No. 09-0627

In the Supreme Court of Ohio

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**DIRECTV, INC., and ECHOSTAR SATELLITE L.L.C.,**

***Plaintiffs-Appellants,***

**v.**

**RICHARD LEVIN, Tax Commissioner of Ohio,**

***Defendant-Appellee.***

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**ON APPEAL FROM THE COURT OF APPEALS,**
**TENTH APPELLATE DISTRICT**
**CASE NO. 08AP-32**

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# APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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## STATE STATUTES

## THIS CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL ISSUES OF GREAT PUBLIC AND GENERAL INTEREST[1]

Ohio law taxes satellite TV service, but not cable. Why the discrimination? According to the statute itself, the distinction is that satellite TV providers send their programming signals "without the use of ground receiving or distribution equipment" within Ohio, whereas cable companies do use "distribution equipment" on the "ground" in Ohio. R.C. 5739.01(XX). Cable companies serve their subscribers by laying an expensive infrastructure of cables throughout Ohio. Satellite TV providers, in contrast, serve Ohio customers directly from thousands of miles above the Earth, and do not need to invest in Ohio infrastructure to deliver their services.

The central question in this case is whether the discrimination against satellite TV customers violates the Commerce Clause, because imposition of the tax is triggered by whether or not a business builds an extensive infrastructure within Ohio. This constitutional question was substantial and controversial enough to split the two courts below. In two lengthy opinions, the Court of Common Pleas concluded that this discrimination violates the Commerce Clause. The Court of Appeals, however, held that it does not. No state supreme court has addressed the issue.

The outcome of this case has profound public importance for a million Ohio households that the state penalizes for choosing to subscribe to satellite TV—a penalty of $80 a year, on average, with a direct impact on the competition between cable and satellite TV. The total toll is far higher: Ohio consumers are also harmed because the tax affords entrenched cable

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[1] The Court of Appeals's opinion, *DIRECTV, Inc. v. Levin*, 10th Dist. No. 08AP-32, 2009-Ohio-636, reproduced at Tab 1, is cited as "CA Op." The Court of Common Pleas issued two summary judgment rulings—on October 21, 2005, and October 17, 2007—which are reproduced at Tabs 2 and 3 and cited as "First SJ Dec." and "Second SJ Dec.," respectively. The Court of Common Pleas' December 14, 2006 order on the Commissioner's motion to reconsider its first summary judgment decision, reproduced at Tab 4, is cited as "Reconsid." Affidavits and depositions—all of which are part of the record on appeal—are cited as "____ Aff." or "____ Dep.," according to the affiant's or deponent's surname.

monopolies a cost advantage that diminishes competition from satellite TV providers, diminishes the diversity of programming and viewpoints available to the Ohio public, and creates a disincentive for cable companies to improve their service. The case is of special importance to the hundreds of thousands of rural Ohioans who are forced to pay the satellite penalty because they have no choice—cable companies do not serve them. More importantly, this case has ramifications far beyond Ohio's satellite-only tax. The Court of Appeals's rationale for sustaining the discriminatory tax weakens Commerce Clause protection in three ways that will have profoundly negative ramifications for innumerable businesses that might be subjected to discriminatory taxes.

*First*, the Court of Appeals concluded that there can be no Commerce Clause challenge where both the favored businesses and the disfavored businesses engage in interstate commerce. CA Op. at ¶ 28. This holding defies three decades of jurisprudence from the U.S. Supreme Court, and guts Commerce Clause protection in a wide range of scenarios. In this increasingly global economy, it is rare that the beneficiaries of a discriminatory statute will all be Mom and Pop shops doing business only in-state, or that the victims will all be out-of-state businesses with no in-state operations. Thus, modern law prohibits a state from discriminating based on whether a business engages in a specified activity or has built something in-state—even if the beneficiary and the victim are both engaged in interstate commerce.

*Second*, the Court of Appeals held that the satellite-only tax does not violate the Commerce Clause because it merely distinguishes between two "modes" of business. CA Op. at ¶ 24-25. But the Supreme Court decisions relied upon by the lower court make clear that such discrimination is permissible *only* when the distinction the state draws has nothing to do with the location of any business activity: The discrimination must "result[] *solely* from differences between the nature of [the two] businesses, *not* from the location of their activities." *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of Treasury* (1989), 490 U.S. 66, 78 (emphasis added). Here, the discriminatory tax is inextricably tied to the *location* of "equipment" in the "ground" in Ohio, so geography is an essential and dispositive consideration in application of the tax. In broadening the "nature of the business" rationale to allow discrimination that does relate to the location of an activity—the laying of cables in Ohio—the Court of Appeals drastically weakened Commerce Clause protection, for almost any location-specific discrimination can be recast as addressed to a difference in the mode of doing business.

*Third*, the Court of Appeals held that proponents' statements to legislators about the purpose and effect of proposed legislation cannot, under Ohio rules of statutory construction, be considered in determining whether that legislation is discriminatory in purpose or effect. CA Op. at ¶ 32-33. But for claims asserted under the federal Commerce Clause, determination of legislative intent is controlled by *federal*, not state, law. There is clear *federal* authority—from the Supreme Court and other appellate courts—that exactly this sort of evidence is relevant to a Commerce Clause claim. In fact, it can often be the most revealing proof of a statute's discriminatory purpose and effect. The Court of Appeals thus erred in disregarding the federal law governing proof of legislative intent.

This Court should review this case to ensure that the Commerce Clause remains a robust bulwark against local protectionism, and not a mere filigree on a parchment page.

## STATEMENT OF FACTS

Sam Satellite and Carl Cable are next-door neighbors. Both enjoy watching Ohio State football on ESPN. Carl subscribes to ESPN through the local cable company. Sam subscribes to ESPN through a satellite provider like DIRECTV or Dish. Both watch the same game through the same network. Yet the State of Ohio requires Sam to pay an extra 5.5 cents in sales tax on every dollar because he subscribes to a satellite TV service rather than cable. Carl does not have to pay that tax.

The story behind the discriminatory satellite-only tax regime is a textbook case of local protectionism. For decades, cable companies were entrenched monopolies. Then came satellite TV, with its high-powered satellites transmitting programming directly to the subscriber's home. Satellite TV threatened cable's monopoly by giving consumers a real choice for the first time.

Ohio's local cable industry sprung to action. It lobbied the General Assembly to insulate it from competition from this "out-of-state" interest. Kozelek Dep., Exh. 10 at 3. Its message was as simple as it was brazen: "[C]able operators . . . must make and maintain a significant investment in Ohio in terms of tangible property, equipment and employees, whereas . . . satellite companies require virtually no investment in Ohio in order to compete." Id., Exh. 10 at 2. The cable industry emphasized that satellite TV "[p]rovides Ohioans with very few job opportunities, [d]oesn't pay an appreciable tax of any kind anywhere in Ohio . . . , [and h]as not done much of anything to support local communities." Id., Exh. 14 at OCTA0021, Exh. 32. In other words, cable railed, the satellite industry "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state*." Green Aff., Exh. F (Ohio Cable Telecomm. Ass'n Press Release (June 2, 2003)) (emphasis added).

Factually, the cable industry had a point. Cable companies reach their customers through elaborate local networks of ground equipment and cables running to individual homes. They have laid some 63,000 miles of cable in Ohio—more than enough to wrap around the world twice. Kozelek Dep., Exh. 7 at OCTA0163. In Ohio alone, cable companies have invested billions of dollars in their networks of ground equipment and related repair and maintenance facilities. They employ about 6,000 Ohio residents, most of them to construct, operate, and maintain these networks and to connect and disconnect drop lines reaching subscribers' homes. Id.; Ciciora Aff. at ¶ 7-24. Moreover, cable companies direct a steady stream of revenues to local governments. At the time this statute was passed, a cable company could not access local rights of way without negotiating franchise agreements with local municipalities or counties, see, e.g., R.C. 4939.01 et seq., and paying a share of its revenues (typically, 3-5% of the cable company's gross revenues) as franchise fees to compensate for use of the Ohio localities' rights of way. See, e.g., Green Aff., Exh. L at 1, Exh. N.

In contrast, satellite TV companies beam signals from outer space directly to their customers, and do not need to build an intricate web of cables in the ground or hang cables on telephone poles. Butterworth Aff. at ¶ 9. Satellite TV companies, therefore, do not employ armies of local workers; they have no offices and have only a handful of workers in Ohio. Id. at ¶ 12. Nor do satellite TV companies pay any rent to local governments, because they do not need to secure rights of way for a signal that beams in from outerspace. Id. at ¶ 9.

Reacting to these differentials in local investment and activity, the General Assembly answered the cable industry's call by enacting a sales tax that applied to satellite TV service, but not to cable. On June 26, 2003, the General Assembly amended the sales tax statute to make retail sales of "satellite broadcasting service" subject to the general tax rate of 6.0% (an amount later reduced to 5.5%). R.C. 5739.01(B)(3)(p), 5739.02, 5741.02. The General Assembly defined "satellite broadcasting service" as:

> the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment *without the use of ground receiving or distribution equipment*, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite …

R.C. 5739.01(XX) (emphasis added). In other words, satellite TV is distinguished from cable on the basis of one factor: "the use of ground … distribution equipment" in Ohio. Id.

The illegality of this protectionist regime was manifest from the start. The sitting Tax Commissioner at the time, Tom Zaino, opposed the discriminatory sales tax, warning that satellite TV companies would have a "significant chance of success" in challenging the tax. Green Aff., Exh. I at 7.

That prediction proved prescient when plaintiffs DIRECTV and EchoStar, the nation's leading satellite television providers, brought this lawsuit challenging the discrimination as a violation of the Commerce Clause. The Court of Common Pleas agreed. It reasoned that:

> [I]n practical effect, the sales tax statute favors a means of delivery of television programming that necessarily involves local economic activity (the tax on certain multichannel television broadcast services can be avoided only if *local* ground equipment other than the subscriber's equipment is installed and used for delivery of the television programming), as compared to a means of delivery which does not necessarily involve local activity (a subscriber can be connected to the direct-to-home satellite broadcast system without the installation and use of *local* ground equipment other than the subscriber's equipment). … If states are allowed to intentionally prefer technologies based upon whether the technologies would cause business activities to be conducted locally, then that is just another way of forcing economic activity to occur locally rather than in other states. In other words, it would allow the states to balkanize the national market, which is precisely what the Dormant Commerce Clause is supposed to prevent.

Reconsid. at 5-6 (emphasis in original). Thus, the court held that Ohio's tax scheme is unconstitutional. See Second SJ Dec. at 10, 43-44, 124.

The Court of Appeals reversed, upholding the discriminatory tax.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

When the Constitution granted Congress the "Power … To regulate Commerce … among the several States," U.S. Const. art. I, § 8, it also impliedly prohibited the states from engaging in "economic protectionism." *New Energy Co. v. Limbach* (1988), 486 U.S. 269, 273-74. Thus, the Commerce Clause embodies an "antidiscrimination principle" that "'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*

(1981), 451 U.S. 725, 754 (quoting *Boston Stock Exch. v. State Tax Comm'n* (1977), 429 U.S. 318, 329). This prohibition is called the "dormant" or "negative" Commerce Clause. This case presents three substantial questions about the scope of the Commerce Clause and how to prove a violation—all questions that transcend the specific business context and statute in this case.

**<u>Proposition of Law No. 1</u>**

**Even though both cable TV companies and satellite TV companies engage in interstate commerce, the satellite-only tax of R.C. 5739.01(XX) violates the Commerce Clause because the tax depends upon whether or not a business builds an infrastructure on the ground in Ohio.**

The Commerce Clause's prohibition against "economic protectionism," of course, means that a state may not bar goods from other states at the border, nor "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 642. It also means that a state may not impose a higher tax on an out-of-state business than on a local business. *W. Lynn Creamery, Inc. v. Healy* (1994), 512 U.S. 186, 193. These sorts of discriminatory state laws are "paradigmatic" examples of prohibited protectionism. Id.

But for at least three decades, the U.S. Supreme Court has made clear that these paradigms are not the only forms of discrimination that violate the Commerce Clause. The Commerce Clause also prohibits a state from imposing a tax that depends upon whether or not an interstate business *engages in a specified operation*, or *builds particular structures or facilities*, within the state. For example, the U.S. Supreme Court struck a New York law that imposed one tax on nonresidents who ran their trades through New York exchanges, but double the tax on customers who opted to sell through out-of-state exchanges. See *Boston Stock Exch.*, 429 U.S. at 324. Likewise, the Court struck a West Virginia tax on wholesalers within the state where the tax depended upon whether or not the product was also *manufactured* in West Virginia. See

*Armco*, 467 U.S. at 642. So, for example, if a company sold widgets at wholesale in West Virginia, the sale might or might not be taxed, depending on whether the seller built its manufacturing facility in Wheeling or Youngstown. The Court also struck a state law that granted businesses a tax credit, depending upon whether or not they built their exporting facilities in-state. *Westinghouse v. Tully* (1984), 466 U.S. 388, 399-401. Similarly, the Court struck a New York law prohibiting any winery from shipping wine directly to New York customers, unless it built "a distribution operation in New York." *Granholm v. Heald* (2005), 544 U.S. 460, 474.

The rationale in these cases was that it is impermissible to "requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm*, 544 U.S. at 475 (quoting *Pike v. Bruce Church, Inc.* (1970), 397 U.S. 137, 145). It is illegal for a state to "us[e] its power to tax an in-state operation as a means of requiring [other] business operations to be performed in the home State." *Boston Stock Exch.*, 429 U.S. at 336 (internal quotation marks omitted). Simply put, "[a] tax may not discriminate between transactions on the basis of some interstate element." *Armco*, 467 U.S. at 642 (quoting *Boston Stock Exch.*, 429 U.S. at 332 n.12).

Ohio's satellite-only tax runs afoul of these holdings, because this tax depends upon whether a facility is built within the state: Satellite TV service is taxed solely because satellite providers distribute programming "directly to" the subscriber's home "*without the use of ground receiving or distribution equipment*," R.C. 5739.01(XX) (emphasis added), but cable is not taxed, because cable operators have invested a fortune to build a web of "ground receiving or distribution equipment" in Ohio. As the trial court correctly observed, drawing on the foregoing precedents, the satellite-only tax is unconstitutional because it "(1) punishes the choice to deliver multi-channel television signals with a technology that permits certain activities to occur non-locally and (2) rewards the choice to use a technology that requires the corresponding activities to occur locally." Second SJ Dec. at 10.

The Court of Appeals ignored these precedents—and the theory on which the satellite-only tax was challenged. It rejected the Commerce Clause claim largely because "neither satellite *companies* nor cable *companies* are properly characterized as an in-state or out-of-state economic interest, based on their physical presence and corporate organization in Ohio and other states." CA Op. at ¶ 15 (emphasis added; citation omitted). According to the Court of Appeals, a Commerce Clause challenge to a discriminatory tax fails unless the victim is entirely foreign and the beneficiary entirely local; all bets are off if the victim of discrimination has some operations within the state or if the beneficiary engages in interstate commerce.

The U.S. Supreme Court rejected any such notion in *Boston Stock Exchange*, where it recognized that differential taxation of two types of business, both engaged in interstate commerce, can violate the Commerce Clause: "The fact that this discrimination is in favor of non-resident, in-state sales *which may also be considered as interstate commerce* ... does not save [the tax law] from the restrictions of the Commerce Clause." 429 U.S. at 334 (emphasis added; citation omitted). As if responding directly to the Court of Appeals's analysis here, the Court held:

> There has been no prior occasion expressly to address the question whether a State may tax in a manner that *discriminates between two types of interstate transactions* in order to favor local commercial interests over out-of-state businesses, but the clear import of our Commerce Clause cases is that *such discrimination is constitutionally impermissible.*

Id. at 335 (emphasis added).

In keeping with this principle, in each of the other cases mentioned above, the Court struck the law as discriminatory, even though the victim had an established presence within the state or the beneficiary was an interstate business, or both. See, e.g., *Westinghouse*, 466 U.S. at 398-400 (beneficiaries had operations out of state and were all *exporting* businesses, and thus by definition were engaged in interstate commerce); *Armco*, 467 U.S. at 639 (noting that during the relevant period, the victim of discrimination "conducted business in West Virginia through five divisions or subdivisions").[2]

In rejecting a Commerce Clause challenge because satellite TV and cable TV are both involved in interstate commerce, the Court of Appeals has set back Commerce Clause jurisprudence several decades. As is evident from the cases rejecting the principle the Court of Appeals adopted, the relevance of this holding transcends the subscription television context and affects how the law will apply in all arenas of business, from manufacturing to wholesaling to retail sales to exporting to stock trades. The Court of Appeals has gutted Commerce Clause protections for them all.

**Proposition of Law No. 2**

**The satellite-only tax of R.C. 5739.01(XX) cannot be saved from Commerce Clause challenge on the ground that the discrimination "results solely from differences between the nature of [two companies'] businesses, *not* from the location of their activities," *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of Treasury* (1989), 490 U.S. 66, 78 (emphasis added), because the discriminatory tax is inextricably tied to the *location* of a specified economic activity.**

The Court of Appeals invoked a second basis for rejecting the Commerce Clause challenge. It concluded that the satellite-only tax could be sustained because any disparity

[2] See also *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue* (1987), 483 U.S. 232, 240-42, 248 (unconstitutional to discriminate in favor of companies that engage in both wholesaling and manufacturing in-state and against those doing only one of the two; among the victims of discrimination were businesses with significant manufacturing or wholesaling business in the state); *Cuno v. Daimler Chrysler, Inc.* (C.A.6, 2004), 386 F.3d 738, 743-46 (tax credit for investments in plant and equipment in Ohio discriminates against out-of-state businesses not making such in-state investments), vacated on other grounds, 547 U.S. 332 (2006).

between in-state and out-of-state interests "'results solely from differences between the nature of [the cable and satellite] businesses, not from the location of their activities.'" CA Op. at ¶ 23 (quoting *Amerada Hess*, 490 U.S. at 78, and citing *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117).

The "nature of the business" rationale, however, is not an exception to the general rule that discrimination on the basis of the geographic location of an economic activity violates the Commerce Clause. Rather, the two Supreme Court cases that the Court of Appeals invoked merely represent the other side of the same coin: that where the tax turns "solely" on differences between the businesses and a statute is *truly* location-neutral, it does not violate the Commerce Clause. Here, by contrast, the distinction the General Assembly drew between two businesses has "everything to do" with location—i.e., imposition of the tax depends on whether cables are laid *on the ground in the state.* Reconsid. at 15. As the Supreme Court has explained, even after *Amerada Hess* and *Exxon*, "discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism" that violates the Commerce Clause. *Lewis v. BT Inv. Managers, Inc.* (1980), 447 U.S. 27, 42 n.9.

The two cases the Court of Appeals cited illustrate the proper application of the principle—and its limitations. See CA Op. at ¶ 15-16, 27. In *Amerada Hess*, a large oil company complained that New Jersey's tax code did not grant a tax credit to adjust for the federal windfall profit tax oil companies paid on crude oil. 490 U.S. at 70-71. They complained that the state's decision not to offer such a deduction discriminated against interstate commerce because New Jersey happened not to have any oil producers. Id. at 77. But, in fact, New Jersey did not grant a credit for *any* federal tax that, like a windfall profits tax, is "measured by profits or income," and the tax provision predated the federal windfall tax by two decades. Id. at 70.

All of this led the Court to conclude that New Jersey's policy decision not to grant an exemption to oil producers was "solely" about a mode of business, and had nothing to do with their location—either in purpose or in effect. Indeed, it was precisely *because* New Jersey law did not discriminate on the basis of geographic location that the Court said the question "whether a state may single out for special tax burdens a form of business activity that is conducted only in other jurisdictions … is not presented in this litigation." Id. at 77. The Court went on to emphasize the governing rule that a tax is unconstitutional when it is "directed specifically at economic activity that occurs only in a particular location." Id. at 78 n.10.

Along the same lines was *Exxon*, which involved a Maryland law prohibiting oil companies or refiners from owning gas stations. 437 U.S. at 119. The statute was enacted in response to a serious problem that arose during the oil crisis, when oil companies supplied gas to their own retailers, and not to others. Id. at 121. Several vertically integrated oil companies challenged the prohibition as discriminatory against interstate commerce, again pointing to the fact that Maryland has no oil producers or refiners and thus the prohibition affected mainly out-of-state companies. Id. at 121-24. The Court rejected this argument because the prohibition was neither linked to nor motivated by the geography of the retailers or producers. Id. at 127. In fact, the Maryland law still allowed out-of-state entities to own gas stations in Maryland—so long as the out-of-state entity was not an oil company. As the Court later explained, the case dealt simply with a "statute [that] discriminated against vertical organization in the petroleum industry"—because of the dangers that form of ownership created for consumers—not against companies that declined to conduct specified business activities in the state. *Lewis*, 447 U.S. at 41. Thus, *Exxon* and *Amerada Hess* do not establish an exception to the basic Commerce Clause rule that discrimination based on the geographic location of an activity is always prohibited.

If the Court of Appeals's analysis stands unreviewed, it will mark an enormous contraction of Commerce Clause protection. Almost any geographically based discrimination could be disguised as a difference based on the nature of the business or product. Under the Court of Appeals's ruling, for example, the state could impose a higher tax on a product that typically comes from out of state, and a lower tax on a competing indigenous product, merely by positing that the two products are just different modes of business. But this Court has rejected exactly such a tax. See *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St. 2d 465, 473-74, 391 N.E.2d 716 (rejecting higher tax on low-sulfur than on high-sulfur coal, on the ground that Ohio produces virtually no low-sulfur coal). The Court of Appeals's rationale would be especially pernicious for telecommunications and information service providers, which compete principally by striving to develop technologies that allow them to deliver their services more quickly and efficiently than their competitors. Thus, the Court of Appeals's ruling condones the very type of local protectionism the Commerce Clause prohibits.[3]

**Proposition of Law No. 3**

**In a Commerce Clause challenge to the "purpose" and "practical effect" of a discriminatory statute, evidence of what proponents communicated to the legislature as to the statute's purpose and effect is relevant and admissible.**

The evidence in the record definitively demonstrated what the law's proponents believed to be the purpose and practical effect of the discriminatory tax. They left no doubt that *they*

[3] The Court of Appeals mentioned that the Commissioner "cite[s] five different trial and appellate court cases (not including the trial court decision in our case), all reaching outcomes in favor of taxing authorities." CA Op. at ¶ 19. The court correctly declined to rely on most of those opinions, because they involved different taxing schemes or were disposed of on different grounds, or both. Instead, the court focused on only two cases. Id. at ¶ 20-22. One was the Sixth Circuit's opinion in *DIRECTV, Inc. v. Treesh* (C.A.6, 2007), 487 F.3d 471, which addressed a very different state statute that taxed cable and satellite service *equally*. The other opinion, from an intermediate state court, exhibits the same legal flaws as the opinion below. *DIRECTV, Inc. v. North Carolina* (N.C. App. 2006), 178 N.C. App. 659, 667, 632 S.E.2d 543.

believed the purpose and effect of the satellite-only tax would be to benefit businesses that "make and maintain a significant investment in Ohio in terms of tangible property, equipment and employees," Kozelek Dep., Exh. 10 at 2, at the expense of a business that "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state*." Green Aff., Exh. F (Ohio Cable Telecomm. Ass'n Press Release (June 2, 2003)) (emphasis added).

The Court of Appeals nevertheless ruled that when considering a Commerce Clause challenge based on the discriminatory purpose or effect of a statute, a court may not "consider[] … written evidence submitted by the plaintiffs regarding arguments presented by lobbyists for the cable television industry in support of the current statutory tax scheme." CA Op. at ¶ 31. That holding was based on a state law rule of statutory construction: "'Ohio has no official legislative history'" and "a court may not resort to legislative history . . . to alter the clear wording of the legislative enactment." CA Op. at ¶ 33 (citation omitted).

However, this case does not involve determining legislative intent for purposes of applying substantive state law; rather, it involves application of the Commerce Clause of the federal Constitution. Thus, the rules governing what kinds of evidence can be used to determine legislative intent are *federal* ones, not state ones. See *Chambers Medical Techs., Inc. v. Bryant* (C.A.4, 1995), 52 F.3d 1252, 1259 n.10 ("[T]he Supreme Court has expressly stated that the legislature's motivation is a necessary consideration in resolving the federal question of whether state regulations violate the Commerce Clause; thus, [state] law concerning statutory construction is not controlling."). The Supreme Court has left no doubt that the federal rule is that statements by lobbyists supporting the protectionist legislation are admissible and, indeed, highly probative.

For example, in considering "[t]he reason for the enactment" and "the intended effect" of a challenged tax, the Court in *Boston Stock Exchange* cited a public statement from the New York Stock Exchange president urging passage of the law to "ease the competitive disadvantage … on New York securities markets," and Executive Branch communications discussing the threat from "regional exchanges to challenge the New York exchanges for business." 429 U.S. at 325-36, 324 n.7, 327 n.10. The Supreme Court and other courts have frequently considered these sorts of extra-legislative pronouncements in assessing whether a law was infected with discriminatory purpose. See, e.g., *Hunt v. Wash. State Apple Advertising Comm'n* (1977), 432 U.S. 333, 352 (citing the state agriculture commissioner's statement that local apple producers "were mainly responsible for this legislation being passed"); *W. Lynn Creamery*, 512 U.S. at 189-90 (referencing declaration of commissioner of state agency that "we must act on the state level to preserve our local industry"); *S.D. Farm Bureau v. Hazeltine* (C.A.8, 2003), 340 F.3d 583, 593-96 (citing statements issued by the drafters of the referendum and disseminated to voters, notes from the committee meetings where the referendum was drafted, and testimony by one lobbyist); *Brown & Williamson Tobacco Corp. v. Pataki* (C.A.2, 2003), 320 F.3d 200, 215 (noting letter submitted by a lobbyist reflecting his interpretation of statute's intended effect).

This Court should thus review the Court of Appeals' decision on evidence of legislative intent to assure conformity with the federal principles governing Commerce Clause cases.

**CONCLUSION**

For the foregoing reasons, this Court should accept jurisdiction of this appeal.

Dated: April 6, 2009

Respectfully submitted,

Peter A. Rosato
CALFEE, HALTER & GRISWOLD LLP

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was served via First Class U.S. Mail on this 6th day of April, 2009 upon the following:

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

DIRECTV, Inc. et al.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

[Richard A. Levin], Tax Commissioner of Ohio,

Defendant-Appellant/
Cross-Appellee.

No. 08AP-32
(C.P.C. No. 03CVH06-07135)

(REGULAR CALENDAR)

## JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on February 12, 2009, the defendant's first, second, third, fourth, fifth, sixth, eighth, and ninth assignments of error are sustained, his seventh assignment of error is overruled, plaintiffs' assignments of error on cross-appeal are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court to enter summary judgment for defendant-appellant Richard A. Levin, Tax Commissioner of Ohio, in accordance with law consistent with said decision. Costs shall be assessed against plaintiffs.

GREY, J., FRENCH, P.J., and BRYANT, J.

By Lawrence Grey
Judge Lawrence Grey

GREY, J., retired, formerly of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| DIRECTV, Inc. et al., | : | |
| Plaintiffs-Appellees/ Cross-Appellants, | : | |
| | : | |
| v. | | No. 08AP-32 |
| | : | (C.P.C. No. 03CVH06-07135) |
| [Richard A. Levin], Tax Commissioner of Ohio, | : | (REGULAR CALENDAR) |
| Defendant-Appellant/ Cross-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on February 12, 2009

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APPEAL from the Franklin County Court of Common Pleas.

GREY, J.

{¶1} Defendant-appellant, Richard A. Levin, in his capacity as tax commissioner of the state of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas in favor of plaintiffs-appellees, DIRECTV, Inc. and EchoStar Satellite Corporation (hereinafter "DIRECTV" and "EchoStar," or collectively "plaintiffs"). The plaintiffs have cross-appealed on some subsidiary aspects of the trial court's decision.

{¶2} The issue raised in this case is the constitutionality of various Ohio sales tax provisions affecting satellite television providers and cable television providers.

{¶3} In 2003, the Ohio General Assembly amended the state sales tax statutes to make retail sales of satellite broadcasting services subject to the general sales tax rate of six percent. (The general rate was later reduced to 5.5 percent.) Pertinent sections include R.C. 5739.01(B)(3)(q), 5739.02, and 5741.02. The amended statutes specifically define what constitutes a "satellite broadcasting service": [D]istribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite * * *." R.C. 5739.01(XX). This definition excludes cable television service providers, who necessarily employ "ground receiving or distribution equipment" to deliver programming to their customers. Although cable television providers do not collect the general state sales tax from their customers, they continue to pay local franchise taxes in areas where they provide service. The imposition of these local franchise taxes is independent of the state sales tax provisions at issue in this case and, although the parties' arguments address the relative burdens and benefits of these two tax elements, the role of the local franchise taxes is ultimately not important to our analysis of the case.

{¶4} Plaintiffs challenged the sales tax imposed on satellite television consumers and collected by satellite television providers, and the concomitant exemption from taxation of cable television, on the ground that it violates the Commerce Clause of the United States Constitution by favoring in-state economic interests and placing an undue burden on interstate commerce, i.e., that the differential taxation provides "a direct commercial advantage to locally franchised cable television systems that is not provided to satellite television companies * * *." (Complaint, ¶44.)

{¶5} After allowing extensive discovery, the trial court eventually decided the matter in successive decisions addressing two rounds of summary judgment motions filed by the parties. Although the trial court concluded that the Ohio tax statutes did not facially or purposely discriminate against interstate commerce, the trial court found that the tax scheme was discriminatory in effect and impermissibly burdened satellite providers by increasing the net costs to television consumers for satellite service in comparison to cable service. In doing so, the trial court concluded that the satellite providers were out-of-state interests engaging in interstate commerce, and conversely that the cable companies were in-state economic interests. The trial court reached this conclusion primarily by comparing the relative size of the staff and physical plant used in Ohio by the two types of pay television (both have a physical presence, including employees, in Ohio, although cable television's is substantially larger) rather than the other aspects of commercial activity and scope that might establish whether one class of competitor is engaged in interstate commerce and the other not.

{¶6} The commissioner brings the following nine assignments of error on appeal:

> 1. The Trial Court erred in entering Summary Judgment in favor of Plaintiffs DIRECTV, Inc. and EchoStar Satellite Corporation on Count I of their Complaint in that the Trial Court a) declared that R.C. §§5739.01(B)(3)(q) (now renumbered R.C. §5739.01(B)(3)(p)), 5739.01(XX), 5739.01(AA)(4), 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 5741.021, 5741.022 and 5741.023, are unconstitutional to the extent that they impose sales and use taxes on the retail sales of " ' satellite broadcasting services', while not imposing the taxes on the retail sales of the cable television industry" and therefore discriminate in practical effect against interstate commerce in violation of the Commerce Clause of the U.S. Constitution; and b) permanently enjoined Defendant Tax Commissioner and others "from taking any action to levy or collect sales and use taxes from Plaintiffs for the retail sales of satellite television services."
>
> 2. The Trial Court erred in denying, with the sole exception of finding no facial discrimination, Summary Judgment to Defendant Tax Commissioner on Count I of the Complaint, to wit, that R.C. ¶¶5739.01(B)(3)(q) (now renumbered R.C. §5739.01(B)(3)(p)), 5739.01(XX), 5739.01(AA)(4), 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 5741.021, 5741.022 and 5741.023, do not discriminate against interstate commerce and/or do not violate the Commerce Clause of the U.S. Constitution.
>
> 3. The Trial Court erred in entering Partial Summary Judgment in favor of Plaintiffs DIRECTV, Inc. and EchoStar Satellite Corporation on Count I of their Complaint and concomitantly denying Defendant Tax Commissioner's 6/16/04 Motion for Summary Judgment in that the Trial Court declared with respect to Count I that a) "in their practical operation, the tax provisions at issue benefit in-state economic interests and burden out-of-state economic interests"; and b) "the sales and use taxes as applied to

direct broadcasting television service providers do not qualify as 'compensatory taxes'."

4. The Trial Court erred in denying Defendant Tax Commissioner's 6/16/04 Motion for Summary Judgment "on the issues of whether there was purposeful discrimination and whether cable television providers and direct broadcast satellite providers are 'similarly situated.' "

5. The Trial Court erred in denying Defendant Tax Commissioner's 9/20/2006 Motion for Reconsideration "[t]o the extent that the Commissioner asks the Court to modify or vacate its earlier decisions."

6. The Trial Court erred in granting Plaintiffs' 12/22/06 Second Motion for Summary Judgment and concomitantly denying Defendant Tax Commissioner's 12/26/06 (Second) Motion for Summary Judgment, thereby concluding that a) the cable broadcasting industry and satellite broadcasting industry are "similarly situated" for dormant Commerce Clause purposes; b) the "Defendant has not met the State's burden of justifying the discrimination against interstate commerce that exists in this case"; and c) "the Ohio sales and use taxes are unconstitutional to the extent, that they apply to direct broadcasting satellite television services while not applying to cable television services."

7. The Trial Court erred in granting Plaintiffs' 11/6/06 Motion for Protective Order thereby quashing Defendant Tax Commissioner's October 31, 2006, Deposition subpoenas and further prohibiting the Defendant from discovering and presenting information directly relevant and material to the Trial Court's novel rationale for determining Commerce Clause discrimination.

8. The Trial Court erred in admitting into evidence and giving substantial weight to the written positions of lobbyists as evidence of the General Assembly's purpose in adopting amendments to Ohio's sales and use tax provisions and/or as evidence of whether Satellite and Cable Companies are "similarly situated."

9. The Trial Court erred in ruling that it was proper to consider the individual thoughts of members of the General Assembly in determining the General Assembly's purpose in adopting amendments to Ohio's sales and use tax provisions

> and/or as evidence of whether Satellite and Cable Companies are "similarly situated."

{¶7} The plaintiffs have filed a cross-appeal and bring the following three assignments of error:

> 1. The trial court erred in finding that it lacked authority to order the repayment of unlawfully collected taxes despite the plain language of R.C. 2723.01.
>
> 2. The trial court erred in requiring plaintiffs-cross-appellants ("plaintiffs") to apply for refunds through the administrative process set forth in R.C. 5739.07, which does not apply to challenges to the validity of a tax law and which imposes requirements virtually impossible to satisfy in this type of case.
>
> 3. The trial court erred in holding that plaintiffs are not entitled to reimbursement of their attorneys' fees and costs out of the common fund that they created through this litigation.

{¶8} We initially note this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶9} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard.*

{¶10} The commissioner's first six assignments of error all address different facets of the principal issue in this case, the constitutionality of the sales tax on satellite television providers and exemption of cable television providers therefrom, and will be addressed together.

