ORIGINAL

No. 09-0627

In the Supreme Court of Ohio

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

Plaintiffs-Appellants,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Defendant-Appellee.

On Appeal From The Court of Appeals,
Tenth Appellate District
Case No. 08AP-32

BRIEF OF AMICUS CURIAE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Ohio Cable Telecommunications Association (the "Association") is an Association of approximately 15 cable companies and over 50 other companies that provide services and support to cable companies and their Ohio subscribers. The Association represents the cable television and telecommunications industry in the Ohio General Assembly, the Public Utilities Commission of Ohio, and the United States Congress on issues of importance to the cable television and telecommunications industry and works to foster a positive image of the cable industry in Ohio. Accordingly, the Association has an interest in this controversy and in urging this Court to affirm the constitutionality of the Ohio Satellite Sales Tax.

Our specific purpose in filing this amicus brief is to demonstrate that whatever may be amici Constitutional Law Professors ("Law Professors") purported "interest in seeing dormant Commerce Clause jurisprudence develop in a sound and rational manner," they have filed a brief that is little more than thinly disguised advocacy on behalf of Appellants ("Satellite Companies") and cannot be viewed seriously as dispassionate scholarly analysis that has any basis in a fair reading of the Court's Commerce Clause jurisprudence.

STATEMENT OF FACTS

The Association adopts and incorporates by reference the statement of facts provided by Defendant-Appellee Richard Levin, Tax Commissioner of Ohio ("Commissioner").

The statement of facts of amici Law Professors fails to acknowledge that (1) Satellite Companies have a substantial in-state presence and that (2) Cable Companies pay local fees that Satellite Companies do not pay. It also misconstrues the Court of Appeals' decision. These omissions and errors are addressed in the argument section of this brief.

SUMMARY OF ARGUMENT

Amici curiae Law Professors do not help this Court decide this case. First, much of their brief is devoted to erecting and then relentlessly flogging a straw man – an untenable proposition of law that the Court of Appeals could not possibly have intended to propound. Specifically, Law Professors claim that the Court of Appeals held "that a tax can never constitute discrimination against interstate commerce, so long as both the benefited and the burdened party are engaged in interstate commerce." (Brief of Constitutional Law Professors at 7, hereinafter "Law Profs. Brief"). Any fair reading of the Court of Appeals' decision exposes this as a blatant misconstruction of the opinion. Besides, so what? The court's decision was not predicated on this purported rule. Rather, the decision rests squarely on a comparison of the activities of these two interstate businesses, on U.S. Supreme Court precedent, and on prior case law rejecting Satellites Companies' claims under essentially identical facts. Law Professors' toppling of this straw man only diverts this Court's attention from the dispositive issues in this case.

Second, Law Professors contend that Ohio discriminates against Satellite Companies because Ohio's taxing statute in part defines satellite companies in the negative: as broadcasters not using "ground receiving or distribution equipment, [other than] the subscriber's receiving equipment." R.C. 5739.01(XX). This contention is nonsense. By parity of reasoning, cable companies are discriminated against because they do not use receiving equipment affixed to subscribers' homes. Or, in a competitive struggle between railroads and trucking companies involving similarly-structured definitions, railroads could claim discrimination because they do not carry freight on roads, and trucking companies could claim discrimination because they do not carry freight on rails. The Ohio statute is geographically neutral, and as a factual matter both satellite and cable companies engage in substantial, but different, in-state activities.

Third, Law Professors assert that the Court of Appeals propounded a "newly-announced" dormant Commerce Clause rule when it relied on the U.S. Supreme Court's finding in *Amerada Hess Corp. v. Director, Div. of Taxation* (1989), 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58; that a tax based not on location but rather on the different nature of two companies is unobjectionable under the Commerce Clause. (Law Profs. Brief at 7-8). Law Professors support their contention by crafting rules of their own imagination for "competing businesses" that are "inextricably linked to the location of their activities." (Id. at 19). There is no authority for these novel rules. To the contrary, the rule in *Amerada Hess* was announced *in the specific context of* competing businesses (retailers who produce their own oil and retailers who acquire oil from third-party suppliers) and *in the specific context* of a statute delineating a mode of business "inextricably linked" to an out-of-state activity (producing your own oil). *Amerada Hess Corp.*, 490 U.S. at 78. The only newly-announced rules are those of Law Professors.

