entities. Indeed, all of the cable and satellite providers at issue are out-of-state entities. Comcast, Bright House, DISH Network, and DirectTV are all out-of-state organizations with out-of-state principal places of business. *See supra*, p.3. And even if they were in state (or had greater in-state operations), their tax would not change. Under Florida law, neither the location of the providers nor the size of their economic footprints affects the CST. Whether satellite providers operate in Florida or outside Florida, the satellite tax is the same. Whether cable providers operate in Florida or outside Florida, the cable tax is the same. Whether they have $10 million locally invested or $10

billion locally invested, the tax is the same. What matters is what service they provide, and where the customer resides—regardless of where the provider resides. This distinction matters, because the Commerce Clause "protects the interstate market, not particular interstate firms" or any "particular structure or methods of operation in a retail market." *Exxon Corp.*, 437 U.S. at 127. So there is no Commerce Clause violation when differential tax treatment of "two categories of companies result[s] solely from differences between the nature of their businesses, [and] not from the location of their activities." *Amerada Hess*, 490 U.S. at 78.

Courts have relied repeatedly on *Exxon* and *Amerada Hess* in rejecting the Satellite Providers' claims. *See, e.g., DirecTV Ohio*, 941 N.E.2d at 1194 ("Relying on . . . *Exxon* and *Amerada Hess*, 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."); *DirecTV North Carolina*, 632 S.E.2d at 549 ("Based on the United States Supreme Court's reasoning in *Amerada Hess* and *Exxon Corp.*, we conclude that the dormant Commerce Clause . . . does not necessarily prohibit discrimination against programmers . . . who deliver programming by satellite as opposed to cable."); *see also DirecTV Kentucky*, 487 F.3d at 481. The panel majority acknowledged that its view conflicted with the other cases, but it found all of the

other courts considering this issue "misapplied [*Amerada Hess*'s and *Exxon*'s] holdings to differential taxes on satellite and cable." Op. at. 16. It found those cases "clearly distinguishable," but only based on the conclusory argument that the laws at issue in those cases "did not give local interests a competitive advantage over out-of-state interests." Op. at 17. But as those courts upholding six other states' laws have recognized, distinctions between cable and satellite are not discrimination against interstate commerce. *See, e.g.*, *DirecTV Ohio*, 941 N.E.2d at 1190 ("The imposition of a sales tax by the Ohio General Assembly on satellite broadcasting services but not on cable broadcasting services does not violate the Commerce Clause of the United States Constitution, because the tax is based on differences between the nature of those businesses."); *DirecTV North Carolina*, 632 S.E.2d at 545 (no Commerce Clause violation "[b]ecause the differential tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses").

Because it incorrectly found cable and satellite similarly situated, and because it ignored the legitimate reasons for treating them differently, the panel majority's decision ultimately turned on its theory that States cannot tax businesses or industries differently if the effects land unequally on companies with differing levels of in-state investment. But as the dissenting judge recognized below, there is "nothing in dormant Commerce Clause jurisprudence" suggesting that

"comparatively greater economic investment in the state" by competing companies suffices to show discrimination, absent facial discrimination or discriminatory intent. Op. at 23 (Marstiller, J., dissenting). Indeed, none of the cases on which the panel majority relied rested its finding of discrimination solely on the fact that a law had a greater impact on an industry with comparatively less in-state economic activity.

Several of the cases the majority opinion cited involved facially discriminatory statutes. *Delta Air Lines* involved facial discrimination against out-of-state airlines. 455 So. 2d at 318 (invalidating tax credit for airlines with a principal place of business in Florida that also employed more than 1200 employees in the state). The laws in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), likewise facially discriminated: The ordinance in *C&A Carbone* required all waste to be processed in a specific in-state facility, depriving out-of-state competitors of access to the market. 511 U.S. at 387-88. And the ordinance in *Dean Milk* prohibited sales of milk not pasteurized locally, also depriving out-of-state competitors of market access. 340 U.S. at 350, 354.

