No. 2009-0627

ORIGINAL

In The Supreme Court of Ohio

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

Plaintiffs-Appellants,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Defendant-Appellee.

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

BRIEF OF AMICUS CURIAE CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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I. STATEMENT OF AMICUS INTEREST

The amici are professors of constitutional law at law schools both inside and outside Ohio, including leading authors on the subject of dormant Commerce Clause jurisprudence, the author of a leading constitutional law treatise, and a former United States Solicitor General and D.C. Circuit Court judge. Their teaching and research interests and agendas give them substantial expertise on the intersection between the dormant Commerce Clause and various forms of state and local taxation. Specifically, the amici are:

- **Derrick Bell**, Visiting Professor of Law, New York University School of Law.
- **Erwin Chemerinsky**, Founding Dean, UC Irvine School of Law; author, *Constitutional Law: Principles and Policies* (3d ed. 2006).
- **Brannon Denning**, Professor of Law and Director of Faculty Development, Cumberland School of Law; author, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417 (2008); *Dormant Commerce Clause Limits on the Regulation of Big Boxes and Chain Stores: An Update*, 58 Case Western Res. L. Rev. __ (forthcoming); *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 Miss. L.J. 623 (2007); *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37 (2006); Cuno *and the Court: The Case for Minimalism*, 4 Geo. J.L. & Pub. Pol'y 33 (2006); *The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense*, 88 Minn. L. Rev. 1801 (2004); *The Maine Rx Prescription Drug Program and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]*, 19 Am. J.L. & Med. 7 (2003); *Smokey and the Bandit in Cyberspace: the Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 Const. Commentary 297 (2002).
- **Peter Edelman**, Professor of Law, Georgetown University Law Center.
- **Jonathan Entin**, Professor of Law and Political Science, Case Western Reserve University School of Law.
- **Stephen Gardbaum**, Professor of Law, UCLA School of Law; author, *The Breadth versus the Depth of Congress's Commerce Power*, in *Federal Preemption: States' Powers, National Interests* (2007).
- **Carlton Larson**, Professor of Law, UC Davis School of Law.
- **Ethan Leib**, Associate Professor of Law, UC Hastings College of the Law.

- **Tracey Maclin**, Joseph Lipsitt Faculty Research Scholar and Professor of Law, Boston University School of Law.

- **Calvin Massey**, Professor of Law, UC Hastings College of The Law; author, *American Constitutional Law: Powers and Liberties* (3d ed. 2009).

- **Stephanie Hunter McMahon**, Assistant Professor of Law, University of Cincinnati College of Law.

- **Kermit Roosevelt**, Professor of Law, University of Pennsylvania Law School.

- **Neil Siegel**, Professor of Law and Political Science, Duke University School of Law.

- **Hon. Kenneth Starr**, Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University School of Law; former judge, United States Court of Appeals for the D.C. Circuit; former Solicitor General of the United States.

- **William Van Alstyne**, Lee Professor of Law, William & Mary Law School.

- **Norman Williams**, Professor of Law and Director of the Center for Law and Government, Willamette University College of Law; author, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. Rev. 1847 (2007); *Why Congress May Not 'Overrule' the Dormant Commerce Clause*, 53 UCLA L. Rev. 153 (2005); *The Dormant Commerce Clause: Why* Gibbons v. Ogden *Should Be Restored to the Canon*, 49 St. Louis Univ. L.J. 817 (2005).

The amici do not have a direct stake in this litigation, but they do have an interest in seeing dormant Commerce Clause jurisprudence develop in a sound and rational manner. The amici are concerned that the dormant Commerce Clause principles reflected in the decision of the intermediate court of appeals here constitute a departure from well-established understandings of the role and purpose of the dormant Commerce Clause. First, the appellate court's view that taxes do not discriminate against interstate commerce if both the favored and disfavored parties are interstate companies finds no support in dormant Commerce Clause precedent. Nor can the court's view that differential treatment is constitutionally permissible whenever the state can point to some small difference in operational methodology between the favored and disfavored companies be squared with existing precedent.

The court's holding could open the door to dramatically expanded use of various forms of discriminatory taxation that would be impermissible under traditional, accepted dormant Commerce Clause principles. Increased use of discriminatory taxes could, in turn, result in economic dislocations and inefficiencies, as companies seek to avoid tax penalties by locating facilities or activities in a particular state, even if the situation would not otherwise warrant that. Moreover, in situations like that presented here, discriminatory taxation based on the court's rationale could provide distinct competitive advantages to forms of technology that rely on physical presence within the state (*e.g.*, those that rely on cables within the state for distribution), and disadvantage newer technologies (*e.g.*, satellite distribution), that do not similarly involve such a presence. This "thumb on the scales" of the competitive market could detrimentally impact the development and implementation of new technologies. The amici thus urge the Court to eschew the intermediate appellate court's flawed dormant Commerce Clause framework, and confirm that the dormant Commerce Clause prevents states from using their tax systems to punish companies that seek to serve an in-state market though out-of-state conduct or facilities.

II. INTRODUCTION

The court below announced two new, never-before-seen dormant Commerce Clause rules that threaten to substantially weaken the protection that the dormant Commerce Clause provides against discriminatory state regulation. First, according to the court below, a state law *per se* does not discriminate against interstate commerce so long as both the party that the law favors, as well as the one disfavored, are interstate companies engaged in interstate commerce. Second, the court held that states are free to discriminate among categories of direct competitors if the state can point to any operational difference between them. Neither rule can be squared with existing dormant Commerce Clause jurisprudence, and together or separately these new rules threaten to throw open the floodgates to states using their tax laws (or other forms of regulation) to favor one interstate competitor (who has a local presence) over another (who does not).

One of the key purposes underlying the dormant Commerce Clause doctrine is to prevent states from requiring businesses to conduct activities within a given state, or conversely, from punishing those business that choose to (or as a result of the technology that they use, necessarily do) conduct their activities elsewhere. Our nation is comprised of separate states, but we are also a single union. The dormant Commerce Clause reflects the basic proposition that our union is best served by "free commerce" among the states. To put it in the U.S. Supreme Court's words, the "basic purpose" of the dormant Commerce Clause is "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 (citation and punctuation omitted).

No one disputes that the prohibition on state discrimination against interstate commerce extends to the states' taxing power. This is necessary, of course, because without the constraints imposed by the dormant Commerce Clause, states may be tempted to use their tax laws, just as any other form of regulation, in a manner that is "destructive of [ ] free commerce." Thus, the

Supreme Court has not hesitated to strike state tax laws that violate non-discrimination principles. While the U.S. Supreme Court's case law in this regard has not been the model of clarity in defining discrimination, one principle consistently emerges: States cannot use their tax laws to increase the tax burden on companies who serve local markets through out-of-state facilities or activities.

The decision below unfortunately rejected ***that*** established dormant Commerce Clause principle, and adopted two others in its stead. First, according to the intermediate court of appeals, a tax *per se* cannot be "discriminatory" when "both [the favored and disfavored companies] are engaged in interstate commerce." *DIRECT, Inc. v. Levin*, 181 Ohio App. 3d 92, 2009-Ohio-636 (hereinafter "Opinion"), at ¶ 28.

This newly-minted *per se* rule unmoors the dormant Commerce Clause from its traditional roots, runs contrary to a multitude of Supreme Court cases, dramatically narrows the scope of the dormant Commerce Clause's prohibition, and clears the way for the state to impose a variety of new state taxes that would not have passed muster under traditional dormant Commerce Clause principles. As just one example, the lower court's rule would presumably uphold a state tax on public companies that imposed a higher rate on such companies when they have an out-of-state headquarters, than when they have an in-state headquarters. As such companies are typically large, interstate companies, under the decision below there is no prohibition on discriminating between them. That is not the law, nor should it be.

Compounding its error, the lower court also misread two U.S. Supreme Court decisions, and found within them a rule that, so long as there is some operational difference between two groups of companies (here, for example, one group distributes television signals over cables, while another does it through satellite communication), a state is free to discriminate between them. That is so even if the tax-favored method is necessarily an in-state method (*e.g.*, cables must be located in the state to distribute signals here), and the tax-disfavored method is not.

Neither of these two rules is correct. The U.S. Supreme Court has held that one key purpose of the dormant Commerce Clause is to prevent states from using their tax laws to divert business "from the most economically efficient channels," *see Boston Stock Exchange v. State Tax Comm.* (1977), 429 U.S. 318, 336, or from "encourag[ing] the development of local industry by means of taxing measures that impose[] greater burdens on economic activities taking place outside the State than [are] placed on similar activities within the State." *Westinghouse Elec. Corp. v. Tully* (1984), 466 U.S. 388, 404. It matters not a whit whether those in-state activities are conducted by interstate companies. The point is straightforward: States cannot seek to reward companies (whether local or interstate companies) for their in-state activities by imposing a higher tax burden on interstate competitors who serve the local market through "economic activity taking place outside the State." The decision below thus contradicts well-settled dormant Commerce Clause case law. Accordingly, the amici urge the Court to correct the decision below, and confirm that Ohio follows (as it must) traditional dormant Commerce Clause doctrine.

III. STATEMENT OF THE FACTS

Satellite television service providers and cable television providers directly compete for viewers in Ohio. Cable providers distribute their signals through cables located in the state, while satellite providers distribute theirs directly to subscribers from satellites not located here.

Ohio's tax laws penalize satellite providers in their competition with cable providers. In particular, in 2003, the state amended the sales tax statute to impose the sales tax on retail sales of satellite broadcasting services, while exempting cable television providers from that tax. The statute defined the group subject to the sales tax as those who "broadcast[] 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).

DIRECTV and EchoStar, two satellite television service providers, challenged that tax on the grounds that it discriminated against interstate commerce. Cable providers, who have distribution equipment in the state, escape the sales tax, while satellite providers, precisely because they lack such distribution equipment in the state, must pay the tax.

The trial court determined that the tax, as applied to satellite television service providers, while "not facially or purposely discriminat[ory] against interstate commerce . . . 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." *See* Opinion at ¶ 5 (describing trial court opinion). The trial court thus struck the sales tax as applied to satellite providers.

On appeal, however, the Tenth District Court of Appeals reversed. The appellate court did not dispute that the satellite providers "are more burdened by Ohio's tax provision than comparable interstate cable providers." Id. at ¶ 27. It determined, however, that this heavier tax burden did not constitute discrimination against interstate commerce.

The appeals court reached this result by applying two newly-announced dormant Commerce Clause rules. First, the court concluded that a tax can never constitute discrimination against interstate commerce, so long as both the benefited and the burdened party are engaged in interstate commerce. To put it in the court's words:

> [W]e 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.***

Id. at ¶ 28 (emphasis added).

Second, and relatedly, the court misread language from *Amerada Hess* and *Exxon Corp.*[1] to the effect 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.'" Id. at ¶ 23 (quoting *Kraft Gen. Foods v. Iowa Dept. of Revenue & Fin.* (1992), 505 U.S. 71, 78, in turn *quoting Amerada Hess Corp*, 490 U.S. at 66). The court erroneously saw in this language carte blanche for states to differentially tax two companies, so long as a state could point to "the use of different technologies under different business models." Opinion at ¶ 22. Such discrimination, according to the court, is merely "between different forms of interstate commerce, [and] is not discrimination *against* interstate commerce." Id. at ¶ 27.

Having held that the tax could not violate the dormant Commerce Clause in that both the favored and disfavored entities are "engaged in interstate commerce," and that the companies are engaged in different forms of interstate commerce, the court declined to reach the Tax Commissioner's other arguments relating to the tax.

IV. ARGUMENT

The decision below—with its insistence that tax laws cannot violate the dormant Commerce Clause when either (1) both the benefited and burdened competitors are "engaged in interstate commerce" or (2) the two groups of competitors have some small difference in technologies or methods of operation—cannot be squared with either the purpose underlying the dormant Commerce Clause or settled dormant Commerce Clause case law. The court below essentially adopted an archaic view of the dormant Commerce Clause under which the doctrine

[1] *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept. of Treasury* (1989), 490 U.S. 66; *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117.

seeks only to prevent states from attempting to protect local mom-and-pop establishments. But the reach of the dormant Commerce Clause extends well beyond that. It rests on the fundamental recognition that the states in our union all "sink or swim together," and that our national interest is best served by free commerce. To that end, it broadly rejects state efforts to interfere with free commerce by penalizing companies for serving local markets from afar. In short, the dormant Commerce Clause does not allow states to punish out-of-state competitors who use one technology to serve the market from outside the state, merely because its competitors, who serve the local market through in-state conduct, are also interstate companies themselves. Narrowing the dormant Commerce Clause in that manner threatens to eviscerate the protection it offers, not only for competitors, but also for the nation's (and Ohio's) citizens.

PROPOSITION OF LAW I:

THE COMMERCE CLAUSE IS DESIGNED TO PROMOTE FREE COMMERCE AMONG THE STATES, AND IT BROADLY PROHIBITS STATE ATTEMPTS TO PUNISH EFFORTS TO SERVE AN IN-STATE MARKET THROUGH OUT-OF-STATE ACTIVITY.

The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.* (1935), 294 U. S. 511, 523. The dormant Commerce Clause is an important component in achieving that "long run prosperity and salvation." The "basic purpose" of the dormant Commerce Clause is "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 (citation and punctuation omitted). The dormant Commerce Clause grew out of the recognition that states may fall prey to the short-term gains that such preferential trade areas would seem to offer, but that over the long term, this form of discrimination would harm not only those companies that engaged in interstate commerce, but the local citizens as well. That lesson is clearly on display here.

In drafting the Constitution, the framers were well aware that unbridled competition among the states could be destructive to the union. The U.S. Supreme Court recounts it thusly: "When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began." *H.P. Hood & Sons v. Du Mond* (1949), 336 U.S. 525, 533. "[E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union." Id. (citation omitted).

To that end, the framers granted ***to Congress***, rather than to the states individually, the power to regulate interstate commerce. *See* U.S. Const. art. I, § 8. With this grant of power came the necessary corollary—absent congressional authorization, states are not allowed to discriminate against interstate commerce. This principle is referred to as the dormant Commerce Clause.

Importantly, the dormant Commerce Clause not only protects those who engage in interstate commerce, but also, in a sense, protects the states against themselves. Left to their own devices, states may well conclude that their short-term interest lies in protectionism. Other states, recognizing that such incentives exist, may respond to, or even try to preempt, such protectionism, by engaging in it first. The result is a downward spiral, a race to the bottom, that harms not only interstate competitors, but the states and their citizens was well. *See* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377 (1996) (advocating dormant-Commerce-Clause foreclosure of state tax incentives for attracting businesses because the incentives discriminate against interstate commerce and deprive the discriminating states themselves of vital tax revenue).[2]

The Founders clearly understood that discriminating against interstate commerce may ultimately harm the discriminating state along with the remainder of the national economy. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution" was "'to consider how far a uniform system in [states'] commercial regulation may be necessary to *their common interest* and *their permanent harmony*.'" *H.P. Hood & Sons*, 336 U.S. at 533 (quoting Documents, Formation of the Union, 12 H.Docs., 69th Cong., 1st Sess., p. 38) (emphasis added).

The Framers and courts also recognized that even though protectionist practices may hurt local communities in the long run, preventing such practices requires a constitutional rule rather than simple reliance on the restraint of local officials themselves. It is often difficult for local officials to forego what appears to be an immediate advantage for local constituencies in favor of preserving a robust interstate economy that benefits all constituencies, including their own, in the long run. As Madison stated, "the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain." The Federalist No. 42 (James Madison). By agreeing to a binding constitutional rule, though, the States are able to

[2] This brief takes no position on Prof. Enrich's argument in that article that state tax ***incentives*** (as opposed to state tax ***burdens***) violate the dormant Commerce Clause. Questions involving the appropriate dormant Commerce Clause treatment of incentives are not presented here, as the tax differential at issue clearly constitutes a burden or "penalty" in the form of a tax that burdens an out-of-state activity that is not borne by a directly competing in-state activity.

secure the long-term gains that might otherwise fall prey to short-term interests, ensuring that a more enduring and unified national economy can grow to the benefit of all.

This case illustrates the importance of that principle. Ohio has adopted tax laws that will have the effect of preserving a status quo that is based on existing cable infrastructure, an infrastructure that currently provides local jobs and income. Indeed, it is possible that artificially bolstering cable television in Ohio in this way may have some short-term value to the local economy. But allowing satellite television to compete fairly with cable in Ohio will ensure that Ohioans themselves benefit from the untold future innovations that stem from the proliferation of a new technology into the state, and will ensure that Ohioans are not left behind if new innovations render old technology obsolete.

By imposing higher taxes on satellite television, Ohio has stifled the growth of that technology in the state, and has isolated itself from whatever advances and innovations may come with it. The dormant Commerce Clause prevents this action, not only to ensure that new innovations can thrive across the nation, but also to ensure that they can thrive within the very state that would otherwise attempt to impede their progress. The Tenth District's oversimplified analysis ignored the fact that the discriminating state's local economy can *itself* can be a victim of the discriminatory measure at issue. The dormant Commerce Clause protects Ohio's citizens, and that decision below deprives the state's citizens of the full scope of that protection.

PROPOSITION OF LAW II:

A STATE CANNOT EXCUSE USING ITS TAX LAWS TO BURDEN OUT-OF-STATE ACTIVITY, AND THEREBY PROVIDE A BENEFIT TO IN-STATE ACTIVITY, MERELY ON THE GROUNDS THAT BOTH (1) THE PARTIES ENGAGED IN THE OUT-OF-STATE ACTIVITY, AND (2) THE PARTIES ENGAGED IN THE IN-STATE ACTIVITY, ARE INTERSTATE COMPANIES.

Not only is the decision below inconsistent with the "free commerce" purpose that lies at the heart of the dormant Commerce Clause, but the rule the decision announces directly contradicts settled dormant Commerce Clause precedent. The court's rule—that a tax can never be impermissibly discriminatory if the favored entities are themselves companies engaged in interstate commerce—runs afoul of myriad dormant Commerce Clause cases. In particular, the rule the court below announced turns on the status of the favored ***entity*** (*i.e.*, is the favored entity a local mom-and-pop, or is it an interstate company?), rather than on the nature of the favored ***activity***. Case after case, however, confirms that it is the nature of the favored ***activity*** that matters. Courts routinely find dormant Commerce Clause violations even when the favored entities include out-of-state companies engaging in interstate commerce. Likewise, courts routinely find dormant Commerce Clause violations when the disfavored entity is a local mom-and-pop seeking to engage in interstate commerce. In all of these cases, it is the nature of the favored or disfavored activity, not the identity of the favored or disfavored party, that controls the outcome. In short, states cannot use their tax laws to tip the scales of competition by burdening out-of-state activities relative to in-state activities.

A. Courts Find Dormant Commerce Clause Violations When Favored Entities Are Located Out-Of-State And Engage In Interstate Commerce.

First, in direct contradiction to the decision below, courts have repeatedly found dormant Commerce Clause violations despite the fact that the provision at issue favored out-of-state entities or entities engaged in interstate commerce.

In *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, the plaintiffs challenged a New York tax on the transfer of stock, which imposed a higher rate if the stock was sold out-of-state than if the stock was sold in-state. Among other things, the tax law provided a "nonresident reduction," whereby nonresidents received a 50% reduction in the tax rate when they transferred stocks that were sold in New York. Indeed, residents of New York were not entitled to this reduction, even if they too transferred stocks that were sold within New York.

Accordingly, by definition, the beneficiaries of the discrimination (or, in other words, the favored parties) were *not* local residents. The Court held that "[b]ecause it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax . . . falls short of the substantially evenhanded treatment demanded by the Commerce Clause." Id. at 332. Moreover, the court rejected any notion that the tax could be saved because it favored certain non-residents rather than New York residents themselves:

> The fact that this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce, . . . does not save [the tax] from the restrictions of the Commerce Clause. A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce.

Id. at 334–35 (citation omitted). In other words, the question is not whether the parties that the tax benefits and the parties that it burdens are local or interstate; rather, the question is whether the tax penalizes taxpayers for their decision to engage in out-of-state, rather than in-state, ***conduct***.

Likewise, the Ohio provision at issue in *Cuno v. DaimlerChrysler, Inc.* (6th Cir. 2004), 386 F.3d 738 (later vacated on standing grounds, *see* 547 U.S. 332 (2006)), granted a tax credit to a large company headquartered outside of Ohio in return for the company agreeing to locate a production plant inside Ohio. Id. at 741. Again, the beneficiary of the challenged provisions—indeed, a named defendant in the case—was hardly a local company limited to conducting business in Ohio. But again, the court found that the tax credit "discriminates against business carried on outside the State," id. at 743 (citation omitted), paying no mind to the fact that DaimlerChrylser itself continued to conduct most of its own business outside of Ohio.

In many more cases, courts have struck state provisions that, while not expressly providing favorable treatment to out-of-state entities engaged interstate commerce, clearly made favorable treatment available to such companies (along with in-state companies) based on their in-state activities. For example, in *New Energy Co. of Indiana v. Limbaugh* (1988), 486 U.S. 269, Ohio provided a tax credit against a tax on selling fuel in Ohio if fuel dealers used ethanol in their products. However, Ohio made the credit available only to dealers who used ethanol produced in Ohio ***or in another state that granted a tax credit for ethanol produced in Ohio.*** Thus, the favored group under the statute expressly included interstate companies (*i.e.*, those who sold out-of-state ethanol into Ohio from states that granted a tax credit for ethanol produced in Ohio). In fact, the plaintiff was an Indiana company that sold ethanol in Ohio and would have been eligible for the credit had it chosen to use Ohio or other qualifying ethanol. The Court nonetheless struck the credit, a result that simply cannot be squared with the lower court's insistence here that discrimination against one interstate company and in favor of another does not matter for dormant Commerce Clause purposes.

Indeed, cases abound in which large, out-of-state companies or companies engaged in interstate commerce were just as eligible to benefit from the state provision at issue as wholly in-state companies were. *See, e.g.*, *Walgreen Co. v. Rullan* (1st Cir. 2005), 405 F.3d 50, 56 (challenged law favored existing pharmacies over new pharmacies, regardless of whether they originally started in Puerto Rico or whether they were part of a larger interstate corporation); *S.D. Farm Bureau, Inc. v. Hazeltine* (8th Cir. 2003), 340 F.3d 583, 587 (challenged law prohibited corporations from owning in-state farms, but exempted family corporations, regardless of where the corporation was located or whether it conducted interstate business). In none of these cases did the courts even suggest that the mere fact that some interstate companies were benefited, while others were burdened, somehow changed the dormant Commerce Clause analysis.

The same is true of this Court's jurisprudence. In *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St.2d 465, the provision at issue granted favorable tax treatment under the Coal Use Tax for using high-sulfur coal, a kind of coal predominantly located in Ohio. In a lengthy opinion striking the tax for violating the dormant Commerce Clause, the Court never once even mentioned whether the companies that mined Ohio coal—*i.e.*, the companies that received a competitive pricing advantage as a result of the tax—were local Ohio companies or not. Rather, the ***exclusive*** focus of the Court's decision was that the provision at issue favored in-state activity (mining Ohio coal), whether conducted by in-state or out-of-state companies.

In all of these cases, just as with the cable companies here, the favored entities were, or could easily have been, businesses headquartered outside of the discriminating state and engaging in interstate commerce themselves. But in none of these cases did that fact preclude the court from finding that the provisions at issue violated the dormant Commerce Clause. Unlike the Tenth District, these courts correctly understood that the dormant Commerce Clause analysis does not merely prevent discrimination in favor of local establishments. It also prevents states from using their tax laws to punish any company, whether local or interstate, for seeking to serve the local market through activities, facilities or resources located outside the state.

B. Courts Find Dormant Commerce Clause Violations When Disfavored Entities Are Located Within The Discriminating State And Engage In In-State Commerce.

The inverse is also true: Courts routinely find dormant Commerce Clause violations when the victims of discriminatory provisions themselves are local companies, but the state is seeking to discourage or prevent them for engaging in interstate commerce.

To begin, several successful dormant Commerce Clause plaintiffs have conducted significant local business within the discriminating state. *See, e.g.*, *Armco, Inc. v. Hardesty* (1984), 467 U.S. 638, 640 (plaintiff corporation manufactured steel and sold steel within the discriminating state); *Westinghouse Elec. Corp. v. Tully* (1984), 466 U.S. 388, 394 (plaintiff did business within the discriminating state and regularly paid taxes to the discriminating state). But beyond simply engaging in local commerce, many successful dormant Commerce Clause plaintiffs have been located within the discriminating state and conduct the majority of their business within state lines. For example, as noted above, in *Dayton Power & Light Co.*, this Court struck a tax that provided a lower rate for those who bought coal located in Ohio than for those who bought coal located outside of Ohio. 58 Ohio St.2d at 471–73. The plaintiff was an *Ohio* utility company in the business of providing power to Ohio customers. Nonetheless, the Court found that by taxing the local plaintiff at a higher rate for purchasing coal found mostly outside of Ohio, the state violated the dormant Commerce Clause. Id. at 476. Likewise, the plaintiff in *Philadelphia v. New Jersey* (1978), 437 U.S. 617, 619, was a New Jersey landfill company that successfully challenged a New Jersey law prohibiting the importation of most solid or liquid waste which came from outside of the New Jersey. And in *South-Central Timber Development, Inc. v. Wunnicke* (1984), 467 U.S. 82, 85–86, the plaintiff was an Alaska logging company that conducted its logging business within Alaska, but ran afoul of an Alaska provision limiting state contracts to companies that not only cut trees in Alaska but also process their lumber in state.

Moreover, some unconstitutional provisions specifically target local companies or local commerce by forcing local business to remain within state borders. In *Tyler Pipe Industries v. Department of Revenue* (1987), 483 U.S. 232, 234, Washington's unconstitutional manufacturing tax was assessed only on products *manufactured within Washington* that were sold to out-of-state purchasers. In *Pike v. Bruce Church, Inc.* (1970), 397 U.S. 137, 138, an Arizona state official invoked an Arizona packaging law applicable only to cantaloupes grown *within Arizona* to prevent the plaintiff from shipping cantaloupes outside of the state. Despite the fact that the law was limited to Arizona cantaloupe growers, the Court still found a dormant Commerce Clause violation. And in *New England Power Co. v. New Hampshire* (1982), 455 U.S. 331, 333–35, the Court found a dormant Commerce Clause violation when New Hampshire attempted to prohibit power companies from selling electricity produced within the state to customers located outside of the state.

One can imagine that in many of these cases, the disfavored and favored entities looked very much alike; specifically, the laws and actions at issue often benefited one small local business to the detriment of another. But in none of these cases did the court dismiss the dormant-Commerce-Clause challenge based on the mere fact that the disfavored class included local companies, or that the favored class included interstate companies. Instead, in each of these cases, the court looked to whether the statute improperly discouraged out-of-state activity.

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None of the above cases can be reconciled with the decision below. The court here held that the dormant Commerce Clause extends only to those situations where the state is seeking to protect local companies, or, in other words, that the dormant Commerce Clause offers no protection when both the favored and disfavored entities are interstate companies. *See* Opinion at ¶ 24, 28 (no Commerce Clause violation because "both [satellite companies and cable companies] are engaged in interstate competition" and are large companies "headquartered outside Ohio"). That rule is demonstrably wrong, as the decisions above reveal. In a case such as this, it is the nature of the ***activity***, not the nature of the ***business entity***, that matters for dormant Commerce Clause purposes.

PROPOSITION OF LAW III:

A STATE CANNOT JUSTIFY DISCRIMINATORY TAXATION ON THE GROUNDS THAT THE DIFFERENTIAL TAX TREATMENT BETWEEN TWO CATEGORIES OF COMPANIES ARISES "SOLELY FROM DIFFERENCES BETWEEN THE NATURE OF THEIR BUSINESSES, NOT THE LOCATION OF THEIR ACTIVITIES," *AMERADA HESS CORP. V. DIRECTOR, DIV. OF TAXATION, N.J. DEPT. OF TREASURY* (1989), 490 U.S. 66, 78, WHEN THE NATURE OF THEIR BUSINESS IS INEXTRICABLY LINKED TO THE LOCATION OF THEIR ACTIVITIES.

The Court of Appeals also attempted to justify its decision by misapplying language from *Amerada Hess Corp.*, 490 U.S. at 78, that permits differential treatment that "'results solely from differences between the nature of [the] businesses, not from the location of their activities.'" Opinion at ¶ 23 (quoting *Amerada Hess*, 490 U.S. at 78; additional citation omitted). In essence, the Court of Appeals concluded that cable television and satellite television are two separate industries, and the satellite-only tax was not a burden on interstate commerce, but rather a permissible tax on one industry (satellite providers) that is of a "different nature" than the other (cable providers).

The flaw in the lower court's analysis, however, is that *Amerada Hess* did not alter the basic dormant Commerce Clause rule that a state may not enact a provision that punishes a business for failing to engage in economic activity within the state. *See Boston Stock Exchange*, 429 U.S. at 331; *Armco*, 467 U.S. at 642; *Westinghouse*, 466 U.S. at 404; *Granholm v. Heald* (2005), 544 U.S. 460, 472; *Lewis v. BT Invest. Managers, Inc.* (1980), 447 U.S. 27, 42 n.9. Rather, *Amerada Hess* stands for the unremarkable, and complementary, proposition that when the differential treatment is based on the different nature of two businesses, ***rather than*** on the amount of activity occurring within the state, the dormant Commerce Clause is satisfied.

In *Amerada Hess*, oil companies challenged New Jersey's tax code for failing to allow them to deduct a federal windfall profit tax from their New Jersey state taxes. 490 U.S. at 70–71. The companies argued that the code "discriminated against oil producers who market[ed] their oil in favor of independent retailers who do not produce oil." Id. at 78. The Court rejected that argument as a valid ground for a dormant Commerce Clause challenge, because the disparate treatment had ***nothing*** to do with the ***location*** of economic activity, but instead was based on the inherent differences between companies that produce oil and companies that sell refined gasoline. Since the businesses are different by nature, the dormant Commerce Clause does not require New Jersey to treat them the same.

The oil companies tried to preserve their challenge by pointing out that because there is no crude oil to be drilled in New Jersey, the denial of a tax credit for such oil production burdens only out-of-state companies. But the Court held that this happenstance alone was not enough to turn the code into a discrimination against interstate commerce. Indeed, there was no facial discrimination, nor any showing of an intent to discriminate against interstate commerce. Id. at 76. There was no singling out of oil companies for a deduction denial. Id. at 70. Moreover, the fact that no oil company could drill for oil in New Jersey meant that no similarly situated in-state business could receive any benefit from the alleged interstate commerce discrimination. Id. at 77.

The Court in *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117, similarly considered a Maryland law prohibiting oil producers from owning retail gas stations. Id. at 119. Again, oil companies challenged the law, again tying their dormant Commerce Clause claim to the fact that there is no crude oil to be drilled in Maryland. Thus, they claimed, only out-of-state companies would be forced to divest. Again, however, the Court rejected the challenge, noting that the law did not facially discriminate based on location, nor was there any showing of an intent to discriminate against interstate commerce. Again, the Court determined that the law discriminated not against interstate commerce, but instead against a particular type of business, no matter its location. Id. at 127. Indeed, the statute was not tipping the scale of competition in favor of local activity ***at all***, but instead only acting as a prohibition against vertical integration (*i.e.*, Maryland was seeking to prohibit a single company from owning both the production and retail distribution ends of the gasoline supply chain).

By contrast, when it ***can*** be shown that a provision effectively discriminates between similar competing businesses based on the location of economic activity, rather than based on location-neutral differences in separate kinds of businesses—particularly where such discrimination puts a thumb on the scale in favor of local activity—courts have not hesitated to find dormant Commerce Clause violations. In *Dayton Power & Light*, for example, this Court struck down an Ohio tax imposing a higher rate for using low-sulfur coal than for using high-sulfur coal. In that case, it was hardly a secret that high-sulfur coal was in abundance in Ohio, while low-sulfur coal was not. Thus, the tax created an incentive for coal users to choose coal produced in Ohio over coal produced elsewhere. 58 Ohio St.2d at 473–74. Similarly, in *Bacchus Imports Ltd. v. Dias* (1984), 468 U.S. 263, the Court struck down a tax exemption for a liquor distilled from a native Hawaiian plant because the exemption created an advantage over liquors produced elsewhere. The Court rejected Hawaii's argument that the local liquor does not compete with the broad liquor market coming from outside the state, concluding that even a small degree of competition between favored and disfavored entities is enough ground for a potential dormant Commerce Clause violation. Id. at 268–69. *Cf. Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, 300 (considering "actual or prospective competition between the supposedly favored and disfavored entities" relevant to whether a provision discriminates against interstate commerce).

This case is not *Amerada Hess* nor *Exxon.* Here, cable television companies and satellite television companies are in direct competition in Ohio. Ohio consumers choose between cable television and satellite television as the source of the programming that appears on their television screens. The only difference between the two businesses is the means by which the programming is delivered. With the satellite-only tax, Ohio has seized upon one of these operational differences and created a direct competitive advantage that extends exclusively to those companies that use in-state ground receiving and distribution equipment for distributing their television content rather than using alternative modes—a competitive advantage that takes the form of a tax on those competitors that lack such an in-state presence. Far from location-neutral differential treatment of separate industries, this is the very sort of economic protectionism that the dormant Commerce Clause prohibits.

By way of example, imagine that Ohio was the only state that allowed a certain method of coal mining, and that all mining in the state was done according to that method. Surely, *Dayton Power & Light* would have come out no differently if the General Assembly had latched on to that Ohio-specific attribute of the coal mining industry as the way of providing a competitive advantage for Ohio coal vis-a-vis out-of-state coal by tying the tax reduction to the Ohio-specific mining method, rather than to the Ohio-specific sulfur content. In either case, the constitutional problem is that the General Assembly is using a proxy (the mining method or the sulfur content) as a way of singling out competitors engaged in in-state activity and providing them a competitive advantage over those competitors serving the market through out-of-state conduct. Similarly here, the tax statute favors a distribution method (cable) that is inextricably linked to a presence in the state, thereby offering a direct competitive advantage to those companies serving the market through in-state conduct. Contrary to the decision below, *Amerada Hess* does not provide a safe harbor for this form of protectionism.

V. CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and confirm that Ohio adheres to accepted understandings of the dormant Commerce Clause doctrine.

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CERTIFICATE OF SERVICE

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