

>> ALL RISE.  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.  
PLEASE BE SEATED.  
>> OKAY.  
GOOD MORNING.  
NEXT CASE ON THE DOCKET IS THE  
FLORIDA DEPARTMENT OF REVENUE  
VERSUS DIRECTV.  
ET. AL.  
WHENEVER YOU'RE READY.  
>> MR. CHIEF JUSTICE, MAY IT  
PLEASE THE COURT.  
MY NAME IS JONATHAN WILLIAMS.  
I'M REPRESENTING THE DEPARTMENT  
OF REVENUE IN THIS CASE.  
I WILL BE SPLITTING TIME WITH  
MR. TRESH.  
FLORIDA'S COMMUNICATIONS  
SERVICES TAX DOES NOT  
DISCRIMINATE AGAINST INTERSTATE  
COMMERCE.  
ON THE CONTRARY, THE LEGISLATURE  
SOUGHT TO SUBJECT ALL  
COMMUNICATIONS SERVICE TO THE  
SAME STATE AND LOCAL TAX REGIME  
TO ALLOW FLORIDIANS TO MAKE TAX  
NEUTRAL CHOICES AMONG SERVICE  
PROVIDERS.  
FEDERAL LAW HOWEVER REQUIRED ONE  
EXCEPTION.  
BECAUSE UNDER THE 1996  
TELECOMMUNICATIONS ACT, CONGRESS  
PROHIBITED LOCAL GOVERNMENTS TO  
DIRECTLY TAX SATELLITE SERVICES  
BUT EXPLICITLY ALLOWED STATE  
GOVERNMENTS TO TAX SATELLITE AND  
SHARE THAT REVENUE WITH THE  
LOCAL GOVERNMENTS AND THAT IS  
EXACTLY WHAT FLORIDA HAS DONE  
HERE.  
IT IS IMPOSED A HIGHER STATE  
COMMUNICATIONS SERVICES TAX IN  
ORDER TO BE ABLE TO SHARE THE  
REVENUE WITH THE RELEVANT LOCAL  
GOVERNMENT.  
AND EFFECT HAS BEEN CLEAR AND  
CONSISTENT.  
IN EVERY SINGLE YEAR EXAMINED IN  
THIS CASE SATELLITE PROVIDERS

ENJOYED A TAX ADVANTAGE OVER THEIR PAY TV COMPETITOR CABLE. PLAINLY, SATELLITE IS NOT THE VICTIM OF DISCRIMINATION AGAINST INTERSTATE COMMERCE IN THIS CASE.

>> THAT IS WHAT-- THE TRIAL COURT FOUND THAT.

>> THAT IS EXACTLY RIGHT.

>> BUT THE FIRST DISTRICT SAID YOU CAN'T, BECAUSE THIS GOES FROM YEAR TO YEAR.

SO, BUT IF YOU FOUND THAT, IF THE COURT FOUND THAT IT WOULD, AT THAT POINT THERE WOULD BE NO CONSTITUTIONAL ISSUE?

>> THAT'S RIGHT.

BECAUSE YOU HAVE TO BE DISCRIMINATED AGAINST.

>> OKAY, SO, THAT'S, ARE YOU GOING TO DIRECT YOURSELF TO THAT OR TO THE CONSTITUTIONAL ISSUE?

>> WELL, NO, I'LL MOVE ON OF COURSE.

SO, THE PROBLEM THOUGH, WITH WHAT THE FIRST DISTRICT DID WAS IT DETERMINED THAT THE RATES COULD CHANGE YEAR TO YEAR AND THERE WAS A HYPOTHETICAL POSSIBILITY THAT THE SATELLITE PROVIDERS COULD LOSE THEIR TAX ADVANTAGE.

WE'VE CITED CASE LAW FROM THE U.S. SUPREME COURT TO THE EFFECT THAT THE HYPOTHETICAL POSSIBILITY OF DISCRIMINATION NEVER AMOUNTS TO A DORMANT COMMERCE CLAUSE DISCRIMINATION UNLESS ACTUAL DOLLARS AND SENSE EFFECT THERE IS DISCRIMINATION AGAINST INTERSTATE COMMERCE.

>> CAN I ASK YOU A QUESTION ABOUT THE GENESIS OF THE LOCAL TAX.

AM I CORRECT IN UNDERSTANDING THAT THE LOCAL TAX WAS A REPLACEMENT FOR THE REVENUE THAT THE LOCAL GOVERNMENTS WOULD HAVE, AT LEAST ROUGHLY A REPLACEMENT FOR THE REVENUES

THAT LOCAL GOVERNMENT WOULD HAVE RECEIVED FROM FRANCHISE FEES?

>> YES.

IT DOES REPLACE THE REVENUE HOWEVER, IT IS NOT A FEE FOR THE USE OF LOCAL RIGHTS OF WAY. SO SERVICES LIKE VIDEO STREAMING SERVICES ARE SUBJECT TO THE EXACT SAME TAX REGIME THAT CABLE TV IS SUB SECOND TO.

SO YOU DON'T SEE--

>> BASICALLY AS PART OF THIS SCHEME CABLE COMPANIES GOT FREE ACCESS TO RIGHT-OF-WAY UNLIKE ANYBODY ELSE WHO USES THE RIGHT-OF-WAY, THAT'S CORRECTS, ISN'T IT.

>> EVERY COMMUNICATION SERVICES PROVIDER HAS FREE ACCESS TO THE LOCAL RIGHTS-OF-WAY. AS THE SIXTH CIRCUIT SAID THERE IS NO DORMANT COMMERCE CLAUSE TO USE RIGHTS-OF-WAY.

THAT IS WHY EVERY ROAD IS NOT A TO ROAD.

THERE IS NO PROBLEM WITH THAT DECISION BY THE STATE.

THAT IS A POLICY DECISION BY THE STATE THE COST, THE TAX IMPOSITION OF, ON A COMMUNICATIONS SERVICE SHOULD NOT BE BASED ON WHETHER IT USES LOCAL RIGHTS-OF-WAY.

THE IDEA WAS TO TREAT ALL COMMUNICATION SERVICES THE SAME TO THE EXTENT THAT THE LEGISLATURE COULD CONSISTENT WITH FEDERAL LAW.

SO THAT THE DIFFERENCE IN TAXATION HERE IS FULLY EXPLAINED BY THE PRESENCE OF PREEMPTION OF LOCAL TAXATION IN THE '96 TELECOMMUNICATIONS ACT.

SO IF ANYTHING THERE IS DISCRIMINATION AGAINST AN ENTITY THAT HAS PREEMPTION SAFETY.

THAT IS NOT DISCRIMINATION AGAINST INTERSTATE COMMERCE.

THAT'S NOT PROTECTIONISM.

THERE IS NO PREEMPTION CLAIM

HERE.

SO THE FACT IS THAT THE MOST RELEVANT DISTINCTION HERE IS THE PRESENCE OF THE PREEMPTION AND THAT IS NOT PROTECTIONISM.

AND SO IT IS CLEAR THAT PROTECTION SYSTEM NOT AT PLAY HERE BECAUSE THERE IS ABSOLUTELY NO EVIDENCE THAT THE LEGISLATURE INTENDED TO DISCRIMINATE AGAINST--

>> THE FEDERAL GOVERNMENT IF THEY WANTED TO PROTECT SATELLITE PROVIDERS LIKE DIRECTV AT THE SAME TIME THEY PROHIBITED IMPOSITION OF THAT PARTICULAR TAX COULD HAVE SAID, THERE SHALL BE NO OTHER TAXES WHICH WOULD HAVE ALMOST BEEN REVERSE DISCRIMINATION.

>> THAT'S RIGHT.

THEY COULD HAVE DONE THAT ABSOLUTELY THAT WOULD BE IN CONGRESS'S COMMERCE POWER TO DO THAT.

THE FEDERAL GOVERNMENT CHOSE NOT TO.