The decision in *Bacchus Imports v. Dias*, 468 U.S. 269 (1984), provides no better support for the panel majority's decision. Although *Bacchus* involved no facial discrimination, the tax exemption's undisputed purpose was to "aid

Hawaiian industry" in competition with out-of-state alcohol producers. *Id.* at 271; *see also Amerada Hess*, 490 U.S. at 78 n.10 (noting that in *Bacchus*, the law was "directed specifically at economic activity that occurs only in a particular location"). This evidence of discriminatory purpose alone—expressed openly in legislative reports—was enough to show that the statute was discriminatory. *Bacchus*, 468 at 270.

Although *Hunt v. Washington State Advertising Commission*, 432 U.S. 333 (1977), involved discriminatory effects, it did not turn on an analysis of comparative in-state investment. The North Carolina law in *Hunt* prohibited any quality grade other than a USDA grade from appearing on a closed crate of apples. The Court found this discriminatory because it disrupted the free market in a way that helped North Carolina growers at the expense of Washington growers. North Carolina apple growers used either the USDA grade or no grade at all, while Washington had developed an expensive inspection and grading process, which was more stringent than the USDA system and enjoyed nationwide acceptance. *Id.* at 351. Thus, "with free market forces at work, Washington sellers would normally enjoy a distinct market advantage." *Id.* at 352. But North Carolina's rule "stripp[ed] away" these advantages that the Washington apple industry had "earned for itself," and required Washington apple growers to pay more to ship apples to North Carolina in special crates without the Washington grades. *Id.* at

351-52. Importantly, the Court found no legitimate purpose supporting the rule. *Id.* at 353-54.

Hunt does not help the Satellite Providers. Whatever might be said for the satellite industry's advantageous tax position before Florida adopted the CST, it hardly represents an "advantage[] it has earned for itself" through the free-market competition. *See Hunt*, 432 U.S. at 351. The CST only revised state and local taxation of communications so that cable and satellite services bear roughly the same aggregate rate, structured consistent with federal law. And unlike the law in *Hunt*, which served no legitimate purpose, Florida has a legitimate interest in removing the barrier of unequal taxation so that communications services providers may serve Florida residents on a more tax-neutral playing field. *See DirecTV Kentucky*, 487 F.3d at 481.

The current body of law does not support the panel majority's decision, and this Court should reject the significant expansion of dormant Commerce Clause jurisprudence the panel majority's decision represents.

3. The Panel Majority's Reasoning Advances an Unworkable Expansion of Dormant Commerce Clause Jurisprudence.

In addition to being legally unsupported, the panel majority's rationale represents an unworkable expansion of dormant Commerce Clause jurisprudence.

a. First, the panel majority's rule—that laws violate the dormant Commerce Clause if their effects land unequally on companies with differing

levels of in-state investment—"lacks standards capable of ready or consistent application," as the United States Solicitor General has explained. Solicitor General Br., 2012 WL 1883083, at *12. Neither the panel majority nor the Satellite Providers explain how great the relative difference in economic footprints must be to constitute discrimination, nor how courts should weigh other factors that might justify differential treatment. *Id.*; *accord DirecTV Tennessee*, 2015 WL 899025, at *8. The proposed rule would inject seemingly arbitrary results into the doctrine, as the "same tax might be valid in one State and unconstitutional in another," based on nothing more than the fortuity of the relative economic impacts in the two states. *See* Solicitor General Br., 2012 WL 1883083, at *12. In addition, the same tax might be constitutional one day and not the next. If the Satellite Providers increased their economic footprint in Florida—for example by opening facilities or adding other infrastructure—the relative disparity would immediately change.