Nevertheless, in attacking both the Court of Appeals' treatment of *Amerada Hess* and the straw man that Law Professors attribute to the court, Law Professors accuse the court of originating "two new, never-before-seen dormant Commerce Clause rules"; "applying two newly-announced dormant Commerce Clause rules"; and "newly-mint[ing a] *per se* rule." (Emphasis *sic.*) (Law Profs. Brief at 4-5, and 7). If this is so, then what older coinage informed the five other courts that had previously considered and rejected Satellite Companies' dormant Commerce Clause claims? *DIRECTV, Inc. v. North Carolina* (2006), 178 N.C.App. 659, 632 S.E.2d 543; *DIRECTV, Inc. v. Treesh* (E.D.Ky. 2006), 469 F.Supp.2d 425, affirmed (C.A.6, 2007), 487 F.3d 471, certiorari denied (2008), 128 S.Ct. 1876, 170 L.Ed.2d 746; *DIRECTV, Inc. v. Tolson* (E.D.N.C.2007), 498 F.Supp.2d 784, affirmed (C.A.4, 2008), 513 F.3d 119. Taking nothing away from the precedential value of Ohio Court of Appeals decisions, one might expect that constitutional law scholars with "an interest in seeing dormant Commerce Clause jurisprudence develop in a sound and rational manner" would want to educate this Court on a Sixth Circuit decision addressing virtually identical facts and claims. (Law Profs. Brief at 2). Law Professors are strangely silent here.

Finally, Law Professors devote a section of their brief to schooling this Court on Commerce Clause history and purposes. Because this case does not turn on any of the matters discussed in that section, we treat it only in passing. Specifically, we call the Court's attention to Law Professors' contention that one of the historical purposes of the dormant Commerce Clause is to facilitate free trade and economic efficiency, and that consideration of this purported purpose should influence the result in this case. (Id. at 3, 10-12). Interestingly, Amicus Curiae Law Professor Brannon Denning recently published a law review article in which he rejects entirely the "free trade theory" of the dormant Commerce Clause as "almost surely wrong as a historical matter." Denning, Reconstructing the Dormant Commerce Clause Doctrine (2008), 50 Wm. & Mary L. Rev. 417, 480. Denning believes that the dormant Commerce Clause doctrine should be "rooted in the Framer's desire to prevent the political instability that resulted from economic rivalries among the states." Id. at 423. He argues that dormant Commerce Clause decisions should "go no further than addressing the sorts of 'discrimination' that produce this union-undermining effect." Id. at 420.

The Ohio Satellite Tax does not have a "union-undermining effect." It provokes no trade war, no race to the bottom, and no destabilizing political friction. Nor does it offend "accepted understandings of the dormant Commerce Clause doctrine." (Law Profs. Brief at 23). To the contrary, accepted dormant Commerce Clause doctrine allows states to draw rational distinctions between classes of taxpayers based on modes of operation. Law Professors would have this

Court announce a rule that opens the door for disappointed taxpayers to convert meritless Equal Protection claims into hopelessly confused battles of competing economic impact statements. The only slippery slope in this case is the one constructed by Satellite Companies and their amici.

