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

APPELLANTS' BRIEF
Part I

E. Joshua Rosenkranz (Pro Hac Vice)
New York Bar No. 2224889
Counsel of Record
Jeremy N. Kudon (Pro Hac Vice pending)
New York Bar No. 3971363
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
Phone: (212) 506-5000
Facsimile: (212) 506-5151
JRosenkranz@Orrick.com
JKudon@Orrick.com

Peter A. Rosato (0068026)
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State Street
Columbus, OH 43215
Phone: (614) 621-1500
Facsimile: (614) 621-0010
PRosato@Calfee.com

Attorneys for Plaintiffs-Appellants

Richard Cordray
OHIO ATTORNEY GENERAL

Lawrence Pratt (0021870)
Alan P. Schwepe (0012676)
Julie E. Brigner (0066367)
Damion M. Clifford (0077777)
Assistant Ohio Attorneys General
Taxation Section
30 E. Broad Street, 25th Floor
Columbus, OH 43215
Phone: (614) 466-5967
Facsimile: (614) 466-8226

Attorneys for Defendant-Appellee

Pantelis Michalopoulos (Pro Hac Vice)
District of Columbia Bar No. 453179
Mark F. Horning (Pro Hac Vice)
District of Columbia Bar No. 203323
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Phone: (202) 429-3000
Facsimile: (202) 429-3902
PMichalopoulos@steptoe.com
MHorning@steptoe.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

Satellite Sam and Cable Carl are next-door neighbors. Both subscribe to pay TV. Their shared passion is college football, which they both watch on ESPN. Beyond that, they watch all the same shows. Yet the State of Ohio slaps Sam with a 5.5% tax on his pay TV subscription—an extra $80 or so a year—and lets Carl off without paying a penny of state tax. The difference is that Carl gets his pay TV from a cable TV company, whereas Sam gets his service from satellite TV. If Sam is anything like the typical consumer, the 5.5% tax could be enough to persuade him to choose cable TV over satellite TV. Either way, the State of Ohio collects no tax revenue from Carl and the millions of other Ohio cable TV subscribers like him—leaving some $79 million a year or more on the table.

Why the discrimination against satellite TV subscribers? The Ohio sales tax statute answers the question explicitly: Satellite TV companies deliver their service directly to their subscribers "without the use of ground receiving or distribution equipment" in Ohio, whereas cable TV companies build and use "ground receiving or distribution equipment" in Ohio. R.C. 5739.01(XX) (Appx. 215). Specifically, Ohio law rewards Carl for choosing a pay TV service that has invested billions of dollars to build thousands of buildings in Ohio and to lay and maintain massive webs of cables across Ohio counties and municipalities. At the same time, the law penalizes Sam because he has chosen a pay TV provider that beams the signal directly to him, without having to build a single building, or lay a web of cables, in Ohio.

The story behind this curious regime is a classic tale of parochial protectionism. When the local cable TV industry urged the General Assembly to carve its service out of a proposed uniform tax on all pay TV service, its justification was all about rewarding companies that contribute to the local economy, while penalizing like services that do not. Cable's message was as simple as it was brazen: "[C]able operators" should be rewarded with favorable tax treatment because they "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." (Supp. 86.) The satellite industry, on the other hand, should be penalized because it "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state.*" (Supp. 98 (emphasis added).) In other words, the satellite industry has found a more efficient way to deliver its service—albeit less lucrative for the local economy—so the State put its thumb on the scale of competition by raising satellite TV's price.

That is not just bad policy hurting Ohio consumers who would prefer to make choices based on quality, service, and price; it is also unconstitutional. Indeed, the unconstitutionality of this protectionist regime was manifest from the start. The sitting Tax Commissioner opposed the discriminatory sales tax, warning that satellite TV companies would have a "significant chance of success" in challenging the tax. (Supp. 106.)

The Commissioner's prediction proved prescient. The Court of Common Pleas for Franklin County held that the satellite-only tax violates the Commerce Clause of the U.S. Constitution. (Appx. 24-147, 167-97.) The judgment came in a series of thoughtful opinions, based on a voluminous record compiled over the course of three years of litigation. It invoked a bedrock principle of the Commerce Clause—a black-letter axiom that governs this case: ***A state may not tax two competing businesses differently based on whether they contribute to the local economy by performing a specified activity or building a specified structure within the state.*** (Appx. 68.) Numerous cases have held that a state may not impose a tax that depends upon whether a company builds a manufacturing plant, an exporting facility, or a distribution center in the state. By the same token, the Court held, Ohio may not impose a tax that depends on whether a company installs a web of cables and distribution facilities on the ground in Ohio to distribute its signal to subscribers or opts for a distribution system that achieves the same function from afar.

The Court of Appeals reversed. It rejected the bedrock antidiscrimination principle, which the U.S. Supreme Court has repeatedly reaffirmed over several decades. In its place, the Court of Appeals substituted two principles that are antithetical to modern Commerce Clause jurisprudence. The first is that a Commerce Clause challenge must fail when some of the favored businesses are headquartered out-of-state and engage in interstate commerce. (Appx. 20.) The second is that discrimination is permissible so long as the favored business and the disfavored business operate in different ways despite being vigorous competitors in the same market. (Appx. 17.)

Both principles are wrong—and wrong in very dangerous ways that strike at the very core of Commerce Clause protection. As this Court has recognized, the operative rule is that "a state may not impose a taxing scheme that discriminates against [interstate] commerce by establishing a direct advantage *to its local economy*." *Dayton Power & Light Co. v. Lindley* (1978), 58 Ohio St.2d 465, 467, 12 O.O.3d 387, 391 N.E.2d 716 (emphasis added). It is impermissible to do so regardless of where competitors happen to be headquartered, whether some of the advantaged parties engage in interstate commerce, or whether the competitors use different technologies to deliver the same competing services. Id.

The bottom line is that cable TV companies and satellite TV companies are in the same business and provide the same service to the same customers. The State may not distinguish the amount of sales tax imposed on the same pay TV service to favor the service that builds and operates an extensive infrastructure in Ohio and penalize the service that does not. This Court should reverse the Court of Appeals, and reinstate the trial court's judgment.

STATEMENT OF FACTS

The Choice Among Similar Pay TV Alternatives

In choosing a pay TV service, Sam and Carl have several options. They could choose a cable TV provider—as long as they do not reside in a rural area, which cable has deemed insufficiently lucrative to serve. See NRTC Am. Br. at 4-5.[1] Or they could choose between the two major satellite TV providers—plaintiffs EchoStar Satellite L.L.C. and DIRECTV, Inc.—which compete vigorously with one another, as well as with cable.

These pay TV competitors are all in the same business, referred to in the industry as "multichannel video programming distribution" or "MVPD." (Supp. 213–15.) They all offer subscribers a wide menu of comparable programming packages, to suit different budgets and tastes. (Supp. 60–61.) They all offer local broadcast stations; basic channels (such as CNN, ESPN, and C-SPAN); premium channels (such as HBO and Showtime); and pay-per-view shows. (Id.; Supp. 214-15, 351–52.) They all bill the subscriber monthly. (Supp. 184.)

In short, there is no dispute in this case that "[w]hile the programming services are delivered via different technologies, *consumers view the services as similar and to a large degree substitutable.*" (Supp. 214 (emphasis added).) If they are typical Ohioans, Carl and Sam base their choice on price, service, and the quality and types of programs offered—not on a fetish for cables over dishes or vice versa.

Since all pay TV providers offer the same basic services and compete for the same consumers, it should be no surprise that they operate in the same basic way. As the trial court held, the undisputed "evidence indicates that there are not substantial differences in the way that

---

[1] Amicus briefs are cited as "___ Am. Br.," according to the abbreviation of the lead amicus.

cable and satellite operators gather their programming signals prior to distribution to consumers." In other words, they all secure the raw materials—TV programs—the same way. All negotiate with programming services—such as CNN, ESPN, and HBO—to secure rights to distribute the program content. (Supp. 2, 359.) As part of the process of gathering the programming, most any pay TV provider—even cable TV—uses satellites. The various networks and other content providers typically beam their programming up to a satellite. (Supp. 2, 367.) From there, each pay TV service has its own mechanism for packaging the various programs and delivering the package to subscribers. (Supp. 2–3, 365.) Therein lies the only material difference between cable TV providers and satellite TV providers.

The One Difference: The Mode of Delivery

As the trial court observed, the undisputed evidence demonstrated that the only significant difference between the two categories of pay TV providers—cable TV and satellite TV—is the means by which the program signal travels from a satellite (or other source) to the individual subscriber's TV—what the trial court called "the final leg of the distribution process." (Appx. 182.) One delivery system courses through thousands of miles of cables and related distribution facilities on the ground, while the other beams through space directly to the subscriber's home.

Cable TV's ground-based distribution system. The typical cable TV provider obtains its programming packages from various networks by satellite. (Supp. 348, 367.) The satellite beams these packages back down to terrestrial distribution points called "headends." (Supp. 15–16.) Each headend is a building of some sort, typically with its own "antenna farm" and studio equipment, and is often staffed with its own complement of cable TV employees. (Id.) At each headend, the local cable operator merges the packages of programming with content from the local broadcast channels. (Id.) The cable employees at the headend then dispatch the completed package of programming into a web of physical fiber optic cables or coaxial cables laid in trenches along roads or hung from electric utility poles. (Supp. 13–15.) The signals course first through massive "trunk" lines, and from there to "feeder" or distribution lines. (Supp. 14–15.) These lines connect a massive network of cable "hub" and "node" installations across Ohio, which must be installed and maintained on a neighborhood-by-neighborhood basis. (Supp. 8–9, 365.) Ultimately, the programming signals reach each subscriber via a "drop" line running from the feeder line to the subscriber's home. (Supp. 13, 15.) No cable TV subscriber could get his final package of programs if the cable company had not invested in building an intricate web of veins and capillaries from a headend on the ground to that subscriber.

