IN THE SUPREME COURT OF THE STATE OF OREGON

LEVEL 3 COMMUNICATIONS, LLC,	)	
	)	Tax Court (Regular Division)
Plaintiff-Appellant,	)	Case No. TC 5236 (Control); 5269; 5291
	)	
v.	)	S067283
	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	
	)	
Defendant-Respondent.	)	

BRIEF OF *AMICUS CURIAE*
COUNCIL ON STATE TAXATION (COST)
IN SUPPORT OF PLAINTIFF LEVEL 3 COMMUNICATIONS, LLC

Appeal from the Judgment of the Oregon Tax Court
The Honorable Robert T. Manicke, Judge

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I. INTEREST OF *AMICUS CURIAE* AND ASSISTANCE PROVIDED BY *AMICUS* BRIEF

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. with an office in Portland, Oregon. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today COST has an independent membership of over 500 multistate corporations engaged in interstate and international commerce, many of which do business in Oregon. COST members represent the part of the nation's business sector most directly affected by state taxation of interstate and international business operations. Many of COST's members conduct activity subject to taxation in Oregon and taken together they employ a substantial number of Oregon citizen.

COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission it has steadfastly pursued since its inception.

COST is vitally interested in this case for two fundamental reasons:

First, the Tax Court's ruling bears directly on how Oregon calculates property taxes, which are by far the largest state and local taxes paid by Oregon businesses. In 2018, for example, the total state and local property tax paid by Oregon businesses represented 38.5 percent of the overall state and local collections from businesses, more than three times the amount (11.5 percent)

collected under Oregon corporation excise tax (*i.e.*, Oregon's general corporate income tax).[1]

Second, the Tax Court's ruling poses a significant threat of undermining the transparency, consistency, and procedural fairness of Oregon's property tax system in a manner that will directly harm COST members. On its face, the decision represents a stunning departure from past practice that is not grounded in the applicable statutory language, legislative history, or prior case law. It also dramatically increases the potential taxation of intangible property by taxing not just property but business enterprise value, thereby rendering Oregon's property tax system more subjective and more open to constitutional attack for discriminating against centrally assessed taxpayers. And by encouraging the taxation of intangible property, the decision poses a risk of making Oregon an extreme outlier among states, the vast majority of which no longer include intangible property in their property tax bases.

For both of these reasons, COST members have a strong interest in ensuring that this Court fully understands the potential consequences of affirming the Tax

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[1] *See* Ernst & Young LLP, STRI, & COST, Andrew Phillips & Caroline Sallee, *Total state and local business taxes: state-by-state estimates for FY18*, at 23 (Oct. 2019), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/fy18-state-and-local-business-tax-burden-study.pdf.

Court's decision and COST hopes to provide this Court with a unique *amicus* perspective on the potential harms that could result from upholding the Tax Court's decision.[2]

II. INTRODUCTION

The Tax Court's decision allowing the imposition of property tax based on the enterprise value of a centrally assessed taxpayer should be reversed because it represents a stark departure from existing law and practice. It would unfairly upend the longstanding and well-settled expectations of centrally assessed businesses that pay property taxes in Oregon.

On its face, the Tax Court's decision is flatly at odds with the plain language of Oregon's property tax statutes, which only authorize the imposition of tax on the value of "property" a company owns on a particular assessment date that is "used or held" in the company's business. Had the Oregon legislature intended to impose property tax more broadly on the far more speculative and intangible-laden value of an enterprise from the perspective of its shareholders, it could have done so, but it did not. As a result, this Court has observed on at least two occasions that

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[2] COST has previously filed *amicus* briefs in Oregon in cases of interest to our members, *Health Net, Inc. v. Dep't of Revenue*, 362 OTR 700 (2018), as well as in cases in other states. COST *amicus curiae* briefs are available online at: https://www.cost.org/state-tax-resources/cost-amicus-briefs/ (last visited Sept. 1, 2020).

property taxes imposed on centrally assessed companies should be based on the value of the company's property as opposed to the value of the business itself. *See Delta Air Lines, Inc. v. Dep't of Revenue*, 328 Or 596, 616, 984 P2d 836, 848 (1999); *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 284, 337 P3d 768, 769 (2014).

The Tax Court decision constructs a tortuous path to circumvent these clear authorities by noting that (1) the property tax statute identifies "franchises" as one of the types of property that can be assessed, and (2) the Oregon legislature could have construed that term as a "franchise" to operate as a company and then relied on three out-of-state cases involving the taxation of capital stock to assume that it had the power to tax a business's enterprise value. But read in the context of the other types of property identified in the statute, the term "franchise" should be read as referring to publicly-granted franchises to conduct certain activities, such as laying pipes or telephone lines, as opposed to the right to operate as a company. Moreover, there is no reasonable basis to presume that the Oregon legislature was even aware of the cases identified by the Tax Court, much less that it relied on them in any way. Indeed, they all involve differently worded statutes and there is no evidence that they served as models for the Oregon property tax statute.