ARGUMENT

I. Law Professors Mischaracterize the Court of Appeals' Decision as Supporting the Untenable Proposition That There Can Be No Dormant Commerce Clause Discrimination if Both the Benefited and Burdened Parties Are Engaged in Interstate Commerce

Much of Law Professors' brief is devoted to knocking down a straw man. The straw man is the unsupportable proposition that "a tax can never constitute discrimination against interstate commerce, so long as both the benefited and the burdened party are engaged in interstate commerce." (Law Profs. Brief at 7). Law Professors attribute this proposition to the Court of Appeals and cite numerous cases that demonstrate that it is not a correct statement of the law. (Id. at 13-18).

The most useful response to this straw man argument is, "so what?" The Commissioner's case is not predicated on this flawed proposition, and nothing here turns on whether the Court of Appeals uttered it. Still, we take a moment to demonstrate that Law Professors have mischaracterized the court's decision.

Dormant Commerce Clause discrimination has been defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality* (1994), 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13. One way in which states can run afoul of the dormant Commerce Clause is to discriminate based on status, such as residency or state of incorporation. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine* (1997), 520 U.S. 564, 567, 117 S.Ct.

1590, 137 L.Ed.2d 852 (statute denied property tax exemption to summer camps "operated principally" for non-resident campers). Another way in which states can run afoul of the dormant Commerce Clause is to discriminate in favor of local activities, products, and transactions. See, e.g., *Bacchus Imports Ltd. v. Dias* (1984), 468 U.S. 263, 285-86, 104 S.Ct. 3049, 82 L.Ed.2d 200 (statute discriminated in favor of locally produced alcoholic beverages).

The Court of Appeals addressed both of these potential grounds for challenge. Specifically, after reviewing the case law, the court conducted a thorough side-by-side analysis of the activities of cable and satellite companies. The court framed its discussion by stating: "Before us are two modes of doing interstate business." (Emphasis added) *DIRECTV, Inc. v. Levin,* (2009) 181 Ohio App. 3d 92, (hereinafter "Opinion"), at ¶ 24. The court then proceeded to explore those modes of doing business by examining the use and location of satellites, cables, dishes, decoders, headend distribution centers, and programming sources. Presumably to dispel any entity-based challenge, the court also noted that both satellite and large cable companies are "national companies headquartered outside Ohio." Id. at ¶ 24-26. The court concluded that "plaintiff satellite companies in the present case have not demonstrated that Ohio's sales tax provisions discriminate against the interstate market for pay television, whether delivered by cable or satellite." Id. at ¶ 27.

The court next turned its attention to the remaining issues on appeal, which were mooted by the court's preceding dormant Commerce Clause analysis. In its sentence making that transition, the court uttered the phrase that Law Professors have plucked from context and proclaimed a "newly-minted *per se* rule":

"Because we find that Ohio's sales tax, as applied to the satellite television providers and not applied to cable television providers, does not run afoul of the dormant

Commerce Clause *because both of these providers are engaged in interstate commerce,* we do not examine the question of whether cable television * * * presents sufficient alternate benefits to warrant differential taxation. Nor do we examine [the other remaining issue on appeal]." (Emphasis added) Id. at ¶28. Seizing on the phrase for which we have supplied italics, Law Professors claim that the court adopted a "never-before-seen" rule: "a tax *per se* cannot be 'discriminatory' when 'both [the favored and disfavored companies] are engaged in interstate commerce.'" (Emphasis *sic.*) (Law Profs. Brief at 4-5).

Law Professors' interpretation of the court's opinion is belied by its sheer absurdity. This proposition of law is so untenable that the Court of Appeals could not possibly have intended it. To be sure, one ground for proving discrimination is that the benefited party does not venture out-of-state while the burdened party does, but this is not the only ground. If the court truly believed "that a tax can never be impermissibly discriminatory if the favored entities are themselves companies engaged in interstate commerce," then what was the purpose of the paragraph upon paragraph of legal analysis in its opinion? (Id. at 13). The court could have called the Secretary of State, downloaded some annual reports, cancelled oral argument, and banged the gavel. Words must be read in context. The italicized phrase was intended to encapsulate the analysis that preceded it, not nullify it.

