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**U.S. Supreme Court Update**



U.S. SUPREME COURT UPDATE

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## Court Receives Four New Petitions for Cert. in SALT Matters

***37** With the new term of the U.S. Supreme Court opening in October, the Court received its normal influx of fall petitions for certiorari, including four new petitions in matters involving state and local taxes.

The Court's new SALT petitions include *ETC Marketing, Ltd. v. Harris County Appraisal Dist.* (Docket No. 17-422), in which a natural gas marketer asks whether an ad valorem tax on natural gas that was stored in Texas while awaiting future resale and shipment to out-of-state consumers, violates the dormant Commerce Clause. Second, in *Dawson v. Steager* (Docket No. 17-419), a retired U.S. Marshal asks whether the doctrine of intergovernmental tax immunity bars a state from exempting groups of state retirees from state income tax while taxing the income of similarly situated federal retirees. Third, in the latest Commerce Clause challenge brought by the satellite television industry, a new petition in *Echostar Satellite LLC v. State of Florida* (Docket No. 17-379) asks the Court to consider whether Florida's Communications Services Tax violates the U.S. Constitution's Commerce Clause by favoring in-state cable providers. We cover these three newpetitions in detail below.

On 8/2/17, the Court also received a new petition for certiorari in *2 Crooked Creek, LLC et al. v. Treasurer of Cass County, Michigan*, Docket No. 17-169, ruling below at *In re Petition of Cass County Treasurer For Foreclosure v. 2 Crooked Creek, LLC.*, 2016 WL 901700 (Mich. Ct. App. 2016), in which the Michigan Court of Appeals held that a county treasurer met the minimum requirements of due process in providing notice to taxpayers regarding their foreclosed property, so the trial court did not abuse its discretion by denying the property owners' motion to set aside the judgment of foreclosure. The property owners allege the treasurer knew she was sending notices to an incorrect address and that she did not act reasonably by failing to search online for the correct address. Based on their allegation, the property owners now ask the U.S. Supreme Court to consider whether, ‘In the Internet age, do the ‘practicable’ ‘additional reasonablesteps' that due process mandates include requiring a Michigan taxing authority to conduct a search of Indiana's online business entity database (or simple Google search) to ascertain an Indiana business's correct address before foreclosing on its multi-million dollar property over approximately $15,000 in delinquent property taxes?‘ We look forward to covering this petition in more detail in the next issue of the JOURNAL.

****2** In addition to these new petitions for certiorari, one previously reported petition remained pending as this issue of the Journal went to press. And the Court still remains set to review a dispute between Delaware and several other states as to which states have priority rights to claiming abandoned, uncashed MoneyGram ‘official checks.‘ The cases set for review are *Delaware v. Pennsylvania et. al.*, Case No. 220145, and *Arkansas et. al. v. Delaware*, Case No. 220146. During the Court's

  

summer recess, the Honorable Pierre N. Leval, of the U.S. Court of Appeals for the Second Circuit, continued his role as Special Master, coordinating the taking of evidence and making reports. (The Court typically assigns original jurisdiction disputes—cases such as disputes between states that are first heard at the Supreme Court level—to a Special Master to conduct what amounts to a trial court proceeding.) We will continue to update readersas more details become available.

Lastly, the Court has denied petitions for certiorari in ten other state and local tax matters, including, as first reported in our immediately preceding column, in *CMSG Restaurant Group, LLC v. New York* (Docket No. 17-147). In *CMSG Restaurant Group*, a New York gentleman's club alleged that the state's application of its sales and use tax laws to fees paid for exotic dance performances violated the First and Fourteenth Amendments to the U.S. Constitution. We cover the denial of this petition in detail below.

**Natural Gas Marketer Alleges Texas Ad Valorem Property Tax Violates Commerce Clause**

On 9/9/17, the Court received a new petition for certiorari in *ETC Marketing, Ltd. v. Harris County Appraisal Dist.*, Docket No. 17-422, ruling below at 518 S.W.3d 371 (Tex. 2017), in which the Supreme Court of Texas held that ETC Marketing Ltd. (‘ETC‘), a natural gas marketer, must pay the county's ad valorem property tax imposed on its surplus gas held (in-state) ***38** for future resale, as the tax does not violate the Commerce Clause to the U.S. Constitution.

