Supreme Court, U.S.
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No. ______

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 OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Cable and satellite TV sell the same service to the same population of customers. But they deliver their products differently: Cable companies distribute TV programs by laying thousands of miles of cable and building hundreds of local facilities in Ohio, an infrastructure that employs thousands of Ohioans. Satellite providers distribute TV programs from satellites and therefore make comparatively trivial local investments and employ only a handful of Ohioans. Ohio imposes a sales tax on satellite TV services, but not on cable TV services. The rationale for the discriminatory tax was that cable contributes more to the local economy.

This Court has held that a Commerce Clause challenge always entails a fact-intensive analysis of a statute's effects and purposes. The questions presented are:

1. Did the court below err in concluding that no examination of effects is necessary merely because a statute can be characterized as distinguishing between two competitors based upon their different "methods of operation"?

2. Did the court below err in concluding that no examination of effects is necessary because some of the beneficiaries of the discriminatory scheme are major interstate companies?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The caption on this petition lists all parties to the proceeding before the Supreme Court of Ohio.

Petitioner DIRECTV, Inc. is a wholly owned subsidiary of DIRECTV Enterprises, LLC, which is a subsidiary of DIRECTV, which is a publicly traded corporation. Other than as set forth above, no other publicly traded company owns 10% or more of DIRECTV, Inc.'s stock.

Petitioner EchoStar Satellite L.L.C., now known as DISH Network L.L.C. ("DISH"), is a wholly owned subsidiary of DISH DBS Corporation, which is a wholly owned subsidiary of DISH Orbital Corporation, which is a wholly owned subsidiary of DISH Network Corporation. DISH Network Corporation and DISH DBS Corporation are publicly traded corporations. Other than as set forth above, no other publicly traded company owns 10% or more of DISH Network L.L.C.'s stock.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio, entered on December 27, 2010, is reported at 941 N.E.2d 1187, 128 Ohio St. 3d 68, and reprinted in the Appendix to this Petition ("App.") at 1a. The decision of the Court of Appeals of Ohio, dated February 12, 2009, is reported at 907 N.E.2d 1242, 181 Ohio App. 3d 92, and reprinted at App. 35a. The following opinions of the Court of Common Pleas, Franklin Country, Ohio, are unpublished, but reprinted in the Appendix: (i) decision dated October 17, 2007, at App. 59a; (ii) decision dated December 14, 2006, at App. 222a; and (iii) decision dated October 21, 2005, at App. 248a.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Ohio on December 27, 2010. On March 10, 2011, Justice Kagan extended the deadline for filing this petition to and including April 27, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides:

> The Congress shall have the Power ... [t]o regulate Commerce ... among the several States.

The relevant portions of Ohio Revised Code

("R.C.") §§ 5739.01 and 5739.02 provide:

R.C. 5739.01 Sales tax definitions

As used in this chapter:

...

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

...

(3) All transactions by which:

...

(p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;

...

(XX) "Satellite broadcasting service" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

R.C. 5739.02 Levy of sales tax—purpose—rate—exemptions.

[A]n excise tax is hereby levied on each retail sale made in this state.

(A)(1) ... The rate of the tax shall be five and one-half per cent....

INTRODUCTION

Sam Satellite and Carl Cable are next-door neighbors. Both enjoy college football on ESPN. Carl subscribes to ESPN through the local cable company. Sam subscribes to ESPN through a satellite provider like Petitioners DIRECTV or EchoStar (now known as DISH). Both Sam and Carl watch the same game broadcast by the same network. Yet the State of Ohio requires Sam to pay an extra 5.5 cents in sales tax on every dollar of his bill because he subscribes to a satellite TV service rather than cable. Carl pays no state tax.

Why the discrimination against satellite TV? The Ohio statute singles out satellite TV providers for special burdens because they send their programming signals "without the use of ground receiving or distribution equipment" within Ohio, whereas cable companies use "distribution equipment" on the "ground" in Ohio. R.C. 5739.01(XX). The "ground equipment" to which the statute refers consists of thousands of miles of cable coursing through Ohio streets and hundreds of facilities, all maintained by thousands of Ohio employees. In contrast, satellite TV providers

distribute their service to Ohio customers from thousands of miles above the Earth. They build virtually no infrastructure in Ohio and hire only a handful of Ohioans to deliver their service.

The Supreme Court of Ohio upheld this statute against a Commerce Clause challenge, over a sharp dissent. The majority and dissent disagreed over two legal points that have split the circuits.

First, the majority held that the satellite-only tax does not violate the Commerce Clause because it is based on differences between cable and satellite's "'methods of operation.'" App. 11a (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)). Invoking that cryptic quote from *Exxon*, the majority concluded that states may discriminate between two competitors based on operational distinctions, even if those are the very distinctions that are responsible for the vastly different local economic footprints.

Ever since this Court used that phrase in *Exxon*, the lower courts have been confused about how operational differences affect a Commerce Clause analysis. One circuit agrees with the majority below that a court need not even assess the purposes and effects of a statute, so long as, on its face, a statute couches its distinction in terms that can be described as differences in operational details. On the other extreme are four circuits that reject any such notion of a "methods of operation" trump card and treat operational differences as virtually irrelevant to a Commerce Clause analysis of effects or purpose. Yet another group of courts—encompassing three circuits—treats operational differences as relevant to

another element of the Commerce Clause analysis, but not dispositive.