More generally, by insisting that the errors they identify in the Court of Appeals' opinion are "newly-announced," "newly-minted," and "never-before-seen" rules, Law Professors render their brief largely irrelevant. (Id. at 4-5, 7). If, as Law Professors contend, the Court of Appeals was engaged in legal pioneering, then what about the five courts that had already rejected essentially identical satellite industry claims? See *DIRECTV, Inc. v. North Carolina, Dept. of Rev.* (2006), 178 N.C.Ct.App. 659; *DIRECTV, Inc. v. Treesh* (E.D.Ky. 2006), 469 F.Supp.2d 425; *DIRECTV, Inc. v. Tolson* (E.D.N.C.2007), 498 F.Supp.2d 784. On what authority did they rely? It could not have been the alleged trail-blazing analysis of the Ohio Court of Appeals. Amici Law Professors are strangely silent here, and offer no guidance to this Court on a large body of highly relevant case law.

The conspicuous silence of Law Professors would be understandable if their sole purpose in offering guidance to this Court were to caution it against adopting some loose language from the Court of Appeals' opinion. Law Professors, however, have thrown their full weight behind Satellite Companies' appeal. This being so, they have an obligation as amici purporting to bring an academic perspective to this dispute to fully examine the relevant case law. But instead they appear to dodge it.

Similar selectivity infects other aspects of Law Professors' brief. For example, Law Professors argument is laced with the theme of economic efficiency – urging that cable and satellite companies compete on a level playing field – and yet there is *no recognition anywhere in their brief* that members of this Association are paying substantially similar if not higher fees to Ohio localities, fees from which Satellite Companies are exempted. Law Professors' failure to confront the real-world facts and pertinent case law prevents their brief from having any practical value in deciding this case.

II. Contrary to Law Professors' Contention, the Satellite Sales Tax Is Geographically Neutral, and both Satellite Companies and Cable Companies Have a Substantial, but Different, In-State Presence

The Satellite Sales Tax defines "satellite broadcasting service" to mean the distribution of programming by satellite "*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* * * *" (Emphasis added.) R.C. 5739.01(XX). Based on this language, Law Professors contend that this statute discriminates against Satellite Companies because it gives a competitive advantage to "companies that use in-state ground receiving and distribution equipment for distributing their television content rather than using alternative modes – a competitive advantage that takes the form of a tax on those competitors that lack such an in-state presence." (Law Profs. Brief at 22).

This is a rhetorical slight-of-the-hand, made available because the statute defines satellite companies partially in the negative: as broadcasters not using "ground receiving or distribution equipment, other than the subscriber's receiving equipment." This fallacy is easily exposed. Under this same reasoning, cable companies could claim that a tax on them discriminates against interstate commerce because cable companies do not use receiving equipment affixed to subscribers' homes. Or consider a tax on "trucking companies," defined as businesses "carrying freight on roads, but not rails." Under Law Professors' logic, trucking companies could claim discrimination because they do not carry freight on rails.

The Ohio statute is geographically neutral, and as a factual matter both satellite and cable companies engage in substantial, but different, in-state activities. Nevertheless, Law Professors' repeatedly state or imply that cable companies are in-state and that satellite companies are not. The formulations vary, but they consistently fail to acknowledge that (1) cable companies also receive most of their programming from satellites; and (2) satellite companies have a substantial in-state presence because of the presence of receiving equipment, among many other reasons. Their assertions paint an incomplete and misleading picture, and we respectfully refer the Court to the briefs of Appellee and amici TWC, Comcast, and Cox Communications for an explanation of the substantial Ohio presence of Satellite Companies. (See, e.g., Brief of Amici Curiae TWC, Comcast, and Cox Communications at 2-3.)

III. A State Does Not Violate the Commerce Clause by Taxing Two Categories of Companies Differently If That Tax Treatment Arises "Solely from Differences Between the Nature of Their Businesses, Not the Location of Their Activities." Further, It Is No Defense to the Application of This Rule That Either (a) the Two Businesses Are in Direct Competition, or (b) the Nature of a Party's Business Is Inextricably Linked to the Location of Its Activities

Every appellate court that has considered Satellite Companies' claim has rejected it, for two basic reasons. First, the claim does not pass the smell test. Instead, it bears the heavy odor of a meritless equal protection claim masquerading as a dormant Commerce Clause discrimination. Absent is the distinctive aroma of an identifiable local interest, such as a Hawaiian brandy or New York wine (or port). Missing is the pungent bouquet of high sulfur Ohio coal. *Bacchus Imports, Ltd.*, 468 U.S. at 265 (okolehao brandy); *Granholm v. Heald* (2005), 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (New York wine); *Westinghouse Elec. Corp. v. Tully* (1984), 466 U.S. 388, 104 S.Ct. 1856, 80 L.Ed.2d 388 (shipping from New York ports); *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St.2d 465, 12 O.O.3d 387, syllabus (high sulfur coal). Indeed, because of the lack of a cognizable local interest, Law Professors can point to no authority that is on all fours with Satellite Companies' claim.

Second, two U.S. Supreme Court precedents have confirmed this judicial intuition. *Amerada Hess Corp.* 490 U.S. 66; *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91. These decisions establish that a state may tax two modes of doing business differently without running afoul of the dormant Commerce Clause when that differential treatment arises "solely from differences between the nature of their businesses, not from the location of their activities." *Amerada Hess,* 490 U.S. at 78. Every court that has considered Satellite Companies' constitutional claim has relied on these two Supreme Court decisions in rejecting it. See *DIRECTV, Inc. v. North Carolina, Dep't of Rev.* (2006), 178 N.C.App. at 663-664; *DIRECTV, Inc. v. Treesh* (E.D.Ky. 2006), 469 F.Supp.2d at 438, affirmed (C.A.6, 2007), 487 F.3d 471, 481 certiorari denied (2008), 128 S.Ct. 1876, 170 L.Ed.2d 746; *DIRECTV, Inc. v. Tolson* (E.D.N.C.2007), 498 F.Supp.2d at 800 (finding "correct in their analysis" the preceding Sixth Circuit and North Carolina appellate decisions).

Thus, it is understandable that Law Professors strain to distinguish these two authorities. Law Professors concede, as they must, the basic proposition that these cases stand for, but they nevertheless chastise the Court of Appeals for applying it, claiming that the court announced a "new, never-before-seen" rule. (Law Profs. Brief at 4). They argue that Satellite Companies' case presents two distinctions with a difference. The first alleged distinction is that although two business models are involved, those businesses are in competition with one another. (This distinction is not urged in their proposition of law, but it surfaces throughout their argument, see, e.g., Id. at 20-22.) The second alleged distinction is that the business model of Satellite Companies is "inextricably linked to the [out-of-state] location of their activities." (Id. at 19). Accordingly, Law Professors contend that *Amerada Hess* and *Exxon* are not applicable here.

Contrary to Law Professors' assertions, however, *Amerada Hess* and *Exxon* are not distinguishable on these grounds. In each of these cases the Court confronted both (a) industry competitors (retailers who produced their own oil and retailers who bought oil from third-party suppliers), and (b) a business model that was "inextricably linked" to out-of-state activities (drilling oil). Specifically, the appellants in *Amerada Hess* claimed that New Jersey "discriminates against oil producers who market their oil in favor of independent retailers who do not produce oil." 490 U.S. at 73. See also *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dept. of Treasury* (1987) 107 N.J. 307, 312, 526 A.2d 1029 (in decision below, New Jersey Supreme Court found that plaintiffs were engaged in "every aspect of the crude oil business, including * * * marketing," and plaintiffs claimed unlawful discrimination vis-à-vis "non-oil-producing petroleum marketers") Id. at 388. Likewise, the appellants in *Exxon* argued that a Maryland statute unlawfully discriminated between vertically-integrated marketers of oil on the one hand and independent marketers of oil on the other. *Exxon,* 437 U.S. at 125-26.