**The taxpayer's constitutional claims.**

In the case below, the taxpayer, a natural gas marketer, claimed the tax at issue, which was an ad valorem property tax imposed by the Harris County Appraisal District, violated the Commerce Clause of the U.S. Constitution by taxing natural gas, which ETC claimed was stored in Texas for future resale and shipment to out-of-state consumers.

In challenging the tax, ETC argued that states and localities may not tax natural gas that is temporarily stored in the course of interstate transit without violating the dormant Commerce Clause, which restricts states' ability to impose taxes on interstate commerce. According to ETC, ‘gas storage is integral to gas transportation, not separate from it; and . . . gas transportation cannot happen without storage.‘ Accordingly, any tax on gas storage constitutes an impermissible tax on interstate commerce. The Supreme Court of Texas disagreed, however.

****3** The Texas court analyzed ETC's challenge by looking to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a case which the state court noted ‘supplies the test for determining the constitutionality of state taxation of interstate commerce.‘ As regular readers of this column are well aware, in order for a tax to satisfy the test announced in *Complete Auto*, the tax must: (1) apply to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. Under the guidance of *Complete Auto*, the Texas court conducted two distinct inquires: first, the court determined whether the tax at issue implicated interstate commercial activity and second, if so, whether the tax satisfied all four prongs of *Complete Auto.*

**Ad valorem property tax satisfies four prongs of *Complete Auto.***

In upholding the constitutionality of the Texas tax, the state court first noted that because ‘ETC places its gas (some of which comes from out of state) in[to] . . . an intrastate pipeline that is connected to an interstate pipeline network . . . , ETC's gas enters interstate commerce.‘ Thus, in following the U.S. Supreme Court's ruling in *Maryland v. Louisiana,* 451 U.S. 725 (1981), the court held ‘[t]he circumstances of ETC's storage‘ indicate that the company's gas is used in interstate commerce. Accordingly, the court proceeded to analyze the tax under the four prongs of *Complete Auto.*

The court focused its *Complete Auto* inquiry primarily on the first prong of the test, which required the lower court to ‘determine whether ETC's gas has a substantial nexus with the taxing state.‘ The Supreme Court of Texas found the best way to determine

  

if a ‘substantial nexus‘ existed between ETC's property and the state of Texas was to decide if the natural gas stored in Harris County was stored as part of a ‘clearly transitory stop . . . integral to the journey itself‘—in which case the tax would violate the dormant Commerce Clause—or whether ETC's storage ‘broke continuity of transit‘—in which case the tax was permissible under the Commerce Clause.

Ultimately, the court determined ETC's gas was not ‘in-transit‘ at the time the tax was imposed because its stoppage in Harris County was not integral to the interstate travel of the gas, but was rather stored for a business-centric purpose. Specifically, the court held ETC's gas had come to rest in Harris County ‘at the pleasure of [ETC], for disposal or use, so that [ETC] may dispose of it either within the state, or for shipment elsewhere, as [ETC's] interest dictates.‘ And although ETC argued that its storage was not a simple business decision, but rather ‘due to the necessities of [the] pipeline system operation,‘ the court held that ETC's business purpose—i.e., ‘to create and maintain a surplus so as to time the market‘—was the ‘very impetus for the lengthy storage.‘

**4 Accordingly, the court found the stored gas was ‘not in transit and thus has a substantial nexus with Texas.‘ The court then examined *Complete Auto*'s other three prongs, finding that (1) the tax was fairly apportioned to activities occurring within the state based on the fact that the tax reaches only property located within a taxing unit of Texas and present on a certain day of the year (or, stated differently per the court, ‘a non-discriminatory property tax confined by both geography and timing is inherently internally consistent,‘ and thus permissible under the Commerce Clause); (2) the tax is nondiscriminatory against interstate commerce in that it targets all qualifying personal property and pays no attention to the property's intended destination; and (3) the tax at issue was reasonably related to the services provided by Texas (specifically, ‘police and fire protection, along with the usual and usually forgotten advantages *39 conferred by the state's maintenance of a civilized society‘). Having met all the prongs of *Complete Auto*, the Texas Supreme Court held that ‘the tax levied in this case withstands constitutional scrutiny.‘