Beyond these considerations, the Tax Court's decision should also be reversed because its attenuated construction of Oregon's property tax laws is likely to invite constitutional challenges. In this regard, the Ninth Circuit Court of Appeals recently found that Oregon's property tax system improperly discriminates against centrally assessed railroads under the Railroad Revitalization and Regulatory Reform Act of 1976, Pub L No. 94-210, § 306, 90 Stat 31 (the "4-R Act"). *BNSF Ry. Co. v. Or. Dep't of Revenue*, 965 F3d 681 (9th Cir 2020). The basis of that ruling was that Oregon's property tax system permitted the taxation of intangible property for centrally assessed taxpayers but did not do so for locally assessed taxpayers. While *BNSF* was based on the 4-R Act, other centrally assessed taxpayers could easily mount a similar challenge under either the Equal Protection Clause of the United States Constitution or the uniformity clause of the Oregon Constitution. Moreover, the Tax Court's ruling will inevitably spur such challenges because basing property taxes on enterprise valuation for centrally assessed companies will inevitably increase the taxation of intangible assets.

Finally, in considering this case, the Court should be aware that upholding the Tax Court's ruling would make Oregon an extreme outlier. Recognizing the inherently subjective nature of valuing intangible assets, most states exclude them entirely from the tax base for property taxes, while those few states that allow them

to be taxed do so on a limited basis. Only one other state, Kentucky, allows for the taxation of intangible assets in a manner that approaches what the Tax Court's decision would allow, but it does so under a statute with far more explicit language than Oregon's law. As a result, upholding the Tax Court's decision would exacerbate the State's hostility towards centrally assessed businesses when it comes to taxing intangible assets.

III. STATEMENT OF THE CASE

COST adopts the Statement of the Case as set forth by Plaintiff-Appellant in its Opening Brief and Except of Record of Plaintiffs-Appellants LEVEL 3 COMMUNICATIONS, LLC (hereinafter referred to as "Plaintiff-Appellant's Brief"). Plaintiff-Appellant's Brief at 2-21.

IV. ASSIGNMENT OF ERROR

The Tax Court erred when it concluded that the value of "property" that is "used or held" by a company on the assessment date as defined in the property tax statutes for centrally assessed businesses includes not only the value of the company's tangible and intangible property in use on the assessment date, but also the value of the entire business enterprise itself from the standpoint of its shareholders.

A. Preservation of Error and Standard of Review.

COST adopts the Preservation of Error and Standard of Review in the First Assignment of Error as set forth by Plaintiff-Appellant in its Plaintiff-Appellant's Brief. *Id*. at 22.

B. Argument on Assignment of Error

1. The Tax Court's Decision Should Be Reversed Because It Unfairly and Improperly Overturns Oregon's Longstanding Rules Governing Centrally Assessed Taxpayers.

COST and its members have long supported fair, efficient, and customer-focused property tax administration, which is highlighted in its policy statement on "Fair and Equitable Property Tax Systems," which is a part of its overall policy statement on "Fair, Efficient, and Customer-Focused Tax Administration."[3] As part of this policy, COST worked with the International Property Tax Institute ("IPTI")[4] in 2018 to publish "The Best (and Worst) of International Property Tax

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[3] COST, *Fair, Efficient, and Customer-Focused Tax Administration*, https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/fair-efficient-and-customer-focused-tax-administration.pdf (last visited Sept. 1, 2020); COST, *supra* note 2.

[4] IPTI is widely recognized as the world's leading international organization specializing in property tax policy and practice. IPTI is a nonprofit organization with members around the world. Its mission is to provide impartial, objective expert advice in the area of property tax systems and promote the concept that these systems should be fair and equitable and meet the needs of all stakeholders, *i.e.,* governments, taxpayers, practitioners, and academics.

Administration" ("Scorecard"). This Scorecard explicitly highlighted the importance of transparency, consistency, and procedural fairness as keys to the administration of an equitable property tax system, noting:

> "[T]he following characteristics of property tax systems * * *, in our view and in the view of taxpayers, represent fair and efficient property tax administration:
>
> - **Transparency**—A fair and efficient property tax system must be transparent to policymakers and taxpayers alike. That includes providing an adequate explanation of the law and regulations on a jurisdiction's website, adequate notice of a proposed valuation, the ability to compare values placed on other properties in the jurisdiction (without disclosing confidential information; *e.g.*, income, expenses, *etc*.), and with frequent revaluations.
>
> - **Consistency**—Consistency is a key attribute for a jurisdiction with a fair and efficient property tax system. Tax forms, filing dates, assessment rates/ratios, adequate assessor training, *etc*., must be consistent across a jurisdiction, and centralized oversight of local assessors' practices should be the norm.
>
> - **Procedural Fairness**—To avoid negative perceptions, taxpayers should be afforded a sufficient amount of time to file an appeal, a balanced and reasonable burden of proof, review before an independent arbiter of an assessor's or a property tax board's findings, and the ability to partially pay (or escrow) any disputed tax. Fairness also requires that the interest rate paid on refunds of overpaid taxes is at the same rate as is levied on the underpayment of the taxes."[5]

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[5] COST & IPTI, *The Best (and Worst) of International Property Tax Administration*, at 3-4 (June 2019), https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/2019-international-property-tax-scorecard---final.pdf.