Satellite TV's extra-terrestrial distribution system. Satellite TV providers have a different distribution system. They do not have or use headends—or terrestrial distribution centers of any sort. Satellite TV providers (also referred to as "direct broadcast satellite" or "DBS") have no antenna farms, buildings, or employees in local neighborhoods. They have no intricate web of cables running under the ground or on telephone poles along local rights of way. (Supp. 1, 55–56.) Instead, satellite TV providers beam the signal directly from satellites orbiting the Earth to an antenna—a pizza-sized receiving dish—at each individual subscriber's home. (Supp. 2–3, 55–56.)

A distinction without a difference. Regardless of delivery vehicle, the subscriber sees the same program on TV. The Ohio State game looks the same whether the signal reaches the pay TV subscriber via the headend-trunk-line-feeder-line-drop-line route coursing under local streets or directly from a satellite beamed to the satellite dish on the subscriber's roof. The subscribers could not care less which route the signals took to reach their TV.

Cable's Massive Local Footprint Translates Into Massive Local Benefits

States and local governments are not nearly as indifferent. The different distribution mechanisms translate into vastly different local economic footprints. Cable companies have laid some 63,000 miles of cable in Ohio—enough to wrap around the Earth twice and leave slack for a large bow. (Supp. 254.) Just in Ohio, cable companies have invested billions of dollars in their thousands of headend buildings, webs of cables, and related repair, maintenance, and distribution facilities. (Id.) They employ thousands of Ohio residents, most of them to construct, operate, and maintain those networks, and to connect and disconnect drop lines to subscribers' homes. (Supp. 13, 98.)

Cable TV's vast ground networks also translate into significant revenues for local governments: The cables that carry television signals to local neighborhoods must be placed under or alongside public roads or hang from public utility poles. (Supp. 13–14.) Not just any business gets to dig up city streets or hang wires on utility poles, however. To do so, cable TV providers must secure permission from local governments to access the public property. R.C. 4939.01 (Appx. 200; Supp. 109.) In exchange for these valuable property rights, cable TV providers must pay rent—so-called "franchise fees." (See, e.g., Supp. 152.) The franchise fees are negotiated at arm's length between cable TV providers and individual local governments. (Supp. 9.) The typical franchise fee is 3–5% of the cable provider's gross revenue from sales to customers within the given area. (See, e.g., Supp. 358–59, 365–66.) In this sense, local governments have become cable's business partners. The governments grant cable TV valuable property rights essential to delivering their pay TV service in return for a cut of the revenues. (Supp. 85.) In any given year, these negotiated deals funnel some $57 million into the coffers of Ohio municipalities. (Supp. 249.)

Because satellite TV providers beam their signals directly to subscribers' homes, their local economic footprint pales in comparison to cable TV's. They do not invest in an infrastructure of buildings, cables, and related facilities within the state. They do not hire armies of Ohio workers. (Supp. 4, 57.) And since satellite TV's distribution system does not touch ground en route from the satellite to the subscriber's dish, satellite TV providers do not need to bargain for rights-of-way to lay cable—or pay local governments rent for the privilege of doing so. (See id.) Accordingly, satellite TV providers are not in partnership with local governments and do not funnel millions of dollars in franchise fees to municipal coffers. (Supp. 98.)

Cable Lobbies for Protectionist Legislation Based on the Different Economic Footprint

The difference in the economic footprint between cable TV and satellite TV was the reason why Ohio legislators granted cable TV a tax advantage. In 2002, the Committee to Study State and Local Taxes (the "Study Committee"), a bipartisan group of legislators and executive branch officials, convened to develop tax reform proposals for Ohio. At the time, pay TV service was not subject to any state sales tax. R.C. 5739.01 (Appx. 201–19). Recognizing that both cable TV and satellite TV provided the same pay TV services, the Study Committee proposed an even-handed 6% tax on both. (Supp. 67–68, 83, 86–87, 99.1–99.5, 106.) Just as there was no plan to give satellite TV providers a credit for the rent they pay the federal government to place satellites in designated orbits, the proposal did not contemplate giving cable TV companies a credit for the rent they pay to use public rights-of-way.

The Ohio Cable Telecommunications Association ("OCTA"), the lobbying organization for Ohio cable providers, sprang to action. From the 1970s until the mid-1990s, the cable industry had enjoyed a monopoly. (See Supp. 234.) But then satellite TV entered the picture, luring away cable customers in droves—to the point where the two major satellite TV providers became the biggest threats to cable's market dominance. (Supp. 240, 246.) The tax proposal presented an opening to hobble its new competitors in a way that would appeal to the state's economic self-interest.

Cable lobbied the Study Committee to exempt cable TV so that the tax would apply only to satellite TV. (See Supp. 86–87, 91–92.) The Study Committee rejected the proposal to discriminate, and the Governor adopted the Committee's recommendation for an equal tax on all pay TV services. (Supp. 83.)

Cable then shifted its efforts to the General Assembly, where it again lobbied for a tax on satellite TV only. Cable's pitch was pure parochial protectionism, insisting that discriminatory treatment was justified because one service contributed heavily to the local economy while the other service did not:

> Unlike satellite or other wireless providers of [television] services . . . , cable operators must construct and maintain an interconnected network of cables and other physical system assets which cross the state . . . . [C]able operators and telephone companies must make and maintain a significant investment in Ohio in terms of tangible property, equipment and employees, whereas other service providers such as wireless and satellite companies require virtually no investment in Ohio in order to compete.

(Supp. 85–86.) OCTA even created a "resource kit for Ohio legislators" that included a chart comparing "Cable vs. Satellite: Contributions to Ohio Government and Communities." (Supp. 255.) The "Resource Kit" trumpeted cable's economic connection to Ohio, all stemming from its ground distribution equipment:

> The cable industry employs **more than 6,000** people across Ohio.
>
> Ohio cable operators pay **over $200 million** in wages to Ohioans.
>
> Cable operators pay **more than $57 million** annually in franchise fees to localities in Ohio.
>
> Cable operators pay **over $31 million** annually in property taxes.

* * *

> The cable industry has **over 63,000 miles** of plant in Ohio, which totals **$2.32 billion** in imbedded infrastructure.

(Supp. 254 (emphasis in original).)

Against this paean to cable, OCTA juxtaposed satellite TV, portraying it as an "out-of-state" interest that does not care about Ohio. (Supp. 86–87, 249.) "How many jobs does DBS create in your district?," cable TV demanded. (Supp. 251.) "How much income does DBS generate in your district for local and state government?" (Id.) Cable TV's answer: 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." (Supp. 343.) OCTA's message screamed out from a press release: Satellite TV "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state.*" (Supp. 98 (emphasis added).) Based on these differing contributions to the local economy, cable TV urged the General Assembly to shield it from the market competition of satellite TV. (Supp. 86–87 (noting that satellite providers' "customer base" in Ohio "is increasing significantly . . . [with an] increasing shift of customers from cable to satellite").)

The Tax Commissioner at the time, Tom Zaino, immediately saw the peril in cable TV's discriminatory proposal. He opposed the satellite-only sales tax, largely because he understood that the Constitution prohibits states from imposing different tax burdens on businesses based upon whether they build an infrastructure within the state. (Supp. 106.) He reported that "the satellite broadcasting industry is standing by to challenge the constitutional authority of the state to tax satellite broadcasting services." (Id.) He warned, "*Their challenge has a significant chance of success.*" (Id. (emphasis added).)

The General Assembly Adopts the Discriminatory Proposal

Ignoring the Tax Commissioner's warnings, the General Assembly granted cable the discriminatory sales tax it sought. On June 26, 2003, the General Assembly amended the sales tax statute to subject a new category of retail sales to the general tax rate of 6.0% (an amount later reduced to 5.5%). The new tax applied only to retail sales of "satellite broadcasting service," not to pay TV generally and not to cable broadcasting service in particular. R.C. 5739.01(B)(3)(q), 5739.02, 5741.02 (Appx. 202, 225, 231). As if to emphasize the protectionist motive, the General Assembly explicitly identified the local economic investment—the investment in "ground receiving or distribution equipment"—as its basis for discriminating. It defined the taxable service, "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, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

R.C. 5739.01(XX) (emphasis added) (Appx. 215). Everyone agrees that this is a satellite-only tax, for satellite TV does not use any "ground receiving or distribution equipment" between the satellite and the "subscriber's receiving equipment," whereas cable TV uses ample "ground receiving or distribution equipment" between the satellite and the subscriber's receiver. Id.

Based on the most recent subscriber numbers on the record, Ohio is likely losing $79 million dollars a year in revenue, or more, by exempting cable from the tax.[2]

---

[2] This estimate is based on a conservative assumption of two million cable subscribers in Ohio (Supp. 343.3) at an average monthly subscription fee of $60. (2 million * $60 * 12 months * 5.5% = $79.2 million/year.)

The Trial Court Strikes the Discriminatory Tax as Unconstitutional

DIRECTV and EchoStar filed this action in the Court of Common Pleas for Franklin County. As relevant here, they challenged the satellite-only sales tax on the ground that it discriminates both *in purpose* and *in practical effect* against interstate commerce in violation of the Commerce Clause of the U.S. Constitution, U.S. Const. Art. I, § 8. (Supp. 23–24; Appx. 168–69.)[3]

As to the *discriminatory purpose*, the trial court found that plaintiffs had presented enough evidence to give rise to a triable issue of fact. (See Appx. 174–81.)

As to the *practical effect*, the trial court agreed with the plaintiffs that the state may not impose a tax on pay TV services and then exempt certain competing services merely because they install a network of "ground receiving or distribution equipment" in Ohio. (Supp. 33–34, 36–37.)