**Question presented.**

In its petition for certiorari, ETC asks ‘[w]hether, or in what circumstances, the Commerce Clause of the Constitution bars a State or locality from taxing natural gas temporarily stored within the jurisdiction during interstate transit.‘

**Federal Officer Alleges W.V.'s Differential Treatment of Retirement Benefits Violates Intergovernmental Immunity**

On 9/19/17, the Court received a new petition for certiorari in *Dawson v. Steager,* Docket No. 17-419, ruling below at *Steager v. Dawson*, 2017 WL 2172006 (W. Va. 2017), in which the Supreme Court of Appeals of West Virginia held that Mr. Dawson, a retired U.S. Marshal, was not entitled to exempt his Federal Employee Retirement System (‘FERS‘) income from state income tax.

**Background.**

According to the court below, James Dawson (‘Dawson‘) worked as a deputy U.S. Marshal in West Virginia. Dawson was enrolled in FERS, a federal retirement plan, and sought a West Virginia exemption for all of his FERS income. Under West Virginia law, however, the state court noted that unlike certain state law enforcement retirees, who may exempt the entirety of their state retirement benefits from taxable income, Dawson was entitled to exempt only a portion of his FERS income.

The state-level exemption at issue is found in West Virginia Code § 11-21-12(c)(6), which ‘allow[ed] the recipients of four small West Virginia retirement plans to exempt from their taxable state income all the benefits received from those plans.‘ This was not, however, according to the court, a blanket exemption for all state-level employees. Instead, the exemption applied only to beneficiaries of the Municipal Police Officer and Firefighter Retirement System; the Deputy Sheriff Retirement System; the State Police Death, Disability and Retirement Fund; and the West Virginia State Police Retirement System. These beneficiaries represented ‘approximately two percent of all state government retirees.‘

  

****5** Based on the limited nature of the exemption at issue, the West Virginia Supreme Court of Appeals held that the state's different treatment of state versus federal law enforcement retirement benefits did not violate the doctrine of intergovernmental tax immunity.

**Lower courts tussle over the application of 'intergovernmental tax immunity.'**

As explained in the West Virginia decision, the doctrine of intergovernmental tax immunity, codified at 4 U.S.C. § 111, provides that the imposition of a 'heavier tax burden on those who deal with one sovereign than is imposed on those who deal with the other must be justified by significant differences between the two classes.' In analyzing this doctrine and reviewing Dawson's claim against the tax on his federal benefits, a West Virginia circuit court first held in Dawson's favor.

This court cited to the U.S. Supreme Court's ruling in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), in which the Court held that a Michigan statute that exempted all retirement benefits paid by the state from tax, but levied an income tax on retirement benefits paid by all other employers, including the federal government, violated the doctrine of intergovernmental tax immunity. According to the circuit court, *Davis* establishes that 'a state law violates intergovernmental tax immunity if it treats state and local government employees more favorable than similarly situated federal government retirees.'

The Supreme Court of Appeals of West Virginia disagreed, however, and reversed the circuit court's decision. Citing to its prior decision in *Brown v. Mierke,* 443 S.E.2d 462 (W. Va. 1994), a case in which it held that the Section 11-21-12(c)(6) exemption did not violate the doctrine of intergovernmental tax immunity, the court held the U.S. Supreme Court's reasoning in *Davis* did not apply here because *Davis* involved a blanket tax exemption for *all* state-level employees that was intended to 'discriminate against federal retirees.' Conversely, the Section 11-21-12(c)(6) exemption benefits only a 'narrow class' of state retirees.