Unless it is reversed, the Tax Court's ill-considered decision will undermine every one of these policy goals by dramatically upending how property taxes are calculated for Oregon's centrally assessed taxpayers, placing over 110 years of property tax law for those taxpayers in serious doubt. Many COST members are subject to central assessment and understand that some measure of intangible property may be included in the property tax base in Oregon for centrally assessed taxpayers. Those members nonetheless have relied on Oregon's longstanding rule that the valuation of the taxpayer's property is based on the ***property***—both tangible and intangible—that is used or held by the taxpayer as of the lien date, as opposed to the ***enterprise value*** investors might use to value the business.

The Tax Court's decision is not only contrary to this longstanding rule, but to the applicable statutory language for reasons stated more fully in Appellant's Opening Brief. The plain language of ORS 308.505(14)(a), (b) expressly limits the type of property that can be taxed to "all ***property*** of any kind, whether real, personal, tangible or intangible, that ***is used or held*** by a company as owner, occupant, lessee or otherwise, for the performance or maintenance of a business or service or for the sale of a commodity" and goes on to give specific examples including "the lands and buildings, rights of way, roadbed, water powers, vehicles, cars, rolling stock, tracks, office furniture, telephone and transmission lines, poles,

wires, conduits, switchboards, machinery, appliances, appurtenances, docks, watercraft irrespective of the place of registry or enrollment, merchandise, inventories, tools, equipment, machinery, franchises and special franchises, work in progress and all other goods or chattels," but specifically *excluding* intangible property representing shares of stock. (Emphasis added.) On its face, this definition leaves no room for basing property taxes on the overall *enterprise value* of a business from the standpoint of its shareholders as the Tax Court's opinion suggests.

The Tax Court's reliance on the inclusion of "franchises and special franchises" in the sample list of property types subject to taxation does not alter this conclusion. As Appellant properly points out, while the definition of the term "franchise" can include the privilege to conduct business as a corporation, it can also be more narrowly construed as a government-granted right to conduct operations in a public space, such as the franchises granted to utilities to lay cable in public rights of way. *See, e.g., Sweetland v. Grants Pass New Water, Light & Power Co*., 46 Or 85, 86, 79 P 337 (1905) (city granted electric, gas, and water utility franchise); *Dunne v. Portland St. Ry. Co.*, 40 Or 295, 296, 65 P 1052, 1053 (1901) (franchise to operate street railway in the city). Here, given the other types of property listed in ORS 308.505(14), it makes far more sense to construe the

term in this narrow fashion, which makes a "franchise or special franchise" something that a business actually holds and uses in its operations in a manner similar to the other listed property. *Gordon v. Rosenblum*, 361 Or 352, 365, 393 P3d 1122, 1129 (2017) (nonexclusive statutory examples "provide context for our understanding of that term").

The Tax Court's opinion is also at odds with the common sense reflected in this Court's prior rulings. Business enterprise valuation is simply too speculative to use for property tax purposes, and for that reason, the Oregon courts have never blessed the business enterprise valuation methodology used by the Tax Court. Rather, this Court aptly understood the issue, and in *Delta Air Lines, Inc. v. Dep't of Revenue*, 328 Or 596, 984 P2d 836 (1999), explicitly noted "the department's task was to determine the value of Delta's assets, not the value of Delta as a firm." *Id*. at 616. This Court's holding in *Delta Air Lines* was not an aberration. Fifteen years later, in *Comcast Corp.*, 356 Or at 294, this Court stated that "[i]t bears emphasizing, however, that only the property used in the business, service, or commodity is assessed (and thus taxed). The value of the business, service, or commodity itself is not subject to central assessment."

The Tax Court's opinion also improperly relies on what it characterizes as a "robust" legislative history consisting of three out-of-state cases pre-dating the

1909 enactment of Oregon's current central assessment property tax regime. Specifically, the Tax Court states that "the legislature is considered to have known, from the opinions in *State Railroad Cases, Adams Express, Henderson Bridge*, and others noted above, that the United States Constitution would allow Oregon to treat the value of all shares in a company as equivalent to the value of the entirety of a corporation's tangible and intangible property." *Level 3 Commc'ns, LLC v. Dep't of Revenue*, TC-RD 5236, 2019 WL 5620088, at *17 (Or Tax Reg Div Oct. 25, 2019).