{¶11} The invalidation of Ohio's sales tax in this case is based upon the power of the United States Congress to "regulate Commerce with foreign Nations, and among the several states," constituting the Commerce Clause of the United States Constitution. Section 8, Article I, United States Constitution. More specifically, at issue here is the so-called "dormant" or "negative" aspect of the Commerce Clause, the implicit corollary that if Congress is to regulate commerce between the states and with foreign nations, then state governments may not impose taxes or other conditions that will impede the free flow of trade between states. *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 278, 97 S.Ct. 1076, 1079, fn. 7.

{¶12} When the alleged infringement by state law is in the form of a tax, the United States Supreme Court has held broadly that a tax is discriminatory if it taxes a "transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Mgmt. v. Hunt* (1992), 504 U.S. 334, 342, 112 S.Ct. 2009, 2014, quoting *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 642, 104 S.Ct. 2620, 2622. For purposes of the dormant commerce clause, "discrimination" is defined as " 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *Granholm v. Heald* (2005), 544 U.S. 460, 472, 125 S.Ct. 1885, 1895, quoting *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality of Oregon* (1994), 511 U.S. 93, 99, 114 S.Ct. 1345, 1350. States may not impose a tax that provides a direct commercial advantage to local businesses and thus burdens and discriminates against interstate commerce. *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 362.

{¶13} A tax provision will not run afoul of the commerce clause if (1) the activity taxed has a substantial nexus with the taxing state, (2) the tax is fairly apportioned to reflect the extent of commercial activity within the taxing state, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to benefits provided by the state. *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079. The third ground for a commerce clause challenge given above is the one at issue in the case before us. A statute may "discriminate" against interstate commerce in three ways: (1) it may be facially discriminatory; (2) it may have discriminatory intent; or (3) it may have a discriminatory effect in practice. *Amerada Hess Corp. v. Dir., Div. of Taxation New Jersey Dept. of the Treasury* (1989), 490 U.S. 66, 78, 109 S.Ct. 1617, 1621. As a final caveat, even a state tax provision that discriminates in practice against interstate commerce may pass constitutional scrutiny if it " 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *Oregon Waste Sys.*, 511 U.S. at 101, 114 S.Ct. at 1351, quoting *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 278, 108 S.Ct. 1803, 1810.

{¶14} Despite the sweeping principles regarding unequal taxation set forth above, the United States Supreme Court has frequently found that differential taxation is not discriminatory taxation, and, in fact, dormant commerce clause tax cases from different commercial domains are often difficult to reconcile. The Supreme Court itself has stated that such cases call upon courts to "make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers[.]" *Boston Stock Exchange v. State Tax Comm.* (1977), 429 U.S. 318, 329, 97 S.Ct. 599, 606. "[T]he result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. * * * This case-by-case approach has left 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.' " Id., quoting *Northwestern States*, 358 U.S. at 457, 79 S.Ct. at 362.

{¶15} Applying the "case-by-case" standard rather deferentially to the states' "indispensable" power to tax, the Supreme Court has allowed many challenged statutes to survive commerce clause scrutiny. Two such cases are heavily cited by the commissioner. In *Amerada Hess*, 490 U.S. 66, 109 S.Ct. 1617, the challenged New Jersey statute provided a credit against state taxes for certain federal taxes, but denied the credit for federal windfall profit taxes paid by oil producers. Because New Jersey had no domestic oil production activity, out-of-state oil producers engaging in other aspects of oil distribution and sales in New Jersey did not receive a state tax credit for federal windfall taxes paid, although they received the same tax credit for other forms of federal taxes as domestic competitors who had no production activities and therefore were not subject to the windfall tax. Despite this superficially comparable treatment of in-state oil distribution and sales activities for tax purposes, oil producers asserted that the denial of the state tax credit for their federal windfall profits tax discriminated against interstate commerce because it affected only out-of-state companies due to New Jersey's lack of a domestic oil production industry. 490 U.S. at 70-72, 109 S.Ct. at 1620-21. The court rejected the contention that the state had singled out for "special tax burdens a form of business activity that is conducted only in other jurisdictions," 490 U.S. at 77, 109 S.Ct. at 1624, and likewise found that the tax scheme did not exert impermissible pressure on outside firms to conduct additional business in-state: "Denying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for oil producers to move their oil-producing activities to New Jersey," 490 U.S. at 78, 109 S.Ct. at 1624. "Whatever different effect the [tax] provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities." Id.

{¶16} In *Exxon Corp. v. Maryland* (1978), 437 U.S. 117, 98 S.Ct. 2207, the challenged Maryland statute prohibited a producer or refiner of petroleum products from operating retail gas stations in the state. As in *Amerada Hess*, producers challenged the law on the basis that it was inherently discriminatory against out-of-state retailers, because Maryland had no domestic companies engaged in oil refining or production and the statute thus excluded only out-of-state firms from retail operation in the state. The court held that although the burden of the ban fell in practice on out-of-state companies due to the absence of in-state refiners, the statute was aimed at a method of doing business (vertically integrated companies) that had led to price inequities, not at protection of local interests to the detriment of interstate commerce: "In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce." 437 U.S. at 126, 98 S.Ct. at 2214.

{¶17} In contrast, two other cases from the United States Supreme Court are notable instances in which a tax has run afoul of the dormant Commerce Clause and are invoked by the plaintiffs in the present case. In *Bacchus Imports, Ltd. v. Dias* (1984), 468 U.S. 263, 104 S.Ct. 3049, the plaintiff liquor importers challenged a tax on wholesale liquor sales that provided an exemption for certain peculiarly local liquors, specifically okolehao, a traditional brandy distilled from the root of an indigenous shrub, and fruit wines manufactured in-state. The Supreme Court found that the exemption amounted to economic protectionism and violated the Commerce Clause because it expressly favored locally produced products in competition with imported ones, demonstrating both discriminatory purpose and effect. The court further held that the state could not support a favorable inquiry regarding the balance between local benefits and burden on interstate commerce that might have validated an otherwise discriminatory statute.

{¶18} In *West Lynn Creamery v. Healy* (1994), 512 U.S. 186, 114 S.Ct. 2205, the court struck down a statute that required all milk dealers in Massachusetts to contribute to a price equalization fund based on all sales, whether locally produced or imported. The state then distributed the fund to domestic milk producers. Noting that, although the tax applied to all producers whether in-state or out-of-state, the proceeds were distributed to in-state producers only, the court concluded that this amounted to a direct monetary subsidy of in-state producers. 512 U.S. at 203, 114 S.Ct. at 2216. "By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone." 512 U.S. at 199-200, 114 S.Ct. at 2214-15. The court summed up the violative nature of the tax and subsidy arrangement by characterizing it as the "paradigmatic example" of a law that violates the dormant Commerce Clause, a protective tariff. 512 U.S. at 193, 114 S.Ct. at 2211; 512 U.S. at 203, 114 S.Ct. at 2216.

{¶19} In light of the Supreme Court's admonition to consider Commerce Clause cases on a case-by-case basis with an eye to the "unique characteristics of the statute at issue and the particular circumstances in each case," *Boston Stock Exchange,* supra, we turn from the conflicting precedent found in the petroleum, dairy, and liquor industries to those cases addressing taxation of pay television, which are not lacking. Unlike the precedent in other commercial sectors, the unanimous weight of precedent here lies on the side of taxing authorities in cases involving differential taxation for satellite and cable television providers. The parties' briefs cite five different trial and appellate court cases (not including the trial court decision in our case), all reaching outcomes in favor of taxing authorities. Two of these guide our analysis of this case and will be discussed at length.

{¶20} In *DIRECTV, Inc. v. North Carolina* (2006), 178 N.C. App. 659, satellite television providers challenged a North Carolina sales tax on satellite television services coupled with an exemption for cable television services. The North Carolina app ellate court stressed in its decision cases such as *Chemical Waste Mgmt.* that discussed and defined the effect of the dormant Commerce Clause to bar differential treatment of in-state and out-of-state economic interests. In essence, the court rejected the satellite providers' argument that their technological means of delivery for programming were inherently out-of-state and that cable providers, conversely, were inherently in-state. 178 N.C. App. at 666-667. The court relied extensively on the ruling in *Amerada Hess*, particularly the language that emphasized that the difference in taxation in that case resulted solely from the nature of the business activity and not its location. The North Carolina court reasoned that satellite providers would be subject to taxation regardless of whether some, any, or none of their facilities were located in-state. Similarly, cable providers with a significant or even predominant portion of their cable delivery systems outside of North Carolina would still be exempt from the sales tax imposed on satellite providers. 178 N.C. App. at 666-667. In substance, the court concluded that the differential tax upon television programming delivery technology that appeared to discriminate against a delivery mechanism that *necessarily* incorporated an out-of-state component, i.e., satellites in orbit above the earth, in the final analysis did not burden interstate commerce because the tax was neither facially discriminatory nor discriminatory in its practical effect.

{¶21} Satellite providers next challenged a differential tax plan in *DIRECTV, Inc. v. Treesh* (C.A.6, 2007), 487 F.3d 471, involving a Kentucky tax scheme that charged a three percent excise tax on all pay television and an additional 2.4 percent gross revenue tax on pay television providers. Proceeds from both were held in a dedicated tax fund. This fund then was disbursed to local taxing authorities in an amount equal to past excise taxes imposed upon cable television providers, but this distribution to local governments was in exchange for local governments foregoing such franchise taxes. If local governments did not forego franchise taxes, the cable providers would receive an equivalent tax credit from the state. Satellite providers contested both the tax credit/rebate scheme and also the bar against local franchise taxes on cable television providers. The district court upheld Kentucky's tax plan by granting a motion to dismiss, *DIRECTV v. Treesh* (E.D.Ky.2006), 469 F.Supp.2d 425, and the plaintiff satellite providers appealed to the Sixth Circuit.

{¶22} As the North Carolina appellate court did, the Sixth Circuit stressed in *Treesh* that the differential taxation between cable television and satellite television providers did not discriminate based upon geographic location or domicile, but rather upon the use of different technologies under different business models. 487 F.3d at 481. The Sixth Circuit in *Treesh* refused to apply cases such as *West Lynn Creamery* and *Bacchus Imports*, finding that the differential taxation of television delivery technologies is not, unlike the objectionable laws in those cases, calculated to divert market share to a local producer at the expense of out-of-state businesses. The court in *Treesh* preferred to compare the commercial context of the tax to that in *Amerada Hess* and *Exxon*, considering that the competing goods in the case are not distinguished by origin, but by business model and thus means of delivery. 487 F.3d at 480.

{¶23} We find the above precedent is persuasive when applied to the case before us, as well it should be as the cases were decided on essentially identical pertinent facts. The sales tax imposed by Ohio on satellite television providers and not upon cable television providers does not violate the dormant Commerce Clause. The clause protects interstate commerce and the interstate market for products, but does not protect "the particular structure or methods of operation in the retail market," *Exxon Corp.*, 437 U.S. at 127, and the "Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results solely from differences between the nature of their businesses, not from the location of their activities.' " *Kraft Gen. Foods v. Iowa Dept. of Revenue & Finance* (1992), 505 U.S. 71, 78, 112 S.Ct. 2365, 2369, quoting *Amerada Hess*, 490 U.S. at 66. As the North Carolina court noted, "neither satellite companies nor cable companies are properly characterized as an in-state or out-of-state economic interest," based upon their physical presence and corporate organization in Ohio and other states. *North Carolina*, 632 S.E.2d at 548.

{¶24} Before us are two modes of interstate business. One delivers pay TV programming directly to the consumer's home, via satellite, to a decoder that may be owned either by the consumer or the satellite television provider. The other delivers pay television to the consumer's home, in some cases utilizing a company-owned set-top decoder, via cable from a "headend" distribution center that receives the imported programming, again often via satellite. Both business models obtain most programming from outside of Ohio and redistribute it to consumers in the state. Both also gather local programming and distribute it to Ohio consumers, and, in some areas, consumers in neighboring states where the customary service markets of Ohio stations "bulge" across state lines. In addition, some locally produced programming is exported nationwide. On an organizational level, the two plaintiff satellite television providers are national companies headquartered outside Ohio. Although some small local cable operations may benefit from the sales tax exemption, the cable companies that provide significant competition in the pay television field are very large regional companies, also headquartered outside Ohio.

{¶25} Even if we focus exclusively on the technological means of program distribution, as the plaintiffs urge us to do, the two classes of competitors cannot be segregated into interstate and local enterprises on the sole basis that the satellite providers place equipment in outer space that necessarily is out of the state of Ohio. In fact, the use of orbital satellites cannot be the distinguishing feature of the two pay television technologies, because cable providers also receive much programming via satellite at the headend centers. The tax distinction between satellite and cable providers does not discriminate against interstate commerce as a whole, but places a burden against one form of delivering pay television to consumers, and the burden would fall equally on a satellite provider headquartered in Ohio, having all program content, satellite uplink, account services, and customers in-state. See, generally, *Brown & Williamson Tobacco Corp. v. Pataki* (C.A.2, 2003), 320 F.3d 200 (upholding New York statute banning both in-state and out-of-state mail-order sales of cigarettes).

{¶26} The simple facts of the type of commerce involved here must inevitably be distinguished from those in *Bacchus Imports* and *West Lynn Creamery*, which involved both a tax on imported products and a related subsidy to in-state manufacturers of such products. Those cases came much closer to the clearly prohibited barrier to interstate commerce that amounted to a tariff, which is clearly prohibited by the Commerce Clause. *Westlynn Creamery*; *Baccus*; *Amerada Hess.*

{¶27} Supreme Court precedent in *Exxon* and *Amerada Hess* demonstrates that the dormant Commerce Clause should not be conceived to protect particular technological or commercial models, but to protect interstate commerce and interstate access to the markets of a given state. The plaintiff satellite companies in the present case have not demonstrated that Ohio's sales tax provisions discriminate against the interstate market for pay television, whether delivered by cable or satellite. At best, the plaintiffs have persuasively, but ultimately to no end, established that they are more burdened by Ohio's tax provision than comparable interstate cable providers. Discrimination between different forms of interstate commerce is not discrimination *against* interstate commerce.

{¶28} Because we find that Ohio's sales tax, as applied to the satellite television providers and not applied to cable television providers, does not run afoul of the dormant Commerce Clause because both of these providers are engaged in interstate commerce, we do not examine the question of whether cable television, by providing additional services in the form of internet access and telephone service, presents sufficient alternate benefits to warrant differential taxation. Nor do we examine the question of whether the amount and burden of franchise fees, which are paid by cable television providers and not by satellite television providers, essentially equalizes taxation on the two means of delivering pay television to Ohio consumers.

{¶29} In accordance with the foregoing, the commissioner's first six assignments of error have merit and the trial court's decision granting summary judgment to plaintiffs is in error.

{¶30} The commissioner's seventh assignment of error alleges procedural error in that the trial court granted a protective order that denied the commissioner the opportunity to obtain further evidence to develop facts regarding the relative scope of operations by the plaintiff satellite companies in-state and out-of-state. In light of our decision in this matter, this ruling by the trial court was not prejudicial as the commissioner was able to develop sufficient evidence on this issue. The commissioner's seventh assignment of error is overruled.

{¶31} The commissioner's eighth assignment of error asserts that the trial court erred by allowing into evidence and then considering for evidentiary purposes written evidence submitted by the plaintiffs regarding arguments presented by lobbyists for the cable television industry in support of the current statutory tax scheme. Given that this matter was decided on summary judgment, the issue is not truly one of evidentiary admissibility, but rather whether the trial court erred on giving weight to these materials in granting summary judgment.

{¶32} The trial court allowed these materials into evidence on the basis that they could by extrapolation provide support for the discriminatory intent of the statute, and in fact the record amply demonstrates that the cable companies did heavily lobby the Ohio legislature for preferential tax treatment on the basis that cable television historically presented a heavier local investment in infrastructure and employment. Lobbying efforts on behalf of legislation, however, are not probative of the intent of the legislature in enacting it.

{¶33} "Ohio has no official legislative history and, consequently, sponsor testimony is of limited value" in legislative interpretation. *Glick v. Sokol*, 149 Ohio App.3d 344, 2002-Ohio-4731, at ¶10. As a consequence, a court may not resort to legislative history, such as the comments of a legislator regarding enactments, to alter the clear wording of the legislative enactment. *Cleveland Trust Co. v. Eaton* (1970), 21 Ohio St.2d 129, 138; *Associated Builders & Contractors of Cent. Ohio v. Franklin Cty. Bd. of Commrs.*, Franklin App No. 08AP-301, 2008-Ohio-2870. We conclude that these statements in discussions regarding the pending tax legislation are of little value in resolving this constitutional challenge. The commissioner's eighth assignment of error is accordingly sustained to the extent that the trial court used such materials to assess the constitutionality of the tax statutes.

{¶34} The commissioner's ninth assignment of error asserts that the trial court erred in allowing consideration of certain statements reflecting the reasoning of members of the legislature for enacting the tax provisions at issue. For the same reasons set forth in the preceding discussion, this assignment of error has merit and is sustained.

{¶35} In accordance with the foregoing, the first, second, third, fourth, fifth, sixth, eighth, and ninth assignments of error brought by the commissioner are sustained and his seventh assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas granting summary judgment to plaintiffs is reversed. Plaintiffs' assignments of error on cross-appeal are rendered moot by our disposition of the appeal and are overruled. The matter is remanded to the trial court to enter summary judgment for defendant-appellant Richard A. Levin, Tax Commissioner of Ohio.

*Judgment reversed;*
*cause remanded with instructions.*

FRENCH, P.J., and BRYANT, J., concur.

GREY, J., retired, formerly of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DirecTV, Inc., et al.,

Plaintiff(s),

-vs- Case No. 03CVH06-7135 (Hogan, J.)

William W. Wilkins, Tax Commissioner of Ohio,

Defendant(s).

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CLERK OF COURTS

DECISION AND ENTRY PARTIALLY GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED 5-3-2004
AND
DECISION AND ENTRY PARTIALLY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED 6-16-2004

Plaintiffs' 5-3-2004 Motion for Summary Judgment is PARTIALLY GRANTED. It is granted to the extent that this Court finds that, (1) in their practical operation, the tax provisions at issue benefit in-state economic interests and burden out-of-state economic interests, and (2) the sales and use taxes as applied to direct broadcasting television service providers do not qualify as "compensatory taxes". Defendants' 6-16-2004 Motion for Summary Judgment is PARTIALLY GRANTED. Defendant's motion is granted as to Counts II, III, and IV (the Equal Protection, fair relationship, and Section 602 preemption claims). It is also granted to the extent that this Court finds that there is no facial discrimination. Both motions are denied on the issues of whether there was purposeful discrimination and whether cable television providers and direct broadcast satellite providers are "similarly situated".

Since this decision and entry does not resolve all of the pending claims, it is not a final judgment entry and the parties should not submit a final judgment entry at this time unless there is a settlement with regard to the remaining claims.

**Standard of Review upon Motion for Summary Judgment**

Summary judgment may be awarded only if (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds, construing the evidence most strongly in favor of the nonmoving party, can come to but one conclusion which is adverse to the nonmoving party. *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298. Because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. *Id.* Doubts must be resolved in favor of the nonmoving party. Id.

The Ohio Supreme Court has ruled that "* * * the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. *State ex rel. Leigh v. State Emp. Relations Board* (1996), 76 Ohio St.3d 143, 146. If the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be preserved for trial. *Id.*

**Analysis of Pending Summary Judgment Motions Relating to the Commerce Clause**

Plaintiffs claim that the Ohio sales tax is unconstitutional under the "dormant" Commerce Clause of the United States Constitution because it discriminates against interstate commerce insofar as the tax applies to direct broadcasting satellite television services but not to cable television services.

As stated by the U.S. Supreme Court in *Am. Trucking Assn.'s v. Mich. PSC,* (2005), 125 S.Ct. 2419,

> Our Constitution "was framed upon the theory that the peoples of the several states must sink or swim together." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L. Ed. 1032, 55 S. Ct. 497 (1935). Thus, this Court has consistently held that the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, contains "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179, 131 L. Ed. 2d 261, 115 S. Ct. 1331 (1995), that "creates an area of trade free from interference by the States," *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977).

The Supreme Court discussed the effect of the Commerce Clause on the States' legitimate taxing power in *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 328-329.

> [W]e begin with the principle that "[the] very purpose of the Commerce Clause was to create an area of free trade among the several States." McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944). It is now established beyond dispute that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States... [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." Freeman v. Hewit, 329 U.S. 249, 252 (1946). The Commerce Clause does not, however, eclipse the reserved "power of the States to tax for the support of their own governments," Gibbons v. Ogden, 9 Wheat. 1, 199 (1824), or for other purposes, cf. United States v. Sanchez, 340 U.S. 42, 44-45 (1950); rather, the Clause is a limit on state power. Defining that limit has been the continuing task of this Court.
>
> [8] On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics

> of the statute at issue and the particular circumstances in each case. E.g., Freeman v. Hewit, supra, at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge... some firm peaks of decision which remain unquestioned." Id., at 458.

The Defendant's argument in the current case appears to use the strategy of pointing out that the facts of this case do not fit neatly within any of the *more specific* holdings of any controlling cases regarding the invalidation of tax statutes. But as stated in the above passage from *Boston Stock Exchange,* cases in this area of the law must often be decided on a case-by-case basis. Accordingly, in a case such as this where there is no clear precedent providing principles of a specific nature applicable to the specific facts of this case, this Court must "make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers". In doing so, the Court should consider the Commerce Clause's purpose of creating a national market and give heed to the "firm peaks of decision" that have emerged from the "quagmire" of the case-by-case approach. One such "firm peak of decision" is a general principle identified by the United States Supreme Court in *Granholm v. Heald* (2005), 125 S.Ct. 1885, 544 U.S. __, as having become well established.

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

What are those "narrowest circumstances" which the Court refers to in *Granholm*? First, a statute will not be found to be discriminatory based on differential treatment of two businesses or groups of businesses if they are not "similarly situated". *General Motors Corp. v. Tracy* (1997), 519 U.S. 278. Second, even a discriminatory statute will not be found to violate the Commerce Clause if the State can meet its burden of justifying the statute "both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake." *Hughs v. Oklahoma* (1979), 441 U.S. 322.

Accordingly, the tax statute in the current case should be found to violate the Commerce Clause if (1) it requires "differential treatment of in-state and out-of state economic interests that benefits the former and burdens the later", (2) cable television service providers and direct broadcasting satellite television service providers are "similarly situated", and (3) the state fails to satisfy its burden of justifying the tax "both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake."

Plaintiffs allege that the tax statute at issue in this case is invalid because it involves (1) facial discrimination, (2) a discriminatory purpose, and (3) discrimination in "practical effect", any one of which defects, taken by itself, is an adequate basis for invalidating the statute's sales tax on direct broadcast satellite services.

Plaintiffs argue that the statute imposing the sales tax in question is facially discriminatory since the imposition of the tax is made conditional upon whether television broadcast signals are received at the consumer's premises by way of direct transmission from an (out-of-state) satellite or by way of certain receiving or distribution equipment located in Ohio. Plaintiffs argue that this differentiation is based upon the in-state or out-of-state location of the transmission activity and the equipment used in that activity. Plaintiffs argue that such differential treatment based on in-state and out-of-state location of equipment and activity is prohibited by the Commerce Clause. The arguments are not persuasive.

Plaintiffs make the argument that satellites are necessarily outside of Ohio since the physics for how to achieve a geosynchronous orbit requires that the satellite be located in outer space above the equator. But it would appear to this Court that their argument functions just as well to establish that the satellites are also necessarily outside of every other state. Hence, the out-of-state location of the satellite does not necessarily entail an inherent connection with interstate commerce. It is logically possible that a direct broadcast satellite services provider might refuse to sell services to anyone outside of Ohio, might move all of its ground operations into Ohio, might purchase its satellite from an Ohio manufacturer who manufactures the satellite from parts made in Ohio from Ohio raw materials, and even might launch the satellite from somewhere in Ohio. Thus, the location of the satellite in outer space, outside of every state, does not logically entail that direct broadcast satellite services have an inherent connection with interstate commerce.

It is true that satellites are necessarily located outside of Ohio and that, therefore, broadcasting television signals from satellites is necessarily an activity that takes place outside of Ohio. However, Plaintiffs misconstrue the case law to the extent that Plaintiffs conclude that the Commerce Clause necessarily prohibits discrimination against such outer space equipment and activities. Since the purpose of the Commerce Clause is to create a national free trade zone, discrimination against outer space activity and equipment is not prohibited by the commerce clause unless there is some adequate connection between interstate commerce and the outer space equipment and activity that are burdened by the discrimination. Nothing *on the face* of the statute would appear to establish such a connection. Thus, this Court is not persuaded that the statute *facially* discriminates against interstate commerce merely because it disfavors equipment and activities that are located, or occur, in outer space.

Plaintiff suggests that the statute facially discriminates because it conditions the sales and use taxes upon whether the television broadcasting service provider fails to locate certain ground receiving or distribution equipment in Ohio. But the statute does not explicitly state that such equipment must be located in Ohio. One has to make further assumptions that do not appear on the face of the statute in order to determine that the sales tax exemption is conditioned upon locating the relevant equipment in Ohio. One has to assume that the subscribers will be located in Ohio and that Ohio subscribers can only be served by the relevant kind of ground receiving or distribution equipment if at least some of that equipment is located in Ohio. Since the sales tax applies to sales in Ohio, it would apply to a sale of satellite broadcasting services to an out-of-state customer so long as the out-of-state customer purchases the services in Ohio. Thus, when a non-resident subscriber purchases television broadcasting services for her use in another state, the applicability of the tax will not be determined by whether any of the relevant equipment is located in Ohio, rather the applicability of the tax will depend upon whether at least some of the relevant equipment is located in the subscriber's home state.

For the reasons state above, this Court finds that the tax statutes at issue do not *facially* discriminate against interstate commerce. Summary Judgment is granted to Defendant on that issue.

Plaintiffs also allege that the Ohio sales and use taxes, as applied to satellite direct broadcast service providers, are invalid under the Commerce Clause because they have a discriminatory purpose. Defendant argues that having a discriminatory purpose is not an adequate basis for invalidation. The Supreme Court has held otherwise. In *Amerada Hess Corp. v. Director, Division of Taxation, New Jersey Department of the Treasury* (1989), 490 U.S. 66, the Court said,

> As our precedents show, a tax may violate the Commerce Clause if it is facially discriminatory, *has a discriminatory intent*, or has the effect of unduly burdening interstate commerce.

The Court went on to explain that it found one of the tax exemptions in *Bacchus Imports, Ltd. V. Dias* (1984), 468 U.S. 263, to be invalid because the exemption was motivated by a discriminatory intent (or, in other words, the tax exemption was invalid because the tax exemption had a discriminatory purpose). Also, in *Minnesota v. Cloverleaf Creamery Co. (1981)*, 449 U.S. 446, 471, n.15, after indicating that economic protectionism is "virtually *per se*" invalid, the Supreme Court said,

> A court may find that a state law constitutes "economic protectionism" on proof either of discriminatory effect, see *Philadelphia* v. *New Jersey*, or of discriminatory purpose, see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S., at 352-353.

The Sixth Circuit has also held that, "A statute can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." *Eastern Kentucky Resources v. Magoffin County Fiscal Court* (1997, 6th Cir.), 127 F.3d

532. Followed by *Lenscrafters, Inc. v. Robinson,* (2005, 6th Cir) 403 F.3d 798, 802. This Court concludes that possessing a discriminatory purpose is one way in which a statute can discriminate against interstate commerce.

In the context of the Commerce Clause, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Oregon Waste Systems v. Dept. of Environmental Quality* (1994), 511 U.S. 93, 99. Consequently, a "discriminatory purpose" would be one that seeks to benefit in-state economic interests and burden out-of-state economic interests.

The Supreme Court's use of the words "economic interest" in the definition of discrimination is significant. It means that the Commerce Clause cannot be construed so narrowly as to only be concerned when businesses are discriminated against in accordance with their residence or when transactions or activities are discriminated against because they occur out-of-state or cross state lines. Rather, it follows from the Supreme Court's definition of "discrimination" that the Commerce Clause is concerned much more broadly with differential treatment whenever in-state economic interests are benefited and out-of-state economic interests are burdened.

In construing the dormant Commerce Clause restriction on discrimination against interstate commerce, this Court must not ignore the rationale for the restriction. That restriction,

> "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

*Granholm* at 1895. Based upon that rationale, citizens possess a "right to have access to the markets of other states on equal terms." *Id.* at 1896. In the current case, direct broadcast satellite services are not given equal access to Ohio markets as compared to cable television service providers. The former are subject to the sales and use taxes at issue while the latter are exempt from those taxes.

In order to determine whether that differential treatment involves a "discriminatory purpose", the definition of "discrimination" applicable in dormant Commerce Clause cases must be considered. To constitute discrimination, the differential treatment must not only benefit in-state economic interests, it must also burden out-of-state economic interests. *Granholm v. Heald* (2005), 125 S.Ct. 1885, 544 U.S. ____. Thus, purposeful discrimination must not only include an intention to benefit in-state economic interests, it must also include an awareness that out-of-state economic interests will be burdened. Both motions are denied on the issue of whether the in-state interests that the General Assembly intended to benefit were *economic* interests. Both motions are also denied on the issue of whether the General Assembly was aware that the differential treatment of cable and satellite services burdened out-of-state economic interests.

It is undisputed that the bill was initially introduced as including a tax on both direct broadcast satellite services and cable television services, but that after lobbying efforts by representatives from the cable television industry, the proposed bill was modified so as to exempt cable television services from the tax. Reasonable minds could conclude that the reasons articulated by the lobbyists for the cable television services motivated the exemption of cable television services from the tax.

It is undisputed that the cable industry lobbyists made the following arguments[1] to the legislators in the "study committee"[2] in support of differential tax treatment of direct broadcast satellite services and cable television services:

1) Since cable operators usually need access to public right of ways for their cable systems, they become subject to local regulation in the form of franchise agreements and permit requirements. Direct Broadcast Satellite services are not subject to these kinds of local regulatory requirements. The types of local regulatory requirements involved include:
   a. local franchise fees up to 5% of gross revenues,
   b. certain customer service standards,
   c. free channels for public, educational, and governmental access,
   d. free production facilities, equipment and services,
   e. free wiring and monthly services for public schools and public buildings,
   f. local rate regulation for basic service, and
   g. commitments as to ownership and use of assets to insure protection of public interests.

2) Given that cable operators are already subject to many taxes including the franchise fees, imposing a new tax on cable operators would

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[1] Plaintiff offered the affidavit of Mr. Green to authenticate a number of documents attached to it including Exhibit C, "Committee to Study State and Local Taxes: Comments of the Ohio Cable Telecommunications Association", Exhibit D, "Committee to Study State & Local Taxes: Testimony of Edward F. Kozelek", and Exhibit F, a 6-2-2003 press release by the cable association regarding the proposed bill. Defendant asks this Court to strike the affidavit and its exhibits. Some of the exhibits have been separately authenticated and hence, the request has become moot as to those. Other exhibits do not appear to have much relevance and the Court has no intention of relying upon them. That leaves Exhibits C, D, and F.

Evidence Rule 901(A) says that authentication can be achieved by evidence sufficient "to support a finding that the matter in question is what its proponent claims." Evidence Rule 901(B)(1) states that this can be done by "Testimony of a witness with knowledge. Testimony that the matter is what it is claimed to be." Here the affidavit is sufficient to support a finding that Mr. Green had knowledge and that these three exhibits are what he and Plaintiffs claim they are. Hence, the authentication requirement is satisfied as to all three.

There is no hearsay problem with regard to Exhibits C, D, and F to the extent that they are not offered to prove the truth of the matters asserted, but rather to show the content of those materials as provided to at least some members of the General Assembly. The Court will not rely upon Exhibits C, D, and F to prove the truth of the matters asserted therein.

Defendant does not point to any evidence that Exhibit C and the testimony in Exhibit D were not provided to some members of the General Assembly. Accordingly, on Mr. Green's undisputed testimony, this Court finds that they were. With regard to Exhibit F, Mr. Green does not testify that it was ever provided to any members of the General Assembly, and hence, this Court has no basis at this time upon which it could find that Exhibit F affected the enactment of the legislation.

[2] A bipartisan group of legislators and executive branch officials formed for the purpose of developing tax reform proposals.

subject them to two layers of taxation whereas direct broadcast satellite services will only be subject to one layer.

3) Since cable operators are subject to the franchise fee requirement and other local regulatory requirements that direct broadcast satellite services are not subject to, cable operators are put at an unfair competitive disadvantage. The customer base for direct satellite broadcast services is growing significantly. A tax should be imposed upon the direct service satellite services in order to level the playing field.

4) Due to the competitive advantage of direct broadcast satellite services, there has been an "increasing shift of customers from cable to satellite [which] will continue to erode Ohio's tax base unless the satellite industry is addressed." Accordingly, direct broadcast satellite service providers should be made subject to a new tax.

Hereafter, these arguments will be referred to as the "cable industry lobbying arguments". Having determined that reasonable minds could conclude that some or all of the reasons set forth in these cable industry lobbying arguments became the purpose of the statute, the Court now turns to the question of determining which, if any, of those purposes would be a discriminatory purpose: a purpose that favors in-state economic interests and disfavors out-of-state economic interests.

Some of the interests identified in the cable industry lobbying arguments are not "economic interests". Since discrimination is defined in terms of favoring local *economic* interests, any purpose to favor non-economic interests is not a "discriminatory" purpose, even if the favored interests are "local" interests. The Court finds that the following interests are not "economic" interests, and thus, may qualify as legitimate local interests:

1) The interest in protecting customer service standards.

2) The interests in education, the promotion of local culture, and the flow of information about local events, government, etc. as served by protecting the industry that provides (a) free channels for public,

educational, and government access, (b) free production facilities, equipment and services, and (c) free wiring and monthly services for public schools and public buildings.

3) The interest in controlling the ownership and use of assets of companies that serve non-economic public interests in order to protect those non-economic public interests.

4) The interest in fair competition in the marketplace ("leveling the playing field") so long as that does *not* mean handicapping a market participant with superior inherent competitive characteristics, or assisting a market participant with inferior inherent competitive characteristics, when such handicapping or assisting both benefits local economic interests associated with the inherently inferior competitor, and burdens out-of-state economic interests associated with the inherently superior competitor.

5) The interest in avoiding unfair double taxation by exempting certain market participants from a tax so long as the law governing compensatory taxes defines when such an exemption is appropriate.

While favoring these local interests would not support a charge of discrimination under the Commerce Clause, favoring other local economic interests identified in the cable industry lobbying arguments would support a charge of discrimination if combined with the burdening of out-of-state economic interests. The local economic interests identified in the cable industry lobbying arguments include:

1) The interest in avoiding the erosion of Ohio's tax base, including the interest in avoiding reduction in the amount of local franchise fees to be collected.