The court's decision came after almost a year of discovery and two rounds of summary judgment motions pertaining to the Commerce Clause issues. The court's first summary judgment ruling concluded that the satellite-only sales tax "in practical operation . . . favors in-state economic interests and burdens out-of-state economic interests." (Appx. 182–83.) That ruling rested on U.S. Supreme Court Commerce Clause authorities which hold that it is impermissible to impose differential taxes based upon whether a business builds within a state or performs some other economic activity within the state. The trial court held that Ohio's pay TV sales tax discriminates against interstate commerce because the tax attaches to the sale of pay TV services only when the signals are distributed to subscribers without using a network of ground

---

[3] Plaintiffs also argued that the tax statute *facially* discriminates against interstate commerce. The trial court rejected this argument (see Appx. 171–74) and plaintiffs are not appealing that point.

equipment in Ohio. (Appx. 181–83.) As the court explained, "distribution by cable necessarily involves installation of a huge network of cables throughout Ohio." (Appx. 182.) "By contrast, satellite providers have not needed, or chosen, to locate any of their distribution equipment in Ohio." (Id.) Thus, the court found that "[r]easonable minds can reach but one conclusion that the differential tax treatment burdens out-of-state economic interests and favors in-state economic interests." (Appx. 181.)

The trial court rejected the Commissioner's argument that the satellite-only sales tax is permissible because it somehow "compensates" for the fact that satellite companies do not pay franchise fees to local governments, as cable companies do. The court found that "[t]he sales and use taxes [imposed by the state] 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." (Appx. 184–85.) It, therefore, concluded that far from "leveling the playing field," the discriminatory tax "tilts the playing field in favor of cable" by saddling satellite TV with additional cost. (Appx. 183.)

Although the trial court held that the Ohio sales tax scheme discriminates against interstate economic interests in favor of in-state interests, it withheld summary judgment, at first, because such discrimination is illegal only if the affected interests are "similarly situated." (Appx. 185, 195.) The trial court concluded that, at that stage, the record was inadequate to resolve whether satellite TV companies and cable TV companies are similarly situated. (Appx. 195.)

After more discovery, and a second round of discovery and summary judgment briefing, the trial court granted plaintiffs summary judgment. Because the Commissioner continued to dispute the court's original ruling, the trial court reiterated and elaborated upon its earlier decision as a predicate to summary judgment, stating that the satellite-only sales tax "(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." (Appx. 33.) The trial court then held that this discrimination is illegal because cable TV providers and satellite TV providers are "similarly situated." (Appx. 107–32.) This was primarily because cable TV and satellite TV "compete in the multi-channel broadcast market." (Appx. 73.)

Because cable TV and satellite TV are similarly situated, the trial court applied strict scrutiny to determine whether the differential sales tax could be justified "'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.'" (Appx. 71 (quoting *Hughes v. Oklahoma* (1979), 441 U.S. 322, 336).) Ultimately, the court struck the satellite-only sales tax, noting the U.S. Supreme Court's well-established rule that discriminatory restrictions are "virtually per se invalid." (Appx. 141 (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality* (1994), 511 U.S. 93, 99).)

The Court of Appeals Reverses the Trial Court

The Court of Appeals reversed for two reasons. First, the court held that the discriminatory effect of that sales tax "does not run afoul of the dormant Commerce Clause because both of these providers"—satellite TV and cable TV—"are engaged in interstate commerce." (Appx. 20.) According to the court, that meant that there was "no[] discrimination *against* interstate commerce." (Id.)

Second, the Court of Appeals concluded that the discrimination was permissible on the ground 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.'" (Appx. 18 (quoting *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of Treasury* (1989), 490 U.S. 66, 78 (other citation and internal quotation marks omitted)).) As the Court of Appeals saw it, the technological difference between the two ways of delivering the same pay TV service was a "difference[] between the nature of their businesses," and not a difference that had to do with "the location of their activities." (Id.)

The Court of Appeals did not override the trial court's conclusion that there was sufficient evidence of discriminatory purpose to give rise to a triable issue of fact. But the court nevertheless entered judgment for the State, without allowing a trial on that independent challenge. (Appx. 22–23.) It is unclear whether the court did so because it mistakenly believed that a court may not resort to legislative comments to assess a Commerce Clause challenge (Appx. 21), or because it mistakenly believed that "the trial court concluded that the Ohio tax statutes did not . . . purposely discriminate against interstate commerce" (Appx. 6).

ARGUMENT

THE SATELLITE-ONLY TAX VIOLATES THE COMMERCE CLAUSE BECAUSE THE TAX ON PAY TV SERVICE DEPENDS UPON WHETHER OR NOT THE SERVICE PROVIDER HAS INVESTED IN BUILDING AN EXTENSIVE "GROUND DISTRIBUTION" INFRASTRUCTURE WITHIN THE STATE.

The General Assembly minced no words about the criterion for imposing the satellite-only tax. Whether or not a pay TV service is taxed depends on one fact—whether the service "use[s] ground receiving or distribution equipment" in Ohio. R.C. 5739.01(XX) (Appx. 215). Cable TV service escapes taxation because cable TV companies have invested a fortune in building and maintaining a network of "ground receiving or distribution equipment"—including thousands of buildings and tens of thousands of miles of cable—in Ohio. In contrast, satellite

TV service is taxed because its providers have devised a way to deliver the same service without installing any "ground receiving or distribution equipment" in Ohio.

There is no dispute that this satellite-only tax is discriminatory. (See Appx. 20.) The central question in this appeal is whether the discrimination—explicitly favoring one service because it invests in building a physical infrastructure within the state, while penalizing a competing service because it does not—amounts to discrimination *against interstate commerce.* The trial court was correct when it held that the answer is yes.

A long line of Commerce Clause cases prohibits a state from imposing a tax that differentiates among similarly situated competitors depending upon whether they perform a specified function or build specified facilities within the state. Contrary to the Court of Appeals' holding, those precedents cannot be ignored just because (as will almost always be the case) the competing enterprises *both* engage in interstate commerce. The U.S. Supreme Court has squarely rejected any such limitation on the Commerce Clause's prohibition against local protectionism. See infra Proposition of Law I.

Nor are those cases negated just because satellite TV providers and cable TV providers use different means of delivering the same service. (Appx. 18.) The limitation the Court of Appeals invoked is based on a misreading of two U.S. Supreme Court cases--Amerada Hess and *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117. There is no limitation or exception to the basic rule that "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 fn.9. The two cases that the court relied upon simply represent the flip side of this rule. If a statute that discriminates between two competitors has nothing to do with "the location of a [business's] activities," it does not violate the Commerce

Clause and turns on differences in the nature of the two businesses. See infra Proposition of Law II.

Finally, in this case about the discriminatory purpose and effects of a taxing scheme, the appellate court erred in precluding consideration of evidence as to what sponsors and legislators touted as the *intended* and *expected* effects of the discriminatory tax and what motivated the legislature in enacting that scheme. The U.S. Supreme Court has confirmed that such evidence is not only relevant but central to the Commerce Clause analysis. See infra Proposition of Law III.

For these reasons, this Court should reverse the Court of Appeals and reinstate the trial court's thoughtful and thorough opinions.

PROPOSITION OF LAW I

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.

A. The Commerce Clause Prohibits Not Only Classic Discrimination Between In-State and Out-of-State Enterprises, But Also More Contemporary Schemes That Grant Preferential Treatment to Businesses That Build or Engage in Specified Business Activities in State.

One of the Framers' "immediate reason[s] for calling the Constitutional Convention" was their concern over economic protectionism on the part of the several states. *Hughes*, 441 U.S. at 325. The Framers knew from painful experience 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." Id. at 325–26. Their solution was to craft the Commerce Clause to foster "an area of free trade among the several states." *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 Commerce Clause grants Congress the "Power . . . To regulate Commerce . . . among the several States," U.S. Const. Art. I, § 8, but in keeping with the clause's provenance, the U.S. Supreme Court long ago recognized that the Clause also impliedly prohibits the states from engaging in "economic protectionism," *New Energy Co. v. Limbach* (1988), 486 U.S. 269, 273–74; see *Walling v. Michigan* (1886), 116 U.S. 446, 455. 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 (citation omitted). This prohibition is called the "dormant" or "negative" Commerce Clause. *Quill Corp. v. North Dakota* (1992), 504 U.S. 298, 309.

The Commerce Clause does not just invalidate state laws that discriminate against interstate commerce on their face—i.e., laws that expressly refer to products or services as in-state or out-of-state. It also invalidates any state statute that either "'will in its practical operation work discrimination against interstate commerce'" or is infected by a discriminatory purpose. *Dayton Power*, 58 Ohio St.2d at 468–69 (quoting *Best & Co. v. Maxwell* (1940), 311 U.S. 454, 455–56).

In earlier times, the classic Commerce Clause violation entailed a state law designed to insulate a particular local business—local farmers or dairies, for example—from competition by like businesses located out-of-state. See, e.g., *Baldwin v. G.A.F. Seelig, Inc.* (1935), 294 U.S. 511 (minimum price statute to prevent New Hampshire dairy farmers from undercutting New York dairy farmers); *I.M. Darnell & Son Co. v. Memphis* (1908), 208 U.S. 113 (property tax exemption on timber grown in Tennessee). Confronted with these schemes, the Supreme Court ruled that a state law is unconstitutional if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Or. Waste Sys.*, 511 U.S. at 99, or if it imposes a higher tax on products or services produced by out-of-state businesses than on the same products or services produced locally, see *W. Lynn Creamery, Inc. v. Healy* (1994), 512 U.S. 186, 193. When a disfavored business alleges this classic form of discrimination, cases may be decided based on whether the disfavored business could be characterized as an out-of-state enterprise while the favored businesses were characterized as in-state. See, e.g., *Philadelphia v. New Jersey* (1978), 437 U.S. 617, 624 (describing as the "clearest example" of impermissible economic protectionism "a law that overtly blocks the flow of interstate commerce at a State's borders").