The court therefore held that 'the total structure of West Virginia's system for taxing personal income does not discriminate against retired members of the United States Marshals Service in violation of 4 U.S.C. § 111.' Instead, the court held the Section 11-21-12(c)(6) exemption merely gives a benefit to 'a very narrow class of former state and local employees, and that ***40** benefit was not intended to discriminate against former federal marshals.'

**Question presented.**

Dawson now asks the U.S. Supreme Court to revisit its ruling in *Davis v. Michigan Department of Treasury* and presents the following question for review: 'Whether this Court's precedent and the doctrine of intergovernmental tax immunity bar states from exempting groups of state retirees from state income tax while discriminating against similarly situated federal retirees based on the source of their retirement income.'

**Satellite Providers Challenge Florida's Communications Services Tax**

****6** On 9/8/17, the Court received a new petition for certiorari in *Echostar Satellite LLC v. State of Florida,* Docket No. 17-379, ruling below at *Florida Department of Revenue v. DirectTV, Inc.* 215 So. 3d 46 (Fla. 2017). In this case, the Florida Supreme Court held that Florida's Communications Services Tax ('CST') did not violate the U.S. Constitution's Commerce Clause.

As detailed by the Florida Supreme Court, Floridians have two options for pay-TV services: (1) cable providers, or (2) direct broadcast satellite providers. The court acknowledged that cable providers and satellite providers 'compete directly . . . for the same customers,' offering 'virtually identical products at retail.' The court noted, however, that despite this direct competition, Florida imposes separate taxes on the providers.

  

Specifically, in 2001, Florida enacted its CST (Fla. Stat. § 202.12), which abandoned a uniform 6% sales tax on all pay-TV services and implemented a two-tiered system in which a communications service 'which [o]riginates or terminates in this state'—*i.e.*, cable providers—would be subject to a 6.8% rate, while service 'by satellite' would be subject to a 10.8% rate (presently, cable service is taxed at 4.92% and satellite is taxed at 9.07%). According to the satellite companies who brought the challenge below, this difference violates the dormant Commerce Clause of the U.S. Constitution.

**Lower courts disagree on the constitutionality of CST.**

A Florida district court originally agreed with the satellite companies' challenge. The district court first found that 'satellite companies and cable companies were similarly situated because they both 'operate in the same market and are direct competitors within that market.'' Moreover, the district court found cable companies to be 'in-state interests due to their local infrastructure and local employment.' And 'because the CST favors communications that use local infrastructure,' the lower court held that the tax had a 'discriminatory effect on interstate commerce' and, therefore, violated the dormant Commerce Clause.

The Florida Supreme Court, however, reversed the district court, finding the CST to be constitutional. According to the Florida Supreme Court, '[c]able companies are not in-state interests for the purpose of the dormant Commerce Clause.' Instead, the Florida Supreme Court found that both cable providers and satellite providers are 'interstate in nature.'

The court noted that 'cable and satellite companies have employees and property both inside and outside of Florida to facilitate their operations and earn income.' Moreover, they 'both employ Florida residents to sell, maintain, or repair their service to Florida customers.' And both types of providers 'own and lease a significant amount of property in Florida.' Conversely, the court found that neither 'cable nor satellite 'produce' anything in Florida. ' Instead, they both use interstate infrastructures to distribute video content received from 'national and regional networks and local broadcasters.' Thus, while the court acknowledged that 'it may be true that cable employs more Florida residents and uses more local infrastructure to provide its services, ' the lower court determined the U.S. Supreme Court has 'never found a company to be an instate interest because it had a greater presence in a state.'

****7** The Florida Supreme Court went on to note that a state may 'treat 'two categories of companies' differently so long as the discrimination is based on 'differences between the nature of their businesses' and not 'the location of their activities.'' And because the court ruled that cable companies are not in-state interests for purposes of the dormant Commerce Clause, the Florida Supreme Court held the CST did not violate the U.S. Constitution by discriminating against interstate vendors.