2) The interest in local rate regulation for basic service.

3) The interest in controlling the ownership and use of assets of companies that serve local public economic interests in order to protect those local public economic interests.

4) The interest in fair competition in the marketplace ("leveling the playing field") *if* that means handicapping a market participant with superior inherent competitive characteristics, or assisting a market participant with inferior inherent competitive characteristics, when such handicapping or assisting both benefits local economic interests

associated with the inherently inferior competitor, and burdens out-of-state economic interests associated with the inherently superior competitor.

5) The interest in avoiding unfair double taxation by exempting certain market participants from a tax if the law governing compensatory taxes does not permit such an exemption.

As between the local economic interests and the local non-economic interests suggested by the cable industry lobbying arguments, there is a genuine issue of fact as to which of those interests the General Assembly intended to favor when it enacted the statute taxing sales by direct broadcast satellite services but exempting cable television service sales. Neither party meets its initial burden *for purposes of summary judgment* of pointing to evidence that would demonstrate an absence of a genuine issue of material fact as to this question and hence both summary judgment motions must be denied on this question.

Plaintiffs also argue that the statute sought to serve other local economic interests since cable service providers make more local investment and employ more Ohioans. Plaintiffs offer Exhibit F to Mr. Green's affidavit, a press release issued by the cable industry association prior to the passage of the bill noting the extent of the cable industry's investment in Ohio and the number of its employees in Ohio. While it is certainly possible that this press release was made available to members of the General Assembly, or that the members of the General Assembly were otherwise generally aware of such alleged facts, neither party points to evidence that would demonstrate an absence of a genuine issue of material fact about such matters. Thus, neither party has met its initial burden *for purposes of summary judgment* with regard to that issue. Consequently, both summary judgment motions are denied as to the issue of whether the differential tax treatment of satellite and cable services was intended to favor local economic interests such as protecting the cable service providers' greater investment in Ohio and employment of more Ohioans.

Since discrimination in the Commerce Clause context is defined as including *both* (1) the favoring of in-state economic interests *and* (2) the burdening of out-of-state economic interests, it would follow that a "discriminatory purpose" must include both (1) an intention to favor in-state economic interests *and* (2) an awareness that doing so will burden out-of-state economic interests. Neither party points to evidence that would demonstrate the absence of a genuine issue of material fact as to whether the members of the General Assembly were generally aware that they were burdening out-of-state economic interests (i.e., the economic interests of other states or of localities within other states). Hence, they did not meet their initial burden *for purposes of summary judgment* and both motions are denied as to that issue.

Plaintiffs also allege that the differential sales and use tax treatment of satellite and cable television providers discriminates in its practical effect against interstate commerce. Since discrimination is defined in the Commerce Clause context as differential treatment of in-state and out-of-state economic interests by favoring the former and burdening the latter, the issues are whether, in practical effect, the differential tax treatment of satellite and cable providers (1) favors in-state economic interests, and (2) burdens out-of-state economic interests.

Summary judgment must be granted to Plaintiffs on both issues. Reasonable minds can reach but one conclusion that the differential tax treatment burdens out-of-state economic interests and favors in-state economic interests.

Given the technology used by cable operators to distribute their television programming after it has been gathered, they must locate substantial distribution equipment in Ohio, and have in fact done so. That, of course requires substantial investment and employment in Ohio. The equipment must, for the most part, be located in public right of ways, which requires obtaining the right to do so, which in most cases involves the payment of franchise fees to local governments.

The evidence indicates that there are not substantial differences in the way that cable and satellite operators gather their programming signals prior to distribution to consumers. What differentiates the two types of services with regard to their effects (in practical operation) on in-state and out-of-state economic interests is the final leg in the distribution process. At a minimum, distribution by cable necessarily involves installation of a huge network of cables throughout Ohio. It has also, as a matter of fact, involved the installation of some "head-ends" in Ohio.

By contrast, satellite providers have not needed, or chosen, to locate any of their distribution equipment in Ohio. The Plaintiffs' distribution equipment is limited to two uplink facilities each, all of which have been located outside of Ohio. Furthermore, given that such a small number of uplink facilities are needed, the probability that any satellite provider would locate a substantial portion of its distribution facilities in Ohio is *very* much lower than the probability that any cable operator selling its services in Ohio would locate substantial distribution facilities in Ohio. Accordingly, reasonable minds, construing the evidence in Defendant's favor, can reach but one conclusion that, in practical operation, the tax distinction between satellite and cable providers in the statutes under consideration, which is based upon the different technologies they use for distribution of television programming, favors in-state economic interests and burdens out-of-state economic interests. Consequently, summary judgment is granted to Plaintiffs on that issue.

The argument that the sales and use taxes at issue merely "level the playing field" since cable providers generally must pay franchise fees is unpersuasive. Franchise fees are the means by which cable providers purchase access to public right of ways. Since satellite providers have no need to access the public right of ways, their ability to avoid franchise fees is a special efficiency associated with their method of transmitting television signals. Consequently, the imposition of sales and use taxes in order to negate that special efficiency does not "level the playing field", but rather works like a golf handicap, depriving the better player of the benefit of his superior competitive characteristics. Under the ordinary meaning of the "level playing field" metaphor, a "level playing field" is one that allows the contest to be determined by the competitive characteristics of the players themselves, rather than by the tilt of the field. The right of equal access to markets[3] entails that it is improper to tax a market participant merely for the purpose of depriving that market participant of the benefit of its own special competitive characteristics. Such a tax levied against a market participant in order to deprive that participant of the benefit of a superior competitive characteristic does not "level the playing field", but tilts the playing field in favor of the participant that lacks the superior competitive characteristic. Since the sales and use taxes at issue in this case deprive satellite service providers of the benefit of a superior competitive characteristic that they possess (the satellite provider's lack of need to pay for access to public right of

[3] *Granholm* at 1896.

ways), those taxes do not "level the playing field", but rather tilt the field in favor of the cable service providers.

In any event, the law has already defined the type of tax that is permitted for the purpose of "leveling the playing field" between in-state and out-of-state economic interests when another tax has allegedly tilted the playing field. An otherwise discriminatory tax is permitted for purposes of leveling the playing field only if it qualifies as a "compensatory tax". The sales and use taxes at issue in this case do not qualify as compensatory taxes.

As stated by the Supreme Court in *Fulton Corp. v. Faulkner* (1996), 516 U.S. 325, 338-339,

> [T]he third prong of compensatory tax analysis . . . requires the compensating taxes to fall on substantially equivalent events. Although we found such equivalence in the sales/use tax combination at issue in *Silas Mason*, our more recent cases have shown extreme reluctance to recognize new compensatory categories. In *Oregon Waste*, we even pointed out that "use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine." 511 U.S. at 105. On the other hand, we have rejected equivalence arguments for pairing taxes upon the earning of income and the disposing of waste, *ibid.*, the severance of natural resources from the soil and the use of resources imported from other States, *Maryland* v. *Louisiana*, 451 U.S. at 759, and the manufacturing and wholesaling of tangible goods, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 244, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. at 642. In each case, we held that the paired activities were not "sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Oregon Waste, supra*, at 103 (internal quotation marks and citation omitted).

The sale or use of satellite broadcast services is clearly not sufficiently similar in substance to the use of public right of ways by cable operators. The sales and use taxes cannot serve as proxies for franchise fees since the franchise fees that cable operators pay are, at least in part, charged for the purpose of compensating the public for the private commercial use of public right of ways. Some courts have described the franchise fees as being like rent. The sales and use taxes at issue do not function like rent since it is undisputed that satellite providers have no need to use public right of ways. Summary judgment is granted to Plaintiffs to the extent that this Court finds that the sales and use taxes at issue do not function as "compensatory taxes" relative to the franchise fees paid by cable providers, and furthermore, they do not "level the playing field" (in the relevant sense that would negate the charge of discrimination), but rather, they tilt the playing field in favor of the cable operators, thereby favoring in-state economic interests and burdening out-of-state economic interests. Reasonable minds, construing the evidence in Defendant's favor, could reach but one conclusion on those issues.

Even though this Court has granted summary judgment on the issue of whether the differential tax treatment of satellite and cable operators satisfies, in practical operation, the definition of discrimination, there remains another issue that must be decided before it can be found that the statute discriminates against the satellite providers. Differential treatment of in-state and out-of-state economic interests is "discrimination" for purposes of the Commerce Clause only if the differently treated entities are "similarly situated". As the United States Supreme Court said in *General Motors Corp. v. Tracy* (1997), 519 U.S. 278,

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and

would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors. In Justice Jackson's now-famous words:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949).

See also, *e. g., Wyoming* v. *Oklahoma*, 502 U.S. 437, 469, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992) (SCALIA, J., dissenting) ("Our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market . . ."); *Reeves, Inc.* v. *Stake*, 447 U.S. at 437 (The dormant Commerce Clause prevents "state taxes and regulatory measures impeding free private trade in the national marketplace"); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977) (referring to "the Commerce Clause's overriding requirement of a national 'common market'"). Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

This passage tends to suggest that entities are similarly situated if they compete in the same market. In the current case, it is undisputed that cable operators and direct broadcast satellite providers compete in the same market. Defendant argues that direct broadcast satellite services and cable television services are not similarly situated because they use different methods to deliver television programming and they are subject to different regulatory schemes. Plaintiffs respond by arguing that they are similarly situated since it is undisputed that they compete with one another.

The case law that Plaintiffs rely upon does not state that actual or prospective competition by itself entails that the competitors are similarly situated. Rather, the cases merely indicate that entities are *not* similarly situated if they do not actually or prospectively compete. The above quoted passage, for example, only says, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference". This leaves open the possibility that two competing entities might not be "similarly situated". Indeed, there have been cases in which certain business entities have been found to be not similarly situated in spite of the fact that they did compete or would have except for the law that was being challenged. See *Exxon v Governor of Maryland* (1978), 437 U.S. 117. *Lenscrafters v. Robinson* (2005, 6th Cir.), 403 F.3d 798.

Defendant argues that there are differences between cable and satellite providers which might be called "differences in the nature of their businesses", and that therefore, the Court should find that they are not similarly situated. The argument is not persuasive because "similarity", unlike "identity", does not entail that "similar" entities are absolutely alike. Entities that are "similar", but not "identical", will have some differences. Entities can be classified as "similar" in spite of their differences when those differences are not so significant within the particular context in which the categorization is being made as to justify a determination that they are not "similar". In other words, one should conclude that two entities are "similar" in a given context, if one is justified in treating the entities as being alike in the given context in spite of their differences. Accordingly, the issue in this case is whether the differences between cable and satellite television services are of the sort that *justifies* a determination in the context of the Dormant Commerce Clause that they are not "similarly situated" even though they do directly compete with one another in the marketplace.

Differential tax treatment of competing businesses that favors in-state economic interests and burdens out-of-state economic interests harms interstate commerce in precisely the manner that the Commerce Clause was meant to prevent. Accordingly, if there is such differential treatment that favors in-state economic interests and burdens out-of-state economic interests, then differences between the competing businesses are adequate to justify a determination that the businesses are not "similarly situated" only if those differences are such that they justify permitting the harm to interstate commerce that occurs as a result of treating the competing businesses differently. Thus, when two businesses are in competition with each other, that alone constitutes good reason for finding them to be "similarly situated" unless there is some overriding reason that justifies treating them differently.

The mere fact that a difference between two businesses can be labeled as a "difference in the nature of the businesses" is not sufficient by itself to justify a determination that the businesses are not "similarly situated". So, for example, businesses were treated as being "similarly situated" despite differences in the nature of the businesses in both *General Motors, supra*, and *Bacchus Imports, supra*.

In the current case, differential tax treatment cannot be justified by the fact that cable services invest more in the local economy and pay franchise fees to local governments. The Commerce Clause forbids reliance upon those local economic interests as a reason for harming interstate commerce. Accordingly, those local economic interests are not an adequate basis for finding that direct broadcast satellite services and cable television services are not similarly situated.

Furthermore, given that these two kinds of multi-channel broadcasting services are in direct competition with each other, the mere fact that they use different methods for delivering television signals, or that they are regulated somewhat differently, are not in and of themselves an adequate basis for finding that they are not similarly situated. On the other hand, if there is some particular difference in the method of broadcast or the regulatory schemes that justifies the harm to interstate commerce resulting from differential treatment, then and only then should those particular differences be regarded as a basis for finding that cable and satellite services are not similarly situated.

What kinds of considerations provide legitimate reasons for treating competitors differently? Legitimate reasons for differential treatment of competitors, if there are any, could provide a basis for a determination that competitors are not similarly situated. In *General Motors* the Supreme Court said,

> We have consistently recognized the legitimate state pursuit of ... interests [in protecting heath and safety] as compatible with the Commerce Clause, which was "'never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 443-444, 4 L. Ed. 2d 852, 80 S. Ct. 813 (1960) (quoting *Sherlock* v. *Alling*, 93 U.S. 99, 103, 23 L. Ed. 819 (1876)). Just so may health and safety considerations be weighed in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present.

*General Motors* at 306-307. If health and safety considerations can be weighed "in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present", this would suggest that businesses which compete in the same market may nevertheless be found to be not similarly situated *if* differential treatment serves the public's interest in health, life, and safety *to such an extent* that the harm done to interstate commerce is justified.

*Lenscrafters v. Robinson* (2005, 6th Cir.), 403 F.3d 798, serves as an example of a case in which the concern for health was weighed in the determination that two kinds of competing businesses were not similarly situated. The Sixth Circuit found that retail optical stores and licensed optometrists who sell eyewear are not "similarly situated" even though they do compete. The Court based that determination in part upon the fact that "Unlike retail optical stores, licensed optometrists are healthcare providers and, as such, have unique responsibilities and obligations to their patients that are not shared by optometric stores". The regulation at issue in that case prohibited the lease of space in retail optometric stores to optometrists. The regulation had the apparent purpose of protecting the professional judgment of optometrists from unnecessary influences unrelated to the needs of their patients. The Court apparently believed that the health related basis for differentiating between optometrists that sell eyewear and retail optical stores was an adequate basis for finding that the two were not similarly situated in spite of their competition against each other in the retail eyewear market.

Health and safety considerations are not the only concerns that should be considered "in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present". In *Maine v. Taylor* (1986), 477 U.S. 131, 138, the Supreme Court said,

> The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under

their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

Thus, not only health and safety, but also any legitimate local concern should be considered when determining whether "the conditions entailing application of the dormant Commerce Clause are present". Such "conditions entailing application of the dormant Commerce Clause" include whether two differently treated entities are "similarly situated". Thus, health, safety, or any other legitimate local concern used to justify the different tax or regulatory treatment of two entities (other than a mere preference for local economic interests over out-of-state economic interests)[4] may be considered in determining whether the two entities are "similarly situated".

Some of the interests allegedly intended to be served by the different tax treatment of cable and satellite companies would appear to qualify as legitimate local non-economic concerns. Those apparently legitimate concerns would include the protection of the educational, informational, and cultural benefits secured from cable companies by franchise agreements between local governments and the cable companies. Those agreements often require that the Cable operators provide channels for local programming, provide facilities for the production of such programming, and provide free equipment and services to the public schools.

How should this Court proceed to determine whether the local non-economic interests in protecting the educational, informational, and cultural benefits secured from cable companies are sufficient to justify a determination that cable and satellite service

[4] The clause aims at preventing the balkanization of the national market by preventing state and local governments from engaging in economic protectionism designed to protect their local economic interests. Thus, in most situations, it would defeat the purpose of the dormant Commerce Clause to find that two competing entities are not similarly situated merely because one better serves local economic interests. There is no apparent reason to make an exception in the current case.

providers are not similarly situated? As noted in *General Motors*, the issue of whether two businesses are "similarly situated" has often been "dormant" in the Commerce Clause cases. As a consequence, the cases have apparently not yet completely formulated a principled approach to the determination of whether two competing businesses are similarly situated. The parties have not pointed to legal authority that explicitly formulates the method for determining whether competing businesses are "similarly situated", nor has this Court discovered any such legal authority in its research. Nevertheless, as indicated above, the Supreme Court has endorsed the practice of considering health, safety, and other legitimate local concerns when "deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present". As a matter of reasonableness, such concerns would not be adequate to justify a determination that the competitors were not similarly situated unless those concerns are adequate to justify the harm to interstate commerce that would result from treating the competitors differently. Thus, it would seem that the appropriate procedure must involve weighing the local benefit sought by the legislature against the harm done to interstate commerce by the differential treatment.[5] Reasonableness would also seem to require that one consider whether there are alternative methods for obtaining the local benefit without engaging in the

[5] Such a weighing appears to have occurred, at least implicitly, in the cases cited by the Defendant. For example, a concern about the possibility of market monopolization if vertical integration (i.e., when a commodity is sold at retail by the producer of a commodity or by some subsidiaries or related companies) is allowed within the market was apparently regarded as an adequate basis for a determination that the vertically integrated entity was not similarly situated with the independent retailer. *Exxon, supra*. A concern for vertical integration was apparently also the basis for the finding in *Ford Motor Co. v. Texas Dept. of Trans.* (5th Cir. 2001), 264 F.3d 493, that independent auto dealers and auto manufacturers with retail operations are not similarly situated even though they compete with one another. Health considerations were the apparent basis for finding that direct shippers of cigarettes were not similarly situated as brick-and-mortar sellers in *Brown & Williamson Tobacco Corp. v. Pataki* (2nd Cir. 2003), 320 F.3d 200. The state had indicated that its purpose was to require face-to-face sales in order to avoid sales of cigarettes to minors. As indicated above, *Lenscrafters, supra*, is another case in which health concerns justify a finding that the competitors are not similarly situated.

differential treatment of competitors, thereby harming interstate commerce. Since the dormant Commerce Clause gives the weight of the Constitution to the purpose of protecting interstate commerce, local interests should not be made a basis for burdening interstate commerce if other adequate means of pursuing the local interest are available.

Thus, it would appear that the reasonable and appropriate method for determining whether a local non-economic interest justifies a determination that two competing businesses are not similarly situated, is to weigh the local benefit resulting from differential treatment against the harm to interstate commerce, and to consider whether there are adequate alternative means for securing the local benefit that do not require as much harm to interstate commerce.

The appropriateness of this method is supported by the fact that a very similar weighing procedure has been adopted in similar contexts such as when local legislation burdens interstate commerce without discriminating against it. In *Pike v. Bruce Church* (1970), 397 U.S. 137, 142, the Supreme Court described the process as follows:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike* shows how legitimate local interests should be evaluated in the dormant Commerce Clause context. Adjusting and applying the *Pike* test to the determination as to whether two competing businesses are similarly situated results in the same reasonable method described in the previous paragraph. A court should not only consider (1) the extent of the burden on interstate commerce caused by the differential treatment, and (2) the importance of the local interest, but also (3) the extent to which the local interest could be promoted with lesser impact on interstate commerce.

Since this procedure had not been identified for the parties prior to this decision, their summary judgment motions did not discuss the issues that the procedure poses. For example, how much better is the cable industry at serving local educational, informational, and cultural interests? What is the extent of the harm to interstate commerce caused by the differential tax treatment of cable and satellite television services? To what extent could local educational, informational, and cultural interests be served without the differential treatment of cable and satellite businesses? For example, to what extent would it have been possible or practicable to make the exemption from the sales and use taxes conditional upon the extent to which a particular satellite or cable provider serves local educational, informational, and cultural interests by providing the relevant services and equipment? Such a distinction would have avoided rewarding free riding cable companies, if any, that are not serving the relevant local interests. At the same time, such a distinction would reward publicly responsible satellite companies, if any, that do serve those local interests. Thus, it would appear that the local non-economic interests could be better served by taxing businesses differently based directly upon the extent to which they serve those local non-economic interests. At the same time, such a distinction in who qualifies for the tax exemption would probably reduce the burden upon interstate commerce since the tax distinction would not be so closely related to the in-state location of equipment used to transmit television programming to subscribers.

Given that genuine issues of material fact remain with regard to whether cable and satellite television service providers are similarly situated, both summary judgment motions are denied on that issue.

**Analysis of Defendant's Summary Judgment Motion with regard Plaintiffs' other Claims**

Plaintiffs allege that the sales and use taxes at issue violate the Equal Protection Clause. Defendants argue without opposition from the Plaintiffs that a rational basis standard applies. Indeed, in *W & S Life Ins. Co. v. State Bd. Of Equalization* (1981), 451 U.S. 658, the Supreme Court indicated that it has required "no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation." In *General Motors, supra,* the Supreme Court said, "state tax classifications require only a rational basis to satisfy the Equal Protection Clause."

A rational basis for differential tax treatment exists if the "difference in treatment rationally furthers a legitimate state interest." *Nordlinger v. Hahn* (1992) 505 U.S. 1. In the current case, reasonable minds construing the evidence in favor of Plaintiffs can reach but one conclusion that the differential tax treatment at issue is rationally related to furthering the state's interest in protecting the local educational, informational, and cultural benefits secured by local governments from cable service providers by way of franchise agreements. While this Court would tend to agree with Plaintiff that any discriminatory purpose that violates the Commerce Clause would be an illegitimate purpose, the interest in protecting such local educational, informational, and cultural benefits is not a discriminatory purpose, much less an illegitimate discriminatory purpose. Having found that the differential tax treatment is rationally related to a legitimate governmental purpose, it is not necessary for equal protection purposes to inquire into whether that was the legislature's actual purpose. *Heller v. Doe* (1993), 509 U.S. 312. Accordingly, summary judgment must be granted to Defendant on the Equal Protection claim.

Plaintiffs do not oppose Defendant's summary judgment motion with regard to Plaintiffs' "fair relation" claim (Count II). Summary Judgment is granted as to that claim.

Count IV of Plaintiffs' Complaint seeks a declaratory judgment that Section 602 of the Telecommunications Act of 1996 preempts the provisions of Ohio Law that allow local governments to levy a 3% sales tax on direct broadcast satellite television services. This Court would wonder whether there is even a justiciable question at this point since no such local tax has been levied. In any event, Section 602 only exempts providers of direct-to-home satellite services from "collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." That section does not prohibit the imposition of a local sales tax on such satellite services so long as the local government has some other method of collecting the tax. Accordingly, at most, Section 602 would preempt a state or local law requiring that direct-to-home satellite service providers collect and/or remit a local sales tax on such services. Summary Judgment is granted in favor of Defendant as to Count IV insofar as this Court hereby declares that Section 602 does not preempt the imposition of a local sales tax on direct-to-home satellite service providers.[6]

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DANIEL T. HOGAN, JUDGE

[6] The question of whether Section 602 preempts any state or local requirement that direct-to-home satellite service providers collect and remit a sales tax is not ripe since there is no suggestion that any such state or local requirement currently exists.

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FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

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CLERK OF COURTS

DirecTV, Inc., et al.,

Plaintiff(s),

-vs- Case No. 03CVH06-7135 (Hogan, J.)

William W. Wilkins, Tax Commissioner of Ohio,

Defendant(s).

**DECISION AND ENTRY GRANTING TAX COMMISSIONER'S MOTION FOR LEAVE TO REPLY FILED 10-24-2006**
**AND**
**DECISION AND ENTRY PARTIALLY GRANTING COMMISSIONER'S MOTION FOR RECONSIDERATION FILED 9-20-2006**

The Tax Commissioner's 10-24-2006 Motion for Leave is GRANTED. The Commissioner's 9-20-2006 Motion for Reconsideration is PARTIALLY GRANTED. The motion is granted to the extent that this Court agrees to consider the supplemental authorities submitted by the Tax Commissioner. To the extent that the Commissioner asks this Court to modify or vacate its earlier decisions, the motion is denied.

This Court understands that there are a number of similar cases filed in other states by the Plaintiffs. If there should be any relevant decisions issued by the courts in those cases, the parties may file a notice(s) of supplemental authority. They should ensure that a copy of such notice and authority itself be delivered to this Court's Staff Attorney and that he is made aware of it. Those decisions will be read and considered. However, the parties should not expect this Court to issue a decision analyzing the persuasiveness of each decision issued by the other courts. Furthermore, consistent with this Court's earlier decision on the issue, the parties should not file any additional motions for reconsideration based on such decisions. While this Court is willing to keep

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itself appraised of such developments in the law, it is unreasonable to expect this Court to issue decisions ad infinitum.

To the extent that the Commissioner asks this Court to modify or vacate its earlier decisions, the motion is denied. The Kentucky and North Carolina Courts take a very similar position to that position previously presented by the Commissioner and rejected by this Court. The decisions of those courts are not binding on this Court and this Court does not find them persuasive.

Initially, this Court had thought it would provide a complete analysis of each of the new decisions. But the task of doing so was taking time and delaying the issuance of this decision. In the interest of moving this case along and providing the parties with some reasons why this Court did not find the cases persuasive, this Court has decided to issue its decision on the motion at this time together with so much of this Court's written analysis of *DIRECTTV v. Treesh* as has already been completed

**Partial Analysis of *DIRECTV v. Treesh***

The following passages in *Treesh* show that the Court was deciding a Civ.R. 12(b)(6) motion to dismiss for failure to state a claim:

> This matter is before the Court on the Motion to Dismiss (Rec. No. 10) filed by the Defendant, Mark Treesh (the "Commissioner"), who has been sued in his official capacity as Commissioner of the Kentucky Department of Revenue.
>
> * * *
>
> On a motion to dismiss made pursuant to Fed. R. Civ. P. 12(b)(6), "the factual allegations in the complaint must be regarded as true. The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheid v. Fanny Farms Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988) (quoting Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983)).

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 15-16 (D. Ky. 2006). While the court was apparently deciding a motion to dismiss for failure to state a claim, the court based its decision granting the motion upon a lack of evidence in the record supporting the plaintiff's claim. In Ohio, a motion to dismiss for failure to state a claim is limited to testing the sufficiency of a complaint. It would be reversible error in Ohio for a court to base its decision on the absence of evidence in the record supporting Plaintiff's claim. Thus, this Court cannot follow the U.S. District Court in *Treesh,* and dismiss this case because of a failure to state a claim.

The earlier decisions of this Court, which Defendant would have this Court reconsider, pertained to motions for summary judgment filed earlier in this case. One might suppose that the *Treesh* Court decided the motion before it as if it were a motion for summary judgment. Even if that were the case, it would still be improper for this Court to follow *Teesh* to the extent that *Treesh* was based upon an absence of evidence in the record supporting the plaintiff's claim. In Ohio, it is reversible error for a court to grant a defendant's motion for summary judgment based *merely* upon the absence of evidence in the record supporting a plaintiff's claim. A defendant moving for summary judgment has the initial burden of pointing to evidence that demonstrates the absence of a genuine issue of material fact. Ohio Courts have repeatedly said that the moving party cannot satisfy this burden merely by saying that the other party will not be able to prove its claim. Rather the moving party must point to affirmative evidence that demonstrates the absence of a genuine issue of material fact. This cannot be accomplished by merely pointing to a current absence of evidence in the record supporting a plaintiff's claim since the plaintiff generally has no obligation to place any evidence in the record supporting its claim until the earlier of either (1) trial, or (2) defendant's satisfaction of its initial burden after filing a motion for summary judgment. Thus, the defendant must first point to affirmative evidence that demonstrates the absence of a genuine issue of material fact before a court can even begin to consider whether there is an absence of evidence in the record supporting the plaintiff's claim.

Since this Court is governed by Ohio law regarding motions for summary judgment, this Court cannot properly follow *Treesh* by granting summary judgment based *merely* upon an alleged absence of evidence in the record supporting Plaintiff's claim.

*Treesh* identifies the following general principles pertaining to what constitutes discrimination against interstate commerce:

> Favoring in-state economic interests over out-of-state economic interests is a classic means by which a state may discriminate against interstate commerce. In fact, the Supreme Court has repeatedly stated that "discrimination," for purposes of the Commerce Clause, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore., 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). Pursuant to these cases, states may not provide "a direct commercial advantage to local business." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959). This is because, "permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects." Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977).

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 16-17 (D. Ky. 2006). While this would appear to be an accurate statement of the legal principles, one should not be mislead by the combination of these principles in the same paragraph. It would be a mistake to assume that providing "a direct commercial advantage to a local business" (i.e., non-interstate, locally domiciled, business) is the *only* way of "favoring in-state economic interests over out-of-state economic interests". When this Court determined that, in practical effect, the sales tax favors in-state economic interests over out-of-state economic interests, it did not base that determination upon a finding that cable television operators are local businesses and satellite broadcast services are interstate businesses. Rather, this Court's determination was based upon a finding that, in practical effect, the sales tax statute favors a means of delivery of television programming that necessarily involves local economic activity (the tax on certain multichannel television broadcast services can be avoided only if *local* ground equipment other than the subscriber's equipment is installed and used for delivery of the television programming), as compared to a means of delivery which does not necessarily involve local economic activity (a subscriber can be connected to the direct-to-home satellite broadcast system without the installation or use of *local* ground equipment other than the subscriber's equipment).

Clearly, a tax that only burdens businesses that utilize a technology that allows them to avoid certain local activities, while not burdening similarly situated businesses who do use a technology that requires those local activities, favors in-state economic interests while burdening out-of-state economic interests.[1] If states are allowed to intentionally prefer technologies based upon whether the technologies would cause

[1] In the current case, providing a favorable tax treatment based upon such local activities tends to favor the economic interests of local workers, local contractors, and local governments (who collect franchise fees from cable companies) while burdening the economic interests of non-local workers and non-local governments (including the federal government which, according to *Treesh*, collects a fee from satellite operators for the use of the air waves).

business activities to be conducted locally, then that is just another way of forcing economic activity to occur locally rather than in other states. In other words, it would allow the states to balkanize the national market, which is precisely what the Dormant Commerce Clause is supposed to prevent.[2] A state's use of its "power to tax an in-state operation as a means of 'requiring (other) business operations to be performed in the home state,'" is "wholly inconsistent with the free trade purpose of the Commerce Clause." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336.

Applying that principle to the current case, the State's use of its power to tax in-state sales of multichannel television broadcast services cannot be used (1) to discriminate in favor of those companies that use a technology that requires the use of local ground equipment other than the subscriber's, while (2) discriminating against those companies that use a technology that allows them to avoid the use of local ground equipment other than the subscriber's. Consequently, if it happens to be true that cable broadcasters and direct-to-home satellite broadcasters are "similarly situated", then the state cannot tax in a manner that favors cable broadcasters over direct-to-home satellite broadcasters unless it can prove an overriding justification for doing so based upon a legitimate (non-protectionist) state or local interest.

This Court denied Defendant's motion for summary judgment on the issue of whether there was intentional discrimination because genuine issues of material fact

[2] Accordingly, this Court cannot, consistent with its oath to uphold the U.S. Constitution, construe binding case precedents as allowing such discrimination so long as other reasonable interpretations exist. Rather, this Court must construe those precedents in the light of the purposes of the Dormant Commerce Clause, which purposes, this Court can presume, are precisely the purposes that the binding precedents were intended to serve.

exist with regard to what the Ohio Legislature intended. Looking to the separate record in that case, the *Treesh* Court said,

> The only evidence in the record regarding the Kentucky legislature's intent with regard to the relevant provisions of the 2005 Amendments is found in the statute itself, which states that the new tax and distribution system:
>
> 1) Addresses an important state interest in providing a fair, efficient and uniform method for taxing communications services sold in this Commonwealth;
>
> 2) Overcomes limitations placed upon the taxation of communications service by federal legislation that has resulted in inequities and unfairness among providers and consumers of similar services in the Commonwealth;
>
> 3) Simplifies an existing system that includes a myriad of levies, fees and rates imposed at all levels of government, making it easier for communications providers to understand and comply with the provisions of the law;
>
> 4) Provides enough flexibility to address future changes brought about by industry deregulation, convergence of service offerings, and continued technological advances in communications; and
>
> 5) Enhances administrative efficiency for communications service providers, the state, and local governments by drastically reducing the number of returns that [*21] must be filed and processed on an annual basis.
>
> 2005 KY H.B. 272 § 88 (codified at KRS § 136.600). This language does not indicate any intent to protect local economic actors or to economically isolate the Commonwealth from the rest of the nation. Eastern Ky. Resources, 127 F.3d at 542.

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 20-21 (D. Ky. 2006). The current case is distinguishable from *Treesh* since the evidence regarding intent is different and more extensive in the current case. Secondly, the respect that this Court owes to the federal legislative branch raises issues of credibility regarding the state legislature's statements about the inadequacies of, and inequities caused by, federal legislation. While a court owes similar respect to the state legislative branch, the competing presumptions merely serve to create a question of credibility as to the stated purpose of the statute. In Ohio, it is improper for a court to resolve credibility issues when deciding a motion for summary judgment. Finally, this would appear to be one of those instances discussed earlier in which the *Treesh* Court did not employ the standards of review that are required in Ohio for deciding a motion to dismiss or a motion for summary judgment.

Next, the Court in *Treesh* states that since the cable and satellite companies are all interstate enterprises, discrimination against the satellite companies does not amount to discrimination against interstate commerce.

> The entire premise of the Satellite Company's Complaint is that Kentucky's new tax provision benefits an alleged local interest, the Cable Companies, and burdens an alleged out-of-state interest, the Satellite Company. However, *there is no evidence in the record* regarding the principal places of business, states of incorporation or the states in which the Satellite Companies and the Cable Companies engage in economic activities. Nor have the Satellite Companies presented any other evidence from which the court can conclude that the Cable Companies are in-state economic interests.
>
> The Satellite Companies assert that they are headquartered in states other than Kentucky and that they have no offices in Kentucky. The KCTA asserts that at least the four largest Cable Companies operating in Kentucky also are headquartered in states other than Kentucky. The parties assert that both the Cable Companies and the Satellite Companies have some employees in the state. Clearly, both engage in the economic activity of selling video programming in the state.
>
> Based on these undisputed assertions, the Cable Companies no more a "resident," "local," or "in-state" business than the Satellite Companies. Thus, regarding a statute that has different effects on the Satellite Companies and the Cable Companies, "there can be no local preference,

> whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." General Motors v. Tracy, 519 U.S. 278, 300, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997).

(Emphasis added). *DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 25-26 (D. Ky. 2006). First, this appears to be another instance in which the court in *Treesh* bases its conclusion upon the absence of evidence in the record, and therefore, *Treesh* does not apply the standards of review that are required in Ohio when deciding motions to dismiss or motions for summary judgment.

More importantly, there appears to be a legal mistake in the last paragraph of the passage. The citation to *Tracy* would suggest that *Tracy* supports the conclusion drawn at the end of this passage. It does not. The full sentence in *Tracy* says,

> Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply.

