No. 10-1322

IN THE

Supreme Court of the United States

DIRECTV, INC. AND ECHOSTAR SATELLITE, L.L.C.,
Petitioners,

v.

RICHARD LEVIN, TAX COMMISSIONER OF OHIO,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

BRIEF *AMICI CURIAE* OF CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF PETITIONERS

Douglas R. Cole
Counsel of Record
Erik J. Clark
JONES DAY
325 John McConnell Blvd.,
Suite 600
Columbus, Ohio 43215
(614) 469-3939
drcole@jonesday.com

MAY 27, 2011

Counsel for Amici Curiae Constitutional Law Professors

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INTRODUCTION AND STATEMENT OF AMICI INTEREST

The amici are constitutional law professors from across the country.[1] Their teaching and research interests give them substantial expertise on application of the dormant Commerce Clause to state taxation. The amici include:

- **William Araiza**, Professor, Brooklyn Law School.[2]
- **Fletcher Baldwin Jr.**, Emeritus Professor, University of Florida Levin College of Law.
- **Loftus Becker**, Professor, University of Connecticut School of Law.
- **David Bederman**, K.H. Gyr Professor of Private International Law, Emory University School of Law.
- **Derrick Bell**, Visiting Professor, New York University School of Law.
- **Paul Campos**, Professor, University of Colorado Law School.
- **Erwin Chemerinsky**, Founding Dean, UC Irvine School of Law; author, *Constitutional Law: Principles and Policies* (3d ed. 2006).

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[1] Counsel for amici timely notified counsel for the parties under Rule 37, and all parties consented to this brief. Counsel for the parties did not author the brief in whole or in part, and no person other than the amici or their counsel have contributed in the preparation or submission of this brief.

[2] Law school affiliations are included for identification purposes only.

- **Randall Coyne**, Frank Elkouri and Edna Asper Elkouri Professor, University of Oklahoma College of Law.
- **David Dow**, Cullen Professor, University of Houston Law Center.
- **Mary Dudziak**, Judge Edward J. and Ruey L. Guirado Professor of Law, History and Political Science, University of Southern California Gould School of Law.
- **Melvyn Durchslag**, Emeritus Professor, Case Western Reserve University School of Law.
- **Peter Edelman**, Co-Director, Joint Degree in Law and Public Policy, and Professor of Law, Georgetown University Law Center.
- **Jonathan Entin**, Professor, Case Western Reserve University School of Law.
- **Jörg Fedtke**, A.N. Yiannopoulos Professor in Comparative Law, Tulane University Law School.
- **Stephen Gardbaum**, MacArthur Foundation Professor of International Justice and Human Rights, UCLA School of Law; author, *The Breadth versus the Depth of Congress's Commerce Power, in Federal Preemption: States' Powers*, National Interests (2007).

- **David Goldberger**, Isadore and Ida Topper Professor Emeritus, The Ohio State University Moritz College of Law.
- **James Huffman**, Erskine Wood Sr. Professor, Lewis & Clark Law School.
- **Raymond Ku**, Associate Dean for Academic Affairs and Professor, Case Western Reserve University School of Law.
- **D. Bruce La Pierre**, Professor, Washington University in St. Louis School of Law.
- **Carlton Larson**, Professor, UC Davis School of Law.
- **Ethan Leib**, Professor, UC Hastings College of the Law.
- **Hugh Macgill**, Oliver Ellsworth Research Professor and Dean Emeritus, University of Connecticut School of Law.
- **Tracey Maclin**, Joseph Lipsitt Faculty Research Scholar and Professor, Boston University School of Law.
- **Karl Manheim**, Professor, Loyola Law School Los Angeles.
- **Toni Massaro**, Regents' Professor, Milton O. Riepe Chair in Constitutional Law, and Dean Emerita, University of Arizona James E. Rogers College of Law.
- **Calvin Massey**, Professor, UC Hastings College of the Law; author, *American Constitutional Law: Powers and Liberties* (3d ed. 2009).