But this argument fails in the first instance because it relies on a mistaken and misguided presumption that Oregon legislators should somehow be deemed aware of legal developments in other states. While Oregon case law has long concluded that the legislature is presumed to be aware of "earlier enactments" as well as "'existing judicial decisions [that] have a direct bearing upon'" the legislation, *State v. Waterhouse*, 209 Or 424, 436, 307 P2d 327, 333 (1957) (citation omitted), such cases have all dealt with Oregon case law, not other state case law. *See State v. Stark*, 354 Or 1, 10, 307 P3d 418, 423 (2013); *State v. Clevenger*, 297 Or 234, 244, 683 P2d 1360, 1366 (1984); *State v. Reams*, 292 Or 1, 8, 636 P2d 913, 917 (1981) (presuming legislature was aware of relevant existing law in Oregon on subject/prior decisions of the Oregon Supreme Court). If the

Legislature wanted to incorporate other states tax laws and case law that existed on or before the legislation was enacted in 1909, it could have done so explicitly. *See Seale v. McKennon*, 215 Or 562, 572, 336 P2d 340, 345 (1959).

There is simply no basis to extend the same presumption to out-of-state cases, particularly for a legislature that sat in 1909, well before the modern age of travel, much less the Internet. Indeed, to do so even today would be folly. As an organization that engages in significant legislative advocacy on tax matters, an essential part of COST's mission is tracking state tax legislation across the country and doing so requires the attention of multiple employees working with both the Internet and local connections in the states they cover. The notion that individual state legislators themselves could possibly be aware of such developments across all 50 states assumes a manifestly unreasonable degree of omniscience. *Wyers v. Am. Med. Response Nw., Inc.*, 360 Or 211, 227, 377 P3d 570, 579 (2015) (cautioning against relying "on unrealistic assumptions about the legislative process and the omniscience of legislators" when construing legislative history).

Yet even assuming such a presumption were in place, the three out-of-state cases cited by the Tax Court all involve different statutory language, which specifically permits taxing capital stock and does nothing to demonstrate that the

Oregon legislature in 1909 sought to impose a broad sweeping property tax on the enterprise value of a business.

- ***Taylor.*** The Tax Court first relies on *Taylor v. Secor*, an Illinois case that led to the consolidation of several cases into what has become known as the State Railroad Tax Cases where the United States Supreme Court ultimately affirmed the constitutionality of an Illinois statute that imposed a separate tax on "'the capital stock of all companies.'" 92 US 575, 603 (1875) (citation omitted). Yet on its face this ruling has no bearing on the differently worded Oregon property tax statute, and the Tax Court's suggestion that the case could have empowered the Oregon legislature to somehow believe that it had the power to tax centrally assessed businesses on a business enterprise basis is mere speculation.
- ***Adams Express.*** The Tax Court next relies on *Adams Express Co. v. Ohio State Auditor*, 166 US 185, 17 S Ct 604, 41 L Ed 965 (1897), which upheld an Ohio statute taxing the intangible property of express companies using language that referred directly to the capital stock of the company. Once again, however, because Oregon has not imposed

a capital stock tax[6] on centrally assessed taxpayers during its 110-year property tax history, *Adams Express* is facially irrelevant to whether the Oregon legislature intended to tax centrally assessed taxpayers on a business enterprise valuation theory.[7]

- ***Henderson Bridge.*** Lastly, the Tax Court relies on *Henderson Bridge Co. v. Kentucky*, 31 SW 486 (Ky Ct App 1895), *aff'd*, 166 US 150, 155 (1897), which involved a differently worded Kentucky property tax that also referred to capital stock. But *Henderson Bridge* focused primarily on whether the tax improperly impacted interstate commerce and only tangentially referenced how the tax was assessed, commenting that "on the authorities cited in *Adams Express* * * *, we

[6] In 1909, Oregon did impose a capital stock tax on banks, *see* Lord's Oregon Laws, tit XXVIII, ch IV, §§ 3568-69, 3575 (1909); thus, the legislature knew how to impose such a tax and had it wanted to do so here it could have. *See Con-way Inc. & Affiliates v. Dep't of Revenue*, 353 Or 616, 624, 302 P3d 804, 809 (2013) (Where the legislature knows explicitly how to say something, its failure to do so in a different context is telling).

[7] Interestingly, a leading case book used in many state and local tax law classes only references *Adams Express* in the corporate income tax chapter as opposed to the chapter on property taxes. *See* Walter Hellerstein, Kirk J. Stark, John A. Swain & Joan M. Youngman, *State and Local Taxation – Cases and Materials* (11th ed. 2020), chs. 7 (corporate income taxes), 9 (property taxes). This absence of any reference further undermines any sense that Oregon legislators could possibly have known of the case in 1909.

> are unable to conclude that the method of taxation prescribed by the statute of Kentucky, and followed in making this assessment, is in violation of the [C]onstitution of the United States." *Id*. at 154-55. As a result, this case is at most a tepid endorsement of a differently worded tax that has no bearing on Oregon's statute.