b. Second, the panel majority's rule would mire dormant Commerce Clause cases in the sorts of "complex factual inquiries" that the Supreme Court has sought to avoid, regardless whether such inquiries would favor the State or the plaintiff. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 341-43 (1996) (refusing to consider state's argument concerning economic incidence of a tax); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 n.8 (1981) (refusing to consider whether tax on in-state coal severance discriminated because companies

passed the expense to out-of-state customers); *see also Davis*, 553 U.S. at 353-55 (noting courts' "unsuitability" to undertake the "very subtle exercise" of "weighing or quantifying" Kentucky tax's effects on interstate commerce). After eight years of development, the record on appeal in this case comprises sixty-two volumes and includes detailed factual stipulations from five cable and satellite providers covering diverse topics relating to potential Florida investments, such as the number and compensation of employees; call centers; leases of fiber optic cables; facilities to receive local programming for satellite transmission; vehicles leased or owned within the state; leases of office space; ownership of Florida corporations; employment of lobbyists; real estate taxes paid; personal property taxes paid; stadium naming rights; bill collection activities; franchise fees; and the use and training of independent contractors. *See, e.g.*, R39:5494-504 (DirecTV stipulation); *see also* R39:5397-98 (index of exhibits to Satellite Providers' motion for summary judgment). Some of those categories have dollar values attached; some do not. How is the Court to compare? Should dollars be considered in the aggregate, or on a per-subscriber basis? What if some expenses increase with every new subscriber, but others do not? And how do legitimate reasons for distinguishing between the services enter the equation? The Department is aware of no case in which the Court has engaged in such an open-ended, fact-intensive analysis to find discriminatory effects.

c. Third, the panel majority's rule would intrude broadly on the State's ability to effect its own tax policies. *See Davis*, 553 U.S. at 338 (dormant Commerce Clause doctrine "respect[s]" the "cross-purpose" of federalism); *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005) (doctrine must not "unduly curtail[]" state "power to lay taxes"). "[N]ot every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). Expansive interpretations of the discriminatory effects prong are the most intrusive on state regulatory authority because they risk conflating generally invalid discriminatory laws with generally valid nondiscriminatory laws with incidental effects on commerce. *Cf. Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 38-39 (1st Cir. 2007) (recognizing the importance of distinguishing the two classes of laws). Courts "must be cautious about applying the dormant Commerce Clause in cases that do not present the equivalent of a protective tariff. States must be allowed, and even encouraged, to work 'to attract business by creating an environment conducive to economic activity.'" *DirecTV Kentucky*, 487 F.3d at 481. This Court should reject efforts to expand the dormant Commerce Clause's reach in such a dramatic fashion.

4. Congress Has Authorized Florida's Tax Structure.

Even if the CST would otherwise violate the dormant Commerce Clause, it would not here, where Congress has already regulated state taxation of satellite. "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). Any State actions that Congress authorizes are "invulnerable to constitutional attack under the Commerce Clause." *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).[14]

In enacting the Telecommunications Act of 1996, Congress determined that the satellite industry should be free from direct local taxation to "excuse" satellite companies from "burdensome dealings with local authorities"—not to lower their tax burdens. *DirecTV Massachusetts*, 25 N.E.3d at 269; *DirecTV, Inc. v. Treesh*, 290 S.W.3d 638, 643 (Ky. 2009) (Telecommunications Act spares satellite providers "from the administrative costs and burdens of local taxation," not from "taxation as such"). Because Florida's law comports with this congressional policy, it is immune from attack under the Commerce Clause. That the actual tax

[14] This Court need not reach this issue because the law, as explained above, is not otherwise a Commerce Clause violation. *See DirecTV Kentucky*, 487 F.3d at 481 n.2 (finding it unnecessary to determine whether "Congress explicitly approved the type of taxation" at issue because it affirmed conclusion that there was no dormant Commerce Clause violation otherwise).

burdens for cable and satellite vary from locality to locality is the natural consequence of Congress's design to allow local taxation of cable, 47 U.S.C. § 542, but not satellite.

If the CST did intrude on Congress's authority, Congress is well equipped to change that. Congress has already set rules in the specific area of state and local taxation of cable and satellite communication. Indeed, Congress has a long track record of regulating the communications industry and assisting satellite providers when appropriate. *See, e.g.*, *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 774 (9th Cir. 2011) (noting Congress passed the Satellite Home Viewer Improvement Act of 1999 "to better enable competition between satellite TV and cable TV"); *Satellite Broad. & Commc'ns Ass'n*, 275 F.3d 337 at 344-52 (detailing history of Congressional satellite and cable TV regulation). If Congress is concerned that Florida and other states' tax regimes put satellite providers at a competitive disadvantage, Congress can study the issue and take action. Congress is much better equipped than courts to determine the appropriate calibration of cable and satellite taxation. *See Davis*, 553 U.S. at 355-56; *Tracy*, 519 U.S. at 307-10.

III. THE TOTAL TAX ON CABLE EXCEEDS THE SATELLITE TAX.

Even if the Commerce Clause prohibited state taxes on satellite services that exceeded state taxes on cable (and it does not), this Court should still reverse. In every year at issue, the average effective CST rate was *higher* on cable services

than on satellite. R31:4295-98. According to the most conservative estimate, the total CST on cable (statewide CST plus local CST) was on average 0.5 percent higher than the total CST on satellite (statewide CST alone, because satellite is exempt from local CST). R31:4298. The Satellite Providers' own economist's report similarly reflects that the combined local and statewide CST on cable exceeded the satellite CST by 0.5 percent. *See* R37:5216.

Accordingly, even if taxing cable and satellite differently *could be* discriminatory, the Satellite Providers still cannot show substantial discriminatory effects. *Cf. Cherry Hill Vineyard*, 505 F.3d at 37-38 (challengers must make "substantial showing" of more than "de minimis" actual discrimination); *accord Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010) (collecting authority). Courts repeatedly refuse to find laws discriminatory in effect without a substantial showing. *Black Star Farms*, 600 F.3d at 1231; *Cherry Hill Vineyard*, 505 F.3d at 30; *Gwadosky*, 430 F.3d at 41; *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2d Cir. 2003); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002).

In finding the applicable tax on satellite higher, the panel majority all but ignored the local component of the CST. It correctly recognized that local CST rates were relevant to the existence of discrimination under the dormant Commerce Clause, Op. at 13-14 (citing *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 722

(Fla. 1994)), but it inexplicably found the local CST an "insufficient method of ensuring equal treatment" because there was no "guarantee" that the local governments would not lower their rates, *id.* at 14. Regardless of any "guarantee," the "hypothetical possibility of favoritism" does not support a dormant Commerce Clause claim. *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 654 (1994).[15] When the discriminatory character of a tax depends on the tax rates actually implemented, the presence or absence of discrimination turns on whether the tax actually discriminates, not whether the local governments *could* set rates that *might* lead to discriminatory effects. *Id.* at 654-55.

IV. THE SATELLITE PROVIDERS ARE NOT ENTITLED TO A REFUND.

Last, even if the challenged tax unconstitutionally discriminated against interstate commerce (and it does not) the Satellite Providers are not entitled to a refund for at least two independent reasons.

First, *purchasers* pay the statewide CST on satellite services; the Satellite Providers merely collect and remit the tax. § 202.16(1)(a), Fla. Stat. ("The taxes

[15] The Satellite Providers incorrectly argued below that *Lohman* renders the average statewide tax burden irrelevant. *Lohman* involved a facially discriminatory tax scheme (different taxation on in-state and out-of-state purchases) that must satisfy a "strict rule of equality" under the compensatory tax doctrine. 511 U.S. at 649. In a discriminatory effects case, there must be "substantial evidence" of an actual discriminatory effect. *Cherry Hill Vineyard*, 505 F.3d at 38-39 (distinguishing facial discrimination cases from discriminatory effects cases). Satellite's statewide tax advantage shows that the CST maintains the industry's advantageous tax position, though to a lesser degree than the previous law.

collected under this chapter . . . shall be paid by the purchaser of the communications service and shall be collected from such person by the dealer of communications services."). When a third party collects a tax from a purchaser and remits it to the Department, only the purchaser may ordinarily seek a refund. *State ex rel. Szabo Food Servs. Inc. of N.C. v. Dickinson*, 286 So. 2d 529, 532 (Fla. 1973). The Legislature provided a somewhat modified rule for CST refunds: Section 202.23 provides that dealers, such as the Satellite Providers, process all purchaser refund requests in the first instance. § 202.23(1), Fla. Stat. The dealer may then seek a refund if the dealer refunds a tax payment in response to a purchaser's request. *Id.* § 202.23(3) ("A dealer who remitted a tax amount to the department for which the dealer subsequently issued a refund or credit to the purchaser pursuant to this section . . . is entitled to a refund or credit of such amount from the department.").[16] The Satellite Providers have never, however, claimed that they issued refunds in response to timely customer requests.

Second, even if they were otherwise eligible for a refund, the Satellite Providers failed to exhaust their administrative remedies. A taxpayer may sue for a

[16] The statute also allows dealers to seek refunds of amounts remitted that were not originally collected from purchasers. § 202.23(3), Fla. Stat. (allowing "dealer who has otherwise remitted to the department a tax amount with respect to communications services which was not due" to seek a refund). This provision cannot authorize the Satellite Providers to enjoy a refund of taxes others paid. *Cf. Dep't of Revenue v. Bank of Am., N.A.*, 752 So. 2d 637, 641 (Fla. 1st DCA 2000) (right to refund strictly construed in Department's favor).

refund without first exhausting administrative remedies only if the statute imposing the tax is facially unconstitutional. *Sarnoff v. Dep't of Hwy. Safety & Motor Vehicles*, 825 So. 2d 351, 357 (Fla. 2002) (only exception to exhaustion requirement is when the "sole basis claimed for the refund is that the statute imposing the tax or fee is facially unconstitutional"). No refund is available when the tax is unconstitutional only as applied, *see id.*, and a statute is facially unconstitutional only when "no set of circumstances exists under which the statute would be valid," *City of Gainesville*, 918 So. 2d at 256. Even if taxing satellite at a higher rate than cable in a particular jurisdiction could violate the dormant Commerce Clause, the satellite CST would remain constitutional in those jurisdictions where the satellite CST was *not* higher than the combined state and local CST for cable. *See Lohman*, 511 U.S. at 654-55 (tax regime that varied county to county was constitutional in counties where out-of-state transactions were taxed at a lower rate than in-state transactions and could not be "rejected *in toto* as facially discriminatory"). Because there is at least one set of circumstances under which the satellite CST may be applied constitutionally (in an area with a local CST of at least four percent), the Satellite Providers' failure to exhaust administrative remedies further precludes any refund.[17]

[17] Determining any refund amount—even if one were warranted—would be incredibly complicated. The measure would potentially turn on, among other things, jurisdiction-by-jurisdiction assessments of the difference between satellite

V. THE ORDER AWARDING COSTS SHOULD BE REINSTATED.

The First District vacated the order awarding costs, R62:9117-18, based on its erroneous reversal of the summary judgment order. Op. at 21. The award of costs should be reinstated.

CONCLUSION

Florida's communications services tax is constitutional. This Court should reverse the decision below.

Respectfully submitted,

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and cable CST rates, the effect of the severability provision, § 202.13(1), Fla. Stat., and the potential for retroactive legislation, *cf. Kuhnlein*, 646 So. 2d at 726, none of which have been considered in this context.

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been furnished by electronic service through the Florida Courts E-Filing Portal on September 25, 2015 to the following:

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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