*GMC v. Tracy*, 519 U.S. 278, 300 (U.S. 1997). This sentence denies that there can be a "local preference" when there is no actual or prospective competition between the supposedly favored and disfavored entities. It says absolutely nothing that would imply that there can be no local preference if the two entities are both interstate enterprises. Furthermore, cases like *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336, show that discrimination against interstate commerce can exist when legal requirements or taxes encourage or require the in-state performance of certain business activities (even though all of the involved businesses might be interstate enterprises).

*Treesh* offers a second argument for the proposition that there can be no discrimination except where local businesses are treated more favorably than interstate businesses.

> ... the statute has the same effects on the Satellite Companies and the Cable Companies whether or not a particular company is a domiciliary or resident of Kentucky. Because the statute "visits its effects equally upon both interstate and local business," CTS Corp. v. Dynamics Corp., 481 U.S. 69, 87, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987)(quotations and citation omitted), it cannot be said to discriminate against interstate commerce on the basis that it benefits in-state economic interests and burdens out-of-state economic interests.

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312 (D. Ky. 2006). The court cites *CTS Corp. v. Dyanamics Corp.* in a way that might lead one to believe that it support's the court's conclusion. It does not. *CTS Corp* did not involve allegations that a tax or legal requirement encouraged or required that a specific activity be performed locally. Thus, to the extent *CTS Corp* might be read loosely as covering such fact patterns not at issue in that case and thereby supporting the notion that such taxes or legal requirements do not "discriminate against interstate commerce on the basis that it benefits in-state economic interests and burdens out-of-state economic interests", that implication would be mere dicta and cannot be regarded as overruling *Boston Stock Exch. v. State Tax Comm'n.*

*Treesh* asserts that the satellite companies' "real complaint" is with federal fees (rather than the state tax scheme).

> The Satellite Companies' Complaint is not aimed solely at the effects of Kentucky's new tax provisions. It is aimed at the combined effects of the state statute and federal laws that impose satellite transmission fees. As no party has raised the issue, the court will not address whether a state statute may be challenged under the dormant Commerce Clause on the basis that, when its effects are combined with those of federal law, an unconstitutional burden is imposed on interstate commerce. It is clear, however, that the Satellite Companies' real complaint is with federal fees

> that apply to them solely because they deliver programming by satellite, not because of their geographic location or that of their competitors.

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 28-29 (D. Ky. 2006). Because of the differences in the Kentucky tax and the Ohio tax, the satellite companies have not even mentioned federal fees in the current case. Thus, this Court is not persuaded that, in this case, the satellite companies "real complaint" is with the federal fees.

Pursuant to the U.S. Constitution, federal law is the supreme law of the land. This is particularly true with regard to the regulation of interstate commerce. Thus, when federal law requires that interstate satellite companies pay a fee for use of the air waves, and allows local governments to charge interstate cable companies a franchise fee up to a certain maximum for the use of local right-of-ways, there is a presumption, based on the respect this Court owes to Congress, that the federal government has equitably resolved the issue of the relative amounts that may be charged as fees for the differing use of public resources by cable and satellite companies. If the state then attempts to use its tax power to undo the balance accomplished by the presumptively equitable resolution established by Congress, and does so in a way that favors the cable industry whose technology requires it to perform local delivery activities, and burdens the satellite industry whose technology does not require such local activity, then surely the Satellite Companies' "real complaint" would be with the state tax scheme rather than with the presumptively equitable federal fees.

*Treesh* relies upon *Exxon* for the propositions that the Commerce Clause does not protect particular structures or methods of operation, or particular interstate firms.

> The Supreme Court has stated that the dormant Commerce Clause protects the interstate market for a particular product, but it does not protect "the particular structure or methods of operation in a retail market."

> Exxon Corporation v. Governor of Maryland, 437 U.S. 117, 127, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978). Nor does it protect "particular interstate firms" operating in an interstate market. Id.

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 29-30 (D. Ky. 2006). One has a choice with regard to how these statements are to be construed. They could be construed as meaning that there can be no discrimination against interstate commerce whenever (1) the disfavored businesses have a structure or method of operation that is different than the favored businesses or (2) the disfavored businesses are fewer than all interstate businesses. Alternatively, they can be construed as meaning that a commerce clause discrimination claim cannot be proved *merely* by proving discrimination against certain structures or methods of operation, or against particular interstate firms. *Treesh* apparently adopts the first alternative. This Court believes the second alternative is preferable.

The first alternative would not be consistent with the purpose of the dormant Commerce Clause since it would permit differential treatment of businesses for reasons that have nothing to do with the policies that courts have recognized as controlling interpretation of the scope of the Dormant Commerce Clause: (1) creating a national market for all goods and services while (2) permitting state and local governments to regulate matters over which they have an adequate health, safety, or other legitimate (non-protectionist) purpose for doing so. *Treesh's* broad reading of the two quotes from *Exxon* would transform a finding that the disfavored businesses are structured or operate differently than the favored businesses, or are fewer than all interstate businesses, into a defense against a commerce clause discrimination claim *even* where the plaintiff can prove that there was differential treatment of similarly situated businesses that favored local economic interests and burdened out-of-state economic interests.[3] Consequently, such a broad interpretation of the two quotes from *Exxon* arbitrarily weakens the Dormant Commerce Clause's protection for the national market.

The better interpretation of those quotes construes them as meaning that a commerce clause discrimination claim cannot be proved *merely* by proving discrimination against certain business structures or methods of operation, or against particular interstate firms. That interpretation is better (1) because, as discussed above, it is more consistent with the policies that guide commerce clause interpretation, and (2) because that interpretation is necessary in order to remain consistent with the next U.S. Supreme Court passage that *Treesh* quotes.

> Likewise, the Supreme Court has held that "the Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results *solely* from differences between the nature of their businesses, not from the location of their activities.'" Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 78, 112 S. Ct. 2365, 120 L. Ed. 2d 59 (1992)(quoting Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury, 490 U.S. 66, 78, 109 S. Ct. 1617, 104 L. Ed. 2d 58 (1989)).

(Emphasis added). *DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312, 29-30 (D. Ky. 2006). The word "solely" cannot properly be ignored since the United States Supreme Court included that word in its statement of the law. The use of that word

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[3] One might argue that businesses that are structured differently or that use different methods of operation are, as a result, not "similarly situated". The argument is not persuasive. The mere fact that there are some differences between businesses does not logically entail that they are not "similarly situated". "Similar" does not necessarily mean "identical". Businesses can be different but still "similar" so long as the differences are not so significant in the particular context so as to justify denying that they are similar. The current context is that of the Dormant Commerce Clause. Accordingly, the policies that control the interpretation of the scope of the Dormant Commerce Clause should control the determination of whether two group of businesses are "similarly situated" for purposes of Commerce Clause analysis. Thus, the mere fact that satellite and cable companies use some different methods of operation is not adequate to establish that they are not "similarly situated". Rather, such a conclusion would only follow if the differences are adequately significant in light of the policies that control Commerce Clause analysis. This Court, in its March 28, 2006 Decision and Entry, discussed at length the proper legal method for making such a determination. Nothing in *Treesh* causes this Court to change its analysis.

shows that the U.S. Supreme Court was being careful to make sure that its pronouncement did not eliminate claims like the current Commerce Clause claim wherein differences "in the nature of the businesses" are tied to differences in "the location of their activities" in such a way that differential tax treatment based upon differences in the nature of the businesses has the "practical effect" of (and may even have been intended to have the effect of) favoring in-state economic interests and disfavoring out-of-state economic interests. Thus, the better interpretation of cases like *Exxon* and *Kraft Gen. Foods* is that they were not intended to permit differential tax treatment of similarly situated businesses where such differential treatment was intended to, or in practical effect does, favor in-state economic interests and burdens out-of-state economic interests, *even though* the explicit purported basis for the differential treatment is a difference "in the nature of the businesses".

*Treesh* argues that the Kentucky statute's different effects on cable and satellite companies has nothing to do with the geographic location of their economic activities.

> Here too, as explained above, the statute's different effects on the Satellite Companies and Cable Companies has nothing to do with the geographic location of their economic activities. No matter where a satellite company operates, it is going to have to pay the federal government for the right to transmit via satellite. The statute's different effect on the Cable Companies and the Satellite Companies is not due to their geographic location. The different effect is due to the manner by which they deliver programming.

*DIRECTV, Inc. v. Treesh*, 2006 U.S. Dist. LEXIS 16312 (D. Ky. 2006). Whether or not this statement is accurate when applied to the effects of the Kentucky statute, it would not be accurate if applied to the Ohio statute. Under the Ohio statute, the applicability of the tax is dependent upon a satellite companies' failure to use "ground receiving or distribution equipment, [other than] the subscriber's receiving equipment or equipment used in the uplink process to the satellite...." R.C. 5739.01(XX). The practical effect of this way of defining what is taxable is that the satellite broadcaster can avoid the imposition of the tax only by using *local* ground receiving or distribution equipment other than the subscriber's equipment and the broadcaster's satellite uplink equipment.[4] Thus, contrary to *Treesh,* the statute's different effects on the Satellite Companies and Cable Companies has everything to do with the geographic location of one of their economic activities. Specifically, the tax singles out those multichannel television service providers that use a technology that allows them to avoid the *local* activity of using ground receiving or distribution equipment other than the subscriber's equipment or equipment used in the uplink process to the satellite. Accordingly, this Court does not find *Treesh* persuasive on this issue.

With regard to *Boston Stock Exchange* the *Treesh* Court said,

> ... the Court determined that the statute's effect was to encourage economic activity in the legislating state and to discourage that same activity in other states. There is not even an allegation here that Kentucky's new tax provisions would have the effect of encouraging any economic activity in Kentucky or discouraging that same activity elsewhere.

*Id.* The Ohio statute, in practical effect, distinguishes cable and satellite providers based upon whether they utilize a technology that happens to require the use of local equipment for the distribution of multichannel television signals. It imposes the tax upon those providers who do not use such a technology. Thus, it encourages multichannel service providers to perform at least some of their distribution related economic activity

[4] In practice, the alternative methods for operating multichannel broadcast services that do not fall within the definition of taxable "satellite broadcast services" involve the use of *local* distribution or receiving equipment other than the subscriber's and the uplink equipment. The local equipment that is necessary for those other alternatives would include local cables or local transmission towers.

in Ohio and discourages multichannel service providers from performing all of their distribution related economic activity in other states.

### A Note about *Amerada Hess Corp. v. Director, Division of Taxation, New Jersey* 490 U.S. 66 (1989)

Both of the decisions submitted by the Commissioner cite *Amerada Hess,* and point out that, in that case, a connection between geographic location and the nature of the business did not result in a finding of discrimination even though the nature of the business was the basis of the differential tax treatment. While that may be true, the current case is distinguishable in ways that *Amerada Hess* recognized as being significant. In *Amerada Hess,* the Court said,

> Nor does the add-back provision exert a pressure on an inter-state business to conduct more of its activities in New Jersey. Denying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for oil producers to move their oil-producing activities to New Jersey. Given these attributes of the add-back provision, it is difficult to see how it unconstitutionally discriminates against interstate commerce.

*Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury,* 490 U.S. 66, 77-78 (U.S. 1989). By way of comparison, the tax at issue here does "exert a pressure on an inter-state business to conduct more of its activities in" Ohio. Satellite companies are given an incentive to install local receiving or distribution equipment other than the subscriber's equipment since doing so will avoid imposition of the tax. That might involve purchasing each subscriber's receiving dish or at least some part of it that would be adequate to constitute "ground receiving equipment [other than] the subscriber's receiving equipment" (maybe a screw or a wire or the front skin of the receiving dish or some other part essential to signal reception). The fact that such an incentive might not be adequate to actually cause the satellite companies to act is irrelevant. "Pressure" exists even when it is not adequate to move the object to which it is applied.

In any event, even if the satellite companies do not respond by using more local equipment other than the subscriber's equipment, the less favorable competitive environment for companies that do not use the relevant sort of *local* ground receiving equipment as compared to those that do use such *local* equipment means there will be market "pressure" tending to cause interstate multichannel television providers in general to increase the relative portion of multichannel television services that are delivered over the relevant sort of local equipment. Since the provision of multichannel services is "an interstate business", the tax at issue here does "exert a pressure on an inter-state business to conduct more of its activities in" Ohio.

Therefore, unlike the add add-back provision in *Amerada Hess,* the tax in the current case does "exert a pressure on an inter-state business to conduct more of its activities in" Ohio either by tending to cause satellite providers to use more local equipment, or by providing cable companies with a better competitive situation, and satellite companies a worse competitive situation, thereby tending to cause their relative market shares to be more favorable to cable providers (whose technology requires the use of the relevant *local* equipment), and less favorable to satellite providers (whose technology does not require them to use the relevant *local* equipment), than they would have been without the imposition of the tax.

The Court in *Amerada Hess* went on to say the following:

> Appellants nonetheless claim that the add-back provision, by denying a deduction for windfall profit tax payments, discriminates against oil

producers who market their oil in favor of independent retailers who do not produce oil. But whatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. Appellants operate both in New Jersey and outside New Jersey. Similarly, nonproducing retailers may operate both in New Jersey and outside the State. Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities.... In this respect, we agree with the analysis of the New Jersey Supreme Court. 107 N. J., at 337-338, 526 A. 2d, at 1046.

*Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, 490 U.S. 66, 78 (U.S. 1989). The Court does not, itself, explain why it believes that,

> Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities

Rather, it refers to an earlier decision by the New Jersey Supreme Court in the same case and agrees with its explanation. The New Jersey Supreme Court had said,

> Plaintiffs are denied a deduction because they produce crude oil and pay the [Windfall Profits Tax]. The fact that they are disallowed the deduction while non-oil-producing petroleum marketers are not affected is because non-oil-producing marketers do not pay the [Windfall Profits Tax]. Moreover, the nonproducing marketers did not benefit, as did plaintiffs, from the decontrol of crude oil prices, but had to purchase their crude oil at the higher decontrolled prices.

*Amerada Hess Corp. v. Director, Division of Taxation*, 107 N.J. 307, 338 (N.J. 1987). There is no such similar reason for finding in the current case that the different effects of the Ohio tax on cable and satellite companies "results *solely* from differences between the nature of their businesses, not from the location of their activities". (Emphasis added). In the current case, the differential tax treatment of cable and satellite companies results from the satellite companies' failure to use certain *local* equipment.

Accordingly, this Court finds that *Amerada Hess* is distinguishable from the current case and that the principles of law stated therein, when properly construed, support this Court's previous decisions.

D. Hogan 12-14-06
DANIEL T. HOGAN, JUDGE

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY. OHIO

DirecTV, Inc., et al.,

Plaintiff(s),

-vs- Case No. 03CVH06-7135 (Hogan, J.)

William W. Wilkins, Tax Commissioner of Ohio,

Defendant(s).



**DECISION GRANTING PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT FILED 12-22-2006**
**AND**
**DECISION AND ENTRY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED 12-26-2006**

Plaintiffs' 12-22-2006 Second Motion for Summary Judgment is GRANTED. Defendant's 12-26-2006 Motion for Summary Judgment is DENIED. Counsel shall submit a final judgment entry pursuant to Local Rule 25.01.

The de facto motion for reconsideration will not be stricken. Since, for the reasons stated below, Plaintiff's Second Motion for Summary Judgment is being granted, it is probably best that the Court of Appeals get a full explanation of why this Court found Defendant's arguments unpersuasive.

## I
## Introduction

The issue before this Court is whether the imposition of Ohio sales and use taxes on sales of direct broadcast satellite television services, but not on sales of cable television services, is unconstitutional under the Commerce Clause of the United States Constitution because it discriminates against interstate commerce insofar as it benefits in-state economic interests by burdening out-of-state economic interests.

The initial bill, as proposed in the General Assembly, would have imposed the Ohio sales and use taxes on sales by both industries. The cable television industry sent lobbyists to the Ohio General Assembly who argued, among other things, that (1) the cable television industry employs many more people in Ohio, and (2) has invested much more heavily in Ohio, than the direct broadcast satellite industry. Before enacting the bill, the General Assembly amended the bill so that the sales and use tax would be applied to direct broadcast satellite television services and not to cable television services.

The plaintiffs, two of the major companies in the direct broadcast satellite television industry, filed this action claiming, among other things, that the state was discriminating against interstate commerce in violation of the Commerce Clause of the US Constitution by giving preferential tax treatment to the cable television industry, as compared to the direct broadcast satellite television industry, because of the cable television industry's greater investment in Ohio and employment of more persons in Ohio.

A previous summary judgment motion decision issued by this Court eliminated the other claims originally asserted by the plaintiffs, but granted partial summary judgment to the plaintiffs on the issue of whether, in practical effect, the differential tax treatment imposed by the Ohio sales and use tax statutes, benefits in-state economic interests and burdens out-of-state economic interests. It does. The remaining issues pertaining to Plaintiff's claim of discrimination in practical effect are (1) whether the cable television industry and direct broadcast satellite television industry are "similarly situated", and if so, (2) whether the resulting discrimination against interstate commerce is justified by some legitimate local non-economic interest that could not be served by some other method.

As an Ohio court being called upon to adjudicate this question, this Court's situation is not unlike that of a hometown umpire in a game involving a favorite local team. Some of the neighbors may not fully appreciate the hometown umpire's attempts to avoid local favoritism. But if the hometown umpire succumbs to the temptation of local favoritism, does that umpire not participate in a practice that denies to athletes the opportunity to meet and truly measure themselves against one another?

Perhaps it is true that one of the greatest principles of reason is that the whole of the law can be found by exploring the implications of one utterance, "Do unto others as you would have them do unto you." In any event, our nation committed itself at the moment of its founding to a similar notion (which may in fact be the same notion), the notion that the equality of persons is a self evident truth. As will be explained below, the Commerce Clause of the U.S. Constitution has long been interpreted as serving that purpose by providing nonresidents of a state with a right of access to the markets of the state on equal terms with the residents of the state.

Accordingly, just as the hometown umpire is called upon to exercise an equal respect for the equal rights of the athletes of both teams under the rules of baseball, so this Court is called upon to extend equal respect to the equal rights of both those who live and work in the two western states where the satellite uplink facilities are located, and those who live and work here in Ohio.

## II
## Standard of Review applicable to a Motion for Summary Judgment

Summary judgment may be awarded only if (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds, construing the evidence most strongly in favor of the nonmoving party, can come to but one conclusion which is adverse to the nonmoving party. *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298. Because summary judgment is a procedural device to terminate litigation, it must be awarded with caution. *Id.* Doubts must be resolved in favor of the nonmoving party. *Id.*

The Ohio Supreme Court has ruled that "* * * the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. *State ex rel. Leigh v. State Emp. Relations Board* (1996), 76 Ohio St.3d 143, 146. If the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be preserved for trial. *Id.*

## III
## The Policies and Principles that Guide the Interpretation and Application of the Dormant Commerce Clause
## Part A:
## The History and Constitutional Significance of the Dormant Commerce Clause

Plaintiffs claim that the Ohio sales tax is unconstitutional under the "dormant" Commerce Clause of the United States Constitution because it discriminates against interstate commerce insofar as the tax applies to direct broadcasting satellite television services but not to cable television services.

> Our Constitution "was framed upon the theory that the peoples of the several states must sink or swim together." *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511, 523, 79 L. Ed. 1032, 55 S. Ct. 497 (1935). Thus, this Court has consistently held that the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, contains "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179, 131 L. Ed. 2d 261, 115 S. Ct. 1331 (1995), that "creates an area of trade free from interference by the States," *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318, 328, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977).

*Am. Trucking Assn.'s v. Mich. PSC*, (2005), 125 S.Ct. 2419. The dormant Commerce Clause is "dormant" in the sense that, even though the explicit words of the Commerce Clause grant Congress the power to regulate interstate commerce, it has long been held that the Commerce Clause implicitly limits the power of the States even without implementing legislation by Congress. *Camps Newfound/Owatonna v. Town of Harrison* (1997), 520 U.S. 564. The US Supreme Court has recently reaffirmed its commitment to the belief that the dormant Commerce Clause is implied by the explicit words of the Commerce Clause when that clause is understood in light of the history of how the Constitution came to be adopted. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 2007 U.S. LEXIS 4746, 22-27 (U.S. 2007).

As stated by the US Supreme Court in *Hughes v. Oklahoma* (1979), 441 U.S. 322, 325-326,

> The few simple words of the Commerce Clause -- -- reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation. See *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-534 (1949). The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.

In one of his letters, James Madison, the "father of the Constitution", wrote that the Commerce Clause

> grew out of the abuse of the power by the importing States in taxing the nonimporting, and was intended as a negative and preventive provision against injustice among the States themselves...

*W. Lynn Creamery v. Healy*, 512 U.S. 186, 193 (U.S. 1994). In *Camps Newfound/Owatonna v. Town of Harrison* (1997), 520 U.S. 564, 571-572, the United States Supreme Court discussed the history of the Dormant Commerce Clause.

> During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, what Justice Johnson characterized as a "conflict of commercial regulations, destructive to the harmony of the States" ensued. See *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 224, 6 L. Ed. 23 (1824) (opinion concurring in judgment). In his view, this "was the immediate cause that led to the forming of a [constitutional] convention." *Ibid.* "If there was any one object riding over every other in the adoption of the

> constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Id.*, at 231.
>
> We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. "In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 [(1945)]; *Morgan v. Virginia*, 328 U.S. 373, 90 L. Ed. 1317, 66 S. Ct. 1050 [(1946)]." *Freeman v. Hewit*, 329 U.S. 249, 252, 91 L. Ed. 265, 67 S. Ct. 274 (1946). Our decisions on this point reflect "upon fullest consideration, the course of adjudication unbroken through the Nation's history." Ibid. See also *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-535, 93 L. Ed. 865, 69 S. Ct. 657 (1949). Although Congress unquestionably has the power to repudiate or substantially modify that course of adjudication, it has not done so.

In conclusion, the purpose of the Dormant Commerce Clause has special significance, even as compared to the other purposes of the Constitution. That purpose is to keep the commercial intercourse among the States free from interference by the states. *Camps Newfound/Owatonna v. Town of Harrison* (1997), 520 U.S. 564. *Am. Trucking Assn.'s v. Mich. PSC*, (2005), 125 S.Ct. 2419. This purpose "reflected a central concern of the Framers." *Hughes v. Oklahoma* (1979), 441 U.S. 322, 325-326. As indicated above, "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Camps Newfound/Owatonna v. Town of Harrison* (1997), 520 U.S. 564.

**The Policies and Principles that Guide the Interpretation and Application of the Dormant Commerce Clause**
**Part B:**
**Courts should Generally Avoid Creating Procedural Exceptions to the Enforcement of the Dormant Commerce Clause**

Given the unique Constitutional significance of the dormant Commerce Clause, it would generally be inappropriate to create procedural exceptions to the enforcement of the dormant Commerce Clause. By "procedural exception", this Court means any sort of procedural device that would weaken the enforcement of the dormant Commerce Clause by reducing the accuracy of the determination as to whether a violation of the clause has occurred. Examples of such procedural devices include (1) a heightened standard of proof or (2) "formalism" (the adoption of some formula or simplified conceptualization that simplifies an analysis, often making it more mechanical, but at the same time, making it less complete and thus less accurate).

Given the strong motive to engage in economic protectionism, the likely result of allowing procedural exceptions is that the states will design their economic protectionist measures to fall within the exceptions. Like waters that rush through the incomplete portion of a partial dam, the states' economic protectionist efforts will rush to conform with the procedural exception so that they will not be blocked by the dormant Commerce Clause. Like a partial dam, the dormant Commerce Clause will be rendered more or less useless. The purpose of the dormant Commerce Clause, a purpose that "reflected a central concern of the framers" and was "one object riding over every other in the adoption of the constitution" will be defeated. The judicial obligation to uphold the Constitution of the United States does not permit this Court to allow or promote such a result.

As an example of an improper procedural exception, it would be inappropriate to adopt some heightened standard of proof that is not currently employed by the United States Supreme Court in dormant Commerce Clause cases. Doing so would allow most actual violations of the dormant Commerce Clause to be ignored merely because the extraordinary standard of proof cannot be satisfied except in rare cases. The Supreme Court has described the appropriate method of deciding dormant Commerce Clause cases as a "sensitive, case-by-case analysis." *W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 201-202. Thus, the adoption of a heightened standard of proof would run contrary to that Supreme Court case law by making the analysis less "sensitive."

As a second example of a procedural exception to the dormant Commerce Clause that should be avoided, it would be inappropriate to adopt some simplistic formalism to decide dormant Commerce Clause cases. In the words of the United States Supreme Court,

> Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects. As the Court declared over 50 years ago: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456.

*W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 201-202. A state may not utilize a "mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Id.* quoting

*Guy v. Baltimore*, 100 U.S. at 443. Put succinctly in the words of Justice Cardozo speaking for a unanimous Court,

> What is ultimate is the principle that one state in its dealings with another may not put itself in a position of economic isolation. *Formulas and catchwords are subordinate to this overmastering requirement.*

(Emphasis added). *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. at 527, followed more recently by *W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 201-202.

The prohibition against using some formalism to decide dormant Commerce Clause cases would apply to some of the Defendant's arguments in this case.

For example, that prohibition prevents the adoption of Defendant's suggestion that all this Court need do is find that both the cable industry and satellite industry are interstate industries and conclude as a result that the differential treatment in this case is not discrimination against interstate commerce. Such a method would completely ignore the fact that the tax scheme in this case (1) punishes the choice to deliver multi-channel television signals with a technology that permits certain activities to occur non-locally and (2) rewards the choice to use a technology that requires the corresponding activities to occur locally.

As another example, the prohibition against formalism prevents this Court from adopting Defendant's suggestion that the commerce clause could not have been violated in this case since the cable and satellite industries utilize different methods of doing business. While Defendant's arguments are based on "formulas and catchwords" that involve repeating certain language that has appeared in Supreme Court precedents, the Supreme Court itself has said that those "formulas and catchwords" are "subordinate to [the] overmastering requirement" that courts engage in a "sensitive, case-by-case analysis of purposes and effects" to determine whether a state tax or regulation places the state "in a position of economic isolation." *W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 201-202. Accordingly, this Court must construe the "formulas and catchwords" adopted from Supreme Court precedents in a manner that facilitates the required "sensitive, case-by-case analysis" rather than in a manner that desensitizes the analysis and prevents a genuine, good faith determination as to whether Ohio has placed itself "in a position of economic isolation."

**The Policies and Principles that Guide the Interpretation and Application of the Dormant Commerce Clause**
**Part C:**
**The Purposes of the Dormant Commerce Clause**

Having considered the history and unique constitutional significance of the dormant Commerce Clause, and the resulting prohibition against the adoption of procedural exceptions, it is necessary to now identify more precisely what it is that the dormant Commerce Clause is intended to accomplish. The dormant Commerce Clause "creates an area of trade free from interference by the States," *Am. Trucking Assn.'s v. Mich. PSC*, (2005), 125 S.Ct. 2419, quoting *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318, 328, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977). The Dormant Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. *Reeves, Inc. v. Stake* (1980), 447 U.S. 429, 436-437.

The dormant Commerce Clause "protects markets *and participants in markets...*" (Emphasis added). *GMC v. Tracy*, 519 U.S. 278, 300 (U.S. 1997). "*Citizens*" have a "right to have access to the markets of other States on equal terms." (Emphasis added). *Granholm v. Heald* (2005), 544 U.S. 460, 472-473. "... the [Supreme] Court's repeated references to "rights" under the Commerce Clause constitute a recognition that the Clause was intended to benefit those who ... are engaged in interstate commerce. The "constitutional protection against burdens on commerce is for [their] benefit . . ." *Morgan v. Virginia*, 328 U.S. 373, 376-377, 90 L. Ed. 1317, 66 S. Ct. 1050 (1946). *Dennis v. Higgins*, 498 U.S. 439, 449-450 (U.S. 1991). "Our system, fostered by the Commerce Clause, is that *every farmer and every craftsman* shall be encouraged to produce by the certainty that he will have free access to every market in the Nation...." (Empasis added). *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657 (1949). *Dennis v. Higgins*, 498 U.S. 439, 449-450 (U.S. 1991). "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state *or the labor of its residents*. Restrictions so contrived are an unreasonable clog upon the mobility of commerce." (Emphasis added). *W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 193-194, quoting Justice Cardozo writing for a unanimous Court in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 79 L. Ed. 1032, 55 S. Ct. 497 (1935).

It is evident from these pronouncements by the United States Supreme Court, especially when the italicized language is considered, that the dormant Commerce Clause does not only protect businesses and corporations that participate in interstate commerce, it also protects individual human beings whose labor (as employees, independent contractors, or employees of independent contractors) provides the products, services, transport, sales and exchanges, etc., that constitute interstate commerce. The Constitution, which, in its own words, was written "for the people", is not merely an expedient instrument for business. Ultimately, the dormant Commerce Clause is meant to protect the economic interests of the individual human beings who reside in this country by ensuring that the products and services that their labor creates or facilitates will find unimpeded markets in every state of the Union. Certainly, differential treatment of businesses that benefits intrastate business and burdens interstate business would generally be one form of differential treatment that benefits the economic interests of a state's own human residents and burdens the economic interests of the human residents of other states. However, that is hardly the only way by which states can, by impeding or conditioning access to their own markets, provide preferential treatment for the economic interests of their own human residents while burdening the economic interests of the human residents of other states.

How does the Constitution, and more specifically, the Commerce Clause, imply the dormant Commerce Clause and more specifically, a right of human individuals to have, for the products or services created by their labor, unimpeded access to the markets of other states? Two of the current nine justices on the United States Supreme Court have argued that the dormant Commerce Clause is not part of the Constitution at all. However, the majority regards it to be well-settled that the dormant Commerce Clause is a part of the Constitution.

The Commerce Clause says, "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ." The clause does not say that Congress' power to regulate commerce among the several states is meant to preempt, at least to some degree, the power of each state to regulate interstate commerce. However, if one reads the words of the Commerce Clause knowing that the framers met with an intention of putting a stop to economic protectionism, then one must infer that the delegation of Power to Congress was intended to have some preclusive effect. Since the clause does not delineate the scope of that preclusive effect, there is an ambiguity which must be resolved as to the extent that state regulation of interstate commerce has been precluded.

The Supreme Court has rejected the possibility that state regulation of interstate commerce was intended to be completely precluded. Since interstate commerce is such a pervasive part of our lives, complete preclusion of state regulation of interstate commerce would prevent states from legislating on matters that were clearly intended to be left in the hands of the states. This leaves two alternatives.

First, there is the possibility that the preclusive effect was intended to be limited to that which results from applying the Supremacy Clause to acts of Congress. Once Congress has enacted a law regulating interstate commerce, any state law that is inconsistent with that federal law would be rendered void because of the supremacy of federal law.

The second alternative is that the grant of the power to Congress to regulate interstate commerce relegated the states to something like an agency role. An agent is expected to both (1) satisfy any explicit requirements of the principal as to the means to be employed for the principal's purpose, and also (2) exercise the agent's discretion to serve and not defeat the principal's purpose.

This second alternative can be illustrated by an analogy to soccer. When children are young, and first begin to play the game, their manner of play is sometimes called "beehive soccer." All of the players bunch around the ball like bees swarming around a hive. Each tries to kick the ball toward their goal. Teammates often steal the ball from each other merely for the opportunity to shoot and score a goal. As the players mature, they move toward playing a more cooperative form of soccer that is originally presented to them as the coaches' game plan. Each player gives up the notion that he or she should seek to constantly control the ball in order to maximize his or her opportunities to score. Let us imagine for sake of this analogy, a particular soccer team that elects its coach, and can democratically remove the coach from office. Let us also suppose that before electing the coach, the team had drafted and enacted a team charter (1) providing for the democratic election and removal of the coach, and (2) assigning the coach authority to determine the game plan and any subsequent strategic orders for the players. Let us further suppose that those who drafted and enacted the charter generally assumed that a democratically elected and democratically removable coach would have the purpose of protecting and promoting the general welfare of the team and each of its members, and hence, would craft a game plan or any subsequent orders so as to not discriminate amongst the players on any basis that would not promote the general welfare. Under all of these circumstances, one can expect that the coaches' game plan will generally be crafted so as to include a distribution of scoring opportunities that will generally be regarded by the players as being fair because not discriminatory on any basis that would not promote the general welfare of the team and its members. Let us imagine, that as the team matures further, the coaches' game plan acquires more details, but at the same time, the players' advancing skills and knowledge provide them with more alternatives with regard to how they can execute their responsibilities within the game plan, thus expanding the scope of their discretion even as the game plan becomes more detailed.

Consider the role of the coach. The coach determines the game plan, and in the course of the game orders the performance of certain additional strategies, all with the purpose of protecting and promoting the general welfare of the team and each of its members.

Consider the role of a player. The player has discretion to choose the specific modes and manner of his or her play so long as that discretion is implemented so as to conform with the coaches' (1) game plan, (2) supplemental orders, and (3) purposes. If the player thinks the game plan, supplemental orders, or some non-ultimate purpose possessed by the coach do not serve the ultimate purpose of protecting and promoting the general welfare, then the player may petition the coach for a modification, but it is beyond the scope of the player's authority to modify the game plan or supplemental orders or ignore the coaches' known purposes. When the player has some question about what the game plan or supplemental orders require in a specific situation, the player can assume that the question should be answered in the way that best serves the coaches' purposes. Even when neither the game plan nor the supplemental orders speak to what the player should do in a specific circumstance, the player's discretion should be exercised in favor of realizing the coaches' purposes. A player is not completely prevented under this standard from acting on that player's own behalf, since that player is included within that group of players whose welfare the coach seeks to protect and promote. To the contrary, since each player is most capable of affecting his or her own welfare, each player should protect and promote his or her own welfare within the game plan, supplemental orders, and purposes of the coach. The player only falls into the vice of selfishness when the player seeks to protect and promote his own welfare in a manner that violates the game plan, supplemental orders, or purposes of the coach.

In this analogy, the states, when they involve themselves in the regulation of interstate commerce, are like the players, the Congress is like the coach, the team charter is like the Constitution, the game plan and supplemental orders are like federal statutes and federal regulations enacted pursuant to the authority provided by Congress, and the coaches' purposes are like Congress' purposes including any purposes derived from, or assumed by, the Constitution.

Pursuant to the analogy, if a state wants to act contrary to federal laws or regulations, or the non-ultimate purposes of Congress, on the grounds that the state action would be consistent with protecting and promoting the general welfare, the state can petition Congress to enact federal legislation permitting that type of action. Likewise, if federal law or congressional purposes are ambiguous so that there is a significant question as to whether the act would be contrary to federal law or the purposes of Congress, the state can petition Congress to enact clarifying legislation. A state having genuinely good intentions would have a much better chance of obtaining the desired federal legislation than one with more selfish motives.