In sum, each of these cases primarily addressed issues relating to state taxing authority under the Commerce Clause of the United States Constitution. Most importantly, they all involve differently worded statutes. There is no evidence whatsoever that such statutes served as models for Oregon's statute. The mere fact that they were ultimately upheld does nothing to show that the Oregon legislature in 1909 sought to impose a broad sweeping property tax on the enterprise value of a business in a statute that does not explicitly do so in its plain language.

Finally, it is also worth noting that unless reversed, the Tax Court's decision would also undermine the fairness of Oregon's property tax system by dramatically changing the administration of Oregon property taxes without any corresponding legislative change or agency rule to provide guidance to taxpayers. Such a significant change in the rules regarding administration without any legislative support flies in the face of good and sound tax administration. Oregon's centrally assessed property taxpayers have justifiably relied on the tax being imposed on

their operating property (both tangible and intangible) as of the lien date, and not the overall value of their business to their investors/shareholders. The Tax Court's acceptance of the latter without any legislative support represents a sea change and is likely to lead to protracted litigation. Indeed, the Tax Court's use of a business enterprise valuation approach is not only unfair, it is devoid of any real guidance on how it will be applied to other centrally assessed taxpayers, and will unjustly increase the compliance cost and likely the property tax owed without any supporting legislative change.

Taxpayers need certainty. They have relied for decades on this Court's clear and repeated rejection of a business enterprise valuation approach for centrally assessed taxpayers. Any attempt to change the law without any legislative mandate or guidance is patently unfair and inconsistent with past precedent. Thus, this Court should reject the Tax Court's attempt to value centrally assessed taxpayers' property using a business enterprise methodology and in so doing, restore consistency and fairness.

2. The Tax Court's Decision Should Be Reversed Because It Improperly Creates Constitutional Problems by Exacerbating the Disparate Treatment of Centrally and Locally Assessed Taxpayers.

This Court has previously held that it "is axiomatic that we should construe and interpret statutes 'in such a manner as to avoid any serious constitutional

problems.'" *Bernstein Bros. v. Dep't of Revenue,* 294 Or 614, 621, 661 P2d 537, 541 (1983) (quoting *Easton v. Hurita,* 290 Or 689, 694, 625 P2d 1290, 1291 (1981)). This principle provides yet another ground to reverse the Tax Court's decision since its tortured interpretation of Oregon's property tax statutes explicitly creates constitutional problems by dramatically increasing the disparate treatment of locally and centrally assessed taxpayers.

In this regard, Oregon's property tax system is already inherently discriminatory and distortive based on its disparate treatment of locally and centrally assessed taxpayers. Specifically, Oregon's system separates property taxpayers into locally assessed taxpayers who can exclude intangible property from their tax bases and centrally assessed taxpayers who cannot. Although authorized by the legislature, the requirement that intangible property be included in the tax base for centrally assessed but not locally assessed taxpayers creates two classes of property taxpayers that are treated fundamentally different. The creation of these two separate classes in and of itself is discriminatory and raises federal and state constitutional issues, namely equal protection and uniformity clause issues.

While this existing disparity is troubling, the Tax Court's decision would make it far worse by dramatically expanding the taxation of the intangible assets of other centrally assessed taxpayers just as it did for the taxpayer in this case. The

potential threat of such a challenge is starkly illustrated by the recent Ninth Circuit Court of Appeals decision in *BNSF,* 965 F3d 681. In *BNSF,* the taxpayer was a centrally assessed railroad. In 2017, the Oregon Department of Revenue (the "Department") elected to alter the railroad's property tax calculation by adding $14.8 billion in accounting goodwill as well as $637 million of other intangible personal property, increasing the railroad's assessed value and tax liability by approximately 30 percent. The railroad responded by suing the Department, alleging that Oregon's property tax system violated the 4-R Act, 49 U.S.C. § 11501(b)(4), because it only requires centrally assessed taxpayers such as railroads to pay property tax on intangible assets. Finding that Oregon essentially has two property tax law systems—one that includes intangible property in the tax base for centrally assessed taxpayers like railroads, and one that does not (*i.e.*, locally assessed taxpayers)—the Ninth Circuit agreed and concluded Oregon's system was in violation of the 4-R Act as it applies to railroads. *BNSF Ry*., 965 F3d at 683.

While the 4-R Act applies only to railroads, the Ninth Circuit's decision underscores the plainly discriminatory nature of Oregon's property tax system, which raises issues under both the equal protection clause of the United States Constitution and the uniformity clause of the Oregon Constitution. U.S. Const,

Amend XIV, §1; Or Const, Art I, § 32; Or Const, Art IX, § 1. Because the Tax Court's decision will inevitably increase the taxation of centrally assessed taxpayers' intangible assets, it will necessarily deepen this existing disparity in a manner that is certain to lead to constitutional challenges.