Second, the majority held that there can be no Commerce Clause violation where both the beneficiaries and the victims of a discriminatory regime are major interstate enterprises. A split has emerged over this proposition as well. A small minority of courts follows the rule the majority below articulated. But most courts have invalidated statutes that grant preferential treatment to the competitor that most contributes to the local economy without regard to where the beneficiaries and victims of the scheme are domiciled and without regard to how much business they transact outside the state.

These issues are critically important to businesses far beyond the pay TV industry. The significance of "methods of operation" has already arisen in cases concerning goods and services as varied as retail eyewear and eye-exam services, car sales and auto repair, cigarette sales, and wine production and sales. The issue is important to any industry in which an innovative competitor may discover a business model for serving customers more efficiently from afar or without an extensive in-state infrastructure. And in this increasingly interconnected economy, the second issue will dictate whether the Commerce Clause continues to provide broad protection against parochial protectionism, or whether it will be sapped of almost all force.

Businesses—especially innovative businesses launched at a national level—need to know what

protections they have against local parochialism. The lower courts have wrestled with these questions for three decades. Their positions are fully percolated and fairly entrenched. Only this Court can allay the confusion.

STATEMENT OF THE CASE

Ohio's Discriminatory Regime

The story behind Ohio's discriminatory satellite-only tax is a textbook case of local protectionism. For decades, cable companies were entrenched monopolies. Then came satellite TV, which transmits programming directly to the subscriber's home.

Ohio's cable industry sprung to action to squelch the competition. It lobbied the General Assembly to insulate it from competition from this "out-of-state" interest. Supplement to Appellants' Brief filed in the Supreme Court of Ohio ("Supp.") at 340. 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." Supp. 339. 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 '[p]rovides little to support local communities.'" App. 21a (alterations in dissent). 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*." Supp. 98 (emphasis added).

Factually, the cable industry had a point: Cable companies reach their customers through elaborate local networks of facilities 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. Supp. 254. In Ohio alone, cable companies have invested billions of dollars in their networks of ground equipment and related repair and maintenance facilities. *Id.* They employ about 6,000 Ohio residents, most of them to construct, operate, and maintain these networks. *See* App. 21a.

In contrast, satellite TV companies do not need to build an intricate web of cables in the ground or hang cables on telephone poles. *See* App. 3a. Satellite TV companies, therefore, do not employ armies of local workers; they have no offices and have only a handful of workers in Ohio. *See* App. 117-18a, 269a; Supp. 4.

The Ohio General Assembly answered the cable industry's call by taxing satellite TV service, but not cable. In 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% (later reduced to 5.5%). R.C. 5739.01(B)(3)(p), 5739.02. 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).

Procedural Background

Petitioners 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:

> [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 is installed and used for delivery of the television programming), as compared to a means of delivery which does not necessarily involve local economic 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).

App. 227-28a (emphasis in original).

The court emphasized that "[i]f 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." App. 228a. Thus, the court held Ohio's tax scheme unconstitutional. App. 220-21a.

The Court of Appeals reversed, upholding the discriminatory tax. *See* App. 35-58a.

A 5-2 majority of the Supreme Court of Ohio affirmed and upheld the satellite-only tax on two grounds. First, the majority concluded that the discriminatory tax was permissible because "[t]he statute's application depends upon the technological mode of operation, not geographic location." App. 15a. The majority fashioned this rationale from snippets of language in two of this Court's cases, which observe that the Commerce Clause does not "protect[] the particular structure or methods of operation in a retail market," *Exxon*, 437 U.S. at 127, and does not invalidate a law that distinguishes "solely between the nature of" the affected entities' "businesses," *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of the Treasury*, 490 U.S. 66, 78 (1989). *See* App. 11-12a. Second, the majority held that the discrimination against satellite TV was not discrimination against interstate commerce because "[b]oth the satellite and cable industries serve customers in Ohio, own property 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." App. 17a.

Two Justices dissented on both grounds. The dissenters emphasized that "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." App. 21-22a. They argued that "operational differences do not *immunize* protectionist discrimination—indeed, *Amerada Hess* and *Exxon* prove the point: despite clear operational differences in each case, the court still looked for location-based discrimination" but "simply could not find it." App. 27a (emphasis in original). Moreover, the dissent pointed out that under the Commerce Clause, "[l]ocal investment, not simply locally headquartered businesses, may not be promoted through discriminatory taxation." App. 22-23a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three reasons: (I) the lower courts are hopelessly split as to two principles that are central to many Commerce Clause challenges; (II) the splits relate to questions of fundamental national importance; and (III) the Ohio Supreme Court's approach to both issues would unsettle this Court's Commerce Clause protections.