Pursuant to the analogy, when states involve themselves in the regulation of interstate commerce, they can and should act to promote the welfare of their own residents and citizens so long as they do not fall into the vice of state selfishness. In other words, when states involve themselves in the regulation of interstate commerce, they should not act inconsistently with the Constitution, statutes enacted by Congress, federal regulations enacted pursuant to congressional authority, or the purposes of Congress including purposes derived from, or assumed by, the Constitution. As will be explained below, the Constitution assumes and intends that Congress would regulate interstate commerce for the benefit of the whole nation and thus exercise its power with the purposes (1) of avoiding economic protectionism between the states, and (2) of avoiding unjustified burdens on interstate commerce. Thus, pursuant to the analogy, when states involve themselves in the regulation of interstate commerce, they should not act inconsistently with the constitutionally assumed purposes of Congress (1) of avoiding economic protectionism between the states, and (2) of avoiding unjustified burdens on interstate commerce.

That is the exact same limitation on state action found in the dormant Commerce Clause. Thus, the second alternative identified above with regard to determining the intended preclusive effect of the Commerce Clause, as elucidated by the analogy, and tales the existence of the dormant Commerce Clause. In other words, the determination that the explicit terms of the Commerce Clause imply the dormant Commerce Clause results from a determination that (1) the second alternative interpretation of the preclusive effect of the Commerce Clause is the better interpretation, and (2) a determination that the Constitution delegated the power to regulate interstate commerce to Congress because it was assumed and intended that Congress would regulate interstate commerce for the benefit of the whole nation and thus exercise its power with the purposes (1) of avoiding economic protectionism between the states, and (2) of avoiding unjustified burdens on interstate commerce.

The second alternative interpretation of the preclusive effect of the Commerce Clause is the better interpretation. From the perspective of the Framers' purpose of preventing economic protectionism, it would have been more reasonable for the Framers to have intended that, with regard to regulating interstate commerce, the states are relegated to an agency role, than it would have been to have intended that the supremacy clause be the only limitation on state regulation of interstate commerce. Assuming, as did the Framers, that the temptation for states to engage in interstate commerce is very strong, relying only upon the Supremacy Clause to limit state regulation of interstate commerce would mean that the states and Congress would constantly be involved in a game of cat and mouse where the states would constantly be looking for new ways of engaging in a economic protectionism and implementing them before Congress would eventually get around to prohibiting them. Congress would then be perpetually involved in discovering the newest methods utilized by the states for economic protectionism and prohibiting them. In between the time a state enacts its economic protectionist law, and the time Congress prohibits it, the Framers' purpose of eliminating economic protectionism would be defeated.

By contrast, conceiving of the states as being relegated to the role of agents of Congress when they regulate interstate commerce, the states are not left with a temporary opportunity to defeat the Framers' purpose of eliminating economic protectionism. At the same time, each state is left free to regulate interstate commerce for the benefit of its own residents so long as it does not violate federal law or defeat Congress' purposes with regard to regulating interstate commerce including any constitutionally assumed and intended purposes such as (1) avoiding economic protectionism between the states, and (2) avoiding unjustified burdens on interstate commerce. If a state believes that certain experimentation in the regulation of interstate commerce would be consistent with the general welfare, even though inconsistent with current federal law or current congressional purposes, the state would have a remedy. It could petition Congress for the enactment of federal legislation that would permit the experimentation. So for example, the Supreme Court has held that

> It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. See, e. g., Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769 (1945). But because of the important role [*139] the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been "unmistakably clear." South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

*Maine v. Taylor* (1986), 477 U.S. 131, 138-139.

Since the second alternative interpretation of the preclusive effect of the commerce clause would better serve the Framers' purpose of preventing states from engaging in economic protectionism, it is the better interpretation. Under that interpretation, states are regarded as having the role of agents of Congress when they engage in the regulation of interstate commerce. While engaged in the regulation of interstate commerce, the role of the states in relation to Congress is like the role of a soccer player in relation to the player's coach.

There is also good reason to believe that the Constitution assumes and intends that Congress would regulate interstate commerce for the benefit of the whole nation and thus exercise its power with the purposes (1) of avoiding economic protectionism between the states, and (2) of avoiding unjustified burdens on interstate commerce.

Since it cannot be disputed that at a bare minimum the Constitution intends at least that degree of preclusion of state action which is entailed by the application of the Supremacy Clause to the regulation of interstate commerce by Congress, it would appear that the Framers understood that Congress is more inclined to avoid economic protectionism between the states than are the state legislatures. This is because state economic protectionism could equally be described as the (all too human) economic selfishness of states. By "state selfishness" this Court means an inclination of a state legislature, in the decision making process, to assign different significance to the benefits or burdens flowing from a proposed action based on whether those benefits or burdens flow to residents or nonresidents of the state. When state regulation of interstate commerce varies from what it would have been but for such state selfishness, it could be described as being "tainted" by state selfishness.

It is easy to understand why state legislatures have a tendency towards such selfishness. The ordinary human selfish tendencies of the mostly ordinary human beings who are the voters within a state will tend to result in the election of state legislators with an excessive tendency toward protection of in-state economic interests at the expense of out-of-state economic interests. However, with regard to Congress, the excessive tendency of one state's representatives or senators toward protection of that state's economic interests will, to some extent, be counterbalanced by the tendencies of the other states' representatives and senators toward protection of their states' economic interests.

Accordingly, the choice to give to Congress the supreme power with regard to regulating interstate commerce suggests that the Constitution embraces the ideal that the regulation of interstate commerce should not be tainted by state selfishness. Rather, it suggests that the Constitution embraces the ideal that the residents and nonresidents of a particular state should be regarded as equals for purposes of regulating interstate commerce. No legislature, in the process of regulating interstate commerce, should regard the welfare of one human being to be more important than the welfare of another human being merely because one is the resident of a particular state. The reason why the Constitution embraced such an ideal can be seen in the history that proceeded the Constitution.

In the Gettysburg Address, Abraham Lincoln identified the signing of the Declaration of Independence as the moment at which this nation was founded. He drew attention to the most famous passage within the Declaration of Independence.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, governments are instituted among men...

With these words, this nation hurled itself into the Revolutionary War, and a whole generation sacrificed or risked life and limb. It is unlikely that a mere 15 years later when the Constitution became effective, the Revolutionary Generation would have forgotten about the self-evident truth (1) of the equality of human persons, (2) that the rights to life, liberty, and the pursuit of happiness are *unalienable,* and (3) that governments are instituted to secure those rights.

The Ninth Amendment to the Constitution does not permit us to conclude that the Constitution denies or disparages those rights even when not explicitly recognized in the Constitution. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." For the Revolutionary Generation, which was committed to the existence of the rights enumerated in the Declaration of Independence, this language would have meant that the failure of the Constitution to mention a right to the pursuit of happiness should not be construed as denying or disparaging that right. To the contrary, based on the promise of the Declaration of Independence, the Revolutionary Generation would have understood the whole purpose of the Constitution as being to "secure" the unalienable rights enumerated in the Declaration of Independence. In the words of the Declaration of Independence, it is a self-evident truth that "governments are instituted" "to secure these rights" to "Life, Liberty, and the pursuit of Happiness."

Indeed, the Supreme Court has held that,

> The theory upon which our political institutions rest is, that all men have certain inalienable rights -- that among these are life, liberty, and the pursuit of happiness;

*Cummings v. Mo.* (1866), 71 U.S. 277, 322. The Supreme Court has embraced the view of Justice Cardozo that "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness." Stanley v. Georgia (1969), 394 U.S. 557. Accordingly, when construing the Commerce Clause, and specifically when determining the level of preclusion of state regulation of interstate commerce that was intended, we should do so with an understanding that the clause was intended to secure the unalienable rights to life, liberty, and the pursuit of happiness.

For purposes of resolving the issue of whether the Constitution embraces the ideal that the regulation of interstate commerce should not be tainted by state selfishness, the right of the pursuit of happiness is the most relevant of the three unalienable rights identified in the Declaration. One significant way that people pursue happiness is through engaging in various activities for compensation, which may come in the form of wages or payment for the sale of services or products. Accordingly, when a state impedes access to its markets, it reduces non-resident persons' opportunity to pursue happiness. In some cases, the state action may be justified in which case the right to pursue happiness is not violated. This is because the scope of each person's right to pursue happiness is limited by other cardinal rights such as the rights of others to life, liberty, and the pursuit of happiness. What cannot be justified under the self-evident values of the Declaration of Independence, and specifically from the determination that the equality of human persons is self-evident, is state impingement on the right to pursue happiness that would not occur but for a state's preference for the pursuit of happiness of its human residents over the pursuit of happiness of nonresident humans. Thus, the self-evident, equal, unalienable right to the pursuit of happiness entails that the regulation of our interstate commerce should not be tainted by such state selfishness.

Since, as stated by the Supreme Court, "The theory upon which our political institutions rest is, that all men have certain inalienable rights -- that among these are life, liberty, and the pursuit of happiness;" *Cummings v. Mo.* (1866), 71 U.S. 277, 322, the question as to the level of preclusion intended by the Commerce Clause should be resolved in such manner as would best ensure that the regulation of interstate commerce will not be tainted by state selfishness. Hence the better interpretation of the Commerce Clause, with regard to the level of preemption of state regulation of interstate commerce, is that it was intended that state legislatures be relegated to the role of agents of Congress. In other words, each state is left free to regulate interstate commerce for the benefit of its own residents so long as it does not violate federal statutes or regulations, or defeat Congress' purposes with regard to regulating interstate commerce including any constitutionally assumed and intended purposes such as (1) avoiding economic protectionism between the states (i.e., state action that is tainted by the sort of state selfishness discussed above), and (2) avoiding unjustified burdens on interstate commerce. These are precisely the limits that have been set by the Supreme Court in its application of the dormant Commerce Clause.

Since the ultimate purpose of the Commerce Clause is to secure the equal, unalienable right of individual human beings to the pursuit of happiness, it does not merely protect interstate businesses against discrimination in favor of intrastate businesses, but rather its protections reach all the way down to protect the individual human beings whose labor, in some manner or another, provides sustenance to interstate commerce. It protects them by prohibiting differential treatment by a state of different businesses that would not occur but for a state's preference for the economic interests of its own human residents over the economic interests of nonresident human beings. In the words of Justice Cardozo,

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with ... *the labor of its residents*. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

(Emphasis added). *W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 193-194, quoting Justice Cardozo writing for a unanimous Court in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 79 L. Ed. 1032, 55 S. Ct. 497 (1935).

**The Policies and Principles that Guide the Interpretation and Application of the Dormant Commerce Clause**
**Part D:**
**The Interaction between the Purposes of the Dormant Commerce Clause and the Legitimate Non-Protectionist Interests of State and Local Governments**

Legitimate local purposes must be considered when determining whether a state or local law violates the dormant Commerce Clause. As stated by the US Supreme Court in *Maine v. Taylor* (1986), 477 U.S. 131, 138,

> The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

The Supreme Court discussed the effect of the Commerce Clause on the states' legitimate taxing power in *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 328-329.

> The Commerce Clause does not ... eclipse the reserved "power of the States to tax for the support of their own governments," *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824), or for other purposes, cf. *United States v. Sanchez*, 340 U.S. 42, 44-45 (1950); rather, the Clause is a limit on state power. Defining that limit has been the continuing task of this Court.

Thus, Commerce Clause analyses of both regulatory and tax provisions involve consideration of legitimate state and local interests. A court must "delicately" balance the state or local interests against the national interest in promoting a free national market.

> ... in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause - where local and national powers are concurrent - the Court in the absence of congressional guidance is called upon to make "delicate adjustment of the conflicting state and federal claims," *H. P. Hood & Sons, Inc. v. Du Mond, supra*, at 553 (Black, J., dissenting), thereby attempting "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce." *Freeman v. Hewit, supra*, at 253. In undertaking this task the Court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with a problem of balance[.]

*Great Atlantic & Pacific Tea Co. v. Cottrell* (1976), 424 U.S. 366, 371. Followed by *Raymond Motor Transp., Inc. v. Rice* (1978), 434 U.S. 429, 440. The Supreme Court has given some guidance as to the nature of this process.

> In this process of "delicate adjustment," the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce, but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.

*Raymond Motor Transp., Inc* at 440. The Court gave further guidance in *Boston Stock Exchange.*

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. e.g., *Freeman v. Hewit*, supra, at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case

> just cited: "[F]rom the quagmire there emerge... some firm peaks of decision which remain unquestioned." *Id.*, at 458.

One such "firm peak of decision" is a general principle identified by the United States Supreme Court in *Granholm v. Heald* (2005), 544 U.S. 460, as having become well established.

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

What are those "narrowest circumstances" which the Court refers to in *Granholm*? First, a statute will not be found to be discriminatory based on differential treatment of two businesses or groups of businesses if they are not "similarly situated." *General Motors Corp. v. Tracy* (1997), 519 U.S. 278. Second, even a discriminatory statute will not be found to violate the Commerce Clause if, subject to strict scrutiny, the State can satisfy its burden of justifying the statute "both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake." *Hughs v. Oklahoma* (1979), 441 U.S. 322.

*Maine v. Taylor,* at 138, identifies two ways in which consideration of state and local interests can enter into the analysis of whether state legislation violates the dormant Commerce Clause.

> In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in Hughes v. Oklahoma, 441 U.S., at 336, that once a

> state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. See also, e. g., Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

Thus, in both situations the court must consider whether legitimate local interests justify the burden on interstate commerce. The difference between the two situations is the level of scrutiny applied.

If, on the one hand, the case involves discrimination against interstate commerce, then, subject to strict scrutiny, the state must demonstrate that the discrimination is justified by a legitimate local purpose that could not be served as well by available non-discriminatory means. *Id.* The State must "show that 'the discrimination is demonstrably justified.'" *Granholm v. Heald* (2005), 544 U.S. 460, 492-493.

If, on the other hand, there is no discrimination, then a violation of the dormant Commerce Clause can only be found if the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Maine v. Taylor,* at 138.

Consideration of legitimate local and state interests can also be appropriate in a third situation. "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *GMC v. Tracy* (1997), 519 U.S. 278, 298. Consequently, there can be discrimination only if the differently treated entities are "substantially similar." When determining whether the differently treated entities are substantially similar, courts have considered the effects that the differently treated entities have in relation to legitimate non-economic state and local interests.

For example, in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786, the state created a "Solid Waste Authority" to handle the solid waste generated in two counties. The Authority owned a solid waste processing plant that separated out recyclable items. The counties enacted "flow control" ordinances that required the solid waste originating from within the counties be transported to that solid waste processing plant. The issue considered by the Court was whether the public Solid Waste Authority and the private owners of out-of-state solid waste processing plants were similarly situated. The Court said,

> States and municipalities are not private businesses -- far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted)). These important responsibilities set state and local government apart from a typical private business.

The Supreme Court considered state and local interests in "protecting the health, safety, and welfare" when determining that the two kinds of entities (public solid waste processing plants and privately owned solid waste processing plants) are not "similarly situated" even though they do compete in the solid waste processing market.

In *GMC v. Tracy* (1997), 519 U.S. 278, the tax scheme at issue favored regulated local utility monopolies which sold natural gas to both residential consumers and large business purchasers while disfavoring marketers that sold natural gas only to large business purchasers. Even though the case involved a deferential tax scheme rather than a health or safety regulation, the Court looked to the differing effects of the regulated monopolies and gas marketers upon health and safety to determine that the regulated monopolies and gas marketers are not similarly situated.

> We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was "'never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444, 4 L. Ed. 2d 852, 80 S. Ct. 813 [*307] (1960) (quoting Sherlock v. Alling, 93 U.S. 99, 103, 23 L. Ed. 819 (1876)). Just so may health and safety considerations be weighed in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present.

*Id.* at 306-307. Even though regulated monopolies and gas marketers competed in the market for large commercial purchasers, the Court found that they were not similarly situated. The Court found that the residential market in which they did not compete should be given controlling significance for purposes of determining whether the regulated monopolies and gas marketers were similarly situated because of the important health and safety interests served in the residential market. Thus, local health and safety interests were considered in the process of determining whether the regulated monopolies and gas marketers were similarly situated.

While *United Haulers* and *Tracy* show that protection of state and local interests sometimes affects the analysis of whether two competing entities are similarly situated, it does not follow that competing business entities are not similarly situated whenever one better serves legitimate non-economic state and local interests. In *Minn. v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 471, the US Supreme Court said,

> When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Hunt v.*

> *Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). If a state law purporting to promote environmental purposes is in reality "simple economic protectionism," we have applied a "virtually per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Thus, the Supreme Court clearly indicated that legislation could both serve a legitimate local concern and, at the same time, be "simple economic protectionism" (i.e., discrimination). Since there can be no "simple economic protectionism" (i.e., discrimination), unless the differently treated parties are "similarly situated", it follows that the mere fact that a legitimate local concern is served by some legislation (that also benefits in-state economic interests and burdens out-of-state economic interests) does not entail that the differently treated business entities are not similarly situated for purposes of the Commerce Clause. In other words, two businesses or industries can be "similarly situated" even though some legitimate local concern tends to support treating them differently. This makes sense since the issue of whether the legitimate local interest justifies the discrimination is supposed to still exist after discrimination (and hence, the similarly situatedness of differently treated businesses) has been decided. The law presumes that the justification issue typically survives after the discrimination issue has been resolved since the law assigns the burden of proof on these two issues to different parties.

By what sort of method does a court consider the legitimate non-protectionist interests of state and local governments in order to determine that two kinds of businesses are similarly situated if the court must do so without necessarily deciding that those state and local government interests are adequate to justify the differential treatment of the two kinds of businesses?

The Supreme Court's most recent Commerce Clause case, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786, was issued after this Court's last attempt to resolve this question. That case causes this Court to alter its method for analyzing whether differentially treated entities are "similarly situated." The United States Supreme Court's reasoning in *United Haulers* suggests a method for deciding the issue of whether two entities are "similarly situated" which involves considering differences in how the two entities serve legitimate local non-economic interests, but does not necessarily depend upon a determination of whether those interests are adequate to justify differential treatment. *United Haulers* implies that differences in how two entities serve legitimate non-economic local interests becomes relevant to determining whether the two entities are "similarly situated" when those differences are adequate to eliminate the suspicion, grounded in the Constitution and its history, that a State or local government's differential treatment of businesses that favors in-state economic interests and burdens out-of-state economic interests is most likely motivated by simple economic protectionism.

In *United Haulers*, the Court was considering whether certain garbage flow control ordinances designed to enhance the effectiveness of a government owned garbage processing facility discriminated against interstate commerce. Those flow control ordinances required garbage haulers to bring local garbage to the government owned facility and thus prevented them from hauling it to out-of state facilities owned by private businesses. The issue was whether the local government and the various private out-of-state garbage processing businesses were "similarly situated."

> Compelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors.

> "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S. Ct. 811, 136 L. Ed. 2d 76 (1997) (footnote omitted). But States and municipalities are not private businesses -- far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted)). These important responsibilities set state and local government apart from a typical private business. Cf. *Tracy, supra*, at 313, 117 S. Ct. 136 L. Ed. 2d 76 (SCALIA, J., concurring) ("Nothing in this Court's negative Commerce Clause jurisprudence" compels the conclusion "that private marketers engaged in the sale of natural gas are similarly situated to public utility companies").
>
> *Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.* As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of "simple economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992); *Philadelphia v. New Jersey*, 437 U.S., at 626-627. Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism.

(Emphasis added). *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786. Thus, the Court found that the local government and private businesses were not "similarly situated" for purposes of that case because the laws favoring local government did not incur the same suspicion, grounded in the Constitution and its history, of economic protectionism as would be typically incurred by laws favoring in-state economic interests and burdening out-of-state economic interests. In other words, the Court considered whether contemplation of the differences between two entities is adequate to remove the suspicion that differential treatment of them, favoring in-state economic interests and burdening out-of-state economic interests, is likely to have been motivated by simple economic protectionism. If the differences between them are adequate to eliminate that suspicion, then they are not "similarly situated" even though they might compete in some or all of the same markets or market segments.

A court should begin with a "healthy" suspicion that state and local government action favoring in-state economic interests and burdening out-of-state economic interests is most likely motivated by economic protectionism. Such a suspicion is appropriate since, as explained at length above, that suspicion, rooted in the experience of the Framers of the Constitution, is the very reason for the existence of the negative Commerce Clause and a primary reason why the Framers chose to write a new Constitution to replace the Articles of Confederation. Thus, that suspicion, as one of the fundamental bases to the United States Constitution, cannot be appropriately eliminated unless, in spite of the constitutionally appropriate assumption that state and local governments are typically inclined to engage in economic protectionism, it is clear from the facts of the particular case that the state or local government was not motivated by economic protectionism. Since the issue of whether that appropriate suspicion has been eliminated in a particular case pertains to the issue of whether the differentially treated entities are "similarly situated", which in turn pertains to the issue of whether there has been discrimination, the burden of persuasion as to whether or not the appropriate suspicion has been eliminated rests upon the plaintiff. For reasons that will be discussed below, a preponderance of the evidence will satisfy the plaintiff's burden.

It makes sense that the question as to whether the constitutionally appropriate suspicion of economic protectionism has been eliminated should be the overarching inquiry for purposes of determining whether competing entities are "similarly situated."[1] As indicated by *United Haulers*, that constitutionally grounded suspicion is the only reason why the burden of proof ever shifts to state and local governments to show that their actions are justified. In the absence of such a suspicion, the presumption would be that the state or local government would have been motivated by a desire to properly balance national interests with state and local interests, and the only question would be whether it had struck a proper balance or failed to appreciate the significance of the effects of its action on interstate commerce. As with the balancing test in *Pike,* in which a court weighs the burden placed on interstate commerce by state or local action against the legitimate state or local interest promoted by that action, the burden of proof would fall on the plaintiff. Since the constitutionally-based suspicion that differential treatment of competing entities *that benefits in-state economic interests and burdens out-of-state economic interests* is motivated by economic protectionism is the rationale for shifting the burden of proof to state and local governments, it follows that the dividing line between adequate similarity for shifting the burden of proof, and adequate difference for refusing to shift that burden of proof, should be the point at which the differences between the competing entities and their situations are adequate to eliminate the constitutionally-based suspicion that the differential treatment of the competing entities is motivated by economic protectionism.

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[1] It is the overarching inquiry in the sense that it encompasses and provides a framework for the consideration of all of the factors that can effect the answer to the question of whether differentially treated competing entities are "similarly situated" for purposes of the dormant Commerce Clause.

If, upon a preponderance of the evidence, the differences between differentially treated competing entities, and the differences between their situations, are not adequate to eliminate the special constitutionally appropriate suspicion that economic protectionism is behind the differential treatment, then a court should find that the competing entities are "similarly situated."

## IV
## The Standard for Determining the Constitutionality of a Statute under the Dormant Commerce Clause of the United States Constitution

Defendant argues "this Court must presume that a statute is constitutional until it is clearly established beyond a reasonable doubt the statute is unconstitutional." This Court has already discussed above, at some length, the inappropriateness of applying a heightened standard of proof with regard to allegations of discrimination under the dormant Commerce Clause. In this section, this Court will consider the specific arguments set forth in Defendant's memoranda.

Defendant argued for the application of a heightened standard of proof in this case in Defendant's original motion for summary judgment. The argument was rejected at that time.

> Defendant argues that the Court must not find the statute unconstitutional unless Plaintiff proves it to be so beyond a reasonable doubt. Defendant cites Ohio case law applying Ohio standards for determining constitutionality. But this case involves a question of constitutionality under the U.S. Constitution. The United States Supreme Court has determined that "[when] discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma* (1979), 441 U.S. 322, 336. The State's attempt to justify the discrimination is subject to the "strictest scrutiny." *Id.* The U.S. Supreme Court has held that "the standards for such justification are high." *New Energy Company of Indiana v. Limbach* (1988), 486 U.S.

269, 278. This Court must follow these binding United States Supreme Court precedents

Seeking to change this result, Defendant now cites three US Supreme Court cases.

*Pension Ben. Guaranty Corp. v. R.A. Gray & Co.* (1984), 467 U.S. 717, 729, is cited for the statement "it is by now well established that legislative acts . . . come to the court with a presumption of constitutionality, and that the burden is on the one complaining..." The only thing indicated by this statement is that there is a presumption in favor of constitutionality and that accordingly the initial burden is upon the one complaining. The statement says nothing about the standard of proof that is required to defeat the presumption. Some presumptions require nothing more than some contrary evidence to defeat them. Others require a stronger showing. The statement quoted from *Pension Ben. Guaranty Corp.* does nothing to establish defendant's position that unconstitutionality must be established "beyond all reasonable doubt." To the extent that *Pension Ben. Guaranty Corp.* stands for the proposition that Plaintiff has the initial burden of proof, this Court has already indicated that Plaintiff has the burden of proof for purposes of proving discrimination. However, as indicated in this Court's earlier decision, US Supreme Court precedent pertaining specifically to the Commerce Clause has indicated that the burden shifts to the state once discrimination has been demonstrated.

Furthermore, in *United Haulers,* the Supreme Court determined that a local government operating a garbage-processing facility was not similarly situated with the out-of-state privately owned garbage-processing facilities. The Court determined that laws that favor in-state economic interests by favoring local government in performance of its at public duties do not call for the same degree of skepticism as laws that favor in-state economic interests by favoring certain private businesses over their competitors. With regard to the latter the Court stated,

> As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of "simple economic protectionism."

*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786. Accordingly, once a plaintiff has shown that (1) a law treats competing businesses differently, and (2) in so doing benefits in-state economic interests and burdens out-of-state economic interests, any presumption in favor of the constitutionality of the law is removed, unless there are special circumstances that remove the constitutionally appropriate suspicion that such laws are motivated by economic protectionism. Despite the many modern cases in which the Supreme Court has considered the dormant commerce clause, none place a heightened standard of proof on the plaintiff with regard to proving discrimination against interstate commerce. Accordingly, this Court finds that the presumption of constitutionality in a dormant Commerce Clause case is defeated when the plaintiff proves by a preponderance of the evidence that (1) a law treats competing businesses differently, (2) the differential treatment benefits in-state economic interests and burdens out-of-state economic interests, and (3) there are no special circumstances that remove the constitutionally appropriate suspicion that such differential treatment is motivated by economic protectionism.

*Ogden v. Saunders* (1827), 12 Wheat. 213, 270, is cited for the statement, "respect due to the wisdom, the integrity, and the patriotism of the legislative body, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." *Ogden,* which was issued in 1827, is an ancient case. Clearly, if it stated the current standard for determining constitutionality under the Federal Constitution, Defendant would have been able to identify a more recent Supreme Court case. The United States Supreme Court is frequently called upon to resolve questions of constitutionality. If a violation of the constitution must be proved beyond all reasonable doubt in order to establish that a law is unconstitutional under the federal Constitution, then surely that standard would have become boilerplate and would regularly appear in United States Supreme Court cases pertaining to the constitutionality of statutes. In fact the United States Supreme Court has been much more cautious and has applied different standards depending upon which clause of the Constitution is at issue.

*Lehnhausen v. Lakeshore Auto Parts Co.* (1973), 410 U.S. 356, 364, is cited for the statement, "there is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration . . .'" *Lenhausen* did not involve any allegations regarding the Commerce Clause. Rather, the issue there was whether a tax violated Equal Protection or the Due Process Clause. Defendant has not identified, and this Court has not been able to find, any binding precedent that would say that, with regard to the Commerce Clause, the presumption of constitutionality can only be overcome by "the most explicit demonstration." The absence of any such language in US Supreme Court Commerce Clause cases clearly suggests that the high Court does not apply such a heightened standard when evaluating legislation under the Commerce Clause. The reason is obvious if one considers the historical basis of the Dormant Commerce Clause as discussed above. Under the assumption of the Framers that states have a natural tendency toward economic protectionism, requiring a heightened standard to prove a dormant Commerce Clause case would defeat the purpose of the dormant Commerce Clause.

The Dormant Commerce Clause represents a solution to a problem in group dynamics. If the states all cooperate by not imposing barriers to interstate commerce, they will all tend to fare well. If all but one cooperates, then the one that engages in economic protectionism may fare even better, but the rest will fare worse. Thus, each State has a motive to engage in economic protectionism. Of course, patriotism or the moral force of the golden rule would encourage them to disregard that motive and cooperate. However, this nation's historical experience under the Articles of Confederation and during the colonial period suggested that patriotism and the force of moral reasoning is inadequate to prevent the states from engaging in economic protectionism. *Camps Newfound/Owatonna v. Town of Harrison* (1997), 520 U.S. 564. As the states individually succumb to the temptation to engage in economic protectionism the nation as a whole fares worse and any gain garnered by any of the states individually by its own economic protectionism is more than eliminated by the economic protectionism engaged in by the others.

When the Framers meant to draft the Constitution, it was in the interest of the nation as a whole to prevent the states from engaging in economic protectionism. The problem has become one of devising a means for insuring that the states would not succumb to the temptation of engaging in economic protectionism when neither patriotism nor the force of moral reasoning was adequate to prevent them from succumbing to that temptation. The United States Supreme Court has long believed that the dormant Commerce Clause is the Constitution's solution to the problem.

Defendant asks this Court to hold that the presumption of constitutionality in Dormant Commerce Clause cases can only be defeated by proof beyond a reasonable doubt. It is suggested that courts should presume that the patriotism and goodwill of the states is adequate to prevent economic protectionism in most cases so that violations should only be recognized when they are proved beyond a reasonable doubt. Given the exceptionally strong temptation to engage in economic protectionism, the Dormant Commerce Clause would be rendered more or less useless if such a heightened standard were to be required. This nation's experience in colonial times and under the Articles of Confederation demonstrated that the patriotism and good will of the states cannot be relied upon to protect the national market. Adopting a heightened standard for proving a violation of the Commerce Clause would defeat the purpose of the Dormant Commerce Clause, and accordingly, would be unreasonable given the fundamental importance of the constitutional policy underlying the Commerce Clause.

## V
## The Question as to whether the Cable Industry is an Interstate Industry Is not Dispositive of this Case

Defendant's Memorandum in Support states

> This Court has made no specific findings on the interstate nature of cable and DBS, although the Court's prior decisions suggest it views DBS as interstate and cable as in-State or intrastate.

(P. 4). This Court's prior decisions suggest nothing of the sort. This Court's decision on the initial summary judgment motions indicated that this Court refused to adopt the simplistic formalism suggested by Defendant whereby a finding that cable television is an interstate industry would be dispositive of this case. This Court said,

> In the context of the Commerce Clause, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Oregon Waste Systems v. Dept. of Environmental Quality* (1994), 511 U.S. 93, 99. Consequently, a "discriminatory purpose" would be one that seeks to benefit in-state economic interests and burden out-of-state economic interests.
>
> The Supreme Court's use of the words "economic interest" in the definition of discrimination is significant. It means that the Commerce Clause cannot be construed so narrowly as to only be concerned when businesses are discriminated against in accordance with their residence or when transactions or activities are discriminated against because they occur out-of-state or cross state lines. Rather, it follows from the Supreme Court's definition of "discrimination" that the Commerce Clause is concerned much more broadly with differential treatment whenever in-state economic interests are benefited and out-of-state economic interests are burdened.

This Court explained its analysis further when it decided Defendant's 9-20-2006 Motion for Reconsideration. This Court stated,

> It would be a mistake to assume that providing "a direct commercial advantage to a local business" (i.e., non-interstate, locally domiciled, business) is the *only* way of "favoring in-state economic interests over out-of-state economic interests." When this Court determined that, in practical effect, the sales tax favors in-state economic interests over out-of-state economic interests, it did not base that determination upon a finding that cable television operators are local businesses and satellite broadcast services are interstate businesses. Rather, this Court's determination was based upon a finding that, in practical effect, the sales tax statute favors a means of delivery of television programming that necessarily involves local economic activity (the tax on certain multichannel television broadcast services can be avoided only if *local* ground equipment other than the subscriber's equipment is installed and used for delivery of the television programming), as compared to a means of delivery which does not necessarily involve local economic activity (a subscriber can be connected to the direct-to-home satellite broadcast system without the

> installation or use of *local* ground equipment other than the subscriber's equipment).
>
> Clearly, a tax that only burdens businesses that utilize a technology that allows them to avoid certain local activities, while not burdening similarly situated businesses who do use a technology that requires those local activities, favors in-state economic interests while burdening out-of-state economic interests.[2] If states are allowed to intentionally prefer technologies based upon whether the technologies would cause business activities to be conducted locally, then that is just another way of forcing economic activity to occur locally rather than in other states. In other words, it would allow the states to balkanize the national market, which is precisely what the Dormant Commerce Clause is supposed to prevent.[3] A state's use of its "power to tax an in-state operation as a means of 'requiring (other) business operations to be performed in the home state,'" is "wholly inconsistent with the free trade purpose of the Commerce Clause." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336.

This Court continues to find that analysis persuasive. Allowing the states to give preferential tax treatment as between competing interstate businesses based upon their performance of certain business operations in state would clearly balkanize, and thus devastate, the national market that the Commerce Clause is meant to protect. Allowing the states to give preferential tax treatment as between competing interstate businesses ostensibly based upon differences in business operations or technologies while actually based upon whether business activities are performed in state or out of state would have the same devastating effect on the national market. This Court will not voluntarily

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[2] In the current case, providing a favorable tax treatment based upon such local activities tends to favor the economic interests of local workers, local contractors, and local governments (who collect franchise fees from cable companies) while burdening the economic interests of non-local workers and non-local governments (including the federal government which, according to *Treesh,* collects a fee from satellite operators for the use of the air waves).

[3] Accordingly, this Court cannot, consistent with its oath to uphold the U.S. Constitution, construe binding case precedents as allowing such discrimination so long as other reasonable interpretations exist. Rather, this Court must construe those precedents in the light of the purposes of the dormant Commerce Clause, which purposes, this Court can presume, are precisely the purposes that the binding precedents were intended to serve.

participate in dismantling the Commerce Clause of the United States Constitution.

The alternative suggested by Defendant, that there can be no discrimination against interstate commerce if the differently treated industries are both interstate industries, is a simplistic formalism that fails to serve the important constitutional purposes of the Dormant Commerce Clause. This Court discussed above, at some length, the inappropriateness of relying upon such simple formalisms in dormant Commerce Clause cases. The Supreme Court has held that the purposes of the dormant Commerce Clause require an investigation into whether in-state economic interests have been benefited and out-of-state economic interests have been burdened.

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

*Granholm v. Heald* (2005), 125 S.Ct. 1885, 544 U.S. 460. All of the in-state and out-of-state economic interests must be considered. While it may be the case that the cable television and direct broadcast satellite television industries are both interstate industries, it does not follow that differential tax treatment of those two industries does not affect local economic interests and out-of-state economic interests differently.

Defendant's expert testifies,

> The technical design of cable TV systems leads to networks that are local. Program signals are delivered to the local collection point called the head end, where they are redistributed to subscribers within the local area.... DBS system designs, on the other hand, are national or regional but not local.

(Krauss Aff. Paragraphs 23-24). Indeed, Defendant admits that the difference between the technologies utilized by the cable and DBS industries "results in cable having local networks, while DBS has a national system." (Motion at P. 11). The individual human beings who maintain the two types of systems have an economic interest in continuing their employment. The communities in which they live have economic interests in retaining or expanding the need for such employment so that other residents would have the option of becoming so employed.

The individual human beings who do the work maintaining the local cable networks that serve Ohio would tend to live in Ohio. As a result, the economic interests of those individual human beings in retaining their employment are predominantly in-state economic interests. Ohio communities would have an economic interest in preserving or expanding the employment opportunities for its residents with regard to maintaining the local cable networks that serve Ohio. Since the communities having this economic interest are predominantly Ohio communities, that economic interest would be a predominantly in-state economic interest.

The individual human beings who maintain the distribution equipment used by direct broadcast satellite companies (i.e., the satellite uplink facilities) would tend to live in the states where that equipment is located. While the local cable networks serving Ohio residents generally must be located in Ohio, the satellite uplink facilities that serve Ohio residents can be (and in fact are) located out of state. It is true that there is a small chance that a satellite uplink facility might come to be located in Ohio. However, since Ohio workers have a better chance for employment in the multi-channel broadcast industry if the cable companies continue to dominate the Ohio market in the multi-channel broadcast industry, and since out-of-state workers have a better chance of employment in the multi-channel broadcast industry if the direct broadcast satellite companies increase their market share in the Ohio market of the multi-channel broadcast industry, in-state economic interests are linked with the cable industry while out-of-state economic interests are linked with the direct broadcast satellite industry. Accordingly, the economic interests of human individuals living outside of Ohio, and their non-Ohio communities, are generally served by allowing direct broadcast satellite television companies unimpeded access to Ohio markets. Thus, out-of-state economic interests are burdened by a tax that burdens the ability of direct broadcast satellite television providers to compete in the Ohio multichannel television market. As discussed above, the Supreme Court has prohibited discrimination against human individuals who would provide their labor in other states.

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state *or the labor of its residents*. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. *W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 193-194, quoting Justice Cardozo writing for a unanimous Court in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 79 L. Ed. 1032, 55 S. Ct. 497 (1935).

Given (1) the link between in-state economic interests and the use of local cable networks as a means of distributing multichannel television signals, and (2) the link between out-of-state economic interests and the use of direct broadcast from satellites to subscriber's receiving equipment as a means for delivering multichannel television signals, differential tax treatment that favors the use of local cable networks over the use of direct broadcast from satellites to the subscriber's receiving equipment will necessarily benefit in-state economic interests while burdening out-of-state economic interests. This is true regardless of whether or not cable television is an interstate industry. Accordingly, this Court stands by its decision to grant summary judgment to

Plaintiff on the issue of whether the differential tax treatment in this case, in practical effect, benefits in-state economic interests and burdens out-of-state economic interests.

## VI
## Introduction to The Remaining Issues

This Court has previously granted summary judgment on the question of whether the Ohio sales and use tax statutes at issue in this case involved "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." In their practical effect, they do. In a fairly recent case, *Granholm v. Heald* (2005), 125 S.Ct. 1885, 544 U.S. 460, the United States Supreme Court stated,

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

Thus, the remaining issues before this Court concern whether this case falls within those "narrowest circumstances." What are those "narrowest circumstances?" First, a statute will not be found to be discriminatory based on differential treatment of two businesses or groups of businesses if they are not "similarly situated." *General Motors Corp. v. Tracy* (1997), 519 U.S. 278. Second, even a discriminatory statute will not be found to violate the Commerce Clause if, subject to strict scrutiny, the State can satisfy its burden of justifying the statute "both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake." *Hughs v. Oklahoma* (1979), 441 U.S. 322.

This Court shall first focus on the issue of whether the cable television industry and the direct broadcast satellite television industry are "similarly situated" for purposes of this case. For reasons that follow, this Court grants summary judgment on this issue and finds that reasonable minds, construing the evidence in favor of defendants, can reach but one conclusion that the two industries are similarly situated. After deciding that issue, this Court will then consider the second issue of whether, subject to strict scrutiny, the State has satisfied its burden of showing that the differential tax treatment of the cable and satellite industries is justified "both in terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake."

## VII
## Entities that Compete with Each Other in the same Market are Generally, but not always, "Similarly Situated"

Differential treatment of in-state and out-of-state economic interests is "discrimination" for purposes of the Commerce Clause only if the differently treated entities are "similarly situated." As the United States Supreme Court said in *General Motors Corp. v. Tracy* (1997), 519 U.S. 278,

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. ... this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause...

The Court went on to explain that the differently treated entities cannot be "similarly situated" unless they compete in the same market. If they do not compete in the same market,

> eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.... Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate

commerce or undue burden upon it, to which the dormant Commerce Clause may apply.

Thus, differentially treated entities are not "similarly situated" unless they compete in the same market. In the current case, it is undisputed that cable operators and direct broadcast satellite providers compete in the multi-channel television broadcast market.

Plaintiffs argue that the cable television industry and direct broadcast satellite television industry are "similarly situated" since it is undisputed that they compete with one another in the same market. However, the case law that Plaintiffs rely upon does not state that actual or prospective competition by itself entails that the competitors are similarly situated. Rather, the cases merely indicate that entities are *not* similarly situated if they do not actually or prospectively compete. The above quoted passage, for example, only says, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference." This leaves open the possibility that two competing entities might not be "similarly situated."

Indeed, there have been cases in which certain differentially treated entities have been explicitly or implicitly found to be not similarly situated in spite of the fact that they did compete or would have except for the law that was being challenged. Those cases include *Exxon v Governor of Maryland* (1978), 437 U.S. 117, *Lenscrafters v. Robinson* (2005, 6th Cir.), 403 F.3d 798, *General Motors Corp. v. Tracy* (1997), 519 U.S. 278, *Ford Motor Company v. Texas DOT* (5th Cir., 2001), 264 F.3d 493, *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, (1989), 490 U.S. 66, 78, *Brown & Williamson Tobacco Corp. v. Pataki* (2d Cir. 2003), 320 F.3d 200, 215-216, and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786.

While these precedents require the conclusion that competition between two groups of businesses is not the only factor relevant to determining whether the two groups of businesses are "similarly situated", it is nevertheless also true that the existence of competition between the two kinds of businesses is a very important factor. Differential tax treatment of *competing* businesses that favors in-state economic interests and burdens out-of-state economic interests harms interstate commerce in precisely the manner that the dormant Commerce Clause was meant to prevent. Thus, when two businesses are in competition with each other, that alone constitutes good reason for finding them to be "similarly situated" unless there is some overriding reason that justifies treating them differently.

## VIII
## Entities can be "Similarly Situated" even though there are Differences in the Nature of their Businesses and/or Methods of Operation

Defendant argues that direct broadcast satellite services and cable television services are not similarly situated because they use different methods to deliver television programming and they are subject to different regulatory schemes. Defendant argues that the Court should find that they are not "similarly situated" because of these differences between those industries which might be called "differences in the nature of their businesses" or "differences in their methods of operation." The argument is not persuasive.

The mere fact that there are some differences between businesses does not logically entail that they are not "similarly situated." "Similar" does not necessarily mean "identical." Businesses can be different but still be "similar" so long as the differences are not so significant in the particular context so as to justify denying that they are similar. The current context is that of the dormant Commerce Clause. Accordingly, the policies that control the interpretation of the scope of the dormant Commerce Clause should control the determination of whether two groups of businesses are "similarly situated" for purposes of the Commerce Clause. Thus, the mere fact that satellite and cable companies use some different methods of operation is not adequate to establish that they are not "similarly situated." Rather, such a conclusion would follow only if the differences are adequately significant in relation to the policies that control Commerce Clause analysis.

As discussed at length above, the appropriate method, in light of *United Haulers,* would be to ask whether differences in the nature of such competing businesses or their methods of operation are of a sort that would eliminate the suspicion that a State or local government's differential treatment of the competing businesses that favors in-state economic interests and burdens out-of-state economic interests is most likely motivated by simple economic protectionism.

*Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.* (1992), 505 U.S. 71, and *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury* (1989), 490 U.S. 66, *Directv, Inc. v. Treesh* (6th Cir., 2007), 487 F.3d 471, and *Exxon Corp. v. Governor of Maryland (1978), 437 U.S. 117,* do not require a different result. Except for certain unpersuasive *dicta* in *Treesh*, They are all consistent with the view that competing businesses can be "similarly situated" in spite of the fact that there are differences in the nature of their businesses and that they utilize different methods of operation. In *Kraft,* the Court said

> ...the Commerce Clause is not violated when the differential tax treatment of two categories of companies "results *solely* from differences between the nature of their businesses, not from the location of their activities."

(Emphasis added). *Kraft Gen. Foods* at 78, quoting *Amerada Hess Corp.*at 78. The word "solely" cannot properly be ignored since the United States Supreme Court included that word in its statement of the law. The use of that word shows that the U.S. Supreme Court was being careful to make sure that its pronouncement did not eliminate claims (like the current Commerce Clause claim) wherein differences "in the nature of the businesses" are linked to differences in "the location of their activities" in such a way that differential tax treatment based upon differences in the nature of the businesses has the "practical effect" of (and may even have been intended to have the effect of) favoring in-state economic interests and burdening out-of-state economic interests.

Thus, *Kraft Foods* is consistent with the view of this Court that a violation of the commerce clause may exist in spite of differences in the nature of the competing businesses or their methods of operation *if* those differences are linked to the location of their activities.

Under the Ohio statute at issue in this case, the imposition of the sales and use taxes depends upon a satellite company's failure to use "ground receiving or distribution equipment, [other than] the subscriber's receiving equipment or equipment used in the uplink process to the satellite...." R.C. 5739.01(XX). The practical effect of this way of defining what is taxable is that the satellite broadcaster can avoid the imposition of the tax only by using *local* ground receiving or distribution equipment other than the subscriber's equipment and the broadcaster's satellite uplink equipment. In practice, the *primary* alternative method for operating multi-channel broadcast services that does not fall within the definition of taxable "satellite broadcast services" (i.e., the method used by cable television services) involves the use of *local* distribution or receiving equipment other than the subscriber's and the uplink equipment. Cable companies are able to avoid the Ohio tax because of their use of *local* cable networks. Thus, the statute's different effects on the Satellite Companies and Cable Companies has everything to do with the geographic location of one of their economic activities. Specifically, the tax singles out those multi-channel television service providers that use a technology that allows them to avoid the *local* activity of using ground receiving or distribution equipment other than the subscriber's equipment or equipment used in the uplink process to the satellite.

In *Amerada Hess,* a connection between location of certain business activities, on the one hand, and certain differences in the nature of the competing businesses, on the other, did not result in a finding of discrimination even though those differences in the nature of the businesses were the basis of the differential tax treatment. However, that was because, under the special facts of the case, differential treatment of businesses based on differences in the nature of the businesses that were linked to location of certain business activities did not put any pressure on interstate businesses to conduct more activity in state. In *Amerada Hess,* the Court said,

> Nor does the add-back provision exert a pressure on an interstate business to conduct more of its activities in New Jersey. Denying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for oil producers to move their oil-producing activities to New Jersey. Given

> these attributes of the add-back provision, it is difficult to see how it unconstitutionally discriminates against interstate commerce.

*Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, 490 U.S. 66, 77-78 (U.S. 1989). Unlike the add-back provision in *Amerada Hess*, the tax at issue in the current case does "exert a pressure on an inter-state business to conduct more of its activities in" Ohio. Satellite companies are given an "incentive" to install local receiving or distribution equipment other than the subscriber's equipment since doing so will avoid imposition of the tax. That might involve purchasing each subscriber's receiving dish or at least some part of it that would be adequate to constitute "ground receiving equipment [other than] the subscriber's receiving equipment" (maybe a screw or a wire or the front skin of the receiving dish or some other part essential to signal reception).

Even if the satellite companies do not respond by using more local equipment other than the subscriber's equipment, the less favorable competitive environment for companies that do not use the relevant sort of *local* ground receiving equipment as compared to those that do use such *local* equipment means there will be market "pressure" tending to cause interstate multichannel television providers in general to increase the relative portion of multichannel television services that are delivered over the relevant sort of local equipment. Since the provision of multichannel services is "an interstate business", the tax at issue here does "exert a pressure on an inter-state business to conduct more of its activities in" Ohio.

Therefore, unlike the add-back provision in *Amerada Hess*, the tax in the current case does "exert a pressure on an inter-state business to conduct more of its activities in" Ohio either by tending to cause satellite providers to use more local equipment, or by providing cable companies with a better competitive situation, and satellite companies a worse competitive situation. The above quote from *Amerada Hess* indicates that the existence of such pressure is significant.

The Court in *Amerada Hess* went on to say the following:

> Appellants nonetheless claim that the add-back provision, by denying a deduction for windfall profit tax payments, discriminates against oil producers who market their oil in favor of independent retailers who do not produce oil. But whatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. Appellants operate both in New Jersey and outside New Jersey. Similarly, nonproducing retailers may operate both in New Jersey and outside the State. Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities.... In this respect, we agree with the analysis of the New Jersey Supreme Court. 107 N. J., at 337-338, 526 A. 2d, at 1046.

*Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, (1989), 490 U.S. 66, 78. The court does not, itself, explain why it believes that,

> Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities

However, the Court said it agrees with the explanation given by the New Jersey Supreme Court in the same case. The New Jersey Supreme Court had said,

> Plaintiffs are denied a deduction because they produce crude oil and pay the [Windfall Profits Tax]. The fact that they are disallowed the deduction while non-oil-producing petroleum marketers are not affected is because non-oil-producing marketers do not pay the [Windfall Profits Tax]. Moreover, the nonproducing marketers did not benefit, as did plaintiffs, from the decontrol of crude oil prices, but had to purchase their crude oil at the higher decontrolled prices.

*Amerada Hess Corp. v. Director, Division of Taxation*, 107 N.J. 307, 338 (N.J. 1987). This explanation is based on the specific facts situation in *Amerada Hess*. Understood in terms of *United Haulers*, this explanation is adequate to eliminate the usual suspicion that differential treatment of businesses benefiting in-state economic interests, and burdening out-of-state economic interests, is motivated by economic protectionism. As will be shown below, there is no such similar reason for finding in the current case that the different effects of the Ohio tax on cable and satellite companies "results *solely* from differences between the nature of their businesses, not from the location of their activities." (Emphasis added). In the current case, the differential tax treatment of cable and satellite companies results, under the terms of the Ohio statute, from the satellite companies' failure to use certain *local* equipment. For reasons that will be explained below, the facts of this case do not eliminate the suspicion that the differential tax treatment was motivated by economic protectionism.

Accordingly, this Court finds that *Amerada Hess* is distinguishable from the current case and that the principles of law stated therein, when properly construed, support the notion that "differences in the nature of competing businesses", or "differences in their methods of operation", do not necessarily entail that the businesses are not "similarly situated" especially when those differences are linked to the local performance of certain business activities.

Defendant asks this Court to rely upon the following paragraph from *Treesh*:

> ...a protective tariff is so clearly problematic because its only possible purpose is to benefit in-state interests at the expense of out-of-state interests -- likewise an industry-specific tax and subsidy scheme. See Note: Functional Analysis, Subsidies, and the Dormant Commerce Clause, 110 Harv. L. Rev. 1537, 1552-54 (1997). Unlike a protective tariff, however, the purposes of Kentucky's 2005 Amendments are much more diffuse. While a purpose of the Amendments might have been to aid the cable industry rather than the satellite industry because the former has a larger in-state presence than the latter, there were clearly many

> other purposes including assessing some tax against a satellite industry that is rapidly growing, and simplifying the current morass of local taxes and franchise fees that cable companies face. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) (upholding a state policy clearly motivated in part by a desire to improve the state's environment, despite any concurrent protectionist motivations). The satellite companies' opinion of the 2005 Amendments might be very different had they been subjected to the tangled regime of local taxation and franchise fees, as they certainly could have been absent the special exemption granted to them by the Telecommunications Act. 47 U.S.C. § 152, historical and statutory notes. Beyond that, because satellite and cable television differ significantly in their means of operation, Kentucky may have wished to remove any barriers it had put in place to the continued viability of cable for reasons entirely unrelated to geography -- for example, that cable providers often provide internet access as well, that cable providers are more likely to provide public access channels, etc. None of these reasons are explicitly given by Kentucky in support of the Amendments, but the possibility that they in some way motivated the Kentucky legislature's actions is the reason that the Supreme Court has held that the dormant Commerce Clause is intended to protect interstate commerce, and not particular firms engaged in interstate commerce, or the modes of operation used by those firms. *Exxon Corp.*, 437 U.S. at 126-28; see also *Amerada Hess Corp. v. Director, Div. of Taxation, N. J. Dep't of the Treasury*, 490 U.S. 66, 78, 109 S. Ct. 1617, 104 L. Ed. 2d 58 (1989) (holding that the differential tax treatment of "two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities" does not violate the dormant Commerce Clause.).

*Directv, Inc. v. Treesh* (6th Cir. 2007), 487 F.3d 471, 481. This entire paragraph is *dicta*. It is also unpersuasive.

*Black's Law Dictionary*, Fifth Edition, defines *dicta* as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand...." Statements in an opinion that are neither necessary nor essential to the result are *dicta*. *Cent. Green Co. v. United States* (2001), 531 U.S. 425, 431 ("the sentence was unquestionably dictum because it was not essential to our disposition of any of the issues contested in *James.*"). *Tyler v. Cain* (2001), 533 U.S. 656, 675 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

In *Treesh*, the Court determined that the important question was whether the tax and subsidy scheme at issue in that case was the "equivalent" of a protective tariff. In the paragraph before the paragraph quoted above, the Court said,

> The satellite companies' allegations are insufficient to demonstrate that the 2005 Amendments create the functional equivalent of a protective tariff. With the Amendments, the state has simply prevented localities from mulcting cable companies through franchise fees, and substituted a uniform state taxation scheme. It has not otherwise altered any competitive balance among in and out-of-state competitors.

*Directv, Inc. v. Treesh* (6th Cir. 2007), 487 F.3d 471. Thus, with this paragraph, the Court had decided the issue of whether the challenged tax and subsidy scheme was the equivalent of a protective tariff.[4] Consequently, the next paragraph, the paragraph which defendant relies upon, was neither essential nor necessary to the determination of the case since it merely purports to identify a second difference between the challenged tax and subsidy scheme and a protective tariff. Since it was not essential or necessary to the determination of the case, that paragraph was *dicta*.

[4] As will be explained below, the principle of law relied upon in *Treesh* is not applicable to the current case. *Treesh* involved a tax and subsidy scheme whereas the current case involves differential taxation. The new law created in *Treesh*, that the key question is whether a tax and subsidy scheme is the "equivalent" of a protective tariff, is only applicable where a subsidy is involved. That principle has never been applied to differential taxation. Arguably, the new law created by *Treesh* only applies where the evidence establishes that the purpose of the tax and subsidy scheme is to prevent a local government from "mulcting" certain private companies.

Not only is the paragraph *dicta*, it is unpersuasive *dicta*. It begins with the assertion "a protective tariff is so clearly problematic because its only possible purpose is to benefit in-state interests at the expense of out-of-state interests." This is an incorrect description of why a protective tariff is problematic under the dormant Commerce Clause. The dormant Commerce Clause does not concern itself with differential treatment of in-state and out-of-state interests in general, but rather, it is concerned with laws that benefit in-state *economic* interests and burden out-of-state *economic* interests. *Granholm v. Heald* (2005), 125 S.Ct. 1885, 544 U.S. 460.

What if the Court meant to say that "a protective tariff is so clearly problematic because its only possible purpose is to benefit in-state [economic] interests at the expense of out-of-state [economic] interests?" The statement is also false. There is no reason why a protective tariff cannot have other purposes in addition to the intent to benefit in-state economic interests at the expense of out-of-state economic interests. A protective tariff designed to foster a certain industry inside the state might be motivated in part by a desire to promote some non-economic purpose or purposes that are served by the in-state industry.

For example, imagine that the legislature has a particular fondness for its in-state Little League baseball teams. Imagine that the local milk industry had a history of sponsoring local Little League baseball teams whenever the local industry had a good year. Imagine that the local milk industry is also governed by certain health regulations that require a special pasteurization process not used or required in other states.

If the legislature enacted a tariff on out-of-state milk in order to (1) expand the in-state milk industry, (2) promote health by ensuring that more of the milk that the public drinks in the state will have undergone the special pasteurization process, and (3) ensure that the local milk industry will sponsor many more Little League baseball teams in the state, that tariff would be a "protective" tariff, and it would also have additional purposes beyond benefiting in-state economic interests at the expense of out-of-state economic interests. Accordingly, *Treesh* is incorrect when it says in *dicta* that the "only possible purpose [of a protective tariff] is to benefit in-state [economic] interests at the expense of out-of-state [economic] interests."

With the cite to *Hughes v. Alexandria Scrap Corp.* (1976), 426 U.S. 794, *Treesh* might be intending to suggest that state legislation with a protectionist motive does not violate the dormant Commerce Clause if it is also motivated by a legitimate non-economic state interest. *Treesh* describes *Hughes* as "upholding a state policy clearly motivated in part by a desire to improve the state's environment, despite any concurrent protectionist motivations."

*Hughes* does not stand for the proposition that state legislation with a protectionist motive does not violate the dormant Commerce Clause if it is also motivated by a legitimate non-economic state interest. The Supreme Court has described the decision in *Hughes* and other "market participant" cases as follows:

> Those cases hold that, where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator. Since "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants," "evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the [dormant] Commerce Clause." *White, supra*, at 207-208, n. 3. The "market participant" exception to judicially created dormant-Commerce-Clause restrictions makes sense because the evil addressed by those restrictions -- the prospect that States will use custom duties,

> exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens, see *Hughes, supra*, at 808 -- is entirely absent where the States are buying and selling in the market.

*College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 685 (U.S. 1999). Thus, the result in *Hughes* was based upon a determination that the dormant Commerce Clause does not apply to state and local governments when acting as "market participants." *Hughes* has no relevance to the question of whether a statute that is motivated by a mixture of protectionist and legitimate non-economic motives violates the dormant Commerce Clause.

In fact, it is well established that a state does not necessarily avoid the requirements of the dormant Commerce Clause merely by having legitimate non-economic interests that are served by the challenged law. The Supreme Court has said, "When legislating in areas of legitimate local concern, ... States are nonetheless limited by the Commerce Clause." *Minn. v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 471. The Supreme Court has also said,

> ... in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause - where local and national powers are concurrent - the Court in the absence of congressional guidance is called upon to make "delicate adjustment of the conflicting state and federal claims," *H. P. Hood & Sons, Inc. v. Du Mond, supra*, at 553 (Black, J., dissenting), thereby attempting "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce." *Freeman v. Hewit, supra*, at 253. In undertaking this task the Court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with a problem of balance:

*Great Atlantic & Pacific Tea Co. v. Cottrell* (1976), 424 U.S. 366, 371. Consequently, to the extent that the *dicta* in *Treesh* suggests that state legislation with a protectionist motive does not violate the dormant Commerce Clause if it is also motivated by a legitimate non-economic state interest, that *dicta* in *Treesh* is not persuasive.

The last half of the above paragraph from *Treesh* suggests an interpretation of *Exxon v Governor of Maryland* (1978), 437 U.S. 117, and *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, (1989), pursuant to which the dormant Commerce Clause would not apply to differential treatment of competing businesses if it could be said that there are "differences between the nature of their businesses" or in their "modes of operation." As indicated above, the entire paragraph is *dicta* including the suggestion that *Exxon* and *Amerada Hess* should be interpreted in this way. This *dicta* regarding the proper interpretation of *Exxon* and *Amerada Hess* is unpersuasive.

*Treesh* characterizes the holding in *Amerada Hess* as follows:

> ...the differential tax treatment of "two categories of companies result[ing] *solely* from differences between the nature of their businesses, [and] not from the location of their activities" does not violate the dormant Commerce Clause.

(Emphasis added). The word "solely" cannot properly be ignored. When that word is not ignored, it is clear that the entire proposition does not apply when the differences between the nature of two categories of companies are linked to the location of their activities. The differences in the nature of the cable television industry and the direct broadcast satellite television industry are linked to the location of their activities. *Treesh* says, "a purpose of the Amendments might have been to aid the cable industry rather than the satellite industry because the former has a larger in-state presence than the latter." The obvious reason why the cable industry has a larger in-state presence is that the cable industry necessarily depends on local cable systems to perform a function that can be performed non-locally by the methods employed by the direct broadcast satellite industry. Thus, the holding in *Amerada Hess* does not apply to the differential tax treatment of the cable and satellite industries because the "differences between the nature of their businesses" are linked to the location of their activities.

*Treesh* cites pages 126 through 128 of *Exxon* as the basis for its interpretation of *Exxon*. The relevant passages from *Exxon* do not require the interpretation imposed on *Exxon* by *Treesh*. Rather, they permit an interpretation of *Exxon* which is much more consistent with the purposes of the Commerce Clause and the case law interpreting that clause.

The first such passage in *Exxon* that *Treesh* might be relying upon states,

> The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

*Exxon* at 126. While it is true that this fact, "by itself", does not establish a claim of discrimination against interstate commerce, it is also true that this fact in combination with certain other facts can establish a claim of discrimination against interstate commerce.

The next passage that *Treesh* might be relying upon states,

> The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an

> otherwise valid regulation causes some business to shift from one interstate supplier to another.

*Exxon* at 127. While this statement is true, one ought not ignore the word "simply" since the Supreme Court must have had a reason for inserting it into the statement. The reason is that a regulation will not be "otherwise valid" if certain other facts are true in addition to the fact that the "regulation causes some business to shift from one interstate supplier to another." Nothing in *Exxon* suggests that a regulation which "causes some business to shift from one interstate supplier to another" is necessarily an "otherwise valid regulation." To the contrary, one must assume that well-established Commerce Clause law applies. As stated by the Supreme Court in *Granholm v. Heald* (2005), 544 U.S. 460,

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

Consequently, a regulation that "causes some business to shift from one interstate supplier to another" may be invalid under the dormant Commerce Clause if the regulation involves "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

The third passage that *Treesh* might be relying upon states,

> The crux of appellants' claim is that, regardless of whether the State has interfered with the movement of goods in interstate commerce, it has interfered "with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806. Appellants then claim that the statute "will surely change the market structure by weakening the independent refiners . . . ." We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.

*Exxon* at 127. One could read this passage as suggesting that state law that treats different companies differently based on their methods of operation does not violate the commerce clause even if the law involves "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." Such an interpretation would generally be inconsistent with other Supreme Court precedents such as *Granholm* which, to repeat it one more time, held

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

Such an interpretation of *Exxon* would also tend to defeat the purpose of the dormant Commerce Clause, which is to prevent economic protectionism.

A far better interpretation of this passage from *Exxon* would be that it is not the *purpose* of the Commerce Clause to protect against differential treatment of businesses based on their use of different methods of operation. In other words, the Commerce Clause does not protect against differential treatment of businesses based on their use of different methods of operation *except* to the extent that such differential treatment based on their use of methods of operation results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later."

The second interpretation is preferable because it is consistent with Supreme Court precedents like *Granholm*, and because it is consistent with the purpose of the dormant Commerce Clause. It does not construe *Exxon* as turning a blind eye on economic protectionism whenever such protectionism uses differential treatment of businesses based on their methods of operation as a way to benefit in-state economic interests and burden out-of-state economic interests.

The fourth and final passage from *Exxon* that *Treesh* may be relying upon says,

> As indicated by the Court in *Hughes*, the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

*Exxon* at 127-128. Later Supreme Court precedent explained that protection of interstate markets can entail protection of particular interstate firms when a statute "discriminates among affected business entities according to the extent of their contacts with the local economy."

> We disagree, however, with the suggestion that *Exxon* should be treated as controlling precedent for this case. Section 659.141 (1) engages in an additional form of discrimination that is highly significant for purposes of Commerce Clause analysis. Under the Florida statute, discrimination against affected business organizations is not evenhanded because only banks, bank holding companies, and trust companies with principal operations outside Florida are prohibited from operating investment subsidiaries or giving investment advice within the State. It follows that § 659.141 (1) discriminates among affected business entities according to the extent of their contacts with the local economy. The absence of a similar discrimination between interstate and local producer-refiners was a most critical factor in *Exxon*. Both on its face and in actual effect, § 659.141 (1) thus displays a local favoritism or protectionism that significantly alters its Commerce Clause status. See *Philadelphia v. New Jersey*, 437 U.S., at 626-627; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S., at 527.

*Lewis v. Bt Inv. Managers* (1980), 447 U.S. 27, 40-42.

In conclusion, entities can be "similarly situated" even though there are differences in the nature of their businesses and/or the methods of their operation. Neither Exxon, Kraft General Foods, nor Amerada Hess require a different result. The contrary *dicta* in *Treesh* is unpersuasive.

Differential tax treatment of *competing* businesses that favors in-state economic interests and burdens out-of-state economic interests harms interstate commerce in precisely the manner that the Commerce Clause was meant to prevent. Thus, when two businesses are in competition with each other, that alone constitutes good reason for finding them to be "similarly situated" unless there is some overriding reason that justifies treating them differently. The mere fact that a difference between two competing businesses can be labeled as a "difference in the nature of the businesses" or a "difference in their methods of operation" is not sufficient by itself to justify a determination that the businesses are not "similarly situated." "Differences in the nature of the businesses" or "differences in the methods of operation" are adequate to justify a determination that competing businesses are not "similarly situated" only if the differences are such that consideration of those differences would eliminate the suspicion, grounded in the Constitution and its history, that a state or local government's differential treatment of the competing businesses that favors in-state economic interests and burdens out-of-state economic interests is most likely motivated by simple economic protectionism. Many kinds of differences are not adequate to eliminate that suspicion and, therefore, do not justify a finding that the businesses are not "similarly situated." So, for example, competing businesses were treated as being "similarly situated" despite differences in the nature of the businesses and methods of operation in *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263.

## IX
## The Appropriate Method for Determining Whether the Cable Television Industry and the Direct Broadcast Satellite Television Industry are "Similarly Situated" for Purposes of this Case

How is a court to determine whether differences in the nature of the competing entities, or other differences in their situations, or methods of operation, are adequate for a determination that they are not "similarly situated?" In Part III.D above, this Court reached some conclusions regarding the proper method for determining whether competing entities are "similarly situated." Given that this Court has just concluded a long digression to discuss issues raised by Defendant's de facto motion for reconsideration, it would seem useful to repeat those conclusions here.

> If, upon a preponderance of the evidence, the differences between differentially treated competing entities, and the differences between their situations, are not adequate to eliminate the special constitutionally appropriate suspicion that economic protectionism is behind the differential treatment, then a court should find that the competing entities are "similarly situated."

Furthermore,

> A court should begin with a "healthy" suspicion that state and local government action favoring in-state economic interests and burdening out-of-state economic interests is most likely motivated by economic protectionism. Such a suspicion is appropriate since, as explained at length above, that suspicion, rooted in the experience of the Framers of the Constitution, is the very reason for the existence of the negative Commerce Clause and a primary reason why the Framers chose to write a new Constitution to replace the Articles of Confederation. Thus, that suspicion, as one of the fundamental bases to the United States Constitution, cannot be appropriately eliminated unless, in spite of the constitutionally appropriate assumption that state and local governments are typically inclined to engage in economic protectionism, it is clear from the facts of the particular case that the state or local government was not motivated by economic protectionism. Since the issue of whether that appropriate suspicion has been eliminated in a particular case pertains to the issue of whether the differentially treated entities are "similarly situated", which in turn pertains to the

> issue of whether there has been discrimination, the burden of persuasion as to whether or not the appropriate suspicion has been eliminated rests upon the plaintiff.

This Court explained the reasons why an inquiry into whether the appropriate suspicion has been eliminated should be the overarching inquiry for purposes of determining whether competing business entities are "similarly situated."

> It makes sense that the question as to whether the constitutionally appropriate suspicion of economic protectionism has been eliminated should be the overarching inquiry for purposes of determining whether competing entities are "similarly situated." As indicated by *United Haulers*, that constitutionally grounded suspicion is the only reason why the burden of proof ever shifts to state and local governments to show that their actions are justified. In the absence of such a suspicion, the presumption would be that the state or local government would have been motivated by a desire to properly balance national interests with state and local interests, and the only question would be whether it had struck a proper balance or failed to appreciate the significance of the effects of its action on interstate commerce.

What are the various factors that should be considered in determining whether the appropriate suspicion of economic protectionism has been eliminated in a particular case? To answer that question, one can review the various cases in which courts have found, either implicitly or explicitly, that differentially treated competing entities are not "similarly situated." As indicated earlier, that would include *Exxon v Governor of Maryland* (1978), 437 U.S. 117, *Lenscrafters v. Robinson* (2005, 6th Cir.), 403 F.3d 798, *General Motors Corp. v. Tracy* (1997), 519 U.S. 278, *Ford Motor Company v. Texas DOT* (5th Cir., 2001), 264 F.3d 493, *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, (1989), 490 U.S. 66, 78, *Brown & Williamson Tobacco Corp. v. Pataki* (2d Cir. 2003), 320 F.3d 200, 215-216, and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786.

In *United Haulers*, the Court indicated that differential treatment of local government and out-of-state business that serves the legitimate non-economic interest recycling waste does not incur the same suspicion as differential treatment of local and out-of-state businesses that would serve the same interests because:

1) "Unlike private enterprise, Government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."

2) "The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 127 S. Ct. 1786, 1795. Thus, two factors that bear upon the suspiciousness of differential treatment of competing entities are (1) whether the favored entity is vested with a special responsibility for protecting health, safety, or welfare and (2) whether the state or local government's differential treatment of the competing entities falls within the scope of their traditional police powers "to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Later in the same decision, the Court relied upon other factors that tend to reduce the suspiciousness of the flow control ordinances at issue.

3) Waste disposal is both typically and traditionally a local government function. *Id.*

4) "Congress itself has recognized local government's vital role in waste management, making clear that 'collection and disposal of solid waste should continue to be primarily the function of state, regional, and local agencies.'" *Id.*

5) "... the most palpable harm imposed by the ordinance -- more expensive trash removal -- is likely to fall upon the very people who voted for the laws" rather than upon "interests outside the state." *Id.*

Thus, other factors that effect the suspiciousness of differential treatment of in-State and out-of-state economic interests include (1) whether the favored entity has typically and/or traditionally been allowed a similar degree of monopoly control over the function, (2) whether Congress has indicated its endorsement of the preference for the favored entities, and (3) whether the most palpable harm imposed by the differential treatment of competing entities "'is likely to fall upon the very people who voted for the laws' rather than upon 'interests outside the state'" so that it is unlikely that the motive for the differential treatment was an economic motive such as economic protectionism.