This is no idle threat. In 1994, the Ohio Supreme Court addressed a similar issue. In an as-applied equal protection clause challenge, the Ohio Supreme Court considered whether a telecommunications company subject to a significantly higher property tax valuation rate than its competitors was entitled to relief. *See MCI Telecomm. Corp. v. Limbach*, 625 NE2d 597 (Ohio 1994). At the time, Ohio's property tax was imposed on telecommunications companies at a significantly higher assessment rate than for other businesses operating in the state.[8] MCI Telecommunications Corporation was subject to assessment on 100 percent of its personal property tax value and successfully argued the Ohio Department of Taxation's application of the state's property tax regime violated the equal protection clause where MCI's competitors were assessed as general businesses on only 31 percent of their personal property tax value. *Id*. Specifically, the Ohio

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[8] *See* HB 66, 126th Gen. Assemb. (Ohio 2005). This case occurred before Ohio's 2005 tax reform phased out a personal property tax on telecommunications companies and general businesses.

Supreme Court held that "two taxpayers within the same class owning or leasing the same type of equipment [were] treated differently, and this treatment denies MCI equal protection of the laws." *Id.* at 601.

While the property tax valuation disparity in Ohio resulted from an assessment rate differential, not the inclusion of intangibles in the tax base, the result is the same—making clear that the disparate treatment of similarly situated taxpayers raises clear equal protection concerns. The increased valuation discrepancy that is likely to occur under the Tax Court's ruling between locally assessed and centrally assessed taxpayers will only increase the potential of similar challenges here in Oregon.

The disparate treatment between locally and centrally assessed taxpayers also raises potential issues under the uniformity clause of Oregon's Constitution, which requires that: "[a]ll taxes shall be levied and collected under general laws operating uniformly throughout the State." Or Const, Art IX, § 1. While this Court has previously determined that Oregon's central assessment property tax regime satisfies the uniformity clause absent a showing of intentional, systematic, or arbitrary discrimination, *Pacificorp Power Mktg., Inc. v. Dep't of Revenue*, 340 Or 204, 219, 131 P3d 725, 733 (2006) (citing *Freightliner Corp. v. Dep't of Revenue,* 275 Or 13, 19-20, 549 P2d 662, 665 (1976)), the increased disparity that will

inevitably result from the Tax Court's decision is likely to draw such rulings into question. As the Ninth Circuit pointed out in *BNSF*, Oregon already has two property tax systems: one that includes intangible property in the tax base for centrally assessed taxpayers and one that does not (*i.e.*, locally assessed taxpayers). *BNSF Ry.,* 965 F3d at 684. As these two property tax systems begin to produce increasingly disparate results, it is far more likely that a taxpayer will be able to show that the resulting discrimination is in fact intentional, systematic, or arbitrary and in violation of the constitutional requirement that all tax laws operate uniformly.

This risk is further compounded by the fact that the disparate treatment of centrally and locally assessed taxpayers was already increasing before the Tax Court's decision. This issue was highlighted in *Comcast*, where Comcast was required to move from local to central assessment due to a change in its business operations. 356 Or at 285-86. The business model change had a significant tax impact because intangibles, while not required to be included when it was locally assessed, were required to be included once Comcast was subject to central assessment. *Id*. at 287.[9] Specifically, Comcast's valuation increased by more than

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[9] This vastly increased its property valuation base. Deregulation at the federal and state level can also have a significant impact, especially when new entrants not

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2.6 times—or an increase in valuation from $434 million (under local assessment without the inclusion of intangibles) to $1.135 billion (under central assessment with the inclusion of intangibles).[10] *Id.* at 286-87.

This disparate treatment was also highlighted in 2017 by Oregon's Legislative Revenue Office ("LRO") in a presentation to members of the legislature that highlighted the significant increase in taxes paid by centrally assessed taxpayers on intangible assets following the *Comcast* decision. The LRO noted the impact of the changed methodology: "[h]igh levels of intangible to tangible value can result in tax assessments several times greater than what would be assessed if the assessment was based on tangible value only." LRO, *Property Tax Central Assessment,* at 2 (Feb. 9, 2017).[11] The significance of this distortion

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treated as public utilities in a state are able to provide some of the same services. *See Powerex Corp. v. Dep't of Revenue*, No. TC 5339, 2020 WL 3989160 (TC-RD July 15, 2020), issued by the Oregon Tax Court, that addressed whether a wholesaler of electricity and natural gas, which is not an Oregon public utility, should apportion its income for corporate income tax purposes as a public utility or a general taxpayer using Oregon's UDITPA. The Tax Court held it should be apportioned using Oregon's UDITPA because it was not a public utility under Oregon's law.