WHAT THE FEDERAL GOVERNMENT WAS TAKING AIM AT ADMINISTRATIVE BURDEN OF SATELLITE PROVIDERS FILING TAX RETURNS IN ALL THESE JURISDICTION.

FLORIDA DOESN'T CREATE ADMINISTRATIVE BURDEN BECAUSE THERE IS ONLY STATE LEVEL TAX. FURTHER TO THE POINT ABOUT DISCRIMINATION AGAINST SATELLITE, IF THE LEGISLATURE HAD REALLY WANTED TO DISCRIMINATE AGAINST SATELLITE, IT WOULDN'T HAVE CREATE ATTACKS REGIME WHERE SATELLITE CONSISTENTLY ENJOYED A TAX BENEFIT.

THE FIRST DISTRICT AND CIRCUIT COURT CORRECTLY REJECTED THE CLAIM THERE IS DISCRIMINATORY PURPOSE.

WHAT YOU HAVE ESSENTIALLY IS A CLAIM OF ACCIDENTAL

DISCRIMINATION BECAUSE THERE IS NO EVIDENCE THAT WAS THE AIM OF WHAT THE LEGISLATURE DECIDED TO DO.

THERE ARE DISCRIMINATORY EFFECTS CASES BUT AS WE POINTED OUT IN OUR BRIEF THE DISCRIMINATORY EFFECTS CASES FACIAL DISCRIMINATION OR THEY'RE SO OUT OF WHACK THERE IS NO REAL PLAUSIBLE NON-DISCRIMINATORY PURPOSE HERE AND THAT IS BUILT INTO THE DEFINITION OF WHAT IT MEANS TO BE DISCRIMINATORY.

>> LET ME JUST ASK YOU A QUESTION.

DID YOU DECIDE TO SPLIT UP YOUR TIME WITH CO-COUNSEL?

>> YES.

>> THANK YOU.

YOU'RE INTO HIS TIME.

>> THANK YOU.

DID YOU GUYS WANT TO DO THAT?

>> YES.

IF THAT PLEASES THE COURT.

[INAUDIBLE]

>> WHERE-- WAS HE ON--

>> HE IS NOT UP THIS TIME?

>> WE RESERVING FIVE MINUTES FOR REBUTTAL.

>> YOU WILL TAKE MORE?

>> OKAY.

OKAY.

ALL RIGHT, SORRY.

>> GOOD MORNING, YOUR HONOR, MY NAME IS ERIC TRESH.

I REPRESENT THE FLORIDA TELECOMMUNICATIONS ASSOCIATION. MAY IT PLEASE THE COURT.

YOUR HONOR, ONE OF THE PRIMARY PROPS WITH THE DISTRICT COURT'S OPINION, WITH THE COURT APPEALS OPINION IS IT IS PREMISED ON ENTIRELY INACCURATE FACTUAL CONCLUSION THAT RUNS CONTRARY TO WHAT JUDGE LEWIS FOUND IN THE COURT.

THAT IS, THAT THE SATELLITE COMPANIES TRANSMIT THEIR SIGNALS TO CUSTOMERS IN FLORIDA WITHOUT

THE USE OF ANY LOCAL PROPERTY.  
WHAT THE STIPULATED FACTS IN  
THIS CASE, EVERYTHING ELSE IN  
THE DISTRICT COURT'S OPINION  
FLOWS FROM THIS PREMISE THAT THE  
SATELLITE COMPANIES ARE  
OUT-OF-STATE, AND THAT THE LOCAL  
COMPANIES, AND THAT THE CABLE  
COMPANIES HAVE A LOCAL INTEREST  
INVOLVED HERE.

>> BECAUSE OF THE USE OF THE  
CABLES?

>> CORRECT.

>> OVER THE RIGHT-- HERE, LOOK.  
I'M LOOKING AT, FIRST DISTRICT  
CASE, I'M LOOKING AT EVERY OTHER  
CASE THAT'S BEEN DECIDED AROUND  
THE COUNTRY.

THAT WE HAVE A DIFFERENT KIND OF  
SATELLITE AND CABLE SETUP THAN  
UTAH, MASSACHUSETTS, OHIO,  
WHEREVER ELSE?

>> NO, YOUR HONOR.

THIS CASE IS EXACTLY LIKE EVERY  
OTHER CASE THAT'S BEEN DECIDED  
AROUND THE COUNTRY.

>> NO.

THE ISSUE OF THESE DORMANT  
COMMERCE CLAUSE AND, WHETHER  
IT'S A LOCAL INTEREST OR WHETHER  
THERE IS SUBSTANTIALLY SIMILAR  
BUSINESSES, IS THAT ISSUE OF  
FACT, LAW OR MIXED QUESTION OF  
FACT OR LAW, THAT ANY APPELLATE  
COURT CAN ANALYZE IT  
DIFFERENTLY?

I MEAN AGAIN, IT IS SORT OF A  
FRIENDLY QUESTION.

SEEMS TO ME IF WE'RE DEALING  
WITH THE UNITED STATES  
CONSTITUTION--

>> YES.

>> THAT THERE HAS GOT TO BE,  
THERE'S GOT TO BE AN APPLICATION  
OF THE SAME INDUSTRY.

>> YES.

>> IN THE SAME WAY.

>> THAT'S PRECISELY CORRECT,  
YOUR HONOR.

IN EACH ONE OF THOSE OTHER

CASES, AND IN THIS CASE AT THE TRIAL COURT, IT WAS DETERMINED THAT THE SATELLITE COMPANIES ARE INTERSTATE BUSINESSES PROVIDING AN INTERSTATE SERVICE.

IT WAS ALSO DETERMINED THAT CABLE COMPANIES WERE INTERSTATE BUSINESSES PROVIDING AN INTERSTATE SERVICE.

AND THAT THESE COMPANIES WERE SUBJECT TO VERY DIFFERENT REGULATORY REGIMES WHICH MAKES THEM NOT SIMILAR FOR COMMERCE CLAUSE PURPOSES.

AND--

>> IS THERE ANY SUPREME COURT CASE, U.S. SUPREME COURT CASE, THAT RELIES ON THE DIFFERING REGULATORY BURDENS IN DETERMINING WHETHER BUSINESS ENTITIES ARE SIMILARLY SITUATED?

>> YES, YOUR HONOR.

>> IS THERE U.S. SUPREME COURT CASES THAT SUPPORT THAT?

>> YES, YOUR HONOR.

>> WHAT'S THAT.

>> IN GM VERSUS TRACY.

IN GM VERSUS TRACY THE UNITED STATES SUPREME COURT HELD TWO COMPETING PROVIDERS OF NATURAL GAS, LOCAL GAS DISTRIBUTION COMPANIES, AND OUT-OF-STATE GAS MARKETERS, THAT WERE COMPETING FOR A SUBSET OF THE SAME CUSTOMERS WERE NOT SIMILARLY SITUATED FOR COMMERCE CLAUSE PURPOSES BECAUSE OF THE FACT OF THE REGULATED, HIGHLY REGULATED NATURE OF GAS MARKET OF LOCAL DISTRIBUTION COMPANIES.

>> DIDN'T THAT CASE INVOLVE THE FACT THAT THERE WERE TWO DIFFERENT MARKETS?

THERE IS CAPTIVE MARKET AND NON-CAPTIVE MARKET?

>> THAT'S CORRECT, YOUR HONOR. SO PART OF THAT CASE TURNED ON THE COURT'S DETERMINATION THERE WERE TWO DIFFERENT MARKETS BUT PART OF THAT CASE OR A LOT OF

THAT CASE TURNED ON HOW THE DIFFERENT COMPANIES WERE REGULATED.

ONE OF THE THINGS THAT THE SUPREME COURT SAID THEY WERE WORRIED ABOUT WAS OHIO RESIDENTS FREEZING FROM NOT, FROM NOT RECEIVING NATURAL GAS.

AND SO THE REGULATORY NATURE, THE FACT THAT THEY HAD TO PROVIDE SERVICE, THE LOCAL DISTRIBUTION COMPANIES, MADE THEM DISSIMILAR, NOT SIMILARLY SITUATED FOR COMMERCE CLAUSE PURPOSES FROM THOSE OUT-OF-STATE GAS MARKETERS.

BUT HERE YOU HAVE A FACTUAL CONCLUSION THAT WAS SO INCORRECT.

WHEN WE TALK ABOUT LOCAL INTERESTS, VERSUS OUT-OF-STATE INTERESTS, WE NEED TO REMEMBER THAT THE FACTUAL RECORD IN THIS CASE SHOWS THAT THE SATELLITE COMPANIES USE THE PUBLIC RIGHTS OF WAY TO PROVIDE THEIR SERVICE.

>> BUT, AGAIN, I'M LOOKING BACK, ON THE STANDARD REVIEW ISSUE.

THIS WAS A SUMMARY JUDGMENT BEFORE THE TRIAL COURT.

>> YES, YOUR HONOR.

>> WHEN YOU SAY THE JUDGE, THE TRIAL COURT MADE FACTUAL DETERMINATIONS, IT IS SUMMARY JUDGMENT, THE FACTS CAN'T BE IN DISPUTE THAT ARE MATERIAL.

SO THAT IS WHY I'M GOING BACK TO TRYING TO UNDERSTAND IF YOU COULD HAVE, FROM STATE TO STATE, DIFFERENT CONCLUSIONS ABOUT THE SAME INDUSTRY?

>> YOU COULDN'T, YOUR HONOR, BECAUSE THE OVERARCHING PRINCIPLE WE'RE DEALING WITH IS THE UNITED STATES CONSTITUTION AND THESE COMPANIES DO BUSINESS, CABLE COMPANIES AND SATELLITE COMPANIES, THE SAME IN ALL THE STATES.

>> WHAT THEY SAID, WHAT THE

FIRST DISTRICT SAID IN MAKING THIS, SAYING IT WAS A LOCAL BUSINESS OR WHATEVER-- WHAT IS THAT STANDARD?

>> LOCAL ECONOMIC INTEREST.

>> THAT THE USE OF THE RIGHT-OF-WAY MADE IT SO.

>> YES.

>> THAT IS, THAT IS A WRONG WAY TO ANALYZE WHETHER THEY'RE LOCAL OR NOT?

>> THAT IS AN INCORRECT LEGAL CONCLUSION.

>> BUT YOU'RE SAYING IN ADDITION THAT SATELLITE ALSO, WELL, HOW DO THEY USE THE RIGHT-OF-WAY?

>> SO, SATELLITE TO BROADCAST, REBROADCAST LOCAL TELEVISION STATIONS, THEY GO AHEAD AND USE THE LOCAL RIGHTS-OF-WAY, THIS IS IN THE STIPULATED FACTS.

THAT THEY SEND THEIR SIGNALS THROUGH LAND LINES, TELECOMMUNICATIONS LAND LINES AND THEY GO TO WHAT IS CALLED AN UPLINK FACILITY.

THESE ARE LAND LINES IN FLORIDA.

THEN THE SERVICE GOES UP INTO THE SKY AND GETS BEAMED BACK DOWN TO SATELLITE COMPANIES.

SO THEY'RE DOING, THEY'RE USING LAND LINES IN REVERSE.

WE USE LAND LINES TO SEND SIGNAL TO OUR CUSTOMERS.

THEY USE THE LAND LINES IN PART TO SEND THEIR SIGNALS UP TO THEIR SATELLITES AND BACK DOWN.

ONE OF THE ERRORS OF LAW THAT THE DCA MADE WAS THAT THEY CONCLUDED CABLE COMPANIES PRODUCE SOMETHING IN FLORIDA. NOTHING COULD BE FURTHER FROM THE TRUTH.

THIS COMMENT ABOUT OUR HEADENDS, A HEADEND IS COMPUTER.

THAT IS REALLY ALL IT IS.

THAT THESE COMPUTERS WE HAVE IN FLORIDA ARE 21st CENTURY PRODUCTION FACILITIES?

THAT IS NOT CORRECT.

THEY HELP DISTRIBUTE THE CABLE SIGNAL.

>> IS THIS, KEEP ON GOING BACK TO YOU'RE TELLING US THIS.

THE JUDGE, THE TRIAL JUDGE SAID, FOUND SOMETHING BUT THEY DIDN'T REALLY FIND ANYTHING BECAUSE IT WAS ON CROSS-MOTIONS AND NOBODY IS SAYING IT SHOULD GO BACK FOR EVIDENTIARY HEARING, RIGHT?

>> THAT'S RIGHT, YOUR HONOR.

WHAT I'M SAYING IS AS A MATTER OF LAW WE HAVE NO, CABLE HAS NO LOCAL INTEREST WHICH IS BEING BENEFITED AND THAT IS THE TEST UNDER THE COMMERCE CLAUSE, CABLE HAS NO LOCAL INTEREST THAT IS BEING BENEFITED BY THE FLORIDA TAX SCHEME.

IT IS COMPETITIVELY NEUTRAL AND WHEN YOU LOOK AT CABLE'S INTEREST, CABLE'S INTEREST GOES AHEAD AND, AND IF CABLE WERE TO MOVE ITS HEADENDS OUT OF THE STATE, THESE 21st CENTURY PRODUCTION FACILITIES, WHICH TODAY THEY HAVE ACTUALLY DONE IN MANY CASES, CABLE WOULD BE SUBJECT TO THE SAME TAX.

IF SATELLITE ON THE OTHER HAND WERE TO MOVE ALL OF THEIR FACILITIES INTO THE STATE OF FLORIDA, THEY WOULD BE SUBJECT TO THE SAME TAX.

WHERE IS THE LOCAL INTEREST THAT IS BEING BENEFITED?

IT DOESN'T EXIST.

WHAT THE SATELLITE COMPANIES ARE REALLY ASKING THIS COURT TO DO IS TO ADOPT A TEST THAT THE SUPREME COURT HAS NEVER DONE. AND THAT IS A RELATIVE ECONOMIC PRESENCE TEST.

>> ONE OTHER QUESTION.

SUBSTANTIALLY SIMILAR ENTITIES, THE TRIAL COURT BELOW FOUND SATELLITE AND CABLE COMPANIES ARE INHERENTLY DIFFERENT ENTITIES WHICH TOOK IT OUT OF PURVIEW.

EVERY OTHER, MOST OF THE OTHER COURTS HAVE FOUND THEM TO BE INHERENTLY DIFFERENT ENTITIES OR NOT SUBSTANTIALLY SIMILAR. IS THAT A QUESTION OF LAW OR FACT?

>> THAT'S A-- THAT IS A MIXED QUESTION BUT IT'S A LEGAL STANDARD UNDER THE CONSTITUTION. IT IS A QUESTION OF LAW WHETHER FOR COMMERCE CLAUSE PURPOSES THESE ENTITIES ARE SIMILARLY SITUATED, YOUR HONOR.

>> YOU'RE INTO YOUR REBUTTAL TIME.

>> THANK YOU, YOUR HONOR.

>> GOOD MORNING YOUR HONORS. MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT.

THE UNITED STATES SUPREME COURT HAS SAID OVER AND OVER AND OVER THAT THE DORMANT COMMERCE CLAUSE PREVENTS A STATE FROM ENACTING, QUOTE, THIS IS A DIRECT QUOTE FROM THE WESTINGHOUSE CASE, TAXING MEASURES THAT IMPOSE GREATER BURDENS ON ECONOMIC ACTIVITIES TAKING PLACE OUTSIDE THE STATE, THEN ARE PLACED ON SIMILAR ACTIVITIES WITHIN THE STATE.

A STATE CAN NOT TAX BUSINESSES DIFFERENTLY BASED ON WHERE THEY PERFORM MANUFACTURING.

THAT IS THE ARMCO CASE.

IT CAN'T TAX THEM DIFFERENTLY BASED ON WHERE PARTICULAR TRANSACTIONS OCCUR.