- **Jason Mazzone**, Gerald Baylin Professor, Brooklyn Law School.
- **Thomas McAffee**, Professor, UNLV William S. Boyd School of Law.
- **Stephanie Hunter McMahon**, Assistant Professor, University of Cincinnati College of Law.
- **Gene Nichol**, Director of the Center on Poverty, Work & Opportunity and Professor, UNC School of Law.
- **Glenn Harlan Reynolds**, Beauchamp Brogan Distinguished Professor, University of Tennessee College of Law.
- **Kermit Roosevelt**, Professor, University of Pennsylvania Law School.
- **Peter Shane**, Jacob E. Davis and Jacob E. Davis II Chair, The Ohio State University Moritz College of Law.
- **Charles Shanor**, Professor, Emory University School of Law.
- **Allen Shoenberger**, Professor, Loyola University Chicago School of Law.
- **Neil Siegel**, Professor of Law and Political Science, Duke University School of Law.
- **Peter Spiro**, Charles R. Weiner Professor, Temple University Beasley School of Law.
- **Marcy Strauss**, Professor, Loyola Law School Los Angeles.
- **Nelson Tebbe**, Associate Professor, Brooklyn Law School.

- **Carl Tobias**, Williams Professor, University of Richmond School of Law.
- **William Van Alstyne**, Lee Professor, William & Mary Law School.
- **Norman Williams**, Professor and Director of the Center for Law and Government, Willamette University College of Law; author, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. Rev. 1847 (2007).

The amici have no direct stake in this litigation, but do have an interest in seeing Commerce Clause jurisprudence develop in a sound manner. Failure to correct the decision below could threaten that development. The amici agree with the petitioners' description of the splits to which the decision below contributes. Amici write separately to stress that the Commerce Clause principles reflected in the Ohio Supreme Court's decision cannot be squared with the Court's existing dormant Commerce Clause precedent. The Court's precedent eschews rigid, formalistic rules, and instead requires a textured and fact-specific inquiry into the purpose and effect of the state legislation. The Ohio court, however, jettisoned that approach and instead latched on to passing phrases from two of the Court's cases to announce broad, per se rules that find no support either in the cases the court cites, nor in any of the Court's modern dormant Commerce Clause jurisprudence.

First, the Ohio court misread the Court's decision in *Amerada Hess* and *Exxon Corp.*[3] to announce a broad per se rule that gives states carte blanche to differentially tax two companies so long as they can point to some operational difference between the two. Such discrimination, according to the court, "does not reflect 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,'" but rather "regulates among these interests even-handedly based on the technological mode of operation." What the Ohio court failed to recognize is that "technological modes of operation" can be inherently tied to physical presence in such a way that preferring one "mode of operation" over another necessarily benefits in-state activity by burdening out-of state conduct.

Second, and relatedly, the Ohio court suggests that taxes do not discriminate against interstate commerce so long as both the favored and disfavored parties are interstate companies. But the Court's Commerce Clause framework does not focus solely on whether a state is trying to benefit a purely in-state *entity*, but also considers whether a state is impermissibly seeking to encourage in-state *activity* by imposing burdens on companies that instead serve the local market through out-of-state activity.

The Court has observed that one of the Commerce Clause's key purposes is to prevent states from using their tax laws to divert business "from the most economically efficient channels," *see Boston*

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

Stock Exchange v. State Tax Comm. 429 U.S. 318, 336 (1977), or from "encourag[ing] the development of local industry by means of taxing measures that impose[] greater burdens on economic activities taking place outside the State than [are] placed on similar activities within the State." *Westinghouse Elec. Corp. v. Tully* 466 U.S. 388, 404 (1984). It matters not a whit whether those in-state activities are conducted by interstate companies, nor whether the favoritism is thinly disguised as a preference for one technology (which just happens to be an in-state technology) over another (which just happens to be an out-of-state technology). Simply put, 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 same local market through "economic activity taking place outside the State."

The Ohio court's flawed analysis matters greatly. The two broad *per se* dormant Commerce Clause principles announced below will allow discriminatory taxation that would be impermissible under traditional dormant Commerce Clause doctrine. Increased use of discriminatory taxes, in turn, could result in economic inefficiencies, as companies seek to avoid tax penalties.

The amici thus join petitioners in urging the Court to grant certiorari and to reverse the decision below.

STATEMENT OF FACTS

Satellite television service providers and cable television providers directly compete for viewers in Ohio. Cable providers distribute their signals through a massive infrastructure located in the state,

including thousands of miles of cable and hundreds of distribution facilities, operated and maintained by scores of workers located there. Satellite providers, by contrast, distribute their signals directly to subscribers from satellites that are not located within the state. They have almost no in-state investment or employees. *See* App. at 4a.

Ohio's tax laws disadvantage satellite providers in their competition with cable providers. In 2003, the state amended its sales tax to tax to retail sales of satellite broadcasting services, while exempting cable television providers. *Id.* at 4a-5a. The statute expressly defined the group subject to the sales tax based on the presence (or absence) of certain equipment in the state. *See* R.C. 5739.01(XX).

Petitioners challenged the tax under the dormant Commerce Clause. They argued that cable providers, whose technology necessarily entails substantial distribution equipment in the state, do not pay the tax, while satellite providers, precisely because they lack that in-state presence, do.

The state trial court determined that the tax, while "not facially or purposely discriminat[ory] against interstate commerce . . . was discriminatory in effect and impermissibly burdened satellite providers by increasing the net costs to television consumers for satellite service in comparison to cable service." App. at 38a. The trial court thus struck the sales tax. *Id.*

The Ohio Supreme Court reached a different result. It concluded that "[t]he statute's application depends on the technological mode of operation, not geographic locations, and while it distinguishes between different types of interstate firms, it does not

favor in-state interest at the expense of out-of-state interests." App. at 15a. Expanding on the the "mode of operation" issue, the court noted that "the sale of satellite broadcasting services is subject to tax regardless of whether the provider is an in-state or out-of-state business and without considering the amount of local economic activity or investment in facilities that the satellite companies bring to Ohio." *Id.* at 16a. Thus, according to the court, the tax differential "result[ed] solely from differences between the nature of their businesses, not from the location of their activities." *Id.* at 20a.

Second, the court noted that both the benefitted and burdened parties were interstate companies. "Like the satellite companies, the major cable providers are interstate companies selling an interstate product to an interstate market." *Id.* at 17a. According to the court, "[b]oth the satellite and cable industries serve customers in Ohio, and employ residents of Ohio, but no major pay-television provider is headquartered in Ohio or could otherwise be considered more local than any other." *Id.* Thus the court concluded, the statute is not "protect[ing] local industries or treat[ing] in-state companies differently from out-of-state companies." *Id.*

The dissent, however, observed that when the tax statute was originally introduced, the statute had taxed both cable and satellite. Lobbyists convinced the legislature to change the statute to exempt cable, expressly arguing that satellite is an "out-of-state industry … which provides Ohioans with very few job opportunities." App. at 21a (quotations omitted). The dissent continued:

> What the cable companies could see, the majority cannot: it is in Ohio's economic interest to support the cable industry's jobs and investment, and relieving the cable industry of the sales tax benefits that interest.

Id.

ARGUMENT

The decision below threatens to sow confusion in dormant Commerce Clause jurisprudence. The Ohio court's insistence that tax laws cannot violate the dormant Commerce Clause when either (1) the two groups of competitors have some small difference in "mode of operation" or (2) both the benefited and burdened competitors are "engaged in interstate commerce," cannot be squared with either the purpose underlying the Commerce Clause or settled Commerce Clause jurisprudence. As to the former, states cannot eviscerate the protection that the doctrine offers against discriminatory taxation by the artifice of couching that discrimination in terms of operational differences when those differences are directly tied to geography. And as to the latter, the decision below adopts an archaic view of the dormant Commerce Clause doctrine under which the doctrine only prevents states from seeking to protect local mom-and-pop establishments. But the doctrine's reach extends beyond that. It rests on the fundamental recognition that the states in our union all "sink or swim together," and that our national interest is best served by free commerce.