[10] *See* David Sawyer, *State Supreme Court Says Comcast Provides Communications Services*, Tax Notes (Oct. 13, 2014) https://www.taxnotes.com/tax-notes-state/appraisals-and-valuations/state-supreme-court-says-comcast-provides-communications-services/2014/10/13/b7n4

[11] Available at

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between centrally and locally assessed taxpayers in Oregon is well known and documented.[12] This Court should not expand and exacerbate it by upholding the Tax Court's decision, but should instead reaffirm that only the property actually used or held for use by a business, as opposed to the enterprise value of a business, is a proper basis for the assessment of property taxes.

3. Upholding the Tax Court's Decision Allowing Property Taxes to Be Assessed on a Company's Enterprise Value Would Make Oregon an Extreme Outlier in Relation to Other States.

Oregon Revised Statutes 308.505(14) explicitly allows the Department to consider intangible property for purposes of determining a centrally assessed taxpayer's property tax. Although it is COST's position that intangible property should be excluded from the property tax base, COST acknowledges the statutory basis for including intangible property in the tax base for centrally assessed taxpayers in Oregon. Upholding the Tax Court's decision regarding the extent to

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https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/97186.

[12] For example, when Dish Network Corp. was subject to central assessment in tax year 2009-2010 (*Dish Network Corp. v. Dep't of Revenue*, 364 Or 254, 434 P3d 379 (2019)), its value from tax year 2008-2009 increased from $17.4 million to $34.9 million. Similar to Comcast's situation, this was an over two-fold increase. *See* Andrea Muse, *State High Court Says Switch to Central Assessment Constitutional*, Tax Notes (Feb. 4, 2019) https://www.taxnotes.com/tax-notes-state/appraisals-and-valuations/state-high-court-says-switch-central-assessment-constitutional/2019/02/04/2934d?highlight=Oregon

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which intangible property is included in the centrally assessed taxpayers' valuation base, however, would make Oregon an extreme outlier among the states.

No state broadly imposes ad valorem property tax on the intangible property of all taxpayers. Indeed, most states completely exclude intangible property from the property tax base (as Oregon does for locally assessed taxpayers). By so doing, these states avoid the difficulties of valuing intangible property on an annual assessment basis and the inequities associated with the subjective nature of such calculations.

Moreover, of the few other states that permit the assessment of property tax on intangible assets for certain taxpayers,[13] all but one limit the inclusion to intangible property directly contributing to or enhancing a taxpayer's property used in its business operations. For example, the Colorado Supreme Court opined on the taxation of intangibles: "intangibles are to be taxed: 'the intangible rights of a public utility that directly contribute to its operations are to be considered as a

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[13] Seven other states allow the assessment of property tax on some form of intangible property: Alabama, Arizona, Arkansas, Colorado, Kansas, Kentucky and Louisiana. *See* Ala Code § 40-21-21; Ariz Rev Stat Ann § 42-14354; Ark Code Ann §§ 26-26-1606 to -07; Colo Rev Stat Ann § 39-4-102; Kan Stat Ann § 79-5a04; Ky Rev Stat Ann § 136.120; La Stat Ann § 1709[marked as repealed in WL]. The statute in one of these states, Arizona, is also likely to be invalid since it only applies to railroads and appears to violate the 4-R Act. *See BNSF Ry.,* 965 F3d 681.

factor in valuing and taxing the operating property and plant of the public utility.'"
Qwest Corp. v. Colo. Div. of Prop. Taxation, 310 P3d 113, 118 (Colo Ct App 2011) (quoting *U.S. Transmission Sys., Inc. v. Bd. of Assessment Appeals,* 715 P2d 1249, 1256 (Colo 1986)). Additionally, the Kansas Supreme Court, when asked to determine whether the inclusion of certain intangible property was constitutional under the Kansas Constitution, determined that "intangible property 'may be used to the extent that it creates an "enhanced" value of tangible property.'" *In re ANR Pipeline Co*., 79 P3d 751, 767 (Kan 2003) (quoting *In re Tax Appeal of W. Res., Inc.,* 919 P2d 1048, 1054 (Kan Ct App 1996)).

Outside of Oregon, only Kentucky approaches the actual valuation of the intangible property in a manner somewhat similar to the approach taken by the Tax Court—albeit to a much more limited extent. Unlike in Oregon, however, Kentucky's statutory scheme provides explicit support for the imposition of a business enterprise valuation methodology. In particular, the Kentucky Constitution provides that a public service corporation as defined by the constitution should be valued using a "fair cash value of * * * a domestic public service corporation as a unit." *See* Ky Rev Stat Ann § 136.160(1) (applying Ky Const § 172). Kentucky's property tax statute also specifically references "nonoperating intangible property." Ky Rev Stat Ann § 136.120(2)(a) ("The

property of the taxpayers shall be classified as operating property, nonoperating tangible property, and *nonoperating intangible property*." (emphasis added)). Finally, Kentucky courts have interpreted its constitutional and statutory provisions to provide for a business enterprise valuation methodology when valuing public service corporations operating property. *See, e.g., Revenue Cabinet v. Comcast Cablevision of the S.*, 147 SW3d 743 (Ky Ct App 2003), citing to *Henderson Bridge*, 31 SW 486.