From this rule, the Court of Appeals derived a false corollary limiting the reach of the Commerce Clause. It concluded that the Commerce Clause is violated only where "one class of competitor is engaged in interstate commerce and the other not" (Appx. 7), or where the "tax . . . provides a direct commercial advantage to local businesses" (Appx. 11). Based on this misunderstanding of the scope of the Commerce Clause, the Court of Appeals believed that the discriminatory impact of a sales tax "does not run afoul of the dormant Commerce Clause" if both the beneficiary and the victim of discrimination "are engaged in interstate commerce." (Appx. 20.) Thus, the Court of Appeals' opinion teeters on the fallacy that the classic form of discrimination is the only one that violates the Commerce Clause. But arguing that this is *the only way* to prove a Commerce Clause violation is like arguing that the Fourth Amendment permits warrantless wiretaps because the Framers did not know about phones. However viable the State's theory in this case may once have been, constitutional doctrine passed it by decades ago.

The reality is that the Commerce Clause's antidiscrimination jurisprudence did not freeze in place in the days of powdered wigs and quill pens when most businesses were purely local. The Supreme Court and this Court have adapted the antidiscrimination principle in step with our modern national economy, where most businesses operate across state lines, to guard against the very same protectionist tendencies. As both the U.S. Supreme Court and this Court have recognized, the Commerce Clause has matured over two centuries to cover not just the "paradigmatic" scenarios of prohibited protectionism that were familiar to the Framers, but also the more "ingenious," modern brands of discrimination that are every bit as corrosive of national unity, and every bit as illegal. *W. Lynn Creamery*, 512 U.S. at 193, 201 (citations omitted); *Dayton Power*, 58 Ohio St.2d at 468–69. Today, "the cases are filled with state laws that aspire to reap some of the benefits of [old-fashioned] tariffs by other means." *W. Lynn Creamery*, 512 U.S. at 193. As to each, the operating principle is the same: The Commerce Clause prohibits "simple economic protectionism . . . effected by state legislation." *Lewis*, 447 U.S at 36 (citation omitted).

The doctrinal rule that controls in this case is that "discrimination *based on the extent of local operations* is itself enough to establish the kind of local protectionism" that is prohibited. Id. at 42 fn.9 (emphasis added). Or, as this Court put it in the context of a discriminatory state tax scheme, "a state may not impose a taxing scheme that discriminates against [interstate] commerce by establishing a direct advantage to its local economy." *Dayton Power*, 58 Ohio St.2d at 467. It is now clear that a tax "may not discriminate between transactions on the basis of some interstate element." *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 642 (quoting *Boston Stock Exch.*, 429 U.S. at 332 fn.12); see also *Granholm*, 544 U.S. at 472 ("[S]tate 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 latter.'" (quoting *Or. Waste Sys.*, 511 U.S. at 99)); *Baldwin*, 294 U.S. at 527 (holding that "the power to tax" may not "be used . . . with the aim and effect of establishing an economic barrier against competition with the products of another state *or the labor of its residents*" (emphasis added)).

That has been the law for at least three decades—since the U.S. Supreme Court decided *Boston Stock Exchange*. There, the Court struck a New York law that taxed an interstate stock transaction at a certain rate if the seller chose to trade through out-of-state exchanges, and half that rate if the seller opted for an exchange in New York. 429 U.S. at 324. The Court condemned the tax discrimination because the "obvious" effect was "to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges," id. at 331, and it was illegal for New York 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," id. at 336 (internal quotation marks omitted). Consumers of goods and services should be free to choose between like competitors "solely on the basis of nontax criteria." Id. at 331.

Summing up the numerous cases reinforcing this doctrinal line over the last three decades, one of the nation's premier constitutional experts has observed: "States have sought to increase the in-state involvement (through local packaging or other in-state processing) with these products because greater in-state exertion means more in-state jobs. Such regulations have met the same fate as virtually all other measures designed to serve local interests at the expense of out-of-state enterprises—invalidation." Laurence H. Tribe, *American Constitutional Law* § 6–9, p. 1080 (3d ed. 2000). While the rule distilled by Professor Tribe might be called "contemporary" in comparison to the specific schemes tried by the Colonies, there is nothing novel or exotic about it. It flows naturally from the Commerce Clause's premise that a state should not be permitted to "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." *H.P. Hood & Sons, Inc. v. Du Mond* (1949), 336 U.S. 525, 533 (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 259 (4th ed. 1873)). In keeping with this principle, the casebooks are rife with cases holding that a state law may not constitutionally discriminate between businesses based on whether or not they *engage in a specified operation*, or *build a particular structure or facility*, within the state. As 16 renowned constitutional law professors explain in an amicus brief filed with the Court, "[t]he 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.'" Con. Law Prof. Am. Br. at 6.

To illustrate, let us focus on three cases that, like this one, involved statutes that discriminated between competitors based upon whether or not they built (or used) a structure or facility within the state—from an export facility to a manufacturing plant to a distribution facility.

The first case involved tax discrimination based upon the use of an in-state export facility. In *Westinghouse Electric Corp. v. Tully* (1984), 466 U.S. 388, New York awarded a tax credit that was tied to a company's exports out of the country but only applied to the portion of the company's exports that were shipped *from New York*. Id. at 393. Under this regime, a company (regardless of whether it was based in New York) could get a hefty tax credit for its imports if it built (or used) a dock in New York City, but not if it used a dock across the Hudson River, in New Jersey. In fact, the tax credit decreased to the extent an exporter increased its out-of-state shipping activity as compared to its activity in New York. Id. at 401. The U.S. Supreme Court unanimously struck the tax, concluding that there was "little room for ... controversy" that the state law violated the Commerce Clause. Id. at 403 (internal quotation marks omitted). It held that "[t]he State has violated the prohibition in *Boston Stock Exchange* against using discriminatory state taxes to burden commerce in other States in an attempt to induce business operations to be performed in the home State that could more efficiently be performed elsewhere." Id. at 406 (internal citations and quotation marks omitted).

The next case, *Armco*, involved tax discrimination based on the degree of in-state manufacturing. In *Armco*, West Virginia imposed a tax on "companies selling tangible property at wholesale in West Virginia," but the tax scheme exempted property that was manufactured in West Virginia. 467 U.S. at 642. So, for example, if a major national enterprise company sold widgets at wholesale in West Virginia, the sale might or might not be taxed, depending on whether the company built its manufacturing plant in Wheeling (in which case the sales would not be taxed) or Pittsburgh (in which case they would be). Id. Indeed, even a wholesaler that had all of its operations in West Virginia was ineligible for the exemption to the extent it sold goods that it did not manufacture in the state. The Court found that this scheme, too, unlawfully discriminated against interstate commerce. Id. West Virginia rewarded wholesalers that built or used a specified facility—a manufacturing plant—domestically. Thus, it ran afoul of the rule that a tax "may not discriminate between transactions on the basis of some interstate element." Id. (quoting *Boston Stock Exch.*, 429 U.S. at 332 fn.12).

The third case, *Granholm*, like this one, involved the building of a *distribution* facility. New York law prohibited any winery from shipping wine directly to New York customers, unless the winery "establish[ed] a distribution operation in New York." 544 U.S. at 474. A winery could not fulfill a New York customer's order by UPS unless it built a brick-and-mortar building in the state. The Supreme Court had "no difficulty concluding that New York . . . discriminates against interstate commerce through its direct-shipping laws," id. at 476, explaining that "[t]he New York scheme grants in-state wineries access to the State's consumers on preferential terms," id. at 474. In-state wineries were favored, because, by definition, they *already* had buildings in the state. Out-of-state wineries were the only ones that needed to build a *new* building in order to ship directly to customers. Id. The Court struck the law, noting its "particular suspicion" of laws that "requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere." Id. at 475 (citation omitted).

There are numerous cases along the same lines—all standing for the proposition that a state may not impose a tax that depends upon the extent to which a business builds or uses a facility within the state, performs an activity within the state, or performs an activity benefiting the local economy.[4]

[4] See, e.g., *Tyler Pipe Indus., Inc. v Wash. State Dep't of Revenue* (1987), 483 U.S. 232, 240–42, 248 (unconstitutional to discriminate in favor of companies both wholesaling and manufacturing in-state and against those doing only one of the two); *Dayton Power*, 58 Ohio St.2d at 473 (striking a law that taxed low-sulfur coal (which was virtually absent from Ohio) more severely than high-sulfur coal (which was abundant), noting that the "practical effect" was to divert business to in-state coal production); *New Energy*, 486 U.S. at 274 (striking an Ohio statute awarding a tax credit for each gallon of Ohio-produced ethanol sold by fuel dealers); *Bacchus* (1984), 468 U.S. 263, 265 (striking a Hawaii statute providing exemption to liquor excise tax for two spirits produced from local produce); *South-Central Timber Development, Inc. v. Wunnicke* (1984), 467 U.S. 82, 84, 99–100 (striking an Alaska regulation that required timber to be processed within the state before export); *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 unconstitutionally discriminates against out-of-state businesses not making such in-state investments), *vacated on other grounds*, 547 U.S. 3, 32 (2006); *Dickerson v. Bailey* (C.A.5, 2003), 336 F.3d 388, 392 (finding unconstitutional a Texas statutory scheme that permitted in-state wineries to ship directly to customers but required out-of-state wineries to use in-state distributors); *Jelovsek v. Bredesen* (C.A.6, 2008), 545 F.3d 431, 438–39 (striking Tennessee statute that exempted wine produced using mostly locally grown grapes from almost all taxes).

B. The Satellite-Only Sales Tax Violates the Commerce Clause Because It Is a Protectionist Tax That Depends on Whether the Pay TV Provider Has Built an Extensive Ground Distribution Network in Ohio.

Under this line of cases, it seems obvious that the Ohio tax statute would be unconstitutional if it had said, "all pay TV services are taxed at a rate of 5.5%, except if the service provider constructs at least 2,000 buildings in Ohio, lays at least 60,000 miles of cable within Ohio's borders, and employs at least 6,000 Ohio workers." See *Delta Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 317 (Fla. 1984) (striking tax scheme that discriminated between businesses based on whether they built headquarters in state and hired a prescribed number of Florida residents). The statute is no less vulnerable just because the General Assembly achieved the same result in practical effect by conditioning the tax on whether a pay TV provider uses "ground equipment" to distribute its programs to subscribers within the state, without specifying how many buildings or other facilities must be built, how many miles of cable must be laid, and how many Ohioans must be employed in order to serve Ohio residents effectively.

Just as a state may not condition a tax on the extent to which a business builds (or uses) an export facility within the state, or on the extent to which the business builds (or uses) a manufacturing plant within the state, so, too, here, Ohio may not condition a tax on whether or not a pay TV service builds (or uses) ground distribution equipment within the state. Here, as in other cases, the discrimination violates the edict that 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 fn.12). And if a state may not favor wineries that build one brick-and-mortar distribution facility within the state over those that do not, it is thousands of times worse for Ohio to favor pay TV companies that build thousands of brick-and-mortar distribution facilities within the state over those that do not. In each circumstance, the state is impermissibly "requir[ing] business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm*, 544 U.S. at 475 (citation omitted).

The discriminatory effect of the satellite-only tax is impermissible regardless of the legislature's motive. But the invalidity is all the more evident here, since the satellite-only tax was pressed and passed on the basis of explicit parochial protectionism—the message that cable TV is entitled to a discriminatory benefit because "cable operators must construct and maintain an interconnected network of cables and other physical system assets which cross the state," and then "mak[ing] and maintain[ing] 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" (Supp. 85–86), "[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 short, the trial court was correct when it observed that 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." (Appx. 33.) Here, as in each of the foregoing precedents, the "diminution of free competition" is "wholly inconsistent with the free trade purpose of the Commerce Clause." *Boston Stock Exch.*, 429 U.S. at 336.

C. The Court of Appeals Erred in Excusing the Discrimination on the Ground That Satellite TV and Cable Both Engage in Interstate Commerce.

The Court of Appeals did not grapple with any of these holdings when it rejected the Commerce Clause claim on the ground that "cable *companies* are [not] 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" (Appx. 18 (emphasis added; citation omitted)), and "both [satellite companies and cable companies] are engaged in interstate commerce" (Appx. 20). Commerce Clause jurisprudence is completely irreconcilable with the Court of Appeals' holding that the Commerce Clause challenge must fail because *some* (though not all) cable TV companies—the beneficiaries of the discrimination—are "headquartered outside Ohio," or because they "obtain most programming from outside of Ohio and redistribute it to consumers in the state." (Appx. 18.)

In so holding, the Court of Appeals diminished the Commerce Clause to nothing but a filigree on a parchment page—a meaningless protection that is without force unless the plaintiff is a foreign enterprise with no in-state presence and all the beneficiaries of the discrimination are Mom-and-Pop enterprises whose transactions never cross state lines. To be sure, total foreigners *can* win Commerce Clause claims on the ground that they have been completely blocked from in-state markets, and a classic Commerce Clause case can be leveled at a statute that benefits only commercial hermits. But the lesson of the cases discussed above, and many more like them, is that the modern-day Commerce Clause is not constrained to such classic caricatures of Commerce Clause schemes. See Con. Law. Prof. Am. Br. at 13-17 ("[I]n 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 business.").

The Supreme Court explicitly held as much three decades ago in *Boston Stock Exchange*, the seminal case discussed above striking New York's tax law discriminating in favor of stock trades using exchanges based in New York. By way of background, in the 1960s, the New York Stock Exchange was losing ground to regional exchanges in other major metropolitan areas, such as Boston, Chicago, and San Francisco. 429 U.S. at 325 fn.7. One reason was that New York had historically imposed a tax on interstate stock sales, whereas other states did not. Id. at 322–23. A nonresident who sold on an exchange outside New York could still be subjected to the New York tax if any part of the transaction touched New York—if, for example, the security would ultimately be delivered in New York (as most were). Id. at 322. To encourage securities traders to run their trades through a New York exchange, New York revised its tax scheme to tax the transactions of nonresidents of New York who opted to sell through the New York exchanges at half the rate imposed on transactions made by nonresidents who did not use a New York exchange. Id. at 324. Thus, by definition, both the favored and disfavored transactions were interstate transactions, for they both involved nonresidents and parts of the transactions were outside New York and other parts inside..

In concluding that the tax discrimination violated the Commerce Clause, the Court addressed, and rejected, the very argument that the Court of Appeals here invoked: "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." Id. at 334 (emphasis added; citation omitted). As if anticipating the Court of Appeals' 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). That is why the U.S. Supreme Court emphasized just a few years later that "discrimination *based on the extent of local operations is itself enough* to establish the kind of local protectionism" that is prohibited, *Lewis*, 447 U.S. at 42 fn.9 (emphasis added)—

without regard to the domicile of victims and beneficiaries and without regard to whether they operate entirely within state boundaries or whether their rivals are entirely foreign. That is why this Court characterizes the discrimination inquiry as revolving around whether the plaintiff has "establish[ed] a direct advantage to *its local economy*," *Dayton Power*, 58 Ohio St.2d at 467 (emphasis added), and not where the beneficiaries and victims are headquartered or whether they both engage in interstate commerce.

If the law were as the Court of Appeals posited, every one of the cases discussed above and illustrated in the table on page 32 would have come out the other way—starting with *Boston Stock Exchange*, itself. No one could ever mistake the New York Stock Exchange for a purely in-state enterprise insulated from interstate commerce. Indeed, the way the tax at issue benefited the New York Stock Exchange was by steering *more* transactions for nonresidents—by definition, interstate transactions—toward the New York Stock Exchange. If, as the Court of Appeals believed, there could be no Commerce Clause violation if the beneficiary engaged in interstate commerce or if the favored transactions were interstate, then the New York Stock Exchange's extensive interstate—and indeed, international—profile would have led the Court to reach the opposite result.

Similarly, in *Westinghouse*, the plaintiff (i.e., the victim of the discrimination against interstate commerce) was hardly a complete foreigner to New York. It was a corporate behemoth that did "do business in New York" and "regularly pa[id] corporate income and franchise taxes to that State." 466 U.S. at 394. Like the satellite TV companies and some cable companies here, the victims and beneficiaries, alike, were *all* engaged in interstate commerce by definition—they were all exporters. Westinghouse's complaint was not that it was being favored over a commercial hermit. Its complaint was that it was being forced to pay a tax penalty for opting not to build a dock in New York when it was more economical or otherwise preferable to build the dock outside New York, say, on cheaper land across the Hudson River. The complaint that the Supreme Court vindicated, in other words, had nothing to do with where various victims and beneficiaries were incorporated or whether their transactions crossed state lines. The complaint was that New York was using tax differentials to reward those companies that contributed to New York's economy by building or using facilities in New York, and to penalize those companies (including companies *based* in New York) that opted not to. Id. at 398–401.

Finally, in *Armco,* the victim of discrimination had a winning Commerce Clause claim even though it "conducted business in West Virginia through five divisions or subdivisions." 467 U.S. at 639. It, too, was not complaining that it was being hobbled in competition against exclusively in-state businesses. Its objection was that it wanted to make its own decisions about where to site its manufacturing plant, free from the pressure of a tax penalty for making a decision contrary to West Virginia's economic self-interest. In fact, in neither *Armco* nor in *Westinghouse* did the Court pause to inquire whether the beneficiaries of the purported discrimination engaged in interstate commerce. The only inquiry was whether the tax preference was based on the performance of a specified activity within the state. See also *Cuno,* 386 F.3d at 744 (tax credit for investments in plant and equipment in Ohio discriminates against out-of-state businesses not making such in-state investments, even though the victim of discrimination has significant in-state presence). And these are just a few examples. See Con. Law. Prof. Am. Br. at 15–18; see also supra at 22–24.

If this Court were to adopt the Court of Appeals' rationale, it would hack a gaping hole in Commerce Clause protection. The Court of Appeals' approach would mean that a state could "establish[ ] a direct advantage to its local economy," *Dayton Power*, 58 Ohio St.2d at 467, by imposing tax penalties and regulatory bans to force businesses of all sorts to make inefficient choices to the detriment of consumers but to the benefit of the state economy. The only constraint on the state would be to exercise the slightest modicum of caution in choosing winners and losers. The state would merely have to make sure that its statutory scheme *either* (1) disadvantaged at least one company that was already doing *some* business in the state *or* (2) advantaged at least one company that engaged in transactions that cross state lines, such as ordering raw materials from out of state or selling products outside the state. It is hard to imagine a protectionist measure that does *not* satisfy this test. The Court of Appeals' standard wipes out the developed Commerce Clause jurisprudence and would encourage "the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. at 754. It is an open invitation to every state to "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." *H.P. Hood*, 336 U.S. at 533 (quoting Story, supra, § 259).