**Questions presented.**

Challenging both the lower court's 'in-state interests' analysis and also raising a discriminatory purpose claim, Echostar Satellite LLC now brings a petition for certiorari, presenting the following two questions for review:

***41** 1. Did the court below err in concluding that a law cannot discriminate against interstate commerce unless it benefits purely in-state companies and burdens purely out-of-state companies?

2. Is a court evaluating a law's discriminatory purpose forbidden from considering evidence other than the law's text and formal legislative history?

**Petition Still Pending**

The following petition for certiorari remained pending before the Court as this issue of the JOURNAL went to press.

  

**Washington asks Court to overturn Yakama Nation 'right to travel' without taxation victory.**

On 6/14/17, the Court received a new petition for certiorari in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, Docket No 16-1498, ruling below at 188 Wash. 2d 55 (Wash. 2017), in which the Supreme Court of Washington held that the Yakama Nation 'tribe[] w[as] entitled under [the Yakama Nation] [T]reaty to import fuel without holding [an] importer's license and without paying state fuel taxes.'

As explained by the court, Article II of the Yakama Nation Treaty of 1855 states, in relevant part: '[I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured them; as also the right, in common with citizens of the United States, to travel upon all public highways.' (Treaty with the Yakamas, 12 Stat. 951, 952-953 (1855)).

In 2013, Cougar Den, a Confederated Tribes and Bands of the Yakama Nation corporation, began transporting fuel from Oregon to the Yakama Indian Reservation. The company sold the fuel to businesses located on Tribal land and owned by Tribal members. The Washington Department of Licensing, however, issued tax assessments on the imported fuel ($3.6 million of taxes, penalties, and fees for hauling the fuel across state lines). Cougar Den refused to pay the assessment, arguing that the imposition of the tax violated its right to travel under the Yakama Nation Treaty of 1855.

In reviewing the assessment, and upholding the lower courts' ruling in Cougar Den's favor, the Washington Supreme Court noted that '[t]here is no dispute that the taxes and licensing requirements would apply if the treaty provision does not apply here.' The court further explained, however, that the U.S. Supreme Court's rule of treaty interpretation requires that 'Indian treaties must be interpreted as the Indians would have understood them.' And, the court concluded that '[t]he Department's interpretation of the treaty provision ignores the historical significance of travel to the Yakama Indians and the rule of treaty interpretation established by the United States Supreme Court. ' The court specifically noted that '[i]n ruling in Cougar Den's favor, both the ALJ and the Yakima County Superior Court based their decisions on the history of the right to travel provision of the treaty, relying on the findings of fact and conclusionsof law from *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997),' in particular the depiction in the record of a 'tribal culture whose manner of existence was dependent on the Yakamas' ability to travel.'

****8** The Washington State Department of Licensing now presents the U.S. Supreme Court with the following question for review in its petition for certiorari: 'Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.' (For more background on this case see U.S. Supreme Court Update, 27 JMT 41 (September 2017).)

**Petitions Denied**

The Court has also denied the following eight previously reported petitions: *616 Croft Avenue LLC v. City of West Hollywood*, Docket No. 16-1137, ruling below at 3 Cal. App. 5th 621 (Cal. Ct. App. 2016); *Wayside Church et al. v. Van Buren County et al.*, Docket No. 17-88, ruling below at 847 F.3d 812 (6th Cir. 2017); *Steager v. CSX Transportation*, Docket No. 16-1251, ruling below at 238 W. Va. 238 (2016); *Homewood Village LLC v. Unified Government of Athens-Clarke County Georgia*, Docket No. 16-1361, ruling below at 2017 WL 491151 (11th Cir. 2017); *Reynolds v. Bethel Park School District,* Docket No. 16-1403, ruling below at *Bethel Park School Dist. v. Reynolds*, No. 2618 (Pa. Commw. Ct. June 9, 2016); *Okrie v. State of Michigan*, Docket No. 17-34, ruling below at 2016 WL 3365308 (Mich. Ct. App. June 16, 2016); *T. Ryan Legg Irrevocable Trust v. Testa*, Docket No. 17-84, ruling below at 149 Ohio St. 3d 376 (2016); and *Irwin Naturals v. Washington Dep't of Revenue*, Docket No. 16-1708, ruling below at 195 Wash. App. 788 (Wash. Ct. App. July 25, 2016).