In contrast to Kentucky, neither Oregon's Constitution nor its statutory provisions include any explicit authority for the application of a business enterprise valuation theory. Conversely, as noted throughout this brief, for more than 110 years, Oregon case law has interpreted its constitutional and statutory provisions to include only operating business property (both tangible and intangible) in the property tax base for centrally assessed taxpayers. Given these considerations, the Tax Court's independent conclusion that the business enterprise valuation methodology is somehow permitted absent explicit statutory or constitutional authority should be rejected.

The Tax Court's opinion also sanctions an approach to unit valuation for centrally assessed taxpayers that is similarly out of step with the approach taken in other states. By way of background, the concepts of "central assessment" and

"unit valuation" were developed in the 1800s, initially in connection with railroad companies by midwestern states.[14] The theory behind central assessment is that it allows a state to value a taxpayer's property using the "unit approach." The unit approach or unit valuation looks at the value of all the taxpayer's property as a unit and apportions a portion of that "unit" value back to local taxing jurisdictions based on an apportionment formula (*e.g.*, wire miles, historic cost of the property, etc.). This methodology was developed in lieu of only valuing the property located within a specific local taxing jurisdiction. For taxpayers with property that spans across many local jurisdiction and state lines, this valuation methodology, if appropriately and fairly utilized, makes sense.

Today, approximately 40 states use central assessment for at least certain categories of taxpayers, with 39 of those states using some form of a unit valuation. *Unit Approach Paper* at 134. Although the theory of central assessment and unit valuation, if properly applied, is sound and accepted as a valuation practice, there is no singular approach that all states apply.[15] The manner in which

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[14] *See* Gary C. Cornia, David J. Crapo & Lawrence C. Walters, *The Unit Approach to the Taxation of Railroad & Public Utility Property*, 5 Lincoln Inst. of Land Policy Conference Papers 126, 133-34 (May 2013) ("*Unit Approach Paper*") (citing *Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Backus*, 154 US 439, 14 S Ct 1122, 38 L Ed 1041 (1894), and *Taylor*, 92 US 575).

[15] For many businesses operating in multiple localities, central assessment can be a

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the Tax Court applies the theory of unit valuation in this case, however, is highly unconventional because it shifts the focus from valuing a business's property (*i.e.*, property tax value) to valuing the business enterprise (*i.e.*, value to the owners of a business).

Generally, the "unit" for purposes of "unit valuation" will include all the "operating property" that is used in the production of the taxpayer's business. "[I]t has generally become accepted that properties owned by a firm that are not required for the operation of * * * business (*i.e.,* 'nonoperating properties') should not be included in the unit." *Unit Approach Paper* at 136. Oregon's law for central assessment actually follows this and excludes property not connected directly with the business.[16] The Tax Court, however, strayed from this principle by basing its decision on the investment value of the entire company, as opposed to the value of the operating property. That decision is simply out of step with the

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preferred property tax administrative practice for both the government and those businesses. Such businesses, however, should be valued and subject to assessment in a similar manner to other types of businesses subject to assessment by local assessors.

[16] *See* ORS 308.555: "If [the Department of Revenue] values the entire property as a unit, either within or without the State of Oregon, or both, the department shall make deductions of the property of the company situated outside the state, **and not connected directly with the business thereof**, as may be just." (Emphasis added.)

current view of the unit valuation methodology that should be used for property tax purposes.

In sum, the Tax Court, by ignoring the plain language of Oregon's statutory provisions as well as Oregon case law (*e.g., Delta Air Lines*, 328 Or 596), has gone to great lengths to concoct its own interpretation. If not reversed, the Tax Court's decision will make Oregon's centrally assessed tax system an extreme outlier among states. Reversing the Tax Court's decision would prevent such an unjust result.

V. CONCLUSION

For all of the foregoing reasons, *amicus* respectfully requests that the decision of the Tax Court be reversed.

Dated: September 8, 2020

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CERTIFICATE OF COMPLIANCE WITH ORAP 9.10(3) AND ORAP 5.05(4)(F)

I certify that this brief complies with the word count limitation in ORAP 5.05(2)(b), with a count of 6751 words.

I certify that the font size in this brief is Times New Roman 14-point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

DATED: September 8, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief of *Amicus Curiae* Council On State Taxation (COST) in Support of Plaintiff LEVEL 3 COMMUNICATIONS, LLC on September 8, 2020, with Daniel W. Parr, Appellate Court Administrator, using the Appellate Court Electronic Filing System.

I hereby certify that I served the foregoing Brief of *Amicus Curiae* Council On State Taxation (COST) in Support of Plaintiff LEVEL 3 COMMUNICATIONS, LLC on the following named person(s) on the date indicated below by notice of electronic filing using CM/ECF system with a copy served via email:

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