Moreover, the Court in both cases acknowledged that the business model of vertically integrated oil companies was inextricably linked to location. See *Amerada Hess*, 490 U.S. at 78 (New Jersey has no oil reserves); *Exxon*, 437 U.S. at 125 (all of Maryland's gasoline supply flows in interstate commerce). Law Professors and Satellite Companies shrug off this inconvenient fact by calling it "happenstance" or a "sheer accident of geology," (Law Profs. Brief at 20; Appellants' Brief Part 1 at 35), but these dismissive gestures have no force of logic. They do not negate the inextricable connection between location and oil production. Nor do they distinguish *Amerada Hess* and *Exxon* from the instant facts, as it is just as much a "happenstance" and "sheer accident" that satellites do not hover over Ohio or that Ohio does not orbit Earth.

Stymied by the unmistakable implications of these Supreme Court precedents, Law Professors resort to pounding the table, declaring yet again that the Ohio statute is "[f]ar from location-neutral." (Law Profs. Brief at 22). As established in the preceding section of this argument, however, this is simply not so. Indeed, the Ohio statute bears the same location-neutrality as the New Jersey and Maryland statutes considered in *Amerada Hess* and *Exxon.*

In the end, Law Professors are compelled to attack the state's reliance on the *Amerada Hess* rule because (like many legal rules) it might produce bad results if pushed to extremes. To demonstrate this they give the example of a hypothetical Ohio statute that discriminates against low sulfur coal based on an *"Ohio-specific"* method of mining, rather than location. (Emphasis added.) (Id. at 22). The constitutional problem, they say, is that the state would be using a distinctive mode of doing business a "proxy" for protecting in-state economic interests. They conclude by stating that the *Amerada Hess* rule "does not provide a safe harbor for *this form* of protectionism." (Emphasis added.) (Id. at 23).

The flaw in Law Professors' argument is that in contrast to their Ohio-specific mining method example, there is no palpable localized interest being protected by the cable/satellite distinction. In other words, no one in this case is asking the *Amerada Hess* rule to shelter to "*this form* of protectionism." *Amerada Hess* is not being pressed to the extreme. Rather, it is the logic of in-effect discrimination that is being pushed to an absurdity, and *Amerada Hess* stands as a guardian against this brand of extremism. It provides, as the law surely must, that states may adopt rational distinctions between classes of taxpayers based on their modes of doing business without being second-guessed in a hopelessly confused battle of competing economic impact statements. It tempers the extreme application of a pernicious logic that would find an unlawful proxy lurking in every legislatively drawn distinction that has an incidental geographic consequence. In short, it assures the states that sometimes a cigar is just a cigar, and not a proxy.

The Supreme Court has admonished that dormant Commerce Clause cases call upon courts to "make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers[.]" *Boston Stock Exchange v. State Tax Comm.* (1977), 429 U.S. 318, 329, 97 St.Ct. 599, 50 L.Ed.2d 514. Though some Commerce Clause cases are difficult to resolve, this one is not. The judicial eye has been cast on Satellite Companies' claims several times already, and in each case those claims have been rejected. We urge this Court to do the same.

CONCLUSION

For the foregoing reasons and also those submitted by Appellee, amicus Ohio Cable and Telecommunications Association respectfully requests that this Court affirm the decision of the Court of Appeals and hold that the Satellite Sales Tax does not violate the Commerce Clause of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amicus Ohio Cable Television Association Curiae National Governors' Association in Support of Defendant-Appellee Richard Levin, Tax Commissioner of Ohio was served by U.S. mail, with sufficient postage, this 14th day of December, 2009, upon the following:

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