THAT IS BOSTON STOCK EXCHANGE.

IT CAN'T TAX THEM DIFFERENTLY BASED WHERE THEY DO THEIR EXPORTING.

THAT'S WESTINGHOUSE.

OTHER CASES LIKE FULTON AND TYLER PIPE AND BODY, EXACTLY THAT SAME PRINCIPLE.

>> DO YOU AGREE IN THIS AREA--

>> HOW DO YOU TAKE--

>> DO YOU AGREE IN THIS AREA SATELLITE, CABLE, THAT THE

DECISION THAT WE'RE REVIEWING IS  
OUT OF STEP WITH ALL OTHER  
DECISIONS ACROSS THE COUNTRY?

>> I DON'T, YOUR HONOR.

>> YOU DO NOT, OKAY.

WE'LL EXPLAIN THAT TO US  
THOROUGHLY.

>> CERTAINLY, YOUR HONOR.

THERE IS NO DOUBT THAT THESE ARE  
DIFFICULT QUESTIONS AND THAT'S  
WHY THEY HAVE DIVIDED COURTS ALL  
OVER THE COUNTRY.

NOT ONLY THE MAJORITY OPINION  
BELOW BUT YOU WILL SEE FOR  
INSTANCE, IN THE DECISION OF THE  
TENNESSEE COURT OF APPEALS,  
ALTHOUGH IT ULTIMATELY RULED  
AGAINST SATELLITE ON SIMILARLY  
SITUATED QUESTION WHICH I WANT  
TO MAKE SURE TO GET TO, IT  
SQUARELY EMBRACED EVERY LAST  
OTHER ONE OF THE ARGUMENTS THAT  
HAVE BEEN MADE HERE.

IT REJECTED THE CLAIM ABOUT MODE  
OF OPERATIONS OR METHOD OF  
OPERATIONS TRUMP CARD FOR THE  
DORMANT COMMERCE CLAUSE JUST--

>> I'M SORRY.

COULD YOU ANSWER JUSTICE LEWIS'S  
QUESTION.

YOU SAID THEY ULTIMATELY RULED  
AGAINST YOU.

YOU ARE SAYING IT IS NOT WEIGHT  
OF AUTHORITY.

IS THERE ANY OTHER CASE FROM A  
SUPREME COURT OR AN APPELLATE  
COURT THAT HAS RULED THE WAY THE  
FIRST DISTRICT HAS RULED?

>> I, SO THE SHORT ANSWER YOUR  
HONOR, IS NO, THERE IS NO FINAL  
DECISION OF AN APPELLATE COURT  
OF ANOTHER CASE THAT RULED FOR  
SATELLITE BUT, AND THIS IS THE  
FUNDAMENTAL SUBSTANTIVE  
POINT I WANT TO MAKE, JUSTICE  
LEWIS, THE CASES ALREADY CAN NOT  
BE RECONCILED.

NOT ONLY THE FIRST DCA BUT THE  
TENNESSEE COURT OF APPEALS  
DISAGREED WITH WHAT OTHER COURTS

HAVE SAID, FOR INSTANCE, ABOUT HOW ONE INTERPRETS EXXON AND AMERADA HESS AND INDEED THIS COURT IN MCKESSON ALSO HAS SAID THAT EXXON AND AMERADA HESS REALLY ARE CASES ABOUT WHETHER THERE IS DISCRIMINATION. THEY ARE NOT CASES ABOUT SOME EXCEPTION TO THE DORMANT COMMERCE CLAUSE WHEN COMPANIES USE DIFFERENT METHODS FOR THEIR OPERATIONS.

NOR COULD THERE BE ANY SUCH EXCEPTION.

IF THAT EXCEPTION EXISTED, BAUCUS AND MCKESSON WOULD HAVE TO COME OUT THE OTHER WAY. HUNT, WHICH IS THE APPLE LABELING CASE INVOLVING A NORTH CAROLINA STATUTE, WOULD HAVE TO COME OUT THE OTHER WAY. JUST ABOUT ANY STATUTE CAN BE REPHRASED OR REFRAMED IN TERMS OF DIFFERENTIATING BASED ON DIFFERENT MODES OF OPERATION.

>> LET ME ASK YOU THIS.

IT IS YOUR BASIC ARGUMENT THAT THIS IS A VIOLATION OF THE DORMANT COMMERCE CLAUSE BECAUSE THE LOCAL, THE CABLE COMPANIES, ARE LOCAL INTERESTS? AND THE SATELLITE COMPANIES ARE INTERSTATE?

>> NO, YOUR HONOR.

AND I WANT TO TRY AND MAKE THIS POINT--

>> WELL, AS A PART OF THAT, AS YOU ANSWER THAT WOULD YOU TELL ME, HOW, HOW IS PLAYS INTO IT, ALL OF THESE, SATELLITE COMPANIES, AND THE CABLE COMPANIES SEEM TO ME TO BE OUT-OF-STATE COMPANIES? AND SO, DOES THAT PLAY INTO WHETHER OR NOT THERE'S A VIOLATION OF THE COMMERCE CLAUSE?

>> IT DOES NOT, YOUR HONOR. SO JUSTICE QUINCE, LET ME START WITH THE SECOND PART OF YOUR

QUESTION AND THEN LOOP BACK  
AROUND.

THERE ARE NUMEROUS CASES IN THE  
UNITED STATES SUPREME COURT,  
CASE AFTER CASE AFTER CASE IN  
WHICH THERE WAS A DORMANT  
COMMERCE CLAUSE VIOLATION, NOT  
WITHSTANDING THE FACT THAT I  
DIDN'T HAVE ONE COMPANY  
DOMICILED WITHIN THE STATE AND  
ANOTHER COMPANY DOMICILED  
OUTSIDE OF THE STATE.

IN THE ARMCO CASE THERE IS NOT A  
WHIFF OF A SUGGESTION THAT THE  
SUPREME COURT IS LOOKING AT  
WHETHER ALL OF THESE  
MANUFACTURERS ARE DOMICILED IN  
THE STATE OF WEST VIRGINIA.  
IT JUST DIDN'T MATTER TO THE  
ANALYSIS.

IN TYLER PIPE ACTUALLY, ALL OF  
THE COMPANIES WERE INSIDE OF THE  
STATE OF WASHINGTON.

IT WAS ALL IN-STATE COMPANIES.  
IT WAS JUST THAT ONE OF THEM WAS  
CHALLENGING THE STATUTE BECAUSE  
OF THE WAY IT WAS AFFECTED BY  
THIS MULTIPLE TAXATION REGIME.  
THE DORMANT COMMERCE CLAUSE MAY  
ONCE AT SOME LONG AGO POINT HAVE  
FOCUSED ON MILK PRODUCERS IN  
VERMONT AND MILK PRODUCERS IN  
NEW YORK.

THAT IS WHAT I LEARNED ABOUT IN  
THE FIRST YEAR OF LAW SCHOOL.  
THOSE ARE CASES FROM THE 1930S.  
BUT THE DORMANT COMMERCE CLAUSE,  
IF IT EVER WAS, IS NOT LIMITED  
TO CASES LIKE THAT.

WHAT MY FRIEND ON THE OTHER SIDE  
ACKNOWLEDGED A MOMENT AGO, AND  
WHAT IS CORRECT IS THAT THE  
DORMANT COMMERCE CLAUSE LOOKS AT  
WHETHER THERE IS A LOCAL,  
ECONOMIC, INTEREST AND LOTS OF  
DIFFERENT THINGS COUNT AS AN  
ECONOMIC INTEREST.

IT COULD BE A COMPANY INSIDE OF  
THE STATE AND A COMPANY  
DOMICILED OUTSIDE OF THE STATE.