***42** Additionally, on 10/10/2017, the court denied a previously unreported petition in *Nickerson v. Wash. State Dep't of Rev., et al.,* Docket No. 17-240, ruling below at *Nickerson v. Wash. State Dep't of Rev.*, 196 Wash. App. 1054 (Wash. Ct. App. 2017),

in which the Washington Court of Appeals held that Washington's imposition of sales and business and occupation taxes on a medical marijuana collective garden was not preempted by the federal Controlled Substances Act and that forcing the collective garden to file tax returns did not violate the owner's Fifth Amendment right against self-incrimination.

**Gentleman's club facial and as applied constitutional challenges to NY's sales tax laws.**

As first reported in our immediately preceding column, on 7/28/17, the Court received a new petition for certiorari in *CMSG Restaurant Group, LLC v. New York,* Docket No. 17-147, ruling below at *CMSG Restaurant Group, LLC v. State, et al.,* 145 A.D.3d 136 (N.Y. App. Div. 2016), in which the New York State Appellate Division held that the state's sales tax—'Amusement Tax' and 'Cabaret Tax' provisions (N.Y. Tax Law § 1105 (f)(1) and (f)(3))—were not unconstitutional on their face nor unconstitutional as applied to CMSG, a men's entertainment club. The New York State Court of Appeals (New York's highest court) declined to review the Appellate Division's decision, resulting in the taxpayer asking the U.S. Supreme Court to consider whether New York's tax violates the First and Fourteenth Amendments (right to free speech and right to equal protection of the laws, respectively) of the U.S. Constitution. As we went to press, the U.S. Supreme Court declined to review this petition.

**New York's sales tax.**

****9** N.Y. Tax Law § 1105(f)(1) imposes a sales tax on any admission charge 'in excess of ten cents to or for the use of any place of amusement in this state, *except for charges for admission to . . . dramatic or musical arts performances*' (emphasis added). (This provision is referred to as the 'Amusement Tax.') As explained by the court, the phrase 'dramatic or musical arts performances' is not defined anywhere in New York's tax laws, but the phrase 'dramatic or musical arts admission charge' is defined in § 1101(d)(5) as '[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.'

N.Y. Tax Law § 1105(f)(3) imposes a sales tax on the amount paid as charges for a roof garden, cabaret or other similar place in the state. (This provision is referred to as the 'Cabaret Tax'). The phrase 'roof garden, cabaret or other similar place' is defined in § 1101(d)(12) as '[a]ny roof garden or other similar place which furnishes a public performance for profit, *but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances'* (emphasis added).

Based on the law, the New York State Department of Taxation and Finance ('Department') issued a $4.8 million tax assessment against the owners of Larry Flynt's Hustler Club, located on the west side of Manhattan. The assessment applied to the sales of the club's 'Beaver Bucks,' which was an in-house currency used to tip topless dancers, floor hosts and bartenders, and to gain admission to private rooms to view entertainment and for lap dances. The club appealed the assessment, but an Administrative Law Judge found that the club was subject to the Amusement Tax and did not qualify for exemption.

Specifically, the ALJ concluded that the tax was properly assessed since the 'service provided by the entertainers at the Hustler Club is sexual fantasy, not dance.' The ALJ went on to note that any 'movements, whether dance moves or other choreography, that comprises an ***43** entertainer's routine and that appeal to the patron, are ancillary to the ultimate service sold, which is sexual fantasy.' Accordingly, the ALJ upheld the assessment. (As noted by the Appellate Division, '[i]n the alternative, the ALJ also found that even if the scrip charges were exempt, plaintiffs' record-keeping practices would have precluded the ALJ from granting an exemption.) The club then appealed the ALJ's decision to both New York State's Tax Appeals Tribunal and to state court, where it raised its constitutional claims.