TABLE 1: SOME CASES WHERE DISCRIMINATION DID NOT DEPEND ON THE DOMICILE OF THE VICTIMS OR BENEFICIARIES OR ON THE ABSENCE OF OTHER INTERSTATE ACTIVITY

CASE	SCHEME	DID DISCRIMINATION DEPEND ON VICTIM BEING FROM OUT-OF-STATE & BENEFICIARY BEING IN-STATE?	DID ALL BENEFICIARIES REFRAIN FROM INTERSTATE COMMERCE?
Westinghouse Elec. Corp. v Tully (1984), 466 U.S. 388	NY awarded a tax credit based upon whether a business built a shipping facility in-state.	No. The tax applied the same to any company that paid NY taxes, regardless of where it was from. A NY-based company would suffer if it built its export facility out-of-state. An out-of-state company would benefit if it built its facility in NY.	No. The credit was available only to companies that export. Beneficiaries and victims alike were all engaged in interstate commerce.
Armco, Inc. v. Hardesty (1984), 467 U.S. 638	WV gave a tax credit to wholesalers, but the tax depended on whether the wholesaler built its manufacturing plant in the state.	No. The tax applied the same to any company that sold at wholesale in WV, regardless of where it was from. If a WV-based wholesaler built its manufacturing plant in out-of-state, it would suffer. If an out-of-state wholesaler built its manufacturing plant in WV, it would benefit.	No. The Court did not even pause to ask that question. The beneficiaries were wholesalers that built manufacturing plants. The beneficiaries that were from out-of-state obviously engaged in interstate commerce.
Bacchus Imports, Ltd v. Dias(1984), 468 U.S. 263	HI exempted liquor distilled from pineapple or from a root indigenous to HI from a tax on wholesale liquors.	No. The statute benefited all sellers of pineapple wine regardless of where they were from (indeed, regardless of where the pineapples were from). It burdened all sellers of other alcoholic beverages including businesses based in HI.	No. HI exempted the specified beverages even if the sellers engaged in interstate commerce.
Dayton Power & Light v. Lindley, Tax Comm'r (1979)., 58 Ohio St.2d 465	OH levied lower tax on use of low-sulfur coal, 80% of which was mined in OH than on high-sulfur coal.	No. The beneficiaries of the lower tax—companies that mine low-sulfur coal—could have been located in or out-of-state. Victims—companies that mine high-sulfur coal—could have been located in or out-of-state.	No. The Court did not even ask that question. Beneficiaries could have been located in-state or out-of-state.
Boston Stock Exchange v. State Tax Comm'n (1977), 429 U.S. 318	Tax distinguished between two categories of *interstate* stock transactions: (1) lower rate on an interstate transaction that used the NYSE versus (2) higher rate on interstate transaction that used an out-of-state exchange.	No. The victims and beneficiaries were all out-of-state. The lower tax in question applied only to non-residents.	No. Because the lower tax was only available to nonresidents who used an exchange in New York to sell their stock, the beneficiaries were all out-of-state businesses engaged in interstate commerce. And, even if you consider the NYSE a beneficiary, it obviously engages in interstate commerce.

PROPOSITION OF LAW II

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, BECAUSE THE DISCRIMINATORY TAX IS INEXTRICABLY TIED TO THE *LOCATION* OF A SPECIFIED ECONOMIC ACTIVITY.

The cases discussed up to this point leave no doubt that once a plaintiff demonstrates that a state law provides a tax advantage based upon whether or not a business builds a facility within the state, or conducts an activity within the state, discrimination against interstate commerce is established. But the Court of Appeals seemed to think that such a showing would not suffice. In its second basis for rejecting the Commerce Clause challenge, the court reasoned that the satellite-only tax was permissible because any disparity 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.'" (Appx. 18 (quoting *Amerada Hess*, 490 U.S. at 78, and citing *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117).) According to the Court of Appeals, the two sorts of pay TV providers are "distinguished . . . by . . . means of delivery" (id.), by "the technological means of program distribution" (Appx. 19). That, according to the Court of Appeals, makes all the difference.

This second rule, too, practically nullifies the Commerce Clause. Contrary to the clear command of cases like *Boston Stock Exchange*, *Armco, Westinghouse*, and *Granholm*, the Court of Appeals' logic would mean that it is perfectly permissible to treat two direct competitors differently even if the discrimination is based explicitly on whether a business builds a facility or engages in a specified economic activity in the state. All the state has to do is *say* that the discrimination is pegged to some sort of difference in how the competitors operate their business, some difference in "technological or commercial models." (Appx. 17.) Never mind that the difference has everything to do with location—here, it has to do with whether or not buildings are built and cables are laid in Ohio. Never mind that there is evidence of discriminatory purpose (which, as the trial court held, gave rise to a triable issue of discriminatory effect). The Court of Appeals' ruling means that any discriminatory purpose and any discriminatory effect will be validated so long as the discriminatory treatment is purportedly tethered to a difference in technology or in operation.

There is no such gaping "technological means" exception to the rule the U.S. Supreme Court has announced in *Boston Stock Exchange, Armco, Westinghouse*, and *Granholm*. Rather, the cases on which the Court of Appeals relied—*Amerada Hess* and *Exxon*—represent the flip side of the same Commerce Clause coin. On the one hand, the basic rule is always that when a distinction between businesses *is* based on where a facility is built or where a function is performed—if the distinction bears some relation to "the location of their activities"—there is a Commerce Clause violation. There is no exception to the basic rule that "discrimination *based on the extent of local operations* is itself enough to establish the kind of local protectionism" that violates the Commerce Clause. *Lewis*, 447 U.S. at 42 fn.9 (emphasis added). That rule applies whether the geographic connection is explicit (as in *Armco*, *Westinghouse*, and *Granholm*) or becomes evident only upon consideration of practical effects (as in *Bacchus* and *Dayton Power*). On the other hand, when a distinction *does not* have anything to do with whether or not a business builds a particular building or performs a particular function within the state—if the distinction is "*not* from the location of their activities," whether explicitly or in practical effect—there is no Commerce Clause violation. It is permissible for a statute to treat two companies differently *if they are in entirely different businesses.* And it is permissible to distinguish one business from another if the distinction "results *solely* from differences between the nature of their businesses," and there is no evidence of a purpose to favor the local economy. That is all those "mode of business" cases means.

A. *Amerada Hess* and *Exxon* Hold Only That a State Is Not Required to Treat Two Companies the Same If They Are in Different Businesses.

That *Amerada Hess* and *Exxon* merely restate the prevailing rule—and do not somehow overrule it—is evident from a review of their facts and holdings.

In *Amerada Hess*, large oil companies complained that New Jersey's tax code did not grant them a special credit against state taxes. 490 U.S. at 70–71. Specifically, their gripe was that they were paying a sizable federal windfall profit tax on the crude oil they sold, and they thought the state should allow them to deduct that large federal tax payment for purposes of calculating their state taxes. See id. They complained that the state's policy decision not to craft such a special deduction discriminated against interstate commerce for two reasons—both of which the Court rejected.

The first argument went something like this: By sheer accident of geology, New Jersey has no crude oil under its crust. Id. at 77. Since all the oil reserves are out-of-state, the decision to deny a state tax deduction only redounds to the detriment of out-of-state companies. Id. at 77–78. Ergo, the tax policy discriminates against out-of-state companies because it "burdens a form of business activity that is conducted only in other jurisdictions." Id. at 77.

This claim looked nothing like the challenges that the Supreme Court precedents—such as *Armco* and *Westinghouse*—had endorsed, which was why the Court rejected it. The state tax law did not refer to the location of any activity and thus "[was] not facially discriminatory in the [*Westinghouse v.*] *Tully* sense, as there is no explicit discriminatory design to the tax." Id. at 76. In fact, the plaintiffs conceded that New Jersey's tax policy could not plausibly be construed as a way to favor local activity over foreign activity or to garner parochial economic benefits for the state. Id. at 77–78. The New Jersey tax statute was enacted *before* Congress ever imposed a federal windfall profits tax, and New Jersey did not grant a credit for *any* federal tax that, like a windfall profits tax, is "measured by profits or income." Id. at 70.

Even more relevant for this case was the oil companies' second argument—that the tax "discriminate[d] against *oil producers* who market[ed] their oil in favor of *independent retailers* who do not produce oil." Id. at 78 (emphases added). That was the argument the Court was rebutting when it uttered the phrase that the Court of Appeals invoked here—that the challenged distinction was permissible because it was based on a difference "between the nature of their businesses, not . . . the location of their activities." Id. The Court's point was simple: Oil producers erect oil rigs, drill into the Earth's crust, and send their product to refiners to convert to gasoline and sell to gas retailers. Gas retailers purchase refined gasoline, set up pumps, and sell gas directly to motorists on the roadside, along with other goods and services from Twinkies to mufflers. They perform different functions, with different equipment, and serve different customers at different points in the commercial chain. Gas retailers do not compete with oil drillers and refiners. The very "nature" of their businesses is vastly different. And since they are not in the same business, there is no requirement that New Jersey treat them same—much less equalize a burden that federal law imposes on one and not the other.

Exxon is *Amerada Hess*'s analytical twin. At issue in *Exxon* was a Maryland law that prohibited oil producers and refiners from owning retail gas stations. 437 U.S. at 119. The state had enacted this prohibition in response to abuses during the 1973 oil shortage, when oil companies preferentially supplied gas to the retailers they owned and discriminated against independent retailers. Id. at 121. Several vertically integrated oil companies challenged the prohibition as discriminating against interstate commerce. As in *Amerada Hess*, the basis of the discrimination claim was the fortuity that Maryland, like New Jersey, had no oil under its crust—and therefore had no oil producers or refiners. So, again, by sheer accident of geology, "the burden of the divestiture requirements falls solely on interstate companies." Id. at 125. And again, the claim looked nothing like the claim in *Armco, Westinghouse,* or *Granholm*. It was more like arguing that a ban on ivory sales is jingoistic because all elephants come from abroad.