IT COULD BE A LOCAL INDUSTRY.  
BUT WHAT CASES LIKE WESTINGHOUSE  
AND ARMO AND FULTON AND TYLER  
PIPE AND BOSTON STOCK EXCHANGE,  
THAT IS WHY I KEEP EMPHASIZING  
THESE CASES, WHAT THEY STAND FOR  
IS THE PROPOSITION THAT FAVORING  
ACTIVITY BASED ON WHERE IT'S  
PERFORMED VIOLATES THE DORMANT  
COMMERCE CLAUSE.

IF A LEGISLATURE SAID, WE'RE  
GOING TO TAX BREAD 5% IF YOU  
BAKE THE BREAD IN THE STATE, AND  
WE'RE GOING TO TAX IT 10% IF IT  
WAS BAKED OUTSIDE THE STATE,  
THAT WOULD VIOLATE THE DORMANT  
COMMERCE CLAUSE AND IT WOULD  
VIOLATE THE DORMANT COMMERCE  
CLAUSE, REGARDLESS WHETHER  
WONDER IS DOMICILED IN FLORIDA  
OR GUAM OR GERMANY.

AND THAT'S EXACTLY WHAT WE HAVE  
HERE.

WE HAVE A SITUATION IN WHICH THE  
SIGNAL DIFFERENCE BETWEEN CABLE  
AND SATELLITE IS WHERE THEY  
PERFORM THIS CRITICAL ACTIVITY  
OF ASSEMBLING AND DISTRIBUTING  
PAY TV SERVICE.

>> LET ME JUST, GOING BACK TO  
THIS, THIS IS A VERY INTERESTING  
LEGAL ISSUE AND I WANT YOU TO  
ADDRESS THIS QUESTION THAT,  
WE'RE DEALING WITH, FIRST OF ALL  
THE PRESUMPTION OF  
CONSTITUTIONALITY.

DORMANT COMMERCE CLAUSE IS A, IS  
PART OF THE COMMERCE CLAUSE THAT  
OBVIOUSLY DEVELOPED BUT IT  
DEVELOPED TO MAKE SURE THERE WAS  
NOT DISCRIMINATION, ADVERSELY  
AGAINST INTERSTATE COMMERCE  
BECAUSE, AND WE HAVE ALL THE  
OTHER STATE HIGH COURTS SAYING  
THAT THERE IS NO DORMANT  
COMMERCE CLAUSE VIOLATION.

THE QUESTION I REALLY HAVE FOR  
YOU IS THIS QUESTION IS IT FACT  
OR LAW?

WE WOULD HAVE TO SAY, TO GO INTO

THE DIRECTION THAT YOU'RE ASKING US TO GO, THAT AS A MATTER OF LAW, THAT EVERY OTHER COURT THAT'S RULED IS WRONG IN THEIR TREATMENT OF THEIR DORMANT COMMERCE CLAUSE AND WE COULD DO THAT.

I JUST WANT TO UNDERSTAND, IS IT, I DON'T KNOW HOW OTHERWISE WE GET A DIFFERENT OUTCOME ON THE DORMANT COMMERCE CLAUSE ANALYSIS ON A, WHERE A LEGAL ISSUE WAS BEING RAISED WHERE NOBODY IS CONTESTING THE FACTS?

>> JUSTICE PARIENTE,  
FUNDAMENTALLY I AGREE WITH YOU. IT IS CERTAINLY HYPOTHETICALLY POSSIBLE AND WE COULD IMAGINE CIRCUMSTANCES IN WHICH YOU HAD DIFFERENT RECORDS DEVELOPED IN DIFFERENT PLACES.

AND WE HAVE AN EXTENSIVE RECORD HERE AND OBVIOUSLY THAT IS THE ONE BEFORE THE COURT BUT YOU'RE ABSOLUTELY RIGHT THAT THERE WERE, THERE WERE CROSS-MOTIONS FOR SUMMARY JUDGMENT.

NO ONE POINTED TO ANY DISPUTED MATERIAL FACTS.

INDEED, LET ME TAKE JUST A BRIEF DETOUR, THIS ARGUMENT ABOUT WHERE CABLE TV IS PRODUCED AND WHAT HAPPENS AT THE HEADENDS, THIS IS SOMETHING THAT HASN'T SHOWED UP UNTIL THE FIRST TIME IN THIS COURT.

THERE WAS NEVER A CLAIM THERE WAS ANY DISPUTE ABOUT THAT AND INDEED THE RECORD IS ABSOLUTELY UNDISPUTED ABOUT WHERE CABLE IS PRODUCED BUT YOU'RE RIGHT.

THE DECISIONS OF SOME OF THE OTHER COURTS ARE ADDRESSING FUNDAMENTALLY THE SAME ISSUE. IT SEEMS TO ME THAT THERE ARE REALLY TWO ISSUES OR TWO CORE ISSUES ON WHICH THERE ARE, OR COULD BE DIFFERENCES.

ONE IS THIS QUESTION ABOUT WHETHER CABLE AND SATELLITE ARE

SIMILARLY SITUATED.

THERE WE HAVE THE MASSACHUSETTS DECISION AND THE TENNESSEE ONE WHICH FOLLOWED IT ABOUT A WEEK LATER.

>> THE MASSACHUSETTS SAID IT WAS OR WASN'T SIMILARLY?

>> THAT CABLE AND SATELLITE ARE NOT SIMILARLY SITUATED.

THE TENNESSEE COURT OF APPEALS ABOUT A WEEK LATER AS I MENTIONED A MOMENT AGO AGREED WITH US ABOUT MOST OF OUR OTHER CONTENTIONS BUT THEN FELL IN LINE BEHIND MASSACHUSETTS.

SO THAT IS THE FIRST POINT.

AND THE SECOND IS JUST THIS QUESTION OF WHETHER THERE'S, WHETHER THERE IS DISCRIMINATION. WHETHER THE DIFFERENCES AND METHODS OF OPERATION CAN LEAD TO DISCRIMINATION.

>> WITH ABOUT THIS ISSUE THAT WAS THEY STARTED WITH, WHICH IS, AND WHICH JUDGE LEWIS FOUND, WHICH IS THAT, YOU KNOW, I FIRST LOOKED AT 6%, 10%, THAT SEEMS LIKE ON ITS FACE, HOW ARE YOU GIVING TWO DIFFERENT TAX RATES? BUT THE FEDERAL GOVERNMENT EXEMPTED THE SATELLITE INDUSTRY FROM HAVING TO PAY LOCAL FRANCHISE FEES, RIGHT? CONGRESS DID THAT?

>> IT DID BUT, I DON'T WANT TO ANSWER, TO INTERRUPT YOUR HONOR'S QUESTION BUT THERE IS MORE TO IT THAN THAT.

>> I'M SURE THERE IS, BUT I GUESS THE QUESTION IS, THAT MEANS THEREFORE THAT LOCAL GOVERNMENTS, EVEN THOUGH INDIVIDUAL HOMES IN THEIR AREA ARE RECEIVING TV SERVICES THROUGH THIS OTHER METHOD, WHICH, AGAIN APPARENTLY HAS SOME TYPE OF COMING INTO FLORIDA ACTION, THEY ARE NOT GETTING THAT REVENUE.

SO THE STATE PUT THIS

DIFFERENTIAL IN SO THAT IT WOULD EQUALIZE THE REVENUE AND THE DEPARTMENT OF REVENUE SAYS IN EVERY YEAR THE CABLE COMPANIES ARE ACTUALLY PAYING MORE TAX THAN THE SATELLITE COMPANIES. NOW, IF THERE ISN'T DISCRIMINATION, JUST BECAUSE OF THAT ONE PART BUT THE OTHER, WHY DON'T WE LOOK AT ENTIRE TAXING SCHEME?

WHY DO YOU SAY THAT THAT'S NOT APPROPRIATE ANALYSIS TO SAY THERE REALLY ISN'T EVEN DISCRIMINATION?

>> SO, LET ME SEE IF I CAN--  
>> I'M LOOKING AT FIRST ISSUE. IF THERE IS NOT DISCRIMINATION, THEN YOU DON'T REALLY GET TO, IT SEEMS TO ME THE DORMANT COMMERCE CLAUSE ARGUMENT.