**Taxpayer's constitutional claims.**

  

In its appeal to state court, the club alleged that the assessments were ‘unconstitutional both on their face and as applied‘ to its operations since the laws violated the club's right to free speech and right to equal protection of the law.

**10 The New York lower courts rejected the taxpayer's claims, however. ‘We conclude that Tax Law § 1105 (f)(1) and (f)(3) are constitutional, and do not violate plaintiffs' right to free speech or their right to equal protection of the law.‘ Specifically, the Appellate Division, cited the New York Court of Appeals prior decision in *Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.,* 85 A.D.3d 1341 (3d Dept. 2011), *affd,* 19 N.Y.3d 1058 (2012).

Specifically, the Appellate Division noted that, in *New Loudon,* New York's highest court had already ruled that ‘no specific type of recreation is singled out for taxation‘ and also that the Legislature, ‘with the evident purpose of promoting cultural and artistic performances in local communities . . . created an exemption that excluded from taxation admission charges for a discrete form of entertainment—‘dramatic or musical art performances.’‘ Accordingly, the court held that ‘the Court of Appeals' decision [in *New Loudon*] affirming the Third Department's rejection of the First Amendment and equal protection claims is binding on the issue of whether [New York's] tax laws violate the right to free speech and equal protection.‘

The Appellate Division went on to note that the Court of Appeals has also ‘made clear that the legislature may enact tax exemptions to subsidize certain forms of expression ‘to the advantage of some forms of expression or speakers, but not others.’‘ Because New York's tax laws ‘do not enforce any differential treatment based on the content of ideas or viewpoints expressed in‘ the entertainment provided at the club, the Legislature remains free to ‘pick and choose between the forms of expression it decides to subsidize through a tax exemption.‘

As stated above, the club also alleged that New York's tax laws ‘violate the Equal Protection Clauses of the Federal and New York State Constitutions since they exempt ‘live dramatic, choreographic or musical performances,’ yet ‘[p]erformances that do not meet these subjective standards are...burdened by additional governmental taxation.’‘ Again, however, the Appellate Division disagreed. The court below found that ‘[f]or purposes of equal protection review, any classification creating differential taxation enjoys a strong presumption of constitutionality,‘ and as long as the tax law ‘neither utilizes a suspect classification nor impairs a fundamental right,‘ it ‘must be upheld if rationally related to achievement of a legitimate state purpose.‘

Applying this ‘rational basis‘ standard of review, the court held the ‘tax exemptions for dramatic, musical, and artistic performances are rationally related to the legitimate ‘purpose of promoting cultural and artistic performances in local communities.’‘ Accordingly, the court held that New York's laws ‘do not deprive any class of businesses of equal protection of the law.‘

In its unsuccessful petition for certiorari, the gentleman's club alleged that ‘New York specifically and directly taxes protected expression, but exempts from taxation ill-defined ‘live dramatic, choreographed, or musical performances.’‘ Based on this allegation, the club asked the U.S. Supreme Court to consider the following question for review: ‘In the circumstances where the state was never obligated—and indeed never even attempted—to justify its content-based differential taxation upon expression, and where administrative proceedings aptly demonstrated that the statutes contained no standards whatsoever to guide the decision makers in determining when live performances were so excluded from taxation, do those statutes violate the First and Fourteenth Amendments?‘ The U.S. Supreme Court denied certiorari on 10/30/17.

**11 The Supreme Court of Texas held that a natural gas marketer must pay the county's ad valorem property tax imposed on its surplus gas held (in-state) for future resale . . . .

The Supreme Court of Appeals of West Virginia held that a retired U.S. Marshal was not entitled to exempt his Federal Employee Retirement System income from state income tax.

The Florida Supreme Court held that Florida's Communications Services Tax did not violate the U.S. Constitution's Commerce Clause.

  

A New York gentleman's club alleged that the state's application of its sales and use tax laws to fees paid for exotic dance performances violated the First and Fourteenth Amendments to the U.S. Constitution.

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