The Court rejected the discrimination claim because (unlike in those cases and this case) the prohibition was neither linked to nor motivated by location: The rule prohibiting oil companies from owning gas stations had nothing to do with *where* the oil companies drilled or refined their oil, or the location of other companies that owned retailers. Id. at 126 fn.16. The Court held that in adopting the ownership rule, the legislature did not discriminate against business that drill *out-of-state*, but against *oil* companies. See id. at 127–28. More specifically, the "statute in issue discriminated against vertical organization in the petroleum industry." *Lewis*, 447 U.S. at 41. The reason for the differential treatment had to do with the oil companies' past behavior and economic might, not where they erected their oil rigs. That was what the Court meant when it held (in another phrase the Court of Appeals seized upon) that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Exxon*, 437 U.S. at 127; (see also Appx. 18 (quoting *Exxon*).)

At no point in *Exxon* or *Amerada Hess* did the Court even hint that it was limiting—much less overruling—the principles that it had established in *Boston Stock Exchange, Armco*, and *Westinghouse*. To the contrary, the *Amerada Hess* Court explicitly distinguished *Westinghouse* as inapplicable to that case. *Amerada Hess*, 490 U.S. at 75–76. By no stretch of the imagination could *Exxon* or *Amerada Hess* be read to limit earlier cases, especially since the Court followed the same bedrock principles in *Granholm*, which post-dated both *Amerada Hess* and *Exxon*.

Granholm's silence regarding whether there is an "*Amerada Hess* exception" speaks volumes in and of itself. If cable TV and satellite TV are critically different in the "nature of their businesses" merely because they employ different delivery systems, then the same is true of the competing wine sellers in *Granholm*. One delivers wine only by direct shipment; the other delivers out of a brick-and-mortar distribution center. That the Court did not mention any *Amerada Hess* exception is powerful evidence that there is none.

In the end, the snippets that the Court of Appeals drew from *Amerada Hess* and *Exxon* stand for nothing but the uncontroversial (and obvious) proposition that "[t]he 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*, 437 U.S. at 126 (emphasis added); *Amerada Hess*, 490 U.S. at 78. There has to be more. There has to be a showing, for example, as there is here, that that statute actually rewards a business for performing economic activities within the state, or imposed a burden *because of* where building and other economic activities occur. *Exxon* and *Amerda Hess* merely represent the flip side of the same Commerce Clause coin discussed above. On the one hand, the rule remains that "discrimination *based on the extent of local operations* is itself enough to establish the kind of local protectionism" that violates the Commerce Clause. *Lewis*, 447 U.S. at 42 fn.9 (emphasis added). On the other hand, there is no Commerce Clause violation where the tax has *nothing* whatever to do with "the location of [a business's] activities," but turns "solely" on differences in the very "nature" of two businesses. (Appx. 18.) The latter principle is a corollary to the bedrock principle, not some amorphous exception that swallows the rule whole.

B. The *Amerada Hess* Rule Is Inapplicable Because Cable TV and Satellite TV Companies Are Direct Competitors in the Same Business, the Tax Is All About the Location of an Economic Activity, and There Is Clear Evidence of Discriminatory Purpose and Effect.

The Court of Appeals contorted *Exxon* and *Amerada Hess* beyond recognition when it tried to apply those cases as an exception to the ordinary rule that any difference in tax treatment based upon whether a business builds in the state is discrimination against interstate commerce.

First, the snippets the Court of Appeals borrowed from *Amerada Hess* apply only where the burden on a business "results *solely* from differences between the nature of [the cable and satellite] businesses, not from the location of their activities." *Amerada Hess*, 490 U.S. at 78 (emphasis added). Even by its own terms, this snippet could not possibly be stretched to save a statute that favors a business because it builds or uses an export facility in the state (as in *Westinghouse*), or because it builds or uses a manufacturing facility within the state (as in *Armco*), or because it builds a distribution facility *on the ground* in the state (as in this case and *Granholm*). In all these circumstances, the distinction between two businesses (as the trial court put it) has "everything to do" with location. (Appx. 162.) In these cases, and here, the distinction is all about *where* a facility will be built or used (or, as here, where a facility will not be built—on the ground in Ohio). In *Exxon* and *Amerada Hess*, the Court's point was that the complaining business was being treated differently for reasons having nothing to do with where they were drilling (or engaging in other activities). Here, however, there is no disputing that satellite TV is being treated differently from cable *precisely because* of the location of its cable and buildings.

Second, in giving its blessing to laws that differentiate "solely" on the "nature of the[] business[]," the Supreme Court made a point of noting that the rule it was following could be applied only "in the absence of discriminatory intent." *Amerada Hess*, 490 U.S. at 78 fn.10.

Unlike the Court's finding in *Amerada Hess* and *Exxon*, this case presents abundant evidence of discriminatory intent, which is why the trial court directed a trial on the discriminatory purpose. In fact, it is hard to imagine any reason why the General Assembly would favor cable TV companies over satellite companies *except* to advance the local economy. Even if the Court of Appeals' mode-of-business exception could apply to companies that are in the *same* business, neither the U.S. Supreme Court nor this Court has ever suggested that the exception could somehow trump the rule that a statute can be invalidated simply because it is infected with a discriminatory purpose. The Court of Appeals, therefore, should not have overridden the trial court's ruling that at a minimum there should be a trial on discriminatory purpose.

Third, unlike oil producers and gas retailers, cable TV and satellite TV are ardent competitors in the *same* business—pay TV service. The trial court so found, as a matter of undisputed fact. (Appx. 132.) They sell the same product, and compete for the same customers in the same markets. They buy the same raw materials from many of the same vendors. They have the same business models. To say that the delivery system makes them different businesses is like saying Land's End and L.L. Bean are in different businesses because one ships to customers by rail and the other by truck. The customers do not care how the product is delivered; they care about the product's quality, the service, and the price. Cf. *Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, 299–300 (for Commerce Clause purposes, one major indication that businesses are in the same business is if they compete for customers).

C. The Court of Appeals' Mode-of-Business Rule Would Gut Commerce Clause Protection.

Like the Court of Appeals' first line of logic, its misreading of *Amerada Hess* and *Exxon* would gut the Commerce Clause. If the location-specific tax in this case could be insulated from

Commerce Clause challenge on the ground that cable TV and satellite TV are entirely different businesses, then most any location-based discrimination can be recast in the same manner.

Take, for example, two similar cases—one from this Court and one from the U.S. Supreme Court. Two decades ago, this Court struck a law imposing a higher tax on low-sulfur coal than on high-sulfur coal. See *Dayton Power*, 58 Ohio St.2d at 473–74. "[T]he virtual absence of low sulfur coal in this state" was no secret; so sulfur content was nothing but a proxy for in-state activity. Id. at 473–74. Under the Court of Appeals' analysis, it would have been easy to justify the differential treatment as "'result[ing] solely from differences between the nature of [the two sorts of coal] businesses, not from the location of their activities.'" (Appx. 18 (citations omitted).) The State could have argued that the discrimination was on the basis of sulfur content, just as it argues here that the discrimination is on the basis of delivery systems. But this Court rejected any such facile approach. *Dayton Power*, 58 Ohio St.2d at 473–74. The key to the Court's analysis was this: "The 'reality' of the situation [was] such that Ohio high sulfur coal and foreign low sulfur coal *compete in the Ohio market place*," which is another way of saying that they were in the *same* business. Id. (emphasis added). This Court struck the statute because the state was favoring one competitor over another: the *practical* difference was that one generated a lot of economic activity within the state and the other did not.

The U.S. Supreme Court encountered a similar breed of protectionism in a case where Hawaii exempted okolehao (a brandy produced using a shrub indigenous to Hawaii) and pineapple wine from the 20% excise tax generally applicable to other alcoholic beverages—the difference being that the favored beverages were produced only in Hawaii. *Bacchus*, 468 U.S. at 265, 269. It would have been easy to argue (as the defenders of the tax statute did) that the sellers of niche liquors were in a different business from the sellers of various mainstream alcoholic beverages. Id. at 268–69. But the Court rejected any such approach, noting that noting that "drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit." Id. The key here, too, was that the beverages made from indigenous fruits *competed* directly with other alcoholic beverages, and so the tax differential artificially imposed "'unequal and oppressive burdens upon the industry and business of other States.'" Id. at 272–73 (quoting *Guy v. Baltimore* (1880), 100 U.S. 434, 443). That, alone, was enough to lead the Court to conclude that the Hawaii tax was "'economic protectionism' in every sense of the phrase." Id.

The outcomes in both these cases—and dozens of others—would be different under the Court of Appeals' approach. If a Commerce Clause challenge could be defeated with the simple artifice of calling cable TV and satellite TV two different businesses, then the same word play could absolve most any Commerce Clause violation. The Court of Appeals' rationale would be especially problematic in the arena of e-commerce, which harnesses innovative technologies to enable far-away businesses to compete efficiently with local companies engaged in more traditional transactions. Competition will diminish—and the value of innovation will be squandered—if states were free to discriminate against the most innovative and efficient companies on the ground "that the dormant Commerce Clause should not be conceived to protect particular technical or commercial models." (Appx. 20.)

So far as we know, outside the cable-satellite context, no appellate court has ever held that *Exxon* or *Amerada Hess* represented such a tectonic shift in Commerce Clause jurisprudence. 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." (Appx. 15.) The court correctly declined to rely on most of those opinions. The prior cases addressed three state statutes—two successive versions of a North Carolina law and one from Kentucky—yielding only three appellate decisions. None of them were from a state supreme court. One of the three appellate cases did not even reach the Commerce Clause claims. See *DIRECTV v. Tolson* (C.A.4 2008), 513 F.3d 119, 125 (dismissing second North Carolina case under principles of comity). The second appellate decision, from the Sixth Circuit, addressed a Kentucky tax scheme that was completely different. See *DIRECTV, Inc. v. Treesh* (C.A.6, 2007), 487 F.3d 471. At issue was a Kentucky statute that, in stark contrast to the Ohio statute, taxed cable and satellite TV service *equally*. See id. at 475. The challenge focused on a feature not present here: Even while taxing satellite and cable TV the same, Kentucky abolished the franchise fees that cable companies, alone, used to pay. The crux of the challenge, then, was that "the 'tax and subsidy' approach ... is a sham." Id. at 478. Specifically, the plaintiffs argued that repeal of *local* franchise fees was effectively a subsidy to cable companies, which, in turn, meant that the effective *state* tax on cable and satellite TV was not really the same. Id. The Sixth Circuit analyzed this argument at length, disposing of it on the ground that "[s]tates and local government are under no mandate to charge for the use of local rights-of-way." Id. at 479.[5] Accordingly, the Court of Appeals was wrong when it characterized this case as one "decided on essentially identical pertinent facts." (Appx. 18.)

That leaves one isolated appellate decision—from an intermediate appellate court in North Carolina. See *DIRECTV, Inc. v. North Carolina* (N.C. Ct. App. 2006), 178 N.C. App.

---

[5] Buried in several pages of analysis rejecting the purported tax-and-subsidy argument was one sentence on which the Court of Appeals in this case seized: "In this case, however, the two 'goods' are distinct, consisting of two very different means of delivering broadcasts." 487 F.3d at 480 (citing *Exxon*, 437 U.S. at 127, for the proposition "that the Commerce Clause does not 'protect[] the particular structure or methods of operation in a retail market'"). (Appx. 17 (highlighting this sentence from *Treesh*).) But this cryptic reference was dictum, since by then the court had already rejected the claim on other grounds.

659, 667, 632 S.E.2d 543. Unlike the others, the North Carolina case did involve a state scheme (since amended) that taxed satellite TV and not cable TV. But the tax was challenged on a different theory than has been presented here. As the court below observed, the North Carolina appellate "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." (Appx. 16.) In other words, the challenge in that case was based entirely on the classic theory that one business was in-state and the other was out-of-state. See *DIRECTV*, 178 N.C. App. at 665 (confirming that case was limited to that theory). The plaintiffs there did not present the theory argued here, that the tax violated the Commerce Clause for the simpler reason that the imposition of the tax depended upon whether or not a particular activity was performed in state. That omission explains why the North Carolina court decided the case largely on the basis of where the companies were located. See, e.g., id. at 664 ("Contrary to Plaintiffs' assertions, cable companies are no more 'local' in nature than are satellite companies. . . . [B]oth businesses are interstate in nature."). The North Carolina court also drew upon *Amerada Hess* and *Exxon*—in passages that the Court of Appeals in this case quoted heavily. Compare Id. at 665-66, with Appx. 16. The original iteration of that analysis was every bit as flawed as its repetition in this case.

PROPOSITION OF LAW III

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 Court of Appeals ruled that, when considering a Commerce Clause challenge based on the discriminatory purpose or effect of a statute, trial courts should not be permitted to "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" (Appx. 21) or "statements reflecting the reasoning of members of the legislature for enacting the tax provision at issue" (Appx. 22). The Court of Appeals based that holding on state law rules of statutory construction, specifically that: "'Ohio has no official legislative history'" and "a court may not resort to legislative history . . . to alter the clear wording of the legislative enactment." (Id. (citation omitted).) This analysis, however, is based on a misapprehension of the purposes for which the lobbying evidence was introduced and, furthermore, runs afoul of applicable federal jurisprudence which is controlling in this constitutional challenge.

As an initial matter, the evidence from the cable industry's lobbying efforts was not introduced to combat the plain meaning of the statute. The statute, by its plain meaning, taxes satellite TV while excluding cable TV from the same sales tax based on cable TV providers having invested in in-state distribution facilities. There is no dispute as to that meaning or any attempt to alter the "clear wording of the enactment" by reference to the cable industry's lobbying efforts. Accordingly, the prohibition against avoiding a statute's plain meaning by reference to legislative history is not triggered in this case.

This case also 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 fn.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 regulation violate the Commerce Clause; thus, [state] law concerning statutory construction is not controlling.").

The U.S. 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. Statements from a bill's supporters pronouncing the purpose and effect of a statute are relevant to proving both the purpose that the Legislature harbored and the likely effect of the legislation. That is why the Supreme Court, in considering Commerce Clause challenges, routinely refers to statements, reports, and declarations outside of the text of the challenged state regulation, including statements by the industry supporting the bill. 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 fn.7, 327 fn.10. In other prominent cases, the Court cited the state agriculture commissioner's statement that local apple producers "were mainly responsible for this legislation being passed," *Hunt v. Wash. State Apple Advertising Comm'n* (1977), 432 U.S. 333, 352, and a proponent's declaration that "we must act on the state level to preserve our local industry," *W. Lynn Creamery*, 512 U.S. at 189–90. Other courts routinely invoke similar evidence to determine the purpose and effect of a statute.[6] As is evident from these cases, opinions from the key proponents of a challenged statute

[6] See, e.g., *Jones v. Gale* (C.A.8, 2006), 470 F.3d 1261, 1270 (citing television advertisement urging voters to "send a message to those rich out-of-state corporations" by voting for an initiative preventing corporate ownership of farms and ranches); *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); *Dickerson* 336 F.3d at 399 fn.48 (citing legislator's statement that ban on direct shipments from out-of-state wineries was intended to "'force people [in Texas] to sell [Texas] alcoholic beverages that they might not otherwise choose to sell'"); *Brown & Williamson Tobacco Corp. v. Pataki* (C.A.2 2003), 320 F.3d 200, 215

as to the statute's purpose and effects are not just relevant, but often can be the best evidence of a legislature's purpose and the actual effect of a statute.

The evidence in the record in this case 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* 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" (Supp. 339), at the expense of a business that "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state*" (Supp. 98 (emphasis added)).

This Court should rule on this Proposition of Law, even if it concludes that the plaintiffs have not presented a valid claim for discrimination in practical effect. As noted above, the Court of Appeals mistakenly believed that its reversal of the trial court's summary judgment ruling on practical effects ended the case. (See Appx. 22–23.) But since the Court of Appeals did not disturb the trial court's conclusion that there is a material issue of disputed fact as to whether the satellite-only tax was motivated by the purpose of discriminating against interstate commerce (Appx. 181), at a minimum, a trial must proceed on that question. When that trial proceeds, the trial court should be free to consider all evidence of the General Assembly's intent.

(noting letter submitted by a lobbyist reflecting his interpretation of statute's intended effect); *McNeilus Truck & Mfg., Inc. v. State ex rel. Montgomery* (C.A.6, 2000), 226 F.3d 429, 443 (citing letters written by in-state dealers and remanufacturers to the Ohio legislature lobbying for legislation that required remanufacturers to enter into binding service agreements with in-state service providers); *Chambers*, 52 F.3d at 1259 fn.10; *Pete's Brewing Co. v. Whitehead* (W.D. Mo., 1998), 19 F. Supp. 2d 1004, 1010 fn.4 (noting that Missouri-based brewer urged passage of law regulating alcoholic beverages, as this fact could "reflect upon the purpose as to why this law was introduced and passed").

The sort of protectionism on display in the satellite-only tax subverts the national unity that the Commerce Clause was designed to protect. It is also detrimental to Ohioans' short-term and long-term interests. In the short-term, the General Assembly's decision to carve cable TV out of the state tax has deprived the public of about $79 million per year, or more, in much-needed tax revenues. It has also deprived Ohio consumers of the benefits of technological innovation and competition, by artificially raising the price of the competitor that has figured out a cheaper, more efficient way to deliver services. In the long-term, what goes around comes around. If this Court endorses this sort of protectionism, then its counterparts in other states will follow suit with regard to goods and services of all sorts, to the ultimate detriment of all citizens, including our own. See NRTC Am. Br. at 6–7.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals on each of the propositions of law raised in this appeal and reinstate the trial court's grant of summary judgment in plaintiffs' favor.

Dated: October 23, 2009

Respectfully submitted,

E. JOSHUA ROSENKRANZ (pro hac vice)
New York Bar No. 2224889
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
(212) 506-5000
Fax: (212) 506-5151
JRosenkranz@Orrick.com

PETER A. ROSATO (0068026)
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State Street
Columbus, OH 43215
(614) 621-1500
Fax: (614) 621-0010
PRosato@Calfee.com

Counsel for Plaintiffs-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Appellants' Brief - Part I* was served by U.S. mail, postage prepaid, this 23rd day of October, 2009, upon the following:

Lawrence Pratt
Alan P. Schwepe
Julie E. Brigner
Damion M. Clifford
Assistant Ohio Attorneys General
Taxation Section
30 E. Broad Street, 25th Floor
Columbus, OH 43215

Counsel for Defendant-Appellee

Douglas R. Cole
Erik J. Clark
Jones Day
325 John H. McConnell Blvd., Ste. 600
Columbus, Ohio 43215

Counsel for Amicus Curiae Constitutional Law Professors

Jeffrey Pearlman
Public Knowledge
1875 Connecticut Avenue., NW
Suite 650
Washington, D.C., 20009

Counsel for Amici Curiae Consumer Federation of America, et al.

Keith C. Nusbaum
Howard R. Rubin
Hannah F. Preston
Sonnenshein Nath & Rosenthal
1301 K. Street, NW
Suite 600, East Tower
Washington, D.C. 20005

Counsel for Amicus Curiae National Taxpayer's Union

John A. Hinman
Hinman & Carmichael, LLP
260 California Street, Suite 1001
San Francisco, CA 94111

Counsel for Amicus Curiae Specialty Wine Retailers Association

Mark C. Ellison
Senior Vice President & General Counsel
National Rural Telecommunications Cooperative
2121 Cooperative Way
Herndon, VA 20171

Counsel for Amicus Curiae National Rural Telecommunications Cooperative

Gerhardt A. Gosnell II
Donald C. Brey
Chester, Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-3413

Counsel for Amici Curiae Satellite Broadcasting and Communications Association, et al.

Peter A. Rosato
One of the Attorneys for Plaintiffs-Appellants