I. THE COMMERCE CLAUSE BROADLY PROHIBITS STATE ATTEMPTS TO PUNISH EFFORTS TO SERVE AN IN-STATE MARKET THROUGH OUT-OF-STATE ACTIVITY.

The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.* 294 U. S. 511, 523 (1935). The dormant Commerce Clause (dormant Commerce Clause) is an important component in achieving that "long run prosperity." The Court has observed that the dormant Commerce Clause's "basic purpose" is "to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) (citation and punctuation omitted).

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

Thus, the dormant Commerce Clause not only protects those who engage in interstate commerce,

but also protects the states against themselves. Left to their own devices, states may well conclude that their short-term interest lies in protectionism. Other states, recognizing that such incentives exist, may respond to, or even preempt, such protectionism, by engaging in it first. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) (avoiding "economic Balkanization" and "the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence") This could well result in a downward spiral that harms not only interstate competitors, but the states and their citizens as well.

Local officials' self-restraint is an insufficient bulwark against protectionism. Local officials may be hard pressed to forego what seems an immediate advantage for local constituencies in favor of preserving a robust interstate economy that benefits all in the long run. As James Madison noted, "the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain." The Federalist No. 42.

This case illustrates the important role that the dormant Commerce Clause plays. Ohio has adopted tax laws that promote a status quo that is based on existing cable infrastructure, an infrastructure that currently provides local jobs and income. Artificially bolstering cable television may well have some short-term value to the state. But over the long run, citizens of each state are best served by markets that allow technologies to compete on an even playing

field, without favoritism for certain technologies, merely because they require an in-state presence.

II. THE DECISION BELOW MISREADS THE COURT'S COMMERCE CLAUSE JURISPRUDENCE IN A WAY THAT THREATENS TO SOW CONFUSION.

Not only is the decision below inconsistent with the anti-protectionist purpose that lies at the heart of the dormant Commerce Clause, but the rules that the decision announces contradict the Court's settled dormant Commerce Clause precedent. First, contrary to the decision below, "operational differences" cannot justify differential taxation when the "operational differences" themselves are inextricably linked to location-based attributes. Second, the Ohio court was wrong to suggest that a tax will never violate the dormant Commerce Clause so long as both the benefitted and the burdened parties are interstate companies. The Court's precedent confirms that it is the nature of the incentivized *activities*, not solely the status of the *entities*, that matters for dormant Commerce Clause purposes.

A. A State Cannot Rely On Alleged "Operational Differences" To Justify Discrimination When The Differences Are Themselves Inextricably Linked To Geography

The Ohio court misread and misapplied language from *Amerada Hess* that differential treatment is permissible when it '"results solely from differences between the nature of [the] businesses, not from the location of their activities."' *See* App. at 12a (quoting *Amerada Hess*, 490 U.S. at 78; additional citation omitted). In essence, the Ohio court asserted that the

satellite-only tax was not a burden on interstate commerce, but rather a permissible tax on one *type* of business (satellite providers) that is of a "different nature" than another *type* of business (cable providers).

The amici concur with the petitioner that the above-cited language from *Amerada Hess* has led to confusion among lower courts about the dormant Commerce Clause's appropriate scope. *See* Pet at 21–23. Decisions like the Ohio court's here treat *Amerada Hess* as though it altered the basic dormant Commerce Clause rule that a state may not enact a provision that punishes a business for failing to engage in economic activity within the state. *See Boston Stock Exchange*, 429 U.S. at 331; *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Westinghouse*, 466 U.S. at 404; *Granholm v. Heald,* 544 U.S. 460, 472 (2005); *Lewis v. BT Invest. Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980). But *Amerada Hess* stands for no such thing. Rather, it merely reflects the unremarkable, and complementary, proposition that when the differential treatment truly arises from the different nature of two businesses, and *not* the amount of activity occurring within the state, the dormant Commerce Clause is satisfied.

In *Amerada Hess*, oil companies challenged New Jersey's tax code for failing to allow them to deduct a federal windfall profit tax from their New Jersey state taxes. 490 U.S. at 70–71. The companies argued that the code "discriminated against oil producers who market[ed] their oil in favor of independent retailers who do not produce oil." *Id.* at 78. The Court rejected that argument because the disparate treatment did not turn on the *location* of

economic activity, but instead on the inherent non-location-based differences between companies: one is a vertically integrated supplier, while the other is not. Accordingly, the dormant Commerce Clause does not require New Jersey to treat them the same.

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

The same was true in the Court's earlier decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). There the Court similarly considered a Maryland law prohibiting oil producers from owning retail gas stations. *Id.* at 119. Much as in *Amerada Hess*, oil companies had challenged the law, tying their dormant Commerce Clause claim to the fact that there was no crude oil to be drilled in Maryland. Thus, they claimed, only out-of-state companies would be forced to divest. The Court rejected the

challenge, noting that the law did not facially incorporate a location-based rule, nor was there any showing of an intent to discriminate against interstate commerce. The Court determined that the law discriminated not against interstate commerce, but instead against a particular type of business, no matter its location. *Id.* at 127. Indeed, the statute did not favor local activity *at all*, but instead only acting as a prohibition against vertical integration (*i.e.*, Maryland was seeking to prohibit a single company from owning both the production and retail distribution ends of the gasoline supply chain).

By contrast, when it *can* be shown that a provision discriminates between similar competing businesses based on the location of economic activity, rather than based on location-neutral differences in separate kinds of businesses—particularly where such discrimination puts a thumb on the scale in favor of local activity—courts have not hesitated to find dormant Commerce Clause violations. Ironically, perhaps the best example is a decision from the very Ohio court at issue here. In *Dayton Power & Light v. Lindley*, 58 Ohio St.2d 465 (1978), the Ohio supreme court struck down a tax imposing a higher rate for using low-sulfur coal than for using high-sulfur coal. High-sulfur coal was in abundance in Ohio, while low-sulfur coal was not. Thus, the court recognized that the tax incentivized coal users to choose Ohio coal over coal produced elsewhere. *Id.* at 473–74. The court properly held that the reference to sulfur content was thinly-disguised protectionism.

Similarly, in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the Court struck down a tax exemption for a liquor distilled from a native

Hawaiian plant because the exemption created an advantage over liquors produced elsewhere. The Court rejected Hawaii's argument that the local liquor does not compete with liquor coming from outside the state, concluding that even a small degree of competition between favored and disfavored entities is enough ground for a potential dormant Commerce Clause violation. *Id.* at 268–69. Cf. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) (considering "actual or prospective competition between the supposedly favored and disfavored entities" relevant to whether a provision discriminates against interstate commerce).

What these cases recognize is that reference to "operational differences" can be a mask seeking to hide a state's discrimination against interstate commerce. Here, cable television companies and satellite television companies directly compete for viewers in Ohio. The only difference between the two businesses is the means by which the programming is delivered. With the satellite-only tax, Ohio has seized upon this "operational difference" to create a direct competitive advantage that extends exclusively to companies that use in-state equipment for distributing their television content rather than using alternative modes that do not require an in-state presence. The in-state activity is benefitted by imposing a tax on the out-of-state analogue. This is the very sort of economic protectionism that the dormant Commerce Clause prohibits.

To put it slightly differently, the taxes at issue in *Amerada Hess* and *Exxon* could not incentivize in-state activity, as increased in-state activity would not ameliorate the differential burden. Here, if the

petitioners changed their operations to use an in-state cable infrastructure to serve their Ohio customers, they too would escape the tax burden, just like their competitors have done. That is not to suggest that the satellite companies will do so, but merely to show that the tax here, unlike in *Amareda Hess* and *Exxon*, not only benefits companies based on their in-state presence, but creates direct incentives to move out-of-state activities into the state.

The point is straightforward—states cannot use "operational differences" as a proxy for location-based discrimination. To offer another example, imagine that Ohio was the only state that allowed a certain coal mining method, and that all mining in the state was done according to that method. Surely, it would violate the dormant Commerce Clause if Ohio's legislature latched on to that Ohio-specific attribute of the coal mining industry to provide a competitive advantage for Ohio coal mining vis-a-vis coal mined out-of-state. Tying a tax reduction to the Ohio-specific mining method would be no different than attaching it to the Ohio-specific sulfur content as in *Dayton Power*. In either case, the constitutional problem is that the state legislature is using a proxy (the mining method or the sulfur content) to provide a competitive advantage for competitors engaged in in-state conduct over competitors serving the same market through out-of-state conduct.

The same is true here, the Ohio tax statute favors a distribution method (cable) that is inextricably linked to in-state presence, thereby offering a direct competitive advantage to that in-state activity. Contrary to the decision below, *Amerada Hess* should

not be understood to provide a safe harbor for this form of protectionism.

B. The Court's Dormant Commerce Clause Jurisprudence Focuses On Whether A Tax Punishes Interstate *Activities*, Not Only Interstate *Entities.*

The Ohio court's suggestion that a tax can never be impermissibly discriminatory if the favored entities are themselves companies engaged in interstate commerce likewise runs afoul of myriad dormant Commerce Clause cases. The Ohio court's framework improperly focuses solely on the status of the favored *entity* (*i.e.*, is the favored entity a local mom-and-pop operation, or is it an interstate company?), rather than on the nature of the favored *activity*. Under the Court's dormant Commerce Clause jurisprudence, however, the nature of the favored *activity* also matters. The Court has not hesitated to find dormant Commerce Clause violations even when the favored entities include out-of-state companies engaging in interstate commerce. Likewise, this Court and the lower courts routinely find dormant Commerce Clause violations when the disfavored entity is a local mom-and-pop seeking to engage in interstate commerce. In all of these cases, it is the nature of the activity, not merely the identity of the favored or disfavored party, that controls. In short, settled Commerce Clause principles preclude states from using taxes to tip the scales of competition by burdening out-of-state activities relative to in-state activities. But the decision below throws those settled principles into doubt.

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

First, contrary to the decision below, the Court has not hesitated to find dormant Commerce Clause violations even though the provision at issue favored out-of-state entities or entities engaged in interstate (rather than local) commerce.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the plaintiffs challenged a New York tax on the transfer of stock, which imposed a higher rate if the stock was sold out-of-state than if the stock was sold in-state. Among other things, the tax law provided a "nonresident reduction," whereby nonresidents received a 50% reduction in the tax rate when they transferred stocks that were sold in New York. Indeed, residents of New York were not entitled to this reduction, even if they too transferred stocks that were sold within New York. Accordingly, by definition, the beneficiaries of the discrimination (or, in other words, the favored parties) were *not* local residents. The Court nonetheless held that "[b]ecause it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax . . . falls short of the substantially evenhanded treatment demanded by the Commerce Clause." *Id.* at 332. Moreover, the court rejected any notion that the tax could be saved because it favored certain non-residents rather than New York residents themselves:

> *The fact that this discrimination is in favor of nonresident, in-state sales which may also be*

> *considered as interstate commerce, . . . does not save [the tax] from the restrictions of the Commerce Clause.* A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce.

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

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

In another case, the Court struck a state provision that, while not expressly providing favorable treatment to out-of-state entities engaged interstate commerce, clearly made favorable

treatment available to such companies (along with in-state companies) based on their in-state activities. In *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988), Ohio provided a tax credit against a tax on selling fuel in Ohio if fuel dealers used ethanol in their products. However, Ohio made the credit available only to dealers who used ethanol produced in Ohio *or in another state that granted a tax credit for ethanol produced in Ohio*. Thus, the group that received a comparative benefit from the statute expressly included interstate companies (*i.e.*, dealers were incentivized to purchase from companies that sold out-of-state ethanol into Ohio from states that granted a tax credit for ethanol produced in Ohio). In fact, the plaintiff was an Indiana company that sold ethanol in Ohio and would have been eligible for the credit had it chosen to use Ohio or other qualifying ethanol. The Court nonetheless struck the credit, a result that simply cannot be squared with the Ohio court's suggestion here that discrimination against one interstate company and in favor of another does not matter for dormant Commerce Clause purposes.

Indeed, cases abound in the lower courts in which large, out-of-state companies or companies engaged in interstate commerce were just as likely to benefit from the state provision at issue as wholly in-state companies were. *See*, *e.g.*, *Walgreen Co. v. Rullan*, 405 F.3d 50, 56 (1st Cir. 2005) (challenged law favored existing pharmacies over new pharmacies, regardless of whether they originally started in Puerto Rico or whether they were part of a larger interstate corporation); *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 587 (8th Cir. 2003) (challenged law prohibited corporations from owning in-state farms, but exempted family corporations,

regardless of where the corporation was located or whether it conducted interstate business). In none of these cases did the courts even suggest that the mere fact that some interstate companies were benefited, while others were burdened, somehow changed the dormant Commerce Clause analysis.

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

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

The inverse is also true: the Court has routinely found dormant Commerce Clause violations when the victims of discriminatory provisions themselves are local companies that the state is seeking to discourage or prevent from engaging in interstate commerce.

To begin, several successful dormant Commerce Clause plaintiffs have conducted significant local

business within the discriminating state. *See, e.g.*, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 640 (1984) (plaintiff corporation manufactured steel and sold steel within the discriminating state); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 394 (1984) (plaintiff did business within the discriminating state and regularly paid taxes to the discriminating state). And beyond simply engaging in local commerce, successful dormant Commerce Clause plaintiffs have included companies that are not only located within the discriminating state, but also conduct the majority of their business within state lines. For example, the plaintiff in *Philadelphia v. New Jersey*, 437 U.S. 617, 619 (1978), was a New Jersey landfill company that successfully challenged a New Jersey law prohibiting the importation of most solid or liquid waste which came from outside of the New Jersey. And in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 85–86 (1984), the plaintiff was an Alaska logging company that conducted its logging business within Alaska, but ran afoul of an Alaska provision limiting state contracts to companies that not only cut trees in Alaska but also processed their lumber in state.[4]

Moreover, some unconstitutional provisions specifically target local companies or local commerce by forcing local business to remain within state borders. In *Tyler Pipe Industries v. Department of*

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[4] Only four Justices joined the portion of the opinion finding a dormant Commerce Clause violation (the case itself was decided on a preliminary issue), but the Court remanded for further consideration of the dormant Commerce Clause question, and nowhere suggested that the fact that the disadvantaged company was in-state would preclude a finding of a violation.

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

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

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It is difficult to reconcile any of the above cases with the decision below. The Ohio court below suggests that the dormant Commerce Clause extends only to situations where the state seeks to protect

local companies, or, in other words, that the dormant Commerce Clause offers no protection when both the favored and disfavored entities are interstate companies. *See* App. at 17a (asserting that "[l]ike the satellite companies, the major cable providers are interstate companies selling an interstate product to an interstate market"). That is simply wrong: it is the nature of the *activity*, not only the nature of the *business entity*, that matters for dormant Commerce Clause purposes.

CONCLUSION

For the foregoing reasons, the amici respectfully urge the Court to grant certiorari and reverse the decision below.

Respectfully submitted,

DOUGLAS R. COLE
Counsel of Record
ERIK J. CLARK
JONES DAY
325 John McConnell Blvd., Suite 600
Columbus, Ohio 43215
(614) 469-3939
drcole@jonesday.com

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Counsel for Amici Curiae Constitutional Law Professors