No.

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

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL ISSUES OF GREAT PUBLIC AND GENERAL INTEREST[1]

Ohio law taxes satellite TV service, but not cable. Why the discrimination? According to the statute itself, the distinction is that satellite TV providers send their programming signals "without the use of ground receiving or distribution equipment" within Ohio, whereas cable companies do use "distribution equipment" on the "ground" in Ohio. R.C. 5739.01(XX). Cable companies serve their subscribers by laying an expensive infrastructure of cables throughout Ohio. Satellite TV providers, in contrast, serve Ohio customers directly from thousands of miles above the Earth, and do not need to invest in Ohio infrastructure to deliver their services.

The central question in this case is whether the discrimination against satellite TV customers violates the Commerce Clause, because imposition of the tax is triggered by whether or not a business builds an extensive infrastructure within Ohio. This constitutional question was substantial and controversial enough to split the two courts below. In two lengthy opinions, the Court of Common Pleas concluded that this discrimination violates the Commerce Clause. The Court of Appeals, however, held that it does not. No state supreme court has addressed the issue.

The outcome of this case has profound public importance for a million Ohio households that the state penalizes for choosing to subscribe to satellite TV—a penalty of $80 a year, on average, with a direct impact on the competition between cable and satellite TV. The total toll is far higher: Ohio consumers are also harmed because the tax affords entrenched cable

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[1] The Court of Appeals's opinion, *DIRECTV, Inc. v. Levin*, 10th Dist. No. 08AP-32, 2009-Ohio-636, reproduced at Tab __, is cited as "CA Op." The Court of Common Pleas issued two summary judgment rulings—on October 21, 2005, and October 17, 2007—which are reproduced at Tabs __ and __ and cited as "First SJ Dec." and "Second SJ Dec.," respectively. The Court of Common Pleas' December 14, 2006 order on the Commissioner's motion to reconsider its first summary judgment decision, reproduced at Tab __, is cited as "Reconsid." Affidavits and depositions—all of which are part of the record on appeal—are cited as "____ Aff." or "____ Dep.," according to the affiant's or deponent's surname.

monopolies a cost advantage that diminishes competition from satellite TV providers, diminishes the diversity of programming and viewpoints available to the Ohio public, and creates a disincentive for cable companies to improve their service. The case is of special importance to the hundreds of thousands of rural Ohioans who are forced to pay the satellite penalty because they have no choice—cable companies do not serve them. More importantly, this case has ramifications far beyond Ohio's satellite-only tax. The Court of Appeals's rationale for sustaining the discriminatory tax weakens Commerce Clause protection in three ways that will have profoundly negative ramifications for innumerable businesses that might be subjected to discriminatory taxes.

First, the Court of Appeals concluded that there can be no Commerce Clause challenge where both the favored businesses and the disfavored businesses engage in interstate commerce. CA Op. at ¶ 28. This holding defies three decades of jurisprudence from the U.S. Supreme Court, and guts Commerce Clause protection in a wide range of scenarios. In this increasingly global economy, it is rare that the beneficiaries of a discriminatory statute will all be Mom and Pop shops doing business only in-state, or that the victims will all be out-of-state business with no in-state operations. Thus, modern law prohibits a state from discriminating based on whether a business engages in a specified activity or has built something in-state—even if the beneficiary and the victim are both engaged in interstate commerce.

Second, the Court of Appeals held that the satellite-only tax does not violate the Commerce Clause because it merely distinguishes between two "modes" of business. CA Op. at ¶ 24-25. But the Supreme Court decisions relied upon by the lower court make clear that such discrimination is permissible *only* when the distinction the state draws has nothing to do with the location of any business activity: The discrimination must "result[] *solely* from differences between the nature of [the two] 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 (emphasis added). Here, the discriminatory tax is inextricably tied to the *location* of "equipment" in the "ground" in Ohio, so geography is an essential and dispositive consideration in application of the tax. In broadening the "nature of the business" rationale to allow discrimination that does relate to the location of an activity—the laying of cables in Ohio—the Court of Appeals drastically weakened Commerce Clause protection, for almost any location-specific discrimination can be recast as addressed to a difference in the mode of doing business.

Third, the Court of Appeals held that proponents' statements to legislators about the purpose and effect of proposed legislation cannot, under Ohio rules of statutory construction, be considered in determining whether that legislation is discriminatory in purpose or effect. CA Op. at ¶ 32-33. But for claims asserted under the federal Commerce Clause, determination of legislative intent is controlled by *federal*, not state, law. There is clear *federal* authority—from the Supreme Court and other appellate courts—that exactly this sort of evidence is relevant to a Commerce Clause claim. In fact, it can often be the most revealing proof of a statute's discriminatory purpose and effect. The Court of Appeals thus erred in disregarding the federal law governing proof of legislative intent.

This Court should review this case to ensure that the Commerce Clause remains a robust bulwark against local protectionism, and not a mere filigree on a parchment page.

STATEMENT OF FACTS

Sam Satellite and Carl Cable are next-door neighbors. Both enjoy watching Ohio State football on ESPN. Carl subscribes to ESPN through the local cable company. Sam subscribes to ESPN through a satellite provider like DIRECTV or Dish. Both watch the same game through the same network. Yet the State of Ohio requires Sam to pay an extra 5.5 cents in sales tax on every dollar because he subscribes to a satellite TV service rather than cable. Carl does not have to pay that tax.

The story behind the discriminatory satellite-only tax regime is a textbook case of local protectionism. For decades, cable companies were entrenched monopolies. Then came satellite TV, with its high-powered satellites transmitting programming directly to the subscriber's home. Satellite TV threatened cable's monopoly by giving consumers a real choice for the first time.

Ohio's local cable industry sprung to action. It lobbied the General Assembly to insulate it from competition from this "out-of-state" interest. Kozelek Dep., Exh. 10 at 3. Its message was as simple as it was brazen: "[C]able operators . . . 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." Id., Exh. 10 at 2. The cable industry emphasized that 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." Id., Exh. 14 at OCTA0021, Exh. 32. In other words, cable railed, the satellite industry "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state*." Green Aff., Exh. F (Ohio Cable Telecomm. Ass'n Press Release (June 2, 2003)) (emphasis added).

Factually, the cable industry had a point. Cable companies reach their customers through elaborate local networks of ground equipment and cables running to individual homes. They have laid some 63,000 miles of cable in Ohio—more than enough to wrap around the world twice. Kozelek Dep., Exh. 7 at OCTA0163. In Ohio alone, cable companies have invested billions of dollars in their networks of ground equipment and related repair and maintenance facilities. They employ about 6,000 Ohio residents, most of them to construct, operate, and maintain these networks and to connect and disconnect drop lines reaching subscribers' homes. Id.; Ciciora Aff. at ¶ 7-24. Moreover, cable companies direct a steady stream of revenues to local governments. At the time this statute was passed, a cable company could not access local rights of way without negotiating franchise agreements with local municipalities or counties, see, e.g., R.C. 4939.01 et seq., and paying a share of its revenues (typically, 3-5% of the cable company's gross revenues) as franchise fees to compensate for use of the Ohio localities' rights of way. See, e.g., Green Aff., Exh. L at 1, Exh. N.

In contrast, satellite TV companies beam signals from outer space directly to their customers, and do not need to build an intricate web of cables in the ground or hang cables on telephone poles. Butterworth Aff. at ¶ 9. Satellite TV companies, therefore, do not employ armies of local workers; they have no offices and have only a handful of workers in Ohio. Id. at ¶ 12. Nor do satellite TV companies pay any rent to local governments, because they do not need to secure rights of way for a signal that beams in from outerspace. Id. at ¶ 9.

Reacting to these differentials in local investment and activity, the General Assembly answered the cable industry's call by enacting a sales tax that applied to satellite TV service, but not to cable. On June 26, 2003, the General Assembly amended the sales tax statute to make retail sales of "satellite broadcasting service" subject to the general tax rate of 6.0% (an amount later reduced to 5.5%). R.C. 5739.01(B)(3)(p), 5739.02, 5741.02. The General Assembly defined "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 …

R.C. 5739.01(XX) (emphasis added). In other words, satellite TV is distinguished from cable on the basis of one factor: "the use of ground … distribution equipment" in Ohio. Id.

The illegality of this protectionist regime was manifest from the start. The sitting Tax Commissioner at the time, Tom Zaino, opposed the discriminatory sales tax, warning that satellite TV companies would have a "significant chance of success" in challenging the tax. Green Aff., Exh. I at 7.

That prediction proved prescient when plaintiffs DIRECTV and EchoStar, the nation's leading satellite television providers, brought this lawsuit challenging the discrimination as a violation of the Commerce Clause. The Court of Common Pleas agreed. It reasoned that:

> [I]n practical effect, the sales tax statute favors a means of delivery of television programming that necessarily involves local economic activity (the tax on certain multichannel television broadcast services can be avoided only if *local* ground equipment other than the subscriber's equipment if installed and used for delivery of the television programming), as compared to a means of delivery which does not necessarily involve local activity (a subscriber can be connected to the direct-to-home satellite broadcast system without the installation and use of *local* ground equipment other than the subscriber's equipment). … If states are allowed to intentionally prefer technologies based upon whether the technologies would cause business activities to be conducted locally, then that is just another way of forcing economic activity to occur locally rather than in other states. In other words, it would allow the states to balkanize the national market, which is precisely what the Dormant Commerce Clause is supposed to prevent.

Reconsid. at 5-6 (emphasis in original). Thus, the court held that Ohio's tax scheme is unconstitutional. See Second SJ Dec. at 10, 43-44, 124.

The Court of Appeals reversed, upholding the discriminatory tax.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

When the Constitution granted Congress the "Power … To regulate Commerce … among the several States," U.S. Const. art. I, § 8, it also impliedly prohibited the states from engaging in "economic protectionism." *New Energy Co. v. Limbach* (1988), 486 U.S. 269, 273-74. 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 (quoting *Boston Stock Exch. v. State Tax Comm'n* (1977), 429 U.S. 318, 329). This prohibition is called the "dormant" or "negative" Commerce Clause. This case presents three substantial questions about the scope of the Commerce Clause and how to prove a violation—all questions that transcend the specific business context and statute in this case.

<u>Proposition of Law No. 1</u>

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.

The Commerce Clause's prohibition against "economic protectionism," of course, means that a state may not bar goods from other states at the border, nor "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 642. It also means that a state may not impose a higher tax on an out-of-state business than on a local business. *W. Lynn Creamery, Inc. v. Healy* (1994), 512 U.S. 186, 193. These sorts of discriminatory state laws are "paradigmatic" examples of prohibited protectionism. Id.

But for at least three decades, the U.S. Supreme Court has made clear that these paradigms are not the only forms of discrimination that violate the Commerce Clause. The Commerce Clause also prohibits a state from imposing a tax that depends upon whether or not an interstate business *engages in a specified operation*, or *builds particular structures or facilities*, within the state. For example, the U.S. Supreme Court struck a New York law that imposed one tax on nonresidents who ran their trades through New York exchanges, but double the tax on customers who opted to sell through out-of-state exchanges. See *Boston Stock Exch.*, 429 U.S. at 324. Likewise, the Court struck a West Virginia tax on wholesalers within the state where the tax depended upon whether or not the product was also *manufactured* in West Virginia. See

Armco, 467 U.S. at 642. So, for example, if a company sold widgets at wholesale in West Virginia, the sale might or might not be taxed, depending on whether the seller built its manufacturing facility in Wheeling or Youngstown. The Court also struck a state law that granted businesses a tax credit, depending upon whether or not they built their exporting facilities in-state. *Westinghouse v. Tully* (1984), 466 U.S. 388, 399-401. Similarly, the Court struck a New York law prohibiting any winery from shipping wine directly to New York customers, unless it built "a distribution operation in New York." *Granholm v. Heald* (2005), 544 U.S. 460, 474.

The rationale in these cases was that it is impermissible to "requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm*, 544 U.S. at 475 (quoting *Pike v. Bruce Church, Inc.* (1970), 397 U.S. 137, 145). It is illegal for a state 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." *Boston Stock Exch.*, 429 U.S. at 336 (internal quotation marks omitted). Simply put, "[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 n.12).

Ohio's satellite-only tax runs afoul of these holdings, because this tax depends upon whether a facility is built within the state: Satellite TV service is taxed solely because satellite providers distribute programming "directly to" the subscriber's home "*without the use of ground receiving or distribution equipment*," R.C. 5739.01(XX) (emphasis added), but cable is not taxed, because cable operators have invested a fortune to build a web of "ground receiving or distribution equipment" in Ohio. As the trial court correctly observed, drawing on the foregoing precedents, 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." Second SJ Dec. at 10.

The Court of Appeals ignored these precedents—and the theory on which the satellite-only tax was challenged. It rejected the Commerce Clause claim largely because "neither satellite *companies* nor cable *companies* are 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." CA Op. at ¶ 15 (emphasis added; citation omitted). According to the Court of Appeals, a Commerce Clause challenge to a discriminatory tax fails unless the victim is entirely foreign and the beneficiary entirely local; all bets are off if the victim of discrimination has some operations within the state or if the beneficiary engages in interstate commerce.

The U.S. Supreme Court rejected any such notion in *Boston Stock Exchange*, where it recognized that differential taxation of two types of business, both engaged in interstate commerce, can violate the Commerce Clause: "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." 429 U.S. at 334 (emphasis added; citation omitted). As if responding directly to the Court of Appeals's 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).

In keeping with this principle, in each of the other cases mentioned above, the Court struck the law as discriminatory, even though the victim had an established presence within the state or the beneficiary was an interstate business, or both. See, e.g., *Westinghouse*, 466 U.S. at 398-400 (beneficiaries had operations out of state and were all *exporting* businesses, and thus by definition were engaged in interstate commerce); *Armco*, 467 U.S. at 639 (noting that during the relevant period, the victim of discrimination "conducted business in West Virginia through five divisions or subdivisions").[2]

In rejecting a Commerce Clause challenge because satellite TV and cable TV are both involved in interstate commerce, the Court of Appeals has set back Commerce Clause jurisprudence several decades. As is evident from the cases rejecting the principle the Court of Appeals adopted, the relevance of this holding transcends the subscription television context and affects how the law will apply in all arenas of business, from manufacturing to wholesaling to retail sales to exporting to stock trades. The Court of Appeals has gutted Commerce Clause protections for them all.

<u>Proposition of Law No. 2</u>

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 (emphasis added), because the discriminatory tax is inextricably tied to the *location* of a specified economic activity.

The Court of Appeals invoked a second basis for rejecting the Commerce Clause challenge. It concluded that the satellite-only tax could be sustained because any disparity

[2] See also *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue* (1987), 483 U.S. 232, 240-42, 248 (unconstitutional to discriminate in favor of companies that engage in both wholesaling and manufacturing in-state and against those doing only one of the two; among the victims of discrimination were businesses with significant manufacturing or wholesaling business in the state); *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 discriminates against out-of-state businesses not making such in-state investments), vacated on other grounds, 547 U.S. 332 (2006).

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.'" CA Op. at ¶ 23 (quoting *Amerada Hess*, 490 U.S. at 78, and citing *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117).

The "nature of the business" rationale, however, is not an exception to the general rule that discrimination on the basis of the geographic location of an economic activity violates the Commerce Clause. Rather, the two Supreme Court cases that the Court of Appeals invoked merely represent the other side of the same coin: that where the tax turns "solely" on differences between the businesses and a statute is *truly* location-neutral, it does not violate the Commerce Clause. Here, by contrast, the distinction the General Assembly drew between two businesses has "everything to do" with location—i.e., imposition of the tax depends on whether cables are laid *on the ground in the state*. Reconsid. at 15. As the Supreme Court has explained, even after *Amerada Hess* and *Exxon*, "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 n.9.

The two cases the Court of Appeals cited illustrate the proper application of the principle—and its limitations. See CA Op. at ¶ 15-16, 27. In *Amerada Hess*, a large oil company complained that New Jersey's tax code did not grant a tax credit to adjust for the federal windfall profit tax oil companies paid on crude oil. 490 U.S. at 70-71. They complained that the state's decision not to offer such a deduction discriminated against interstate commerce because New Jersey happened not to have any oil producers. Id. at 77. But, in fact, New Jersey did not grant a credit for *any* federal tax that, like a windfall profits tax, is "measured by profits or income," and the tax provision predated the federal windfall tax by two decades. Id. at 70.

All of this led the Court to conclude that New Jersey's policy decision not to grant an exemption to oil producers was "solely" about a mode of business, and had nothing to do with their location—either in purpose or in effect. Indeed, it was precisely *because* New Jersey law did not discriminate on the basis of geographic location that the Court said the question "whether a state may single out for special tax burdens a form of business activity that is conducted only in other jurisdictions … is not presented in this litigation." Id. at 77. The Court went on to emphasize the governing rule that a tax is unconstitutional when it is "directed specifically at economic activity that occurs only in a particular location." Id. at 78 n.10.

Along the same lines was *Exxon*, which involved a Maryland law prohibiting oil companies or refiners from owning gas stations. 437 U.S. at 119. The statute was enacted in response to a serious problem that arose during the oil crisis, when oil companies supplied gas to their own retailers, and not to others. Id. at 121. Several vertically integrated oil companies challenged the prohibition as discriminatory against interstate commerce, again pointing to the fact that Maryland has no oil producers or refiners and thus the prohibition affected mainly out-of-state companies. Id. at 121-24. The Court rejected this argument because the prohibition was neither linked to nor motivated by the geography of the retailers or producers. Id. at 127. In fact, the Maryland law still allowed out-of-state entities to own gas stations in Maryland—so long as the out-of-state entity was not an oil company. As the Court later explained, the case dealt simply with a "statute [that] discriminated against vertical organization in the petroleum industry"—because of the dangers that form of ownership created for consumers—not against companies that declined to conduct specified business activities in the state. *Lewis*, 447 U.S. at 41. Thus, *Exxon* and *Amerada Hess* do not establish an exception to the basic Commerce Clause rule that discrimination based on the geographic location of an activity is always prohibited.

If the Court of Appeals's analysis stands unreviewed, it will mark an enormous contraction of Commerce Clause protection. Almost any geographically based discrimination could be disguised as a difference based on the nature of the business or product. Under the Court of Appeals's ruling, for example, the state could impose a higher tax on a product that typically comes from out of state, and a lower tax on a competing indigenous product, merely by positing that the two products are just different modes of business. But this Court has rejected exactly such a tax. See *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St. 2d 465, 473-74, 391 N.E.2d 716 (rejecting higher tax on low-sulfur than on high-sulfur coal, on the ground that Ohio produces virtually no low-sulfur coal). The Court of Appeals's rationale would be especially pernicious for telecommunications and information service providers, which compete principally by striving to develop technologies that allow them to deliver their services more quickly and efficiently than their competitors. Thus, the Court of Appeals's ruling condones the very type of local protectionism the Commerce Clause prohibits.[3]

<u>Proposition of Law No. 3</u>

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 evidence in the record 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*

[3] 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." CA Op. at ¶ 19. The court correctly declined to rely on most of those opinions, because they involved different taxing schemes or were disposed of on different grounds, or both. Instead, the court focused on only two cases. Id. at ¶ 20-22. One was the Sixth Circuit's opinion in *DIRECTV, Inc. v. Treesh* (C.A.6, 2007), 487 F.3d 471, which addressed a very different state statute that taxed cable and satellite service *equally*. The other opinion, from an intermediate state court, exhibits the same legal flaws as the opinion below. *DIRECTV, Inc. v. North Carolina* (N.C. App. 2006), 178 N.C. App. 659, 667, 632 S.E.2d 543.

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," Kozelek Dep., Exh. 10 at 2, at the expense of a business that "contributes next to nothing to Ohio's economy, *pocketing its profits and taking them out of state*." Green Aff., Exh. F (Ohio Cable Telecomm. Ass'n Press Release (June 2, 2003)) (emphasis added).

The Court of Appeals nevertheless ruled that when considering a Commerce Clause challenge based on the discriminatory purpose or effect of a statute, a court may not "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." CA Op. at ¶ 31. That holding was based on a state law rule of statutory construction: "'Ohio has no official legislative history'" and "a court may not resort to legislative history . . . to alter the clear wording of the legislative enactment." CA Op. at ¶ 33 (citation omitted).

However, this case 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 n.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 regulations violate the Commerce Clause; thus, [state] law concerning statutory construction is not controlling."). The 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.

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 n.7, 327 n.10. The Supreme Court and other courts have frequently considered these sorts of extra-legislative pronouncements in assessing whether a law was infected with discriminatory purpose. See, e.g., *Hunt v. Wash. State Apple Advertising Comm'n* (1977), 432 U.S. 333, 352 (citing the state agriculture commissioner's statement that local apple producers "were mainly responsible for this legislation being passed"); *W. Lynn Creamery*, 512 U.S. at 189-90 (referencing declaration of commissioner of state agency that "we must act on the state level to preserve our local industry"); *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); *Brown & Williamson Tobacco Corp. v. Pataki* (C.A.2, 2003), 320 F.3d 200, 215 (noting letter submitted by a lobbyist reflecting his interpretation of statute's intended effect).

This Court should thus review the Court of Appeals' decision on evidence of legislative intent to assure conformity with the federal principles governing Commerce Clause cases.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction of this appeal.

Dated: April 6, 2009

Respectfully submitted,

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