>> SO, YOUR HONOR, LET ME SEE IF I ANSWER YOUR QUESTION AND JUSTICE CANADY'S FIRST QUESTION ALL AT ONCE BECAUSE I THINK THEY GO TOGETHER.

BEST WAY TO LOOK AT THIS IS HISTORICALLY. PRIOR TO THE ENACTMENT OF THIS STATUTE, UNIFORM PRACTICE AROUND THE COUNTRY, INCLUDING IN FLORIDA, AND THIS REMAINS IN PRACTICE ALMOST EVERY STATE OF THE COUNTRY STILL TODAY, WAS TO TAX CABLE AND SATELLITE THE SAME, TO IMPOSE AN EQUAL SALES TAX, WHICH IS REFERRED TO IN THE TAX LINGO AS A TAX FOR PRIVILEGE OF DOING BUSINESS IN THE STATE, AND THEN IN ADDITION CABLE COMPANIES HAD TO PAY FRANCHISE FEES.

THESE CONTRACTUALLY NEGOTIATED FEES THAT WERE ESSENTIALLY RENT FOR USING PUBLIC RIGHTS OF WAY.  
>> LOCAL, THOSE WERE LOCAL FEES, FRANCHISE FEES?

>> YES.  
THEY WERE CONTRACTUALLY NEGOTIATED WITH PARTICULAR

LOCALITIES.

THEY WERE NEGOTIATED ON A PERCENTAGE BASIS, USUALLY ABOUT THREE TO 5% OF REVENUE AND THEY WERE PAID FOR THE RIGHT TO RIP UP THE ROADS AND SIDEWALKS AND LAY CABLES DOWN.

THEY WERE RENT.

WHAT CABLE THEN DID, IT WENT AROUND THE COUNTRY AND STARTED TELLING THE STORY OF PARODY AND SAYING IT'S NOT FAIR.

IF YOU ADD IN FLORIDA, 6% TO THE 3 TO 5% THAT WE'RE PAYING, OUR CUSTOMERS ARE PAYING MORE THAN SATELLITE CUSTOMERS.

NOW THE REASON FOR THAT IS THAT SATELLITE WASN'T RIPPING UP SIDEWALKS.

IT DIDN'T NEED TO PAY THAT RENT. IT HAD THIS INNOVATIVE BUSINESS MODEL.

OF COURSE IT HAD TO PAY FOR SATELLITES.

IT HAD TO PAY FOR ORBITAL SLOTS FOR THE SATELLITES.

IT HAD ITS OWN COSTS OF DOING BUSINESS.

BUT TO GET TO THE QUESTION YOU ASKED, JUSTICE PARIENTE, WHETHER THIS IS ALL JUST CALL, IT IS NOT.

WHAT WE HAVE NOW IS THE DIFFERENTIAL TAX, 10.8% VERSUS 6.8%.

AND THEN THE LATTER DAY EQUIVALENT FOR THE FRANCHISE FEES ADDED ON TOP.

SO THE QUESTION HERE IS WHETHER THAT REPLACEMENT FOR FRANCHISE FEES MAY BE CONSIDERED IN THE ANALYSIS.

>> OKAY.

SO LET ME ASK YOU, WE'RE TALKING ABOUT WHICH INDUSTRY HAS MORE CLOUT EITHER IN TALLAHASSEE OR WASHINGTON.

SO AT WHAT POINT DID THE SATELLITE INDUSTRY GO TO CONGRESS AND SAY, EXEMPT US FROM

ALL THESE LOCAL FEES?

>> YOUR HONOR, WHAT CONGRESS SAID IS, SATELLITE SHOULD NOT BE SUBJECT TO THESE FRANCHISE FEES BUT THE REASON IT GAVE IS CRITICAL.

THE REASON IT GAVE IS THIS IS A NATIONAL INDUSTRY THAT DOES NOT USE PUBLIC RIGHTS OF WAY. THE FEDERAL EXEMPTION IS NOTHING OTHER THAN THE RECOGNITION OF FACTUAL UNDERPINNINGS I JUST RECOUNTED TO YOUR HONOR A MOMENT AGO.

SATELLITE WASN'T DOING THIS. THE HOUSE REPORT, WE CITED IN THE PREVIOUS BRIEF, HOUSE REPORT 104-204.

SAYS THE REASON WE'RE EXEMPTING SATELLITE FROM THESE LOCAL FEES BECAUSE THEY DON'T OPERATE IN THIS PARTICULAR WAY.

SO--

>> WHEN CABLE PAYS LOCALLY, IF THEY PAY FOR THEIR OWN CABLE TO BE USED ON THE RIGHT-OF-WAY, ARE THEY PAYING FOR THE RIGHT TO USE THE RIGHT-OF-WAY?

>> YES, YOUR HONOR.

THAT'S WHAT THESE FRANCHISE FEES ARE.

THAT'S CLEAR FROM THE TREATISES, THE VERY SAME BENDER TREATISE THAT WAS CITED BY THE MASSACHUSETTS HIGH COURT. THAT IS WHAT THE FRANCHISE FEES WERE.

IT IS RECOGNIZED IN FEDERAL LAW AS WELL.

I BELIEVE 47 USC SECTION 542. THESE FRANCHISE FEES ARE VERY WELL-UNDERSTOOD MECHANISM.

>> DO YOU THINK THE LAW WAS PASSED WITH DISCRIMINATORY INTENT IN FLORIDA, THE SALES TAX, WITH INTENT, DISCRIMINATORY INTENT?

>> WE HAVE MADE THAT ARGUMENT BUT IT'S A SEPARATE ARGUMENT AND SEPARATE BASIS FOR

UNCONSTITUTIONALITY.

WE DON'T NEED TO SUCCEED IN  
PERSUADING THE COURT OF THAT IN  
ORDER TO WIN AN ARGUMENT ABOUT  
DISCRIMINATORY EFFECT.

>> WHY ISN'T THOUGH-- I GUESS,  
WHY ISN'T EQUALITY, WHETHER IT'S  
A GOOD OR BAD IDEA THAT THE  
CABLE COMPANIES PAY FRANCHISE  
FEES, IN THE END REALLY TALKING  
ABOUT THE CUSTOMER THAT GETS  
SCREWED OR HELP DEPENDING WHAT  
GOES ON HERE.

>> ABSOLUTELY, YOUR HONOR.

>> BECAUSE IT ALL GETS PASSED  
AND THAT IS WHO IS PAYING.  
WHY ISN'T A CORRECT THING TO  
EQUALIZE THAT TAX THAT IS BEING  
BORNE BY THE CONSUMER?

>> SO THE ANSWER, AND THIS WAS  
EXACTLY THE POINT I WANTED TO  
GET TO, YOUR HONOR.

THE ANSWER IS COMPENSATORY TAX  
DOCTRINE.

IT IS ABSOLUTELY COMMON IN THESE  
DISCRIMINATORY TAX CASES FOR A  
STATE TO SAY, OKAY, WELL, WE  
HAVE THIS DIFFERENTIAL TAX AND  
IT IS JUSTIFIED AND IT IS  
JUSTIFIED BY THIS OTHER THING  
OVER HERE.

HAPPENS ALL THE TIME.

THAT WAS THE ARGUMENT IN ARMCO.  
THAT WAS THE ARGUMENT IN FULTON.  
CASE AFTER CASE AFTER CASE  
STATES HAVE SOUGHT TO JUSTIFY  
SOME KIND OF DIFFERENTIAL  
TREATMENT BASED ON THE EXISTENCE  
OF ANOTHER TAX.

AND THE SUPREME COURT, BECAUSE  
PRECISELY BECAUSE THIS ARGUMENT  
IS SO OFTEN MADE, DEVELOPED A  
COMPENSATORY TAX DOCTRINE TO  
DEAL WITH IT.

THERE ARE TWO CRITICAL THINGS TO  
SAY ABOUT THE COMPENSATORY TAX  
DOCTRINE.