I. THE COURTS ARE SPLIT ON TWO PRINCIPLES CENTRAL TO MANY COMMERCE CLAUSE CHALLENGES.

The Commerce Clause grants Congress the "Power ... [t]o regulate Commerce ... among the

several States." U.S. Const. art. I, § 8, cl. 3. Embedded within this grant of power is an implied prohibition against states' discriminating against interstate commerce by using legislative or regulatory measures to protect or enhance their own local economy. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 395–97 (1984). This prohibition is called the "dormant" or "negative" Commerce Clause. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992).

Obviously, a business that is harmed by a state statute can prove a Commerce Clause violation by demonstrating that the statute explicitly benefits in-state interests over out-of-state interests. But even a statute that does not facially discriminate against interstate commerce violates the Commerce Clause if it discriminates in "practical effect" or if it was motivated by a discriminatory purpose. *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *see Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984). In considering such claims, this Court has steadfastly "eschewed formalism." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). It has insisted that courts engage in "a sensitive, case-by-case analysis of purposes and effects." *Id.*

A court that conducted such a "sensitive ... analysis of purposes and effects" here would focus intensely, as the dissent below did, on how much more economic benefit cable brings to Ohio than satellite TV. App. 21a. But the majority below considered that intensive inquiry unnecessary. And its reasons for applying categorical exemptions from

the standard Commerce Clause analysis highlight two areas of confusion among the lower courts.

The lower courts are hopelessly split on how to apply the Commerce Clause rules in two situations—both of which arise with increasing frequency in today's global economy—and particularly over whether they are still required to conduct the traditional examination of effects and purposes.

A. The Lower Courts Are Split Into Three Camps As To How Differing "Methods Of Operation" Fit Within A Commerce Clause Analysis.

This case happens to involve companies that sell a particular service (pay TV) but that have different ways of delivering that service (air vs. ground distribution). The first issue, however, pervades cases far beyond that pay TV context. Competitors often sell products that compete vigorously for consumer attention but have different business models, and particularly (as here) different modes of delivery. Two retailers, such as Barnes & Noble and Amazon.com, can sell the same exact books in direct competition, albeit through very different business models and with very different modes of delivery. Two wine merchants can sell bottles of wine in direct competition, but deliver those bottles differently, through a local brick-and-mortar store or by shipment directly to the home from anywhere in the country. National chains and local stores can compete in selling a variety of products, but they have different business models. The examples abound in the case law across a wide range of

products and services, from used cars to eyeglasses and cigarettes to waste disposal.

The lower courts are in utter disarray on how to analyze a Commerce Clause challenge when faced with these different modes of delivery or business models. The confusion arises from two of this Court's Commerce Clause decisions, *Exxon* and *Amerada Hess*. Both cases are described in greater detail below. *See infra* at 34-36. For present purposes, suffice it to say that these cases addressed challenges to state laws treating oil companies differently from gas retailers. In rejecting Commerce Clause challenges, the cases made Delphic observations about the two businesses having different "methods of operation," *Exxon*, 437 U.S. at 127, exhibiting "differences between the nature of their businesses," not "the location of their activities," *Amerada Hess*, 490 U.S. at 78.

The courts have split into three discrete and irreconcilable camps.

Camp 1: "Methods of operation" as a trump card. Some lower courts read *Amerada Hess* and *Exxon* to override this Court's admonition that a Commerce Clause challenge necessarily entails "a sensitive, case-by-case analysis of purposes and effects," *W. Lynn Creamery*, 512 U.S. at 201, whenever the state can describe the distinction as based upon a "method of operation" or "nature of business." In these jurisdictions, it does not matter how much more the favored business advances the local economy than the disfavored innovators. The trump card prevails so long as the state can say,

"The statute says nothing explicit about favoring the local economy; the statute simply promotes one mode of business over another."

This case presents the starkest illustration of this camp. The trial court found as undisputed fact that cable's "huge network" in Ohio contributes vastly more to the local economy than satellite TV and it found a triable issue of fact as to whether that was exactly why the Ohio General Assembly adopted the discriminatory regime. App. 266-69a. Yet, the Ohio Supreme Court dispensed with any examination of effects and purposes. Instead, it uncritically accepted the state's label, concluding that analysis of purposes and effects is unnecessary because the statute never mentions building within the state or contributing to the local economy, but rather refers only to a mode of business. It did not matter to the Ohio Supreme Court that the main distinction between the two modes of business is all about building infrastructure within the state—and more specifically, revolves around whether the infrastructure is laid in the "ground" in Ohio or elsewhere.

None of that matters, according to the Ohio Supreme Court, because this Court "has pointed out ... that the Commerce Clause of the United States Constitution 'protects the interstate market, not particular interstate firms' or 'particular structure[s] or methods of operation in a retail market.'" App. 11a (quoting *Exxon*, 437 U.S. at 127 (alterations by Ohio Supreme Court)).

The Sixth Circuit also falls in this camp. It

addressed a very different statutory scheme, adopted by Kentucky, that also favored cable over satellite TV. *See DIRECTV, Inc. v. Treesh*, 487 F.3d 471, 480 (6th Cir. 2007). The court acknowledged that "*a* purpose of the [statute] might have been to aid the cable industry rather than the satellite industry because the former has a larger in-state presence than the latter." *Id.* (emphasis in original). But it dispensed with any further analysis of the motