

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.

Case No. 09-0627

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District, Case No. 08AP-32

**BRIEF OF *AMICI CURIAE* SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION, ACE SATELLITE, BUCKEYE DISH
INSTALLATION, INC., CABLE ALTERNATIVES, PRIMEVIEW SATELLITE,
KIDWELL SATELLITE, RICHLAND COUNTY SATELLITE, PREMIERE
SATELLITE & ELECTRONICS, INC., WELLS FAMILY EQUIPMENT, THOBE TV,
FELIX ELECTRONICS, VINCE'S TV & APPLIANCE, DIGI-TECH SATELLITE,
DUDLEY SATELLITES, GEORGE'S ELECTRONICS, INC., AND PROGRESSIVE
SATELLITE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

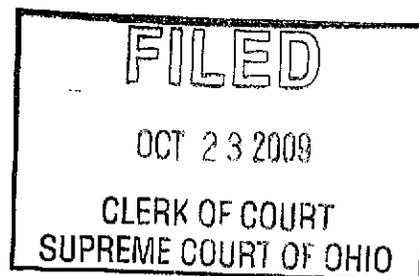
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STATUTES

R.C. 5739.019

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae Satellite Broadcasting and Communications Association (“SBCA”) is the national trade organization representing all segments of the direct broadcast satellite (“DBS”) industry. It is committed to expanding consumer use of satellite technology for the delivery of video, audio, data, music, voice, interactive, and broadband services. The SBCA represents a variety of companies comprising the satellite services industry including: satellite service providers, equipment manufacturers, distributors, retailers, and national and regional distribution companies.

Amici curiae Ace Satellite, Buckeye Dish Installation, Inc., Cable Alternatives, Primeview Satellite, Kidwell Satellite, Richland County Satellite, Premiere Satellite & Electronics, Inc., Wells Family Equipment, Thobe TV, Felix Electronics, Vince’s TV & Appliance, Digi-Tech Satellite, Dudley Satellites, George’s Electronics, Inc., and Progressive Satellite (“Retailers and Installers” and, together with SBCA, “Amici”), are just fifteen of the scores of retailers and installers of satellite TV equipment who are members of the SBCA and operate in Ohio. Amici do not directly provide satellite TV service to consumers—that service is primarily offered by Appellants DISH Network and DIRECTV. Instead, the Retailers and Installers and other members of SBCA are responsible for marketing and selling satellite TV service to consumers, and for installing the small satellite dishes that DBS subscribers use to receive programming from Appellants.

Amici’s interest in this lawsuit is straightforward: the success of their businesses is inextricably linked to the demand for satellite TV service. In the six years since the General Assembly artificially raised the price of satellite TV relative to their only competitor—cable—by enacting the “satellite-only tax,” Amici have experienced first-hand the chilling effect that it has

had on demand for satellite related products and services. Compared to similar businesses in neighboring states like Indiana, Illinois, and Michigan—all states without discriminatory taxes on satellite TV—Retailers and Installers and the other constituents of SBCA have hired fewer employees, purchased less new equipment, and have generally been less able to expand their businesses in Ohio. Accordingly, the Court’s resolution of this case is of great importance to Amici.

INTRODUCTION

Amici agree with and adopt all of the points of law set forth in the Appellants’ Brief and submit this brief to discuss the importance of Proposition of Law No. 3. In so doing, Amici also write to highlight the significant negative ramifications of the General Assembly’s decision to protect the interests of the Ohio cable industry.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the statement of facts provided by Plaintiffs-Appellants DIRECTV, Inc. and EchoStar Satellite, L.L.C.

ARGUMENT

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.

A. Satellite TV Made Significant Inroads Into Ohio’s Pay TV Market Through Innovation and Ingenuity.

Most Ohio families have three choices when comes to television: cable, satellite, or “rabbit ears.” In terms of picture quality and available programming, no one would confuse “over the air” television with “pay TV.” The same, however, cannot be said about satellite TV and cable. While there are certainly households that choose satellite TV because DIRECTV or DISH Network carry a channel that their cable provider does not, or because they offer more HD channels, most customers would neither know nor care whether their TV programming reached them via cable or satellite while they are sitting on their couch watching an Ohio State football game.

All else being equal, when two businesses provide the same basic service in the same market, customers will choose the service that offers the lowest price. And price is simply a function of the costs associated with providing a good or service and a reasonable expectation of profit determined by what the market will bear. That, at least, is how it works for Amici’s businesses. In their experience, customers almost always decide between one retailer and another, or one installer and another, based, to some extent, on price. Thus, each of them is constantly looking for ways to maximize efficiency to reduce their costs so that they may lower their prices while still remaining profitable. For some that means relying more on the Internet and less on face-to-face interactions to sell their products. For others, it means shipping their

goods through the mail rather than delivering them on company-owned trucks and vans. In all cases, however, it means utilizing the available technologies, or innovating new ones, to maximize efficiencies wherever possible so as to compete more effectively in their relevant market.

By following this formula for success—a formula born out of free market economies in which fair competition leads to the continuous availability of new products and services and creates downward pressure on prices—the satellite TV providers were able to penetrate deep into the market for subscription video service in Ohio at breakneck speed. As satellite TV and cable offer essentially the same service, they compete vigorously for customers on programming, quality, customer service, and most importantly, price. And until the legislature stepped in 2003 to alter the competitive landscape for pay TV services by imposing a discriminatory tax on satellite TV, no one would deny that when it came to price, satellite had the edge. This was, in large part, due to the fact that the satellite TV providers developed an innovative technology that allowed them to drastically reduce the costs associated with providing TV programming relative to the costs of providers using traditional cable. Specifically, by delivering their programming signals directly to their subscribers via satellites, the satellite TV providers avoided two significant costs associated with the provision of cable service: (1) building a massive infrastructure of buildings, cables, and maintenance and repair facilities in the state and paying an army of employees in the process; and (2) paying rent, or “franchise fees,” to the municipalities in which they provide service for access to the public rights-of-way. This competitive advantage allowed the satellite providers to offer their service at a lower price than their cable competitors.

B. Cable Looked To The Ohio Legislature To Protect It From Its New Competitive Threat.

Understandably concerned about “[t]he increasing shift of customers from cable to satellite,” the Ohio cable companies were looking for a way to protect their declining market share and dwindling profits from the further encroachment of the satellite TV providers. (Supp. 86–87.) But, rather than develop new ways to compete more effectively in the market, the cable industry took their plight to the statehouse. At that time, the legislature was considering a proposal that would have imposed an equal 6% tax on the retail sale of both cable *and* satellite TV service. Recognizing the opportunity, the Ohio cable providers used the proposed, competitively-neutral tax scheme as their vehicle to lobby for an alternative tax scheme—one that would only be applied to satellite TV.

Cable’s message in support of their satellite-only tax proposal was riddled with protectionist themes and messages. They pleaded for the legislature not to tax cable because “[C]able operators . . . must make and maintain a significant investment in Ohio in terms of tangible property, equipment and employees.” (Supp. 339.) Whereas the satellite companies, they continued, “require virtually no investment in Ohio in order to compete,” (Id.), and “[p]rovide[] Ohioans with very few job opportunities, [don’t] pay an appreciable tax of any kind anywhere in Ohio . . . , [and have] not done much of anything to support local communities.” (Supp. 343.) In sum, cable’s message was to punish the satellite industry that “contributes next to nothing to Ohio’s economy, *pocketing its profits and taking them out of state.*” (Supp. 98 (emphasis added).)

Amici understand the appeal of these arguments and do not dispute the veracity of cable’s assertions. Because of the difference in how each service physically transmits its programming signals—which is the only discernable difference between the two types of pay TV service—

cable generates a tremendous amount of revenue for Ohio and its municipalities. Satellite TV, simply, does not. Any legislator would be swayed by the simplistic force of cable's protectionist message.

C. **Ohio's Enactment Of The Protectionist Satellite-Only Tax Violates the Basic Purpose Behind The Adoption Of The Commerce Clause.**

Like cable, the Framers of the Constitution also understood the power and persuasiveness of arguments rooted in the economic protectionism. And they also knew that, at times, the temptation of the states to indulge their short-sighted protectionist tendencies would be too great to resist. Indeed, this was one of the primary reasons the Framers adopted the Commerce Clause—to prevent the states from favoring businesses that contribute to the local economy by shackling foreign competition with discriminatory measures. The Commerce Clause was designed to foster “an area of free trade among the several states” so as to promote the development of a vibrant national economy that would have been unfathomable if the several States were permitted to freely indulge their natural economic protectionist tendencies. *Boston Stock Exch. v. State Tax Comm'n* (1977), 429 U.S. 318, 329 (citation omitted); see also *Granholm v. Heald* (2005), 544 U.S. 460, 472.

The Tax Commissioner at the time of the satellite-only tax was enacted, Tom Zaino, understood this well. He realized immediately that imposing a discriminatory tax on satellite TV would be plainly unconstitutional. He even went so far as to warn the General Assembly that if enacted, the satellite TV companies would have a “significant chance of success” if they challenged the satellite-only tax in court. (Supp. 106.)

The Commerce Clause, however, was adopted to serve a much greater purpose than just to protect businesses from discriminatory and protectionist legislation. The Framers understood that the Commerce Clause was necessary to ensure that the citizens of every state

were able to reap the benefits of a free and fair national marketplace unhindered by the influence of parochial protectionist motivations. For, while a protectionist measure may provide a boon to one sector of the economy, many others often suffer as a result. Such is the case with Ohio's satellite-only tax:

For example, as satellite TV has become a less attractive option for Ohio families, all of the local businesses that make up the secondary market for satellite TV equipment and services, such as the Retailers and Installers, feel the pinch. Indeed every member of the SBCA that operates in Ohio has seen their business slow. But, the impact of the discriminatory tax is perhaps felt most intensely by the multitudes of Ohio families that have either refused to drop their service for cable or that are not served by cable and thus have no other option for subscription TV service. These families not only suffer the absence of a little extra money from their checking accounts each month, but they also suffer the infuriating feeling of impotence as their pleas to their elected representatives to end the discrimination fall on ears deafened by the influence of the entrenched cable monopoly. Since the enactment of the discriminatory satellite-only tax, thousands of phone calls from frustrated and angry satellite subscribers have flooded the statehouse. Despite their vehement protestations, however, their calls to end the discrimination have yet to be answered.

The deleterious effects of this protectionist tax, however, do not end there. The satellite-only tax ultimately harms every citizen in Ohio, even those who do not subscribe to satellite TV. In protecting cable, Ohio has given up over \$80 million per year in additional tax revenues. Thus by choosing to protect cable TV from their satellite competitors, the State has also chosen to forgo the opportunity to create new jobs, improve schools, repair streets, or fund public works

projects. Every Ohio citizen suffers these losses so that the cable industry may be adequately protected from fair market competition.

Finally, in enacting the satellite-only tax, the General Assembly has undermined price competition in the video marketplace by allowing cable to charge 5.5% more than the market would otherwise allow, and robbed the public of the tremendous benefits that accompany free and fair competition. Since satellite TV service emerged as a viable competitor to the cable industry in the late 1990s, programming options have increased, the quality of service has improved, constant rate hikes have been checked, new technologies like digital and high definition TV and on-demand services have become commonplace, and the number of available channels and programming packages has skyrocketed. Whether a consumer chooses cable or satellite as their method of video service, she gets more value for every dollar she spends on pay TV service now than she did a decade ago. But without fair competition, cable providers have less incentive to improve their service or reduce their prices. As a result, every Ohio consumer of pay TV in the State of Ohio is affected.

D. This Court Should Not Sanction An Intentionally Anticompetitive And Discriminatory Tax Merely Because The Improper Purpose Is Not Explicit In Its Text.

To ensure that the Commerce Clause provides robust protections against the negative ramifications of local economic protectionism, the Supreme Court of the United States has identified three ways in which a statute may discriminate against interstate commerce: (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. In failing to consider evidence relevant to determining the legislative intent motivating the enactment of the satellite-

only tax or the practical effects of its enactment, the Court of Appeals has created a dangerous precedent that will lead to the proliferation of such protectionist legislation—all to the detriment of Ohio businesses and its citizens.

The Court of Appeals refused to consider the evidence in the record that showed that R.C. 5739.01(B)(3)(p) and (XX) were enacted with the intent to protect local economic interests at the expense of a national service. Applying state law rules governing the interpretation of a statute's *meaning*, the Court of Appeals determined that the trial court should not be permitted to “consider[] . . . written evidence submitted by the plaintiffs regarding arguments presented by lobbyists for the cable industry in support of the current tax scheme,” (Appellants’ Appx. 21), or “statements reflecting the reasoning of members of the legislature for enacting the tax provision at issue.” (Appellants’ Appx. 22.) The Court of Appeals reasoned that “a court may not resort to legislative history . . . to *alter the clear wording of legislative enactment.*” (Id. (citation omitted) (emphasis added).) As Appellants explain in their brief, however, that rule of statutory construction is inapplicable here. The legislative history is not being offered to combat the *meaning* of the satellite-only tax, but rather to show that the *purpose and effect* of the statute was discriminatory and protectionist in nature.¹

Such an examination is not only required, it is critical to the analysis of any dormant Commerce Clause challenge. In evaluating a dormant Commerce Clause challenge, “where other sources, other than the state’s own self-serving statement of its legislative intent, indicate the presence of actual and discriminatory purposes, a state’s discriminatory purpose can be

¹ Plaintiffs did not need to introduce lobbying evidence to address the plain meaning of R.C. 5739.01(XX). The text of the statute is clear; it targets pay TV services that broadcast “programming or services by satellite directly to the subscriber’s receiving equipment *without the use of ground receiving or distribution equipment.*” R.C. 5739.01(XX) (Appellants’ Appx. 215) (emphasis added).

ascertained from [those] sources.” *E. Ky. Res. v. Fiscal Court of Magoffin County, Ky.* (C.A.6, 1997), 127 F.3d 532, 542. In fact, the United States Supreme Court has determined that evidence supporting legislative intent, including statements by lobbyists, is admissible and highly probative. (See Appellants’ Brief at 46–47 & n.6). Even if Ohio law would generally proscribe such evidence of legislative purpose in a state law challenge, that does not bar its consideration here in a Federal Constitutional challenge. *Chambers Med. Techs., Inc. v. Bryant* (C.A.4, 1995), 52 F.3d 1252, 1259 fn.10 (“The 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.” (emphasis added)).

It would be a grave miscarriage of justice for any court to stamp its seal of approval on a tax that was enacted with the intent to discriminate against interstate commerce simply because the unconstitutional purpose is not explicitly described on the face of the statute. Yet that is precisely what happened in this case. The evidence excluded by the Court of Appeals plainly shows that this legislation was enacted with a discriminatory purpose. It granted cable, a method of providing video service that requires a substantial economic investment within the state, a competitive advantage over satellite TV, which can more efficiently deliver its video service without any in-state investment, to protect local economic interests.

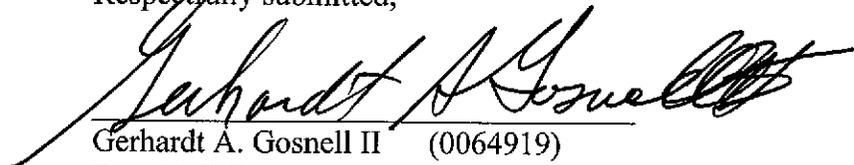
CONCLUSION

The evidence in this case establishes the underlying discriminatory intent and anticompetitive purpose behind the General Assembly’s enactment of the satellite-only sales tax. That evidence was properly considered by the trial court and wrongfully excluded by the Court

of Appeals. Once corrected, the State's claim that it had a legitimate, non-discriminating purpose behind its disparate treatment of cable and satellite is simply untenable.

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals and reinstate the trial court's grant of summary judgment in Plaintiffs-Appellants' favor.

Respectfully submitted,



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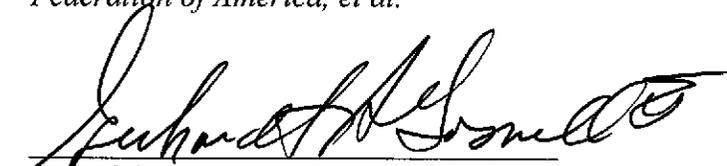
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