ONE IS AT NO POINT, INCLUDING  
HERE IN THIS COURT, HAS THE  
DEPARTMENT EVEN TRIED TO SATISFY

IT.

THEY DO NOT EVEN ACKNOWLEDGE THAT THAT TEST GOVERNS HERE. SO IF THE COURT AGREES THAT THE COMPENSATORY TAX DOCTRINE, CASES LIKE ARMCO AND MARYLAND VERSUS LOUIS, GIVES US THE ANSWER HOW TO FIGURE OUT THIS QUESTION OF EQUALITY, THEN WE WIN.

THE SECOND PART OF THE ANSWER, YOUR HONOR, IS THAT THE COMPENSATORY TAX DOCTRINE IS PARTICULARLY RIGOROUS. IT REQUIRES THE STATE TO SATISFY WHAT THE SUPREME COURT HAS CALLED A STRICT RULE OF EQUALITY.

THE TWO THINGS BEING TAXED HAVE TO, IN IS THE LANGUAGE OF FULTON, MUTUALLY EXCLUSIVE PROXIES FOR ONE ANOTHER. THEY HAVE TO BE IDENTICAL TAXES LEVIED ON THE SAME THING. AND JUSTICE CANADY, TO GET BACK TO YOUR QUESTION FROM THE OUTSET AGAIN, THEY AREN'T.

THE TWO TAXES ARE QUITE DIFFERENT. ONE IS A SALES TAX THAT IS LEVIED FOR THE PRIVILEGE OF DOING BUSINESS IN THE STATE. THE OTHER IS THE CARRY FORWARD OF THESE FRANCHISE FEES, THE CONTRACTUALLY NEGOTIATED RENT AGREEMENTS FOR USING PUBLIC RIGHTS-OF-WAY AND THE STATUTE SAYS THAT--

>> BUT THAT EXPLAINS THE HISTORY OF IT.

AND I UNDERSTAND THAT BUT, AREN'T THEY FORMALLY THE SAME? NOTWITHSTANDING THE HISTORY, ARE THEY NOT FORMALLY OPERATE IN THE SAME MANNER?

>> NO, YOUR HONOR.

>> OKAY.

EXPLAIN.

>> THEY ARE BOTH CALCULATED ON A PERCENTAGE BASIS ON SALES BUT THAT DOESN'T MAKE THEM THE SAME

THING.

THAT IF IT DID, MARYLAND VERSUS LOUISIANA WOULD HAVE COME OUT THE OTHER WAY WHERE THE EXTRACTION TAX AND FIRST USE TAX ON PETROLEUM WERE BOTH CALCULATED ON THE SALE OF THE PETROLEUM PRODUCT.

IN A CASE LIKE THAT, THE LESSON IS, YOU LOOK AT WHAT THE TAX IS ACTUALLY TAXING.

WHAT IS THE THING BEING TAXED? AND ONE IS A SALES TAX, A TAX FOR THE PRIVILEGE EVER DOING BUSINESS IN THE STATE.

AND THE OTHER IS A FRANCHISE FEE AND BECAUSE OF THAT THE DEPARTMENT CAN NOT SATISFY THE COMPENSATORY TAX DOCTRINE.

>> JUST THAT I LOOK AT IT FROM THE POINT OF VIEW FROM THE CONSUMER WHO THE BOTTOM LINE THERE'S A TAX.

HOW DOES THAT THEN DISCRIMINATE AGAINST ONE INDUSTRY WHO IS PROVIDING, AS YOU'RE ARGUING THE SAME SERVICES WHICH IS TV SERVICES WHEN THE TAX AMOUNT IS BASED ON THE AMOUNT OF REVENUE?

>> SO, YOUR HONOR, THAT'S EXACTLY THE DEPARTMENT'S ARGUMENT.

THAT IT ALL COMES OUT ABOUT THE SAME AND IT COMES OUT IN THE WASH AND THAT IS EXACTLY WHAT THE COMPENSATORY TAX DOCTRINE SAYS THAT WE CAN NOT DO.

THAT SAME ARGUMENT COULD HAVE BEEN MADE IN MARYLAND VERSUS LOUISIANA.

IN ARMO IN FACT, THE TAX CREDIT WAS A SMALL FRACTION OF TAXES THAT WERE OTHERWISE BEING PAID. THE COMPANY CAME OUT, THE TAX WAS A FRACTION.

SO IT WASN'T JUST THAT THERE WAS EQUALITY.

THE COMPANY ACTUALLY STILL CAME OUT WORSE, PURPORTEDLY FAVORED INDUSTRY WAS WORSE OFF AND STILL

THE SUPREME COURT SAID THAT DOESN'T MATTER.  
THE TAXES HAVE TO BE ON THE SAME EVENT IN THE SAME AMOUNT.  
WELL IT IS TRUE FROM THE CONSUMER'S PERSPECTIVE YOU ADD THEM ALL UP AND THEY MAY LOOK ROUGHLY THE SAME ON THE BILL, THAT IS JUST NOT THE ANALYSIS THAT THE CONSTITUTION REQUIRES.  
>> YOUR TIME IS UP, SIR.  
>> THANK YOU, YOUR HONOR.  
>> LIKE TO START WHERE THE COURT JUST LEFT OFF WITH THE COMPENSATORY TAX DOCTRINE.  
THE SUPREME COURT HAS BEEN VERY CLEAR.  
IT IS ABOUT WHEN THAT DOCTRINE APPLIES.  
IT'S MERELY A SPECIFIC WAY OF JUSTIFYING A FACIALLY DISCRIMINATORY TAX AS ACHIEVING A LEGITIMATE LOCAL PURPOSE THAT CAN NOT BE ACHIEVED THROUGH NON-DISCRIMINATORY MEANS.  
THAT IS--  
>> ARE YOU CITING FROM A CASE?  
>> YES.  
THAT IS OREGON WASTE SYSTEMS.  
AND--  
>> IS IT, SO WHAT HE'S SAYING IT'S GOT TO BE THE SAME TAX AS OPPOSED TO FUNCTIONAL-- YOU'RE SAYING, I BET MARYLAND LOUISIANA, DOES THAT HOLD THAT?  
>> THAT WAS A FACIALLY DISCRIMINATORY TAX REGIME.  
THE SUPREME COURT SPECIFICALLY DESCRIBED IT AS DISCRIMINATING ON ITS FACE.  
SO THERE ARE TWO DIFFERENT QUESTIONS HERE.  
WE'RE DEALING WITH QUESTION ONE AND THAT DEALS WITH THE COMPENSATORY TAX REGIME DEALS WITH QUESTION TWO.  
QUESTION ONE IS, DO YOU HAVE A DISCRIMINATORY TAX?  
DO YOU HAVE A TAX THAT DISCRIMINATES AGAINST INTERSTATE

COMMERCE?  
THAT'S WHAT WE'RE DEALING WITH  
HERE.  
COMPENSATORY TAX IS QUESTION  
TWO.  
YES YOU HAVE A FACIALLY  
DISCRIMINATORY TAX, IS IT  
JUSTIFIED?  
IF YOU HAVE A FACIALLY  
DISCRIMINATORY TAX THERE IS  
STRICT RULE OF EQUALITY AND  
THERE IS ESSENTIALLY A STRICT  
SCRUTINY STANDARD THAT IS  
APPLIED ONCE YOU DETERMINE THERE  
IS DISCRIMINATION.  
BUT THE QUESTION IS WHETHER  
THERE IS DISCRIMINATION.  
>> INTERSTATE COMMERCE?  
>> THAT IS EXACTLY.  
THAT IS EXACTLY RIGHT.  
THERE ARE ALL MANNER OF  
DISCRIMINATION MIGHT BE ILLEGAL  
UNDER OTHER CONSTITUTIONAL  
PROVISIONS, RACIAL  
DISCRIMINATION, FOR EXAMPLE BUT  
THE DORMANT COMMERCE CLAUSE  
DOESN'T SAY ANYTHING ABOUT THAT.  
SO THE WRONG QUESTION FOR THE  
COMPENSATORY TAX DOCTRINE.  
BUT EVEN IF COMPENSATORY TAX  
DOCTRINE APPLIED, IT IS SIMPLY  
NOT TRUE THAT THE LOCAL  
COMMUNICATIONS SERVICES TAX IS A  
FEE FOR RIGHT-OF-WAY USE, OR  
PLACING FIXTURES IN THE  
RIGHT-OF-WAY IS WHAT THE  
LANGUAGE IN 202.19 SAYS.  
VIDEO STREAMING SERVICES ARE  
SUBJECT TO THE LOCAL  
COMMUNICATIONS SERVICES TAX.  
THOSE STREAMING SERVICES DON'T  
HAVE TO PUT ANY FIXTURES IN THE  
RIGHT-OF-WAY.  
IF YOU GO ON AMAZON'S SITE,  
SAMPSON WILL TELL YOU THAT YOUR  
AMAZON PRIME SUBSCRIPTION IS  
SUBJECT TO COMMUNICATIONS  
SERVICES TAX BECAUSE IT INCLUDES  
VIDEO STREAMING.  
IT REPLACES THE REVENUE, THE