*General Motors Corp. v. Tracy* (1997), 519 U.S. 278, relies upon a similar set of factors when finding that the local regulated natural gas monopolies and the natural gas distributors were not "similarly situated."

*Tracy* utilizes a method of analysis that applies when the entities being considered provide different products. *Tracy* indicates that products that are physically the same are nevertheless different when one of the entities supplies the product to purchasers subject to regulations protecting the purchaser while the other entity is not subject to those protective regulations. When the products are different, the entities might not compete at all, or they may compete in some markets (or market segments) and not others, or they might compete in all markets and market segments that they participate in.

*Tracy* says that if they do not compete at all, then they are not "similarly situated." *Tracy* at 300.

*Tracy* does not answer the question of what happens if the competing entities compete in all of the markets in which they each participate. In light of *United Haulers*, it would appear that the appropriate question to ask is whether the facts of the case are such that the constitutionally appropriate suspicion of economic protectionism has been eliminated.

*Tracy* was concerned with what to do when the entities at issue compete in some markets but not in others. *Tracy* indicated that a court should ask whether "controlling significance" should be given to the market(s) in which they compete, or the market(s) in which they do not compete. The Court determined that the local natural gas regulated monopolies and the natural gas marketer's at issue in that case did not compete in the market that should be accorded controlling significance, the market for residential users of natural gas. Based on that finding, the Court held that they were not "similarly situated." Accordingly, *Tracy* stands for the proposition that entities are not "similarly situated" for Commerce Clause purposes when they do not compete in the market that should be accorded controlling significance.

*Tracy* does not answer the question as to what happens if they do compete in the market that should be accorded controlling significance. In light of *United Haulers,* it would appear that the appropriate question to ask is whether the facts of the case are such that the constitutionally appropriate suspicion of economic protectionism has been eliminated.

When asking which market should be accorded controlling significance, *Tracy* relied upon most of the same factors as were relevant to the analysis in *United Haulers.* The Court noted that the regulations that regulate local natural gas monopolies (which include price controls, universal residential service, and continuity of service) impose a special responsibility on those local gas monopolies to protect the health and safety of their customers that was not shared by the natural gas distributors. *Tracy* at 294-298. The Court indicated that the tax scheme favoring the residential market served by the local natural gas monopolies promotes health and safety. *Tracy* at 306. The Court also indicated that similar regulation imposing a special responsibility on local gas monopolies, and in turn favoring them in the marketplace, was traditional and widespread through every state in the union. *Tracy* at 304. Finally, the Court indicated that Congress had endorsed that practice. *Tracy* at 304 and 309.

The similarity of the factors used to determine both which market should be given controlling significance, and whether two differentially treated competing entities that provide the same product to the same markets are similarly situated, suggests that these two issues may in fact depend upon the resolution of one and the same issue: whether the facts of a case are such that the typically appropriate suspicion that the preferential treatment of in-state economic interests is motivated by economic protectionism. Consideration of the policies and basic principles involved in dormant Commerce Clause cases suggest that the same sort of inquiry should be employed.

The Dormant Commerce Clause "creates an area of trade free from interference by the States," *Am. Trucking Assn.'s v. Mich. PSC,* (2005), 125 S.Ct. 2419, quoting *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318, 328, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977). The Dormant Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. *Reeves, Inc. v. Stake* (1980), 447 U.S. 429, 436-437. Since the purpose of the dormant Commerce Clause is to protect competition throughout the national marketplace, that purpose is served only if controlling significance is given to markets and market segments in which there is competition. When state or local legislation would reduce competition in such markets or market segments, and doing so benefits in-State economic interests, and burdens out-of-state economic interests, the same justification as discussed above exists for suspecting that the state or local action is motivated by economic protectionism. Consequently, it is appropriate to employ the same sort of inquiry into whether that suspicion of economic protectionism has been eliminated.

When state or local legislation affects competition between certain entities in a particular market(s) or market segment(s), and does so by benefiting in-state economic interests and burdening out-of-state economic interests, and more specifically by protecting or expanding some market or market segment in which only the entities tied to in-state economic interests participate, then controlling significance should be accorded to the market in which there is competition between the entities unless the facts are such that they eliminate the suspicion that the choice to favor the non-competitive market was motivated by economic protectionism.

*Tracy* also applied a version of judicial restraint to the determination of which market should be accorded controlling significance. The Court noted the significance of the possible health and safety consequences in that case of failing to accord controlling significance to the residential market. It indicated that it felt incompetent to determine the likelihood of those severe consequences, and determined that the Court should be cautious and accord controlling significance to the residential market. *Tracy* at 306-309. It applied that judicial restraint with regard to refusing to engage in difficult economic predictions (1) involving "elaborate analysis of real-world economic effects", "that are virtually impossible for a court", and that "even expert economists" might find difficult when (2) dire consequences would result from an incorrect prediction. *Tracy* at 308-309.

In *Lenscrafters v. Robinson* (2005, 6th Cir.), 403 F.3d 798, the statute at issue prohibited optometrists from practicing their profession in conjunction with retail eyewear stores (as employees or lessees of space in the store). The Court specifically found that the statute did not have a discriminatory purpose, but did have a purpose relating to protecting the health and safety of the public.

> We think that the district court was correct in holding that no rational factfinder could conclude that the challenged provision was purposefully discriminatory.... The proponents of the legislation were seemingly concerned with optometrists who practiced in or in conjunction with any retail establishments, regardless of whether those establishments were owned by in-state or out-of-state interests. This nondiscriminatory purpose comports with the Tennessee Supreme Court's findings in Sundquist, where the court noted that to allow optometrists to practice in conjunction with businesses "would risk subordinating the standards of the optometry profession to the influence of commercial interests operated by lay business persons rather than by health care professionals." 33 S.W.3d at 778.

*Lenscrafters, Inc. v. Robinson* (6th Cir. 2005), 403 F.3d 798, 803. The Court went on to explicitly find that optometrists and retail eyewear stores are not "similarly situated" in spite of the fact that they compete in certain markets. The Court specifically noted that optometrists have a special responsibility not shared by optometric stores.

> In our view, dispensing optometrists and optical stores are not similarly situated for Commerce Clause purposes. It is instructive to note the obvious differences between dispensing optometrists and optical retail stores. As the district court properly noted, licensed optometrists and optometric stores such as Lenscrafters are not similarly situated because they provide different services to the market. Unlike retail optical stores, licensed optometrists are healthcare providers and, as such, have unique responsibilities and

> obligations to their patients that are not shared by optometric stores.

*Lenscrafters, Inc. v. Robinson* ($6^{th}$ Cir. 2005), 403 F.3d 798, 804. Although the Court did not specifically mention the fact, it is well known that state governments typically and traditionally regulate the healthcare professions and grant those professions monopolies over the practice of their professions. That common knowledge probably played a role in the Court's determination that "no rational factfinder could conclude that the challenged provision was purposefully discriminatory."

*United Haulers*, *Tracy*, and *Lenscrafters* have suggested seven factors that are relevant for determining whether disparately treated competing entities are "similarly situated." Those seven factors are:

(1) Whether the favored entity is vested with a special responsibility for protecting health, safety, or welfare

(2) Whether the state or local government's differential treatment of the competing entities falls within the scope of their traditional police powers "to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons",

(3) Whether the favored entity has typically and/or traditionally been allowed a similar degree of monopoly control over the function,

(4) Whether Congress has indicated its endorsement of the preference for the favored entities,

(5) Whether the differential treatment amounts to a determination by the people as to what functions belong to government as opposed to private enterprise, and

(6) Whether the most palpable harm imposed by the challenged law "'is likely to fall upon the very people who voted for the laws rather than upon 'interests outside the state'."

(7) When the possible consequences of failing to accord controlling significance to the market that has been protected by local or state legislation are dire, and the court is incapable of gauging the likelihood of those consequences, caution counsels in favor of according controlling significance to the market that was favored by the local or state legislation.

Each of the first six factors helps resolve the question of whether the typically appropriate suspicion of economic protectionism has been eliminated. With regard to items (1) and (2), a responsibility or purpose to promote health and safety is given a greater weight than other responsibilities or purposes. The U.S. Supreme Court has indicated that it "has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Raymond Motor Transp., Inc. v. Rice* (1978), 434 U.S. 429, 443-444.

With regard to item (4), evidence that Congress favors competition between two entities is particularly strong evidence that they are "similarly situated." In that case, both the dormant Commerce Clause, and the explicit positive terms of the Commerce Clause come together to argue in favor of protecting competition between the entities. The State or local legislative act of giving special preference to local economic interests becomes considerably more suspicious, especially if the purported legitimate state or local purposes would be generally shared by all states and localities so that such purposes would already have been considered in the congressional determination that competition between the two kinds of entities should be promoted.

In contrast, courts should not give weight to evidence that Congress allows preferential treatment for one of the competing entities, that would benefit in-state economic interests and burden out-of-state economic interests, unless that evidence is unambiguous.

> It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. See, e. g., *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). But because of the important role the

> Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

*Maine v. Taylor* (1986), 477 U.S. 131, 138-139.

*Exxon, Amerada Hess, Brown and Williamson*, and *Ford Motor Company* did not explicitly discuss which factors affect the analysis of whether competing entities are "similarly situated." Nevertheless, the sort of factors that were discussed in *United Haulers, Tracy*, and *Lenscrafters* are adequate to explain the results in those cases.

In *Brown and Williamson,* the Court assumed, without explanation, that direct shippers of tobacco products, and "brick-and-mortar" stores that sell tobacco products, are not "similarly situated" for purposes of a dormant Commerce Clause challenge to a state law requiring face-to-face sales of tobacco products enacted for purposes of assuring collection of taxes and avoiding sales to minors. The direct shippers who filed the lawsuit alleged that they could not economically participate in a market that required face-to-face sales, but could participate in a market not subject to that regulation. Accordingly, pursuant to *Tracy* there is a question as to whether the regulated or unregulated market should be given controlling significance. Sellers of tobacco products have typically and traditionally been assigned a special responsibility to avoid sales to minors and collect the higher sales taxes that often apply to those products. Congress endorsed the practice of placing special responsibilities on those who would sell tobacco products when it enacted laws requiring warnings on cigarette packages. Since, as the Court recognized in *Brown and Williamson*, the higher taxes on tobacco products are intended for health and safety reasons to reduce their use, both the requirement to avoid sales to minors and the requirement to collect higher sales taxes have significant health and safety purposes. While the Plaintiffs' expert testified that only 1.9% of minors purchasing tobacco products do so from direct shippers, the Court nevertheless found that given the pernicious effects of tobacco products, preventing those purchases still had a significant health and safety benefit. In any event, the Court thought that the health benefits from ensuring collection of the taxes from all purchasers are significant. Under those circumstances a court could easily conclude that these factors, taken together, eliminate the usually appropriate suspicion under the dormant Commerce Clause that state laws favoring in-state interests and burdening out-of-state interests are motivated by economic protectionism. The law at issue in *Brown and Williamson* appears to be an ordinary and typical attempt to reduce the use of tobacco products rather than a protectionist attempt to favor in-state economic interests over out-of-state economic interests.

*Exxon, Amerada Hess,* and *Ford Motor Company* all involved dormant Commerce Clause challenges to state statutes that prohibited producers of a product from participating in the state retail market for those products. *Exxon* and *Amerada Hess* were decided before *Tracy*. *Tracy* was the first case in which the Supreme Court recognized that whether there is discrimination depends in part upon whether the differentially treated entities are "similarly situated." Accordingly, *Exxon* and *Amerada Hess* do not include a finding that the producers and retail dealers involved in those cases were "similarly situated." Nevertheless, as pointed out by the Fifth Circuit Court in *Ford Motor Company*, the Court in *Exxon* employed a method of comparing the treatment of similarly situated entities to determine whether they were subject to differential treatment, and refusing to compare the treatment of entities that were not similarly situated.

> the Court's focus in *Exxon* was on the discriminatory effect between in-state and out-of-state dealers, not on discrimination between out-of-state producers and in-state dealers. *Exxon*, 437 U.S. at 125-26. Hence, in analyzing whether [a statute] is discriminatory under the dormant Commerce Clause we examine its effect on similarly situated business entities.

*Ford Motor Company* at 501. Treating the matter as having been settled by Exxon, Ford Motor Company found that producers who would compete in the retail market and retail dealers who are not producers are not "similarly situated" (at least for purposes of a challenge to a state law that prohibited the producers are competing in a state's retail market).

Thus it appears to be established law that, generally, producers who would compete in a retail market are not "similarly situated" with the retail dealers in that market who are not producers, at least for purposes of a dormant Commerce Clause challenge to a law that prohibits the producers from competing in the retail market. While the courts that established this law did not explain it, it would appear that it is best explained by the sort of judicial restraint exercised in *Tracy*.

The type of judicial restraint employed in *Tracy*, when applied to the vertical integration cases under consideration, results in a determination that producers and non-producers are not similarly situated for purposes of a dormant Commerce Clause analysis of a state or local law prohibiting producers from participating in the retail market. Producers and retail dealers prospectively compete in the retail market that would exist if producers were not excluded by law from the retail market. They do not actually compete in the actual retail market since the producers are excluded from that market by law. Accordingly, there is an issue, as in *Tracy,* regarding which market should be given controlling significance. A possible consequence of failing to accord controlling significance to the market from which producers have been excluded by state or local law, is the very evil that the dormant Commerce Clause is meant to avoid: the reduction of competition in the marketplace. Courts are likely to believe themselves incapable of judging the likely extent of the monopolization of markets that might occur if they give controlling significance to the unregulated market and as a consequence strike down the local or state law. Thus, the judicial restraint advised by *Tracy* would argue against a finding that producers and retail dealers are similarly situated for purposes of a dormant Commerce Clause challenge to a state or local law prohibiting producers of a product from participating in the retail market for that product.

Review of *United Haulers, Tracy, Lenscrafters, Exxon, Amerada Hess, Ford Motor Company,* and *Brown and Williamson* has revealed the appropriate method for determining whether certain entities are "similarly situated" for Commerce Clause purposes.

First, the court should consider whether the entities provide the same products. In determining whether the products are the same, the court considers not only whether they are physically different, but also whether they are provided by one entity subject to regulatory protections while being provided by the other entity without the same regulatory protection.

If the products are the same, then they are competing entities, and they are "similarly situated" unless the facts of the case eliminate the generally appropriate suspicion that any different treatment of those entities by state or local law, which benefits in state economic interests and burdens out-of-state economic interests, was motivated by economic protectionism.

If the products are different, then the court should ask whether they compete in all the same markets and market segments, whether they do not compete in any of the same markets and market segments, or whether they compete in some markets or markets segments but not in other markets and market segments.

If they do not compete in any of the same markets, then they are not similarly situated.

If they compete in all of the same markets and market segments, then they are "similarly situated" unless the facts of the case eliminate the generally appropriate suspicion that any different treatment of those entities by state or local law, which benefits in state economic interests and burdens out-of-state economic interests, was motivated by economic protectionism.

If they compete in some markets and market segments, but not in other markets and market segments, then the court should ask whether controlling significance should be given to a market (or market segment) in which they compete, or to a market (or market segment) in which they do not compete. Generally, controlling significance should be accorded to markets and market segments in which they compete. However, if state or local legislation acts to protect a market or market segment in which they do not compete, that market or market segment can be given controlling significance if the facts of the case are sufficient to eliminate the usual suspicion that state and local law, which benefits in-state economic interests and burdens out-of-state economic interests, is motivated by economic protectionism.

In certain cases, the court should exercise judicial restraint and accord controlling significance to the market or market segment protected by the state or local legislation. Those would be cases that involve economic predictions if both (1) they involve "elaborate analysis of real-world economic effects", "that are virtually impossible for a court", and that "even expert economists" might find difficult, *and* (2), at the same time, extraordinarily grave consequences might result if the court invalidates the state or local law based upon an incorrect prediction.

If controlling significance is accorded to markets or market segments in which the entities do not compete with each other, then those entities are not similarly situated.

If controlling significance is accorded to markets or market segments in which the entities compete with each other, then those entities are similarly situated, unless the facts of the case eliminate the generally appropriate suspicion that any different treatment of those entities by state or local law, which benefits in state economic interests and burdens out-of-state economic interests, was motivated by economic protectionism.

## X
## The Cable Television Industry and the Direct Broadcast Satellite Television Industry are "Similarly Situated" for Purposes of this Case

### 1) The Cable Television Industry and the Direct Broadcast Satellite Television Industry Provide slightly different Multi-Channel Television Products

As indicated above, the court should begin by considering whether the cable industry and the satellite industry provide the same products. In determining whether the products are the same, the court considers not only whether they are physically different, but also whether they are provided subject to regulatory protections by one entity while being provided by the other entity without the same regulatory protection.

The product that is subject to the Ohio's sales and use tax at issue is the multi-channel video programming provided by the direct broadcast satellite industry. Thus the issue here is whether multi-channel video programming provided by the direct broadcast satellite industry is the same product as the multi-channel video programming provided by the cable television industry. There are differences between the products such as:

1) A consumer must have a satellite dish located on or near their property to receive satellite multi-channel video programming. No such dish is required for cable service.
2) A consumer must have a cable connected to a local cable network in order to receive cable multi-channel video programming. No such connection to the local cable network is required for satellite service.
3) Cable service and satellite service are subject to different federal regulations that provide protection to consumers.
4) Cable service is typically subject to franchise requirements imposed by local governments. Some requirements may be designed to protect consumers. Grant of a franchise enables a cable company to install its cable system on public rights of way. Satellite companies are not subject to such franchise requirements since they have no need to lay cables along public rights of way.
5) Cable and satellite service may be affected differently by environmental conditions such as the weather.
6) Since the cables provide for communication in both directions, both to and from the consumer, phone and internet service can currently be provided over the same cable as cable service. Cable companies sometimes bundle phone and Internet service together with their multi-channel video programming service. The satellites do not currently provide for two-way communication, but the satellite multi-channel video programming providers sometimes bundle their service together with phone and Internet services provided by other companies through agreements with those companies.

Some people might regard the differences as so significant that they would not consider the products fungible. Accordingly, reasonable minds can reach but one conclusion: that there are some differences in the products that might affect whether they compete in all of the same markets or market segments.

**2) The Multi-Channel Video Program Products Provided by the Cable and Direct Broadcast Satellite Television Industries Compete in Some Markets but Not in Other Markets.**

Since the cable and direct broadcast television industries provide slightly different products, this Court should ask whether they compete in all the same markets and market segments, whether they do not compete in any of the same markets and market segments, or whether they compete in some markets or markets segments but not in other markets and market segments.

Since the tax statute at issue imposes a sales and use tax on the multi-channel video program broadcasting services provided by the direct broadcast satellite television industry, we are primarily concerned in this case with demand for the multi-channel video program broadcasting products offered by the cable television and direct broadcast satellite television industries. The markets for telephone and Internet services are relevant in this case only to the extent that telephone services and Internet services are sometimes sold in a package together with multi-channel video program broadcasting services. There is no suggestion in this case that a purpose for the differential treatment imposed by the tax statute was to protect the markets for telephone or Internet services, or any other market other than the markets for multi-channel video program broadcasting services. Accordingly, the focus here is on the markets and market segments involving the sale of multi-channel video program broadcasting services.

The relevant definition in Black's Law Dictionary defines "market" as "the demand there is for any particular article." Thus, one determines what markets exist by determining what demand exists. In this case, the variations in demand for multi-channel video program broadcasting services must be considered.

At the most general level, there exists demand for multi-channel video program broadcasting services. Thus, that demand defines an overarching "general" market for multi-channel video program broadcasting services.

The demand for multi-channel video program broadcasting services can be differentiated conceptually into three categories: (1) demand specifically and exclusively for cable multi-channel video program broadcasting services, (2) demand specifically and exclusively for direct broadcast satellite multi-channel video program broadcasting services, and (3) demand for multi-channel video program broadcasting services that does not differentiate between whether those services are provided by the cable or direct broadcast satellite television industries. Thus, these different categories of demand would define three markets or market segments which we could call (1) the "distinct" market (or market segment) for cable multi-channel video program broadcasting services, (2) the "distinct" market (or market segment) for direct broadcast satellite multi-channel video program broadcasting services, and (3) the undifferentiated market (or market segment) for cable and direct satellite broadcasting multi-channel video program broadcasting services.

Items (1) and (3) combine to form a general market (or market segment) for cable multi-channel video program broadcasting services. Items (2) and (3) combine to form a general market (or market segment) for direct broadcast satellite multi-channel video program broadcasting services.

Defendant asks this Court to also consider the market (or market segment) for multi-channel video program broadcasting services bundled together with Internet and Internet telephone services. The general demand for bundled services defines a general market for those services. Defendant argues that it provides the whole bundled product, whereas plaintiffs only provide the multi-channel video program broadcasting service component of a bundled product. While that may be true, markets are defined by demand. Thus, whether an industry provides the whole bundle, or only a part of the bundle is relevant only to the extent that consumer demand can be differentiated on that basis. The demand for the bundled product can be divided conceptually into three categories: (1) demand specifically and exclusively for a bundled product provided via a single provider, (2) demand specifically and exclusively for a bundled product provided by multiple providers, and (3) demand for a bundled product which does not differentiate based on whether the product is provided by a single provider or multiple providers. These differences in demand would define three markets (or market segments) which we could call (1) the "distinct" market (or market segment) for a bundled product provided by a single provider, (2) the "distinct" market (or market segment) for a bundled product provided by multiple providers, and (3) an undifferentiated market (or market segment) for a bundled product.

Note that items (1) and (3) combine to create a general market (or market segment) for a bundled product provided by a single provider. Items (2) and (3) combine to create a general market (or market segment) for a bundled product provided by multiple providers.

Defendant also asked this Court to consider the market and/or market segment for multi-channel video program broadcasting services that are subject to the consumer protection regulation applicable to the cable industry. However, once again, markets are defined by demand. Generally there is a demand for multi-channel video program broadcasting services that defines a broad overarching general market for multi-channel video program broadcasting services. Once again, that demand is conceptually distinguishable into three varieties: (1) demand specifically and exclusively for multi-channel video program broadcasting services that are subject to the consumer protection regulations applicable to the cable television industry, (2) demand specifically and exclusively for multi-channel video program broadcasting services that are not subject to the consumer protection regulations applicable to the cable television industry, and (3) demand for multi-channel video program broadcasting services that does not distinguish between the services that are subject to the regulations and the services that are not. These three kinds of demand would define three markets (or market segments): (1) a "distinct" market (or market segment) for multi-channel video program broadcasting services that are subject to the consumer protection regulations applicable to the cable television industry, (2) a "distinct" market (or market segment) for multi-channel video program broadcasting services that are not subject to the consumer protection regulations applicable to the cable television industry, and (3) an undifferentiated market for multi-channel video program broadcasting services.

Note that items (1) and (3) combine to form a general market (or market segment) for multi-channel video program broadcasting services that are subject to the consumer protection regulations that apply to the cable television industry. Items (2) and (3) combine to form a general market (or market segment) for multi-channel video program broadcasting services that are not subject to the consumer protection regulations that apply to cable television industry.

Construing the evidence most strongly in favor of defendant, reasonable minds can reach but one conclusion that the cable television and the direct broadcast satellite television industries compete in all of the markets (or market segments) identified in this section of this decision that were not identified as "distinct" markets: (1) the "distinct" market (or market segment) for cable multi-channel video program broadcasting services, (2) the "distinct" market (or market segment) for direct broadcast satellite multi-channel video program broadcasting services, (3) the "distinct" market (or market segment) for a bundled product provided by a single provider, (4) the "distinct" market (or market segment) for a bundled product provided by multiple providers, (5) the "distinct" market (or market segment) for multi-channel video program broadcasting services that are subject to the consumer protection regulations applicable to the cable television industry, and (6) the "distinct" market (or market segment) for multi-channel video program broadcasting services that are not subject to the consumer protection regulations applicable to the cable television industry. These markets (or market segments) were called "distinct" because the demand was so specific that it excluded many available multi-Channel video service products that are available. For either conceptual reasons, or reasons based on the evidence, it would appear that there is no competition between the cable television industry and the direct broadcast satellite television industry in those markets (or market segments) that have been identified as "distinct" markets (or market segments). In any event, for purposes of this decision, this Court will assume the view that favors the defendant, that there is no competition between the cable television industry and the direct broadcast satellite television industry in those markets (or market segments) that have been identified as "distinct" markets (or market segments).

**3) Controlling Significance Must Be Accorded to Markets in which the Cable Television and Direct Broadcast Satellite Television Industries Compete**

Since the cable and direct broadcast satellite television industries compete in some markets and market segments, but not in other markets and market segments, the next question that must be asked is whether controlling significance should be given to the markets and market segments in which they compete, or to the markets and market segments in which they do not compete.

The methodology was explained above. Generally, controlling significance should be accorded to the markets and market segments in which the entities compete. Since the purpose of the dormant Commerce Clause is to protect competition throughout the national marketplace, that purpose is served only if controlling significance is given to markets and market segments in which there is competition. In the current case, all of the "distinct" non-competitive markets (or market segments) identified above are included within broader markets (or market segments) in which the two industries do compete, including, at the broadest level, a general overarching market for multi-channel video program broadcasting services. Thus the purpose of the dormant Commerce Clause argues strongly for according controlling significance to the multi-channel video program broadcasting services markets in which there is competition between the cable and direct satellite broadcasting television industries. Thus, competitive markets should generally be accorded controlling significance.

Furthermore, since the commerce clause aims at protecting the entire national market, its greatest concern is to protect broad competitive markets like the general overarching market for multi-channel video program broadcasting services.

Both of these considerations argue strongly in favor of according controlling significance to the general overarching market for multi-channel video program broadcasting services.

However, if state or local legislation is intended to protect a narrower market or market segment in which the entities at issue do not compete, that market or market segment can be given controlling significance, even if the state or local legislation benefits in-state economic interests and burdens out-of-state economic interests, if and only if the facts of the case are sufficient to eliminate the usual suspicion that the state or local legislation is motivated by economic protectionism.

That exception is not applicable in the current case because the tax legislation at issue here was not primarily intended to protect a market or market segment in which the cable and satellite television industries do not compete. Rather, the legislation was intended to protect or enhance the competitive position of the cable television industry generally in the multi-channel video program broadcasting services markets and market segments. Defendant states in his Memorandum in Support of his Motion for Summary Judgment,

> Cable provides services to schools and local government that [direct broadcast satellite] cannot duplicate. These services relate to public protection, public education and the ability of local governments to respond to the interests of their citizens. In structuring the tax, the legislature considered these important non-economic interests and acted to protect these interests in the only way available to the legislature.

Even assuming that the legislature was not also intending to forward economic interests, the legislature's intention would logically not have been limited to protecting the relatively minor noncompetitive "distinct" markets in which the cable television industry participates, but rather, would logically have extended to enhancing the cable television industry's competitive position throughout the entire overarching multi-channel video program broadcasting market in Ohio.

Since this is not a case like *Tracy* and *Lenscrafters* in which the state or local legislature was focused on protecting a noncompetitive market, there is no reason why this Court should accord controlling significance to such noncompetitive markets in violation of the general principle that controlling significance should generally be accorded to broad competitive markets. Construing the evidence in favor of Defendant, reasonable minds can reach but one conclusion that controlling significance should be accorded to the general overarching market for multi-channel video program broadcasting services. It is undisputed that the cable television industry and the direct broadcast satellite television industry compete in the general overarching market for multi-channel video program broadcasting services.

**4) The Facts of this Case are not such that they Eliminate the Suspicion of Economic Protectionism that is Typically Appropriate when Legislative Acts Benefit In-State Economic Interests and Burden Out-Of-State Economic Interests. Consequently, this Court Must Conclude that the Cable and Direct Broadcast Satellite Television Industries are "Similarly Situated"**

Since controlling significance has been accorded to markets or market segments in which the cable and direct broadcast satellite television industries compete with each other, the next question is whether the facts of the case eliminate the generally appropriate suspicion that any different treatment of those entities by state or local law, which benefits in state economic interests and burdens out-of-state economic interests, was motivated by economic protectionism. If Plaintiffs can show that the facts of this case are not adequate to eliminate that suspicion, then, for reasons elaborated above, this Court must find that the cable television and direct broadcast satellite television industries are "similarly situated."

One very important factor in determining whether cable television and direct broadcast satellite television are "similarly situated" are the acts and policies of Congress relating to those two industries. In both *Tracy* and *United Haulers,* the United States Supreme Court looked to Congressional policy and actions to determine whether the entities at issue were "similarly situated." That makes sense given that (1) the Commerce Clause explicitly allocates to Congress the authority to regulate interstate commerce and (2) Congress provides a model for what a reasonable legislature, not motivated by economic protectionism, would do when balancing the need to promote competition in interstate commerce against other concerns, especially the sort of concerns that are shared by all or most states and localities, such as the need for local emergency warning systems and protection of the sort of benefits that are typically obtained through local cable franchise agreements across the country. When a state statute imposes differential tax treatment that thwarts clear Congressional policy in favor of competition by striking a balance which prefers such local benefits over promoting the competition which Congress favors, then that state or local statute creates even greater suspicion than usual that the state legislature was motivated by economic protectionism.

Section 3 of the Cable Television Consumer Protection Act of 1991 states,

> ... it is the policy of Congress in this legislation to:
>
> *     *     *
>
> (2) rely on the marketplace, to the maximum extent;
>
> *     *     *
>
> (4) regulate cable system rates where an effective competition does not exist;
>
> (5) ensure that consumers and programmers are not harmed by undue market power of cable operators.

Congress was aware of the fact that the cable television industry had "undue market power." Consequently, it recognized the need to regulate cable system rates "where an effective competition does not exist." Nevertheless, Congress believed it is best to rely on competition in the marketplace "to the maximum extent." Thus, the policy of Congress is to promote competition so that regulation can be reduced.

Congress enacted 47 USC 548, effective December of 1992. Section 548(a) reiterates Congress' intent "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market..."

In furtherance of that policy Congress amended 47 U.S.C. 303 in 1996 to give the FCC "exclusive jurisdiction to regulate the provision of direct-to-home satellite services." Apparently, Congress had concluded that state and local regulation of direct broadcast satellite television services was interfering with direct broadcasting satellite television industry's competition with cable television.

Congress reiterated its policy of promoting competition between cable and satellite television services in the "Joint Explanatory Statement of the Committee of Conference" to the Intellectual Property and Communications Omnibus Reform Act of 1999.

> The Conference Committee believes that promotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry.

A Government accounting office report issued 3-25-2004 says,

> Competition to cable operators has emerged erratically. Companies emerged in some areas to challenge cable operators, only to halt expansion or discontinue service altogether. Conversely, competition from direct broadcast satellite (DBS) operators has emerged and grown rapidly in recent years. Nevertheless, cable rates continue to increase at a faster pace than the general rate of inflation.
>
> *   *   *
>
> Competition from DBS operators has induced cable operators to lower cable rates slightly, and DBS provision of local broadcast stations has induced cable operators to improve the quality of their service.

(GAO-04-262T, p. 1-2). The FCC reported in 2005 that,

> Americans are voracious consumers of media services, spending close to 30% of their day engaged in some activity involving media, with television viewing the dominant media activity.
>
> *   *   *
>
> Competition in the delivery of video programming services has provided consumers with increased choice, better picture quality,

> and greater technological innovation. In particular, the effect of DBS competition has resulted in the addition of networks to cable operators' channel lineups, although it has only lowered cable rates slightly.

(FCC 06-11, p. 3-4).

In conclusion, Congress is clearly pursuing a policy favoring the promotion of competition between the cable television and direct broadcasting satellite television industries, and the pursuit of that policy has resulted in the improvement of cable television service while causing some reduction in cost of cable television services.

Judicial restraint should argue against any court deciding that it is in a better position than Congress, which has been constitutionally assigned the role of regulating interstate commerce, to determine the wisdom of its policy favoring the promotion of competition between the cable television and direct broadcast satellite television industries.

When state or local legislation benefits in-state economic interests and burdens out-of-state economic interests, and *also* thwarts clear Congressional policy in favor of such competition, then courts should be even more suspicious than usual that the action was motivated by economic protectionism. One can assume that, when Congress undertook the policy of promoting competition, Congress was well aware of any typical superior public benefits that the cable television industry might provide over direct broadcast satellite television, such as ability to participate in local early warning systems and any special local benefits that might typically be secured by local franchise agreements. Congress would have been aware that the promotion of competition from the direct broadcast satellite television industry would result in more households receiving their multi-channel video programming from satellite providers and fewer households receiving their multi-channel video programming from cable providers with the results that (1) fewer households would be linked to local early warning systems and (2) cable providers, who are likely to be able to secure fewer customers in a local area, would be less motivated to agree to the same level of local benefits in local franchise agreements or might not seek out those agreements at all. Congress knew that and nevertheless opted in favor of promoting competition. Consequently, courts should look with skepticism upon arguments, like those proposed here, that state government needs to give preferential tax treatment, and thus a competitive advantage, to the cable industry in order to protect local early warning systems and the various local benefits derived in local cable franchise agreements.

Of course, the defendant has previously argued in this case that the statute at issue does not give preferential tax treatment to the cable industry, but merely levels the playing field. This Court previously explained why the argument is not persuasive.

> The argument that the sales and use taxes at issue merely "level the playing field" since cable providers generally must pay franchise fees is unpersuasive. Franchise fees are the means by which cable providers purchase access to public rights-of-way. Since satellite providers have no need to access the public rights-of-way, their ability to avoid franchise fees is a special efficiency associated with their method of transmitting television signals. Consequently, the imposition of sales and use taxes in order to negate that special efficiency does not "level the playing field", but rather works like a golf handicap, depriving the better player of the benefit of his superior competitive characteristics. Under the ordinary meaning of the "level playing field" metaphor, a "level playing field" is one that allows the contest to be determined by the competitive characteristics of the players themselves, rather than by the tilt of the field. The right of equal access to markets[5] entails that it is improper to tax a market participant merely for the purpose of depriving that market participant of the benefit of its own special competitive characteristics. Such a tax levied against a market

[5] *Granholm* at 1896.

participant in order to deprive that participant of the benefit of a superior competitive characteristic does not "level the playing field", but tilts the playing field in favor of the participant that lacks the superior competitive characteristic. Since the sales and use taxes at issue in this case deprive satellite service providers of the benefit of a superior competitive characteristic that they possess (the satellite provider's lack of need to pay for access to public rights-of-way), those taxes do not "level the playing field", but rather tilt the field in favor of the cable service providers.