LOCAL CST DOES, BUT IT IS NOT A TAX ON USING OR PLACING FIXTURES IN LOCAL RIGHTS OF WAY. THAT IS SIMPLY AN INCORRECT DESCRIPTION OF WHAT THE LOCAL CST DOES.

THERE IS ONE TAXABLE PRIVILEGE IDENTIFIED IN CHAPTER 202. THAT TAXABLE PRIVILEGE IS THE PRIVILEGE OF DELIVERING COMMUNICATIONS, SELLING COMMUNICATIONS SERVICES.

>> WAS THIS ARGUMENT, IS THIS ARGUMENT MADE BEFORE JUDGE LEWIS, THIS ISSUE OF THE DISCRIMINATORY TAX?

ARE THESE, WERE THESE SAME-- I'M TRYING TO MAKE SURE WE'RE NOT MOVING THE NEEDLE ONE WAY OR THE OTHER?

THEY SAID SOMETHING, THAT YOU'RE RAISING SOMETHING FOR THE FIRST TIME HERE.

>> RIGHT.

SO THE ASSERTION THAT THE DEPARTMENT WAS RAISING AN ISSUE FOR THE FIRST TIME HERE WAS, THAT THE DEPARTMENT WAS TALKING THERE BEING LEGITIMATE PURPOSE. THAT IS SIMPLY NOT TRUE.

IT WAS VIGOROUSLY CONTESTED WHETHER THERE WAS LEGITIMATE PURPOSE OR DISCRIMINATORY PURPOSE AND PERHAPS THE BRIEFING MIGHT NOT HAVE MADE IT CLEAR IN THE WAY THAT OPPOSING COUNSEL WOULD HAVE LIKED TO HAVE DONE BUT THERE WAS ABSOLUTELY A QUESTION WHETHER THERE WAS DISCRIMINATORY PURPOSE AND THERE WAS ABSOLUTELY QUESTION WHETHER THERE WAS DISCRIMINATION AND EFFECT.

I THINK THE BEST DESCRIPTION WHAT THEY TRIED TO DO WE WAVED THE DEFINITION OF DISCRIMINATION AND OF COURSE YOU CAN'T DO THAT. WHAT WE HAVE HERE IS FLORIDA'S LEGISLATURE TRYING TO MAKE ITS OWN TAX SYSTEM NEUTRAL AS TO ALL

COMMUNICATIONS SERVICES AND ACCOMMODATING FEDERAL LAW WHILE ALLOWING LOCAL GOVERNMENTS TO HAVE SOME LEVEL OF TAX AUTONOMY BECAUSE LEON COUNTY MIGHT WANT TO HAVE A TAX RATE THAT IS DIFFERENT FROM MIAMI-DADE COUNTY, THAT IS DIFFERENT FROM CITRUS COUNTY.

AND THAT IS LEGITIMATE.

>> I'M JUST CURIOUS ABOUT THIS AMAZON STREAMING.

THERE IS A TAX ON, YOU, THAT THE LOCAL GOVERNMENT GETS TO CHARGE FOR VIDEO STREAMING THROUGH AMAZON?

>> CORRECT.

SO IF YOU GO--

>> EVEN THOUGH THERE IS NO LOCAL, WHAT STRUCTURE ARE THEY USING TO DO THAT STREAMING?

>> AMAZON HAS A PRESENCE IN THE STATE.

THEY HAVE WAREHOUSES HERE.

SO--

>> SO IT'S A WHOLE DIFFERENT WAY-- BUT THEY DON'T RUN CABLE, CORRECT?

DOES THE STREAMING GO THROUGH THE CABLE?

>> SURE.

YOU SIGN IT ON INTERNET.

YOU CAN GET IT THROUGH YOUR PHONE, OF COURSE.

YOUR COMPUTER.

>> THAT IS ANOTHER, ANOTHER DAY I GUESS.

I WAS JUST--

>> RIGHT.

THERE IS NO NEXUS, THERE IS NO NEXUS ISSUE HERE.

>> IT HAS TO DO WITH THE USE OF CABLE ON THE RIGHT-OF-WAY, THE LOCAL TAX THAT IS CHARGED FOR CABLE COMPANIES?

>> RIGHT.

SO REGARDLESS WHETHER YOU USE THE RIGHT-OF-WAY OR PLACE FIXTURES IN THE RIGHT-OF-WAY, YOU'RE SUBJECT TO THE LOCAL CST

SO LONG AS YOU'RE NOT A  
SATELLITE SERVICE.  
AND THAT'S THE DISTINCTION.  
I'M OUT OF TIME.

THANK YOU.

>> THANK YOU.

>> IF I COULD RAISE TWO POINTS  
VERY QUICKLY, YOUR HONORS.  
SO THE FIRST POINT IS THAT WITH  
REGARD TO THE POINT JUSTICE  
PARIENTE, THAT YOU WERE MAKING,  
LOTS OF COMMUNICATIONS  
PROVIDERS, NETFLIX, CELL PHONE  
COMPANIES, LOTS OF  
COMMUNICATIONS PROVIDERS THAT DO  
NOT USE THE RIGHT-OF-WAY, PAY  
BOTH THE LOCAL CST AND THE STATE  
CST.

THE SATELLITE COMPANIES ONLY PAY  
THE STATE CST BECAUSE OF THE  
FEDERAL LAW.

THE SECOND POINT THAT I WOULD  
LIKE TO MAKE, IN MY SHORT TIME,  
IS THAT THERE IS NO, UNLIKE  
EVERY CASE, THEY CITED, BAUCUS,  
HUNT, DEAN MILLER,  
DELTA AIRLINES, THERE IS SIMPLY  
NO LOCAL INTEREST THAT IS BEING  
BENEFITED BY THE CST THE CABLE  
COMPANIES ARE PROVIDING AN  
INTERSTATE SERVICE.

THIS HAS NOTHING TO DO-- THE  
CST DOESN'T DEPEND UPON WHERE  
THE COMPANIES ARE HEADQUARTERED  
CLEARLY BUT WHEN YOU LOOK AT  
CABLE'S SERVICE, IT IS  
INTERSTATE NATURE AND UNLIKE THE  
PEOPLE THAT WERE BENEFITED IN  
DELTA AIRLINE OR THE LOCAL  
APPLES THAT WERE BEING BENEFITED  
IN HUNT, THERE IS NO LOCAL  
INTEREST HERE.

BOTH COMPANIES HAVE EQUIPMENT IN  
THE STATE.

BOTH COMPANIES HAVE EQUIPMENT  
OUT OF THE STATE AND IT DOESN'T  
MATTER WHERE ANYTHING IS  
LOCATED.

>> APPEARS LOCAL INTEREST HERE  
IN KEEPING TIME.

YOU'RE OUT OF TIME, SIR.  
>> THANK YOU, YOUR HONOR.