In any event, the law has already defined the type of tax that is permitted for the purpose of "leveling the playing field" between in-state and out-of-state economic interests when another tax has allegedly tilted the playing field. An otherwise discriminatory tax is permitted for purposes of leveling the playing field only if it qualifies as a "compensatory tax." The sales and use taxes at issue in this case do not qualify as compensatory taxes.

As stated by the Supreme Court in *Fulton Corp. v. Faulkner* (1996), 516 U.S. 325, 338-339,

> [T]he third prong of compensatory tax analysis . . . requires the compensating taxes to fall on substantially equivalent events. Although we found such equivalence in the sales/use tax combination at issue in *Silas Mason*, our more recent cases have shown extreme reluctance to recognize new compensatory categories. In *Oregon Waste*, we even pointed out that "use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine." 511 U.S. at 105. On the other hand, we have rejected equivalence arguments for pairing taxes upon the earning of income and the disposing of waste, *ibid.*, the severance of natural resources from the soil and the use of resources imported from other States, *Maryland* v. *Louisiana*, 451 U.S. at 759, and the manufacturing and wholesaling of tangible goods, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 244, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. at 642. In each case, we held that the paired activities were not "sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Oregon Waste, supra*, at 103 (internal quotation marks and citation omitted).

> The sale or use of satellite broadcast services is clearly not sufficiently similar in substance to the use of public rights-of-way by cable operators. The sales and use taxes cannot serve as proxies for franchise fees since the franchise fees that cable operators pay are, at least in part, charged for the purpose of compensating the public for the private commercial use of public rights-of-way. Some courts have described the franchise fees as being like rent. The sales and use taxes at issue do not function like rent since it is undisputed that satellite providers have no need to use public rights-of-way. Summary judgment is granted to Plaintiffs to the extent that this Court finds that the sales and use taxes at issue do not function as "compensatory taxes" relative to the franchise fees paid by cable providers, and furthermore, they do not "level the playing field" (in the relevant sense that would negate the charge of discrimination), but rather, they tilt the playing field in favor of the cable operators, thereby favoring in-state economic interests and burdening out-of-state economic interests. Reasonable minds, construing the evidence in Defendant's favor, could reach but one conclusion on those issues.

Both industries pay fees that are a prerequisite to their use of public resources. Congress has imposed various fees (and processes for determining fees by the FCC or by competitive bidding) that are a precondition for (1) using a geosynchronous orbital position permitted to the United States by treaty, (2) launching through U.S. air space, and (3) using a specific frequency in the electromagnetic spectrum. 47 USCS 158, 159, and 309(j). Congress has permitted local governments insofar as they qualify as "franchising authorities" to charge cable operators a franchise fee of not more than 5 percent of gross revenues as a condition for awarding a franchise allowing a cable operator to construct a cable system over public rights-of-ways and through easements. 47 USCS 542 and 541. The exact amount is to be determined by the franchising authority so long as it does not exceed 5 percent. Thus, Congress has determined that the price that would be determined *by a "franchising Authority"* is a fair price for the use of public rights-of-way so long as that price does not exceed 5 percent of gross revenues.

Since Congress and the FCC are not subject to the same temptation to engage in economic protectionism in favor of the in-state economic interests of a particular state, and since the power to regulate interstate Commerce has been given to Congress by the U.S. Constitution (and since the FCC and the "franchising authorities" receive their authority from Congress), their determination as what to constitutes a fair price for use of public resources must be given deference. Consequently, their determination as to the appropriate charges for public resources defines what counts as "a level playing field." Consequently, when a state imposes a tax scheme that taxes direct broadcast satellite services at a higher rate than cable television services, it cannot reasonably be argued that the tax scheme is "evenhanded" and "levels the playing field."

The differential taxes imposed in this case do not level the playing field by removing an unfair advantage given to the direct broadcast satellite industry, but rather, it tilts the playing field in favor of cable television service providers by eliminating the inherent competitive advantage possessed by the direct broadcast satellite services insofar as they do not require access to public rights-of-way and easements.

Defendant suggests that the tax in this case was endorsed by the "preemption of local taxation" provision or 47 USCS 152, which says,

> This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

While this provision does permit a State to impose a tax on the direct broadcasting satellite industry, it does not provide that a state can fail to be evenhanded with its taxation of the cable and satellite television industries.[6] Given Congress' clear policy of promoting competition between the two industries in order to overcome the excessive monopoly power of the cable industry, it is unlikely that Congress intended that the above provision would be construed to permit states to give preferential tax treatment to the cable industry.

The fact that the taxes at issue (1) are not "evenhanded" but do tilt the playing field in favor of the cable industry by negating the fair balance of costs for public resources established by Congress, and, in the process, (2) controverts the clear policy of Congress to promote competition between the two industries in order to reduce the excessive market power of the cable industry, argues for an increased suspicion that the state was motivated by economic protectionism when it imposed the unequal sales and use taxes at issue in this case.

Another factor that can affect the degree of suspicion that differential tax treatment was motivated by economic protectionism is whether the state or local government's differential treatment of the competing entities falls within the scope of

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[6] The Supreme Court encountered a similar situation in *Wyoming v. Oklahoma* (1992), 502 U.S. 437, 457-458. The state of Oklahoma argued that the Federal Power Act reserves to the States the regulation of local retail electric rates. The Supreme Court rejected the suggestion that reserving a power to the states amounts to permitting them to use that power to discriminate against interstate commerce.

> Even if the Act is accepted as part of the State's rate-regulating authority, we cannot accept the submission that it is exempt from scrutiny under the Commerce Clause. Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause as Oklahoma here seeks to justify.

*Id.* at 458. See also, *Maine v. Taylor* (1986), 477 U.S. 131, 138-139. (While "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid", "because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been 'unmistakably clear.'")

There is no "unmistakably clear" congressional direction in this case that would permit taxation that is not evenhanded.

their traditional police powers "to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." A related factor is whether the favored entity is vested with a special responsibility for protecting health, safety, or welfare that is not shared by the disfavored entity. These factors are closely linked in this case. The argument that the differential tax treatment in this case is justified by purposes that fall within the proper police powers of the state such as the protection of health, safety, and welfare, is premised upon the assertions that (1) the cable television industry has certain special responsibilities relating to the protection and promotion of health, safety, and welfare which are not shared by the direct broadcast satellite industry, that (2) differential tax treatment favoring the cable television industry over the direct broadcast satellite industry will make the cable television industry competitively stronger with the result that it will serve more Ohio households. If the cable television industry is enabled to serve more Ohio households, it will be better able to fulfill the health, safety, and welfare purposes that caused the state, local, and federal government entities to assign the special responsibilities to the cable television Industry.

In fact, both the cable and the satellite industries are vested with such special responsibilities. Thus, the issue is whether there is some significant difference that would adequately explain the differential tax treatment in this case so as to eliminate the suspicion that the state was motivated by economic protectionism. The special responsibilities that have been discussed by the parties include responsibilities to (1) participate in emergency warning systems, (2) disseminate local information, and cover local events, culture, and provide local programming, (3) provide universally available service, (4) protect privacy, (5) satisfy certain customer service requirements, and

(6) provide certain free services to educational and other public institutions pursuant to some franchise agreements.

With regard to participation in emergency warning systems, the cable industry is required to participate in both local and national emergency warning systems, while the direct broadcasting satellite industry is required to participate in the national emergency warning system and to pass through any local emergency messages carried on local broadcast channels that it broadcasts. Otherwise, its participation in local warning systems is voluntary.

This difference in regulatory treatment is due to the current technological capabilities of the two industries. Congress would have been aware of these varying technological capabilities when it instituted a policy of favoring competition between the cable and satellite industries to reduce the cable industry's monopoly power. Congress would have been aware that promoting such competition would mean that across the country fewer homes would be served by the cable television industry with its capability of more fully participating in local emergency warning systems. Congress determined that the better policy was to promote competition rather than promote more effective local emergency warning systems. This was the determination of the legislative body that is empowered by the Commerce Clause to regulate interstate commerce because it is not subject to the same temptation to engage in economic protectionism. When a state legislature determines otherwise, its disagreement with Congress increases the suspicion that its action is motivated by economic protectionism. Thus, even though promoting more effective local emergency warning systems would promote health and safety, that fact does not, in this case, eliminate the suspicion that the differential tax treatment was motivated by economic protectionism.

It is noteworthy that had the General Assembly's intent been to increase the effectiveness of local emergency warning systems while, nevertheless, attempting to give some respect to Congress' policy of promoting competition by the direct broadcast satellite television industry in order to reduce the monopoly power of the cable television industry, then the General Assembly could have made the difference in tax treatment turn on whether the operator of a multi-channel video programming service participated, to some specified degree, in local emergency warning systems. The failure to make the distinction along those lines increases the suspicion that the differential tax treatment was motivated by economic protectionism.

The parties disagree about the extent to which the other special responsibilities imposed by law on the cable television industry differ from the special responsibilities imposed upon the direct broadcast satellite television industry. None of those other responsibilities pertain, in any obvious and direct way, to the specific police power purposes of protecting health and safety. The U.S. Supreme Court has indicated that it "has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Raymond Motor Transp., Inc. v. Rice* (1978), 434 U.S. 429, 443-444. Thus the remaining differences in the special responsibilities assigned to the two industries, none of which pertain to health and safety, are less likely to eliminate the suspicion that the differential tax treatment was motivated by economic protectionism.

In any event, Congress would have been aware of the differences in special responsibilities assigned by law to the two industries when Congress instituted the policy of favoring competition between the cable and satellite industries in order to reduce the cable industry's monopoly power. Congress would have been aware that promoting such competition would mean that, across the country fewer homes would be served by the cable television industry, with the result that the benefits flowing from any greater special responsibilities imposed by law on the cable television industry would be reduced. Congress determined that the better policy was to promote competition even if it entailed reducing the benefits that would flow from the allegedly greater special responsibilities assigned by law to the cable television industry. This was the determination of the legislative body that is empowered by the Commerce Clause to regulate interstate commerce because it is not subject to the same temptation to engage in economic protectionism on behalf of any one particular state or locality. When a state legislature determines otherwise, its disagreement with Congress increases the suspicion that its action is motivated by economic protectionism.

It has been suggested that one possible reason for the differential tax treatment in this case was to ensure the continued provision of free services to educational and other public institutions that are required conditions of some cable franchises. That would not be an appropriate reason for the differential tax treatment. In *C & a Carbone v. Town of Clarkstown* (1994), 511 U.S. 383, 386, the US Supreme Court rejected the notion that the financing of public facilities is an appropriate reason for differential treatment of in-state and out-of-state economic interests.

> We consider a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station before

> leaving the municipality. The avowed purpose of the ordinance is to retain the processing fees charged at the transfer station to amortize the cost of the facility. Because it attains this goal by depriving competitors, including out-of-state firms, of access to a local market, we hold that the flow control ordinance violates the Commerce Clause.

Since facilitating the public acquisition of facilities and services is not an appropriate reason for differential treatment of in-state and out-of-state economic interests, the fact that the statute at issue tends to facilitate the free acquisition of certain facilities and services for educational and other public institutions does not serve to reduce the suspicion that the differential tax treatment in this case was motivated by economic protectionism.

Another factor to be considered in determining whether the suspicion of economic protectionism has been eliminated is whether the favored entity has typically and/or traditionally been allowed a similar degree of monopoly control over the function at issue. The emergence of the direct broadcast satellite television industry is a relatively new phenomenon. Since at least 1991, Congress has promoted a policy of maximizing competition in the multi-channel video programming market as opposed to allowing the market to be monopolized by cable operators.[7] This Court finds that, in view of Congress' policy of promoting competition between the two industries, consideration of any "typical" or "traditional" favoritism given to the cable television

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[7] Section 3 of the Cable Television Consumer Protection Act of 1991 states,

> ... it is the policy of Congress in this legislation to:
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> * * *
>
> (2) rely on the marketplace, to the maximum extent;
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> * * *
>
> (4) regulate cable system rates where an effective competition does not exist;
> (5) ensure that consumers and programmers are not harmed by undue market power of cable operators.

industry over the direct broadcast satellite industry does not eliminate the suspicion that the differential tax treatment in this case was motivated by economic protectionism.

The final factor to be considered in determining whether the suspicion of economic protectionism has been eliminated is whether the most palpable harm imposed by the law "'is likely to fall upon the very people who voted for the laws rather than upon 'interests outside the state'." *United Haulers, Supra.* Here, "palpable" means, "easily perceptible by the mind." *(Merriam-Webster's Online Dictionary).* The most easily perceptible harm in this case is the harm to those who purchase direct broadcast satellite television services and have to pay the sales or use taxes. That is a minority of voters in Ohio. Most voters know that they could avoid that harm merely by opting for cable television services. The other harms which are not as easily perceptible would be the loss of customers to the direct broadcast satellite television industry, the loss of jobs in that industry primarily outside of Ohio, and reduced competition to the cable television industry resulting in higher rates and lower quality of services. The first two kinds of harm to not fall upon Ohio voters and the extent of the latter harm would be difficult for the typical Ohio voter to predict. Accordingly, consideration of this factor does not reduce the suspicion that the differential tax treatment in this case was motivated by economic protectionism.

After considering the relevant factors, this Court concludes that, construing the evidence most strongly in favor of Defendant, reasonable minds can reach but one conclusion that consideration of the relevant factors does not eliminate the suspicion that the differential tax treatment in this case, that benefits in-state economic interests, and burdens out-of-state economic interests, was motivated by economic protectionism.

Reasonable minds can reach but one conclusion that, since the differences between the cable television industry and direct broadcast satellite television industry and any differences in their situations are not adequate to eliminate the suspicion that the differential tax treatment in this case was motivated by economic protectionism, this Court finds that the two industries are "similarly situated" for purposes of application of the dormant Commerce Clause to this case.

## *XI*
## *Directv, Inc. v. Treesh* (6th Cir., 2007), 487 F.3d 471, does not Require a Different Result.

In part VIII of this decision, this Court considered a particular paragraph from *Directv, Inc. v. Treesh* (6th Cir., 2007), 487 F.3d 471, and determined that the paragraph does not control the result in this case because it was unpersuasive *dicta*. This Court now considers whether the portions of *Treesh* that were case dispositive are applicable to the current case. This Court finds that *Treesh* is distinguishable from the current case, and that the new law created in that case is not applicable to the facts of the current case since the current case does not involve a tax and subsidy scheme and also since the current case does not involve "mulcting" by local governments.

In *Treesh,* the Sixth Circuit considered two amendments to Kentucky statutory law. One amendment imposed the same excise tax on both the cable television industry and the direct broadcast satellite television industry. The other prohibited local governments from levying any franchise fee or tax on a multi-channel video programming service and provided for a tax credit to any cable operator who paid any franchise fee or tax. Directv and EchoStar filed suit alleging a violation of the dormant Commerce Clause. They argued that, since only cable companies must obtain franchises and pay franchise fees, the Kentucky statutory scheme amounted to a discriminatory "tax and subsidy approach."

The Court determined that, considered individually, neither the tax nor the subsidy in that case violates the Commerce Clause.

Unlike the current case, the tax rate imposed on both industries was the same. Consequently, the Court's determination in *Treesh* that such a tax, by itself, would not violate the Commerce Clause, has no relevance to the current case.

Unlike the current case, the Kentucky statutory scheme prohibited the imposition of franchise fees by local franchising authorities and provided for a credit whenever a cable operator paid such a fee. Since cable operators were being allowed to use public rights-of-way without charge, the Court recognized this as a subsidy. Without direct authority for the proposition, the Court said, "The provision of access to the state infrastructure free of charge is an acceptable option that the state may exercise."[8] The

[8] From the fact that "not every road is a toll road" the Court concluded that, "States and local government are under no mandate to charge for the use of local rights-of-way." Of course, it does not follow from the fact that there is no general mandate to charge for all uses of local rights-of-ways, that there is no legal requirement to charge for certain kinds of commercial uses if failure to do so would constitute economic protectionism. The Court felt that providing free access to public rights-of-way for purposes of laying a cable system is analogous to allowing truckers to drive their trucks over public rights-of-way without charge. The Supreme Court will have to decide whether the analogy is persuasive. While it is both typical and traditional throughout all 50 states to allow many sorts of vehicles to drive over public rights-of-way without charge, is it also typical and traditional across all 50 states to allow the installation of privately operated cable systems or other privately operated utility systems along public rights-of-way without charge? Might not a state that starts allowing cable operators free access to its public rights-of-way for purposes of installing a cable system create more suspicion that its action is motivated by economic protectionism than a state that decided to treat trucks like other vehicles and allow truckers to drive their trucks over public rights-of-way without charge?

Congress, the body empowered by the Commerce Clause to regulate interstate commerce, gave the power to impose franchise fees to "franchising authorities." Would a state's attempt to create a subsidy by removing that authority raise some suspicion that it has economic protectionist motives if the result of the action is to benefit in-state economic interests and burden out-of-state economic interests?

*Treesh*, relied upon *West Lynn Creamery,* 512 U.S. at 199, n. 15, for the proposition that even direct monetary subsidies to in-state companies will often not violate the Commerce Clause. However, in a later case, the Supreme Court said, "We have 'never squarely confronted the constitutionality of subsidies,'" *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 588-589 (U.S. 1997).

Court concluded that the subsidy of cable operators created by prohibiting franchise fees does not violate the Commerce Clause.

The current case is distinguishable because it involves differential tax treatment rather than a subsidy created by prohibiting the imposition of franchise fees. In *Camps Newfound/Owatonna v. Town of Harrison* (1997), 520 U.S. 564, 588-589, the Supreme Court rejected the notion that differential tax treatment should be construed as the equivalent of a subsidy.

> ... the Town submits that its tax exemption scheme is ... a legitimate discriminatory subsidy of only those charities that choose to focus their activities on local concerns.... We find these arguments unpersuasive. Although tax exemptions and subsidies serve similar ends, they differ in important and relevant respects, and our cases have recognized these distinctions.
>
> * * *
>
> The Town argues that its discriminatory tax exemption is, in economic reality, no different from a discriminatory subsidy of those charities that cater principally to local needs. Noting our statement in *West Lynn Creamery* that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business," 512 U.S. at 199, the Town submits that since a discriminatory subsidy may be permissible, a discriminatory exemption must be too. We have "never squarely confronted the constitutionality of subsidies," *Id.*, at 199, n.15, and we need not address these questions today. Assuming, arguendo, that the Town is correct that a direct subsidy benefitting only those nonprofits serving principally Maine residents would be permissible, our cases do not sanction a tax exemption serving similar ends.

Since differential tax treatment is not regarded as the equivalent of a subsidy for purposes of the Commerce Clause, and since the current case involves differential tax treatment rather than a preferential subsidy, the Court's determination in *Treesh* that the subsidy resulting from the Kentucky prohibition of franchise fees, does not, by itself, violate the Commerce Clause, has no relevance to the current case.

*Treesh* recognized that, pursuant to *West Lynn Creamery v. Healy*, 512 U.S. 186, "a tax and a subsidy, each of which would be constitutional standing alone, might together be unconstitutional." *Treesh* noted that the tax and subsidy scheme in *West Lynn Creamery* had been found unconstitutional because of its similarity to a "paradigmatic example" of a law that violates the dormant Commerce Clause: a protective tariff. *Treesh* held, "we must be cautious about applying the dormant Commerce Clause in cases that do not present the *equivalent* of a protective tariff," (emphasis added) in order to avoid limiting the states' "right to experiment with different incentives to business." *Treesh* found that Kentucky tax and subsidy scheme favoring the cable television industry was not the *equivalent* of a protective tariff, and as a result, found that it did not violate the dormant Commerce Clause.

In fact, *West Lynn Creamery* did not require complete "equivalence", but was decided upon the basis of a very specific similarity between protective tariffs and the tax and subsidy scheme in that case.

> The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State. A tariff is an attractive measure because it simultaneously raises revenue and benefits local producers by burdening their out-of-state competitors. Nevertheless, it violates the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States.
>
> Because of their distorting effects on the geography of production, tariffs have long been recognized as violative of the Commerce Clause.

*W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 193. Having determined that the key feature of a protective tariff that makes it unconstitutional is its "distorting effects on the geography of production", the Supreme Court proceeded to discuss whether the tax and subsidy scheme at issue in that case had "distorting effects on the geography of production." Determining that it did, the Supreme Court found that tax and subsidy scheme to be unconstitutional.

> The Massachusetts pricing order ... will almost certainly "cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, n. 16, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978).... This effect renders the program unconstitutional, because it, like a tariff, "neutraliz[es] advantages belonging to the place of origin." *Baldwin*, 294 U.S. at 527.

*W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 196.

The Supreme Court never required in *West Lynn Creamery* that a court find a tax and subsidy scheme to be fully "equivalent" to a protective tariff before finding that the tax and subsidy scheme is unconstitutional. Rather, *West Lynn Creamery* merely focused on whether the tax and subsidy scheme has a specific similarity to a protective tariff: specifically, does the tax and subsidy scheme have "distorting effects on the geography of production?" *West Lynn Creamery* falls squarely within established dormant Commerce Clause jurisprudence insofar as the comparison between protective tariffs and the tax and subsidy scheme in that case was used for the purpose of identifying the protectionist nature of that tax and subsidy scheme. There was no suggestion that a tax and subsidy scheme need share with a protective tariff any feature other than being protectionist in order to be unconstitutional. To the extent that *Treesh* performs a more far-reaching comparison of the challenged law and protective tariffs to determine whether they do or do not have shared features above and beyond their protectionist effects of "distorting the geography of production" and other economic activity, it appears to be creating new law. *Treesh* certainly does not cite any precedent for the proposition, "we must be cautious about applying the dormant Commerce Clause in cases that do not present the *equivalent* of a protective tariff." (Emphasis added). This Court has used Lexis to search for any other federal case in the last 60 years that employs a method of asking whether a challenged law is the *equivalent* of a protective tariff. So far as this Court can determine, there are none. Thus, the holding in *Treesh* that "we must be cautious about applying the dormant Commerce Clause in cases that do not present the *equivalent* of a protective tariff" is new law. (Emphasis added).

Since the current case does not involve subsidies, this Court must decide whether the method from *Treesh* applies when subsidies are not involved. As stated by Chief Justice Marshall,

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

*Cohens v. Virginia* (1821), 19 U.S. 264, 399-400.

At a minimum, it does not appear appropriate to regard *Treesh* as being applicable to cases that do not involve subsidies. Arguably, it should only apply to subsidy or tax-and-subsidy cases that do not involve "mulcting" by local governments.

The lack of case law regarding the appropriate treatment of subsidies under the dormant commerce clause is the probable reason why the Court felt it necessary to establish a new principle in order to decide the case. Thus there is no need to expand the coverage of the new principle to cases like the current case that involved differential taxation since there is no comparable lack of case law regarding the proper analysis of differential taxation. Furthermore, the new principle enunciated in *Treesh* appears to be inconsistent with the law that has been established for the analysis of allegedly discriminatory taxation and regulation. In those areas of the law, rather than being "cautious about applying the dormant Commerce Clause in cases that do not present the *equivalent* of a protective tariff" (emphasis added), courts avoid such a formalistic approach.

> Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects. As the Court declared over 50 years ago: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456.

*W. Lynn Creamery v. Healy* (1994), 512 U.S. 186, 201-202. Accordingly, the required investigation in a differential tax or regulation case involves determining whether the statutory provision "Will and its practical operation work discrimination against interstate commerce." *Id.* A court should not avoid the inquiry as to whether the challenged allegedly discriminatory taxation or regulation "Will in its practical operation work discrimination against interstate commerce" merely because the tax or regulation at issue is not the "equivalent" of a protective tariff.

It is arguable that the new principle of law in *Treesh* does not apply generally even in cases involving subsidies or tax-and-subsidy schemes. *West Lynn Creamery* was a tax and subsidy scheme case. Nevertheless, as made clear by the quote above, the Supreme Court applied the requirement to avoid formalism to the adjudication of that case which involved a tax-and-subsidy scheme.

*Treesh* was a departure from *West Lynn Creamery.* Whereas the Supreme Court in *West Lynn Creamery* focused upon the issue of whether the tax and subsidy scheme at issue had "distorting effects on the geography of production", *Treesh* implicitly recognized that the tax and subsidy scheme in that case did alter the "competitive balance among in-state and out-of-state competitors", but then dismissed the significance of that distorting effect on the geography of production because it was the result of preventing localities from "mulcting cable companies through franchise fees." Apparently, the Court determined that a law that prevents localities from mulcting cable companies through franchise fees is not the equivalent of a protective tariff because protective tariffs do not prevent localities from mulcting cable companies through franchise fees. Apparently, the Court also determined that the effects of the statute in question upon the geography of production were irrelevant because those effects were caused by preventing the mulcting of cable companies, something a protective tariff would never do. Since *Treesh* was concerned about whether there was "equivalence" between the tax and subsidy scheme and a protective tariff, *Treesh* ignored the facts that answered the inquiry posed by *West Lynn Creamery:* Does the tax-and-subsidy scheme have distorting effects on the geography of production? It would appear that in order to reconcile *Treesh* and *West Lynn Creamery*, *Treesh* must be distinguished on the basis that it involved a tax-and-subsidy scheme that, according to the Court, was designed to prevent the "mulcting of cable companies."

Unlike *Treesh,* the current case does not involve the "mulcting of cable companies." There is no evidence, or even any suggestion, that Ohio local governments have been "mulcting" cable companies with franchise fees. One dictionary defines "mulcting" as follows:

> 1 : to punish by a fine
>
> 2 a : to defraud especially of money : SWINDLE b : to obtain by fraud, duress, or theft

*Merriam-Webster's Online Dictionary*, http://www.m-w.com/dictionary/mulcting. Franchise fees are not fines imposed as punishment. They are a kind of fee that is imposed upon certain parties who wish to use public assets for a certain purpose. There is no fraud, duress, or theft involved. Congress has explicitly permitted local governments, if they qualify as franchising authorities, to charge a franchise fee of up to 5 percent of gross revenues. 47 USCS 542. There is no suggestion, nor any evidence, that local governments in Ohio have been charging franchise fees in excess of the 5 percent limit.

Since this case does not involve any tax and subsidy scheme, and since it is undisputed that Ohio's local governments have not been "mulcting" cable companies with franchise fees, this case is clearly distinguishable from *Treesh.* This Court finds that the new law announced by *Treesh* is therefore not applicable to the current case. Rather than ask whether the tax scheme in the current case is the equivalent of a protective tariff with regard to features of protective tariffs over and beyond their tendency to affect the geography of production, this Court is bound by well-established Commerce Clause law that requires the following analysis: First, the Court must determine whether there has been differential treatment of in-state and out-of-state economic interests. If so, then the Court must determine whether differentially treated businesses are similarly situated. Finally, if discrimination is found to exist on those grounds, then the Court must determine whether the state can show, subject to rigorous scrutiny, that the discrimination is justified.

That is the analysis that this Court is performing.

## XII
## The State has not Shown, Subject to Rigorous Scrutiny, that the Discriminatory Use and Sales Tax on Direct Broadcast Satellite Television Services is Justified

This Court has found that Ohio's sales and use tax, in practical effect, benefits in-state economic interests and burdens out-of-state economic interests. In addition, this Court has found that the cable television industry and the direct broadcast satellite television industry are similarly situated. As a matter of law, it follows that the Ohio's sales and use tax discriminates against interstate commerce in practical effect.

One final issue remains to be resolved: whether the discrimination is justified.

> [when] discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.

*Hughes v. Oklahoma* (1979), 441 U.S. 322, 336. "If a restriction on commerce is discriminatory, it is virtually per se invalid." *Oregon Waste Systems V. Department of Environmental Quality* (1994), 511 US 93, 99. "Rigorous scrutiny" of a law that discriminates against interstate commerce is appropriate since such discriminatory laws are "often the product of 'simple economic protectionism'." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, (2007), 127 S. Ct. 1786, 1793-1796. This more rigorous scrutiny is appropriate once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect." *Maine v. Taylor* (1986), 477 U.S. 131, 138.

"[T]he burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* at 138.

In addition, since discrimination against interstate commerce burdens interstate commerce, the following principle of law applies: "The Court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with a problem of balance"[9]. *Great Atlantic & Pacific Tea Co. v. Cottrell* (1976), 424 U.S. 366, 371. Followed by *Raymond Motor Transp., Inc. v. Rice* (1978), 434 U.S. 429, 440. The Supreme Court has given some guidance as to how the problem of balance should be resolved.

> In this process of "delicate adjustment," the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce, but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.

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[9] It would make no sense to say that courts are only confronted with the problem of balance in cases that involve non-discriminatory burdens on interstate commerce. It is well established that a court must review a state or local legislature's judgment regarding whether a legitimate local interest justifies a burden on interstate commerce when there is no suggestion of discrimination. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). Consequently, it would make no sense to defer to the judgment of the state or local legislature in cases where discrimination has been proved so that there is a strong likelihood that the state or local legislative judgment was distorted by economic protectionist motives.

*Raymond Motor Transp., Inc* at 440. "The burden is on the state to show that 'the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism'." *Chemical Waste Management v. Hunt* (1992), 504 U.S. 334, 344.

The defendant argues that the tax on direct broadcast satellite television services serves legitimate local interests. Specifically, Defendant argues that the cable industry serves certain local interests that the direct broadcast satellite television industry does not serve. Defendant argues that by taxing sales of direct broadcast satellite television services, and not cable television services, the state increases the number of households that utilize cable television services, and in that manner, serves the legitimate local interests that only the cable television industry serves. Defendant notes that the federal government has preempted the regulation of the direct broadcast satellite television industry and as a consequence, taxation is the only effective method left in the state to serve the local interests at issue.

Defendant asserts that cable television technology allows local communities to break into programming to announce local emergencies, such as tornado warnings. Defendant asserts that the cable television technology also allows broadcast of locally produced programming such as school board and city council meetings. Finally, Defendant asserts that, since cable operators must negotiate with local communities to gain access necessary to sell and deliver cable services, local communities have the leverage necessary to gain certain local services such as broadcast of local government proceedings and local events, delivery of emergency notices, and provision of free services including Internet access for public schools and institutions.

The first question that must be considered is whether the local interests identified by Defendant are legitimate. The interests identified by Defendant are widely shared by most local communities across the country. They are interests that Congress would have been aware of when Congress decided to promote competition between the cable television industry and the direct broadcast satellite television industry in order to limit the monopoly power of the cable television industry and, thereby, reduce the need to regulate cable television rates. Likewise, Congress would have been aware of the local interests identified by Defendant when, in furtherance of competition between the two industries, Congress preempted all state and local regulation of the direct broadcast satellite television industry, apparently having determined that the state and local governments have a tendency toward disadvantaging the direct broadcast satellite television industry to an extent that the direct broadcast satellite television industry would not provide the level of competition to the cable television industry that Congress believes is needed. Having been prevented by Congress from using its regulatory powers to reduce competition between the two industries, the State of Ohio is trying to accomplish the same thing through its taxing power. While Congress has not explicitly prohibited such conduct, the conduct clearly places Ohio at cross-purposes with Congress. Since the States' function when regulating interstate commerce is to be the agent of Congress, they are not permitted to defeat congressional purposes for reasons that the Congress has already rejected. Accordingly, the local interests that Ohio claims to have relied upon do not provide "legitimate" reasons for reducing competition between the two industries. Consequently, they are not "legitimate local interests" for purposes of this particular case.

If this Court were to find that the local interests at issue are "legitimate" local interests, the next question pursuant to *Great Atlantic, Raymond Motor Transp., Inc.*, and *Chemical Waste Management* is whether those local interests are adequate to justify the burden on interstate commerce. In the current case, the burden imposed on interstate commerce is the reduction in competition between the two industries. This Court does not have to weigh and balance the local interests against that harm to interstate commerce because Congress, as the branch of government given the power to regulate interstate commerce, has necessarily already performed that function. Congress decided to promote competition between the two industries in spite of the fact that all or most of the local communities across the country share the very same interests that Ohio now relies upon. Thus, Congress determined that those local interests do not provide an adequate reason for limiting competition between the two industries. Deferring to the judgment of Congress, this Court finds that the various local interests identified by defendant do not "demonstrably" justify Ohio's attempt to reduce competition between the two industries by discriminating against interstate commerce.

Even if this Court were to find that the local interests at issue are "legitimate local interests", and furthermore find that, if there were no alternative means of serving those interests, those interests would be adequate to justify the burden that the Ohio sales and use taxes place on interstate commerce, the sales and use taxes on direct broadcast satellite television services would still be unconstitutional because they are not the least discriminatory means for achieving the local purpose.

With regard to the acquisition of free internet and other free services and assets for schools and other public institutions, the State could have acquired those services and assets without discrimination by simply paying for those services and assets. The Supreme Court has already determined that financing an acquisition is not an adequate reason for discrimination against interstate commerce. *C & a Carbone v. Town of Clarkstown* (1994), 511 U.S. 383, 394.

With regard to (a) increasing the effectiveness of local emergency warning systems, and (b) increasing the amount and availability of local programming, the state could have been evenhanded with regard to taxation while offering targeted monetary subsidies. Specifically, the State could have been evenhanded by taxing both industries equally (possibly taking into account any additional local sales and use taxes paid only on cable services at the local level), either at the full rate or at a reduced rate, or by not imposing the sales and use tax on either industry. At the same time, the State could have offered targeted monetary subsidies to companies in the multi-channel video programming market. The subsidies could be provided in amounts that are proportionate to the extent to which the companies actually serve the local interests at issue. Such a strategy would at least be less discriminatory than the current strategy since it provides direct broadcast satellite television companies with an opportunity to qualify for the subsidies by developing their technology so that they could satisfy the local interests at issue.[10]

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[10] Whether this strategy would violate the dormant Commerce Clause is not before this Court and this Court has not determined the answer to that question. On the one hand, the State would still be interfering with the ability of the direct broadcasting satellite companies' ability to fully compete in the multi-channel video programming market, and that action would still appear to be contrary to Congress' purpose of promoting competition in that market. On the other hand, (1) the targeting of the subsidies would reduce the suspicion that the state had an economic protectionist motive, (2) the link between differential treatment and the location of performance of certain economic activities would be less explicit and less certain, and (3) the use of monetary subsidies might bring the state action within the purview of the "market participant" doctrine as applied in *Hughes v. Alexandria Scrap Corp.* (1976), 426 U.S. 794.

Construing the evidence in Defendant's favor, reasonable minds can reach but one conclusion that Defendant has not met the State's burden of justifying the discrimination against interstate commerce that exists in this case.

## XIII
## Conclusion

For the above stated reasons, summary judgment must be granted in favor of Plaintiffs. This Court hereby declares that the Ohio sales and use taxes are unconstitutional to the extent, but only to the extent, that they apply to direct broadcasting satellite television services while not applying to cable television services.

D. Hogan 10-17-07
DANIEL T. HOGAN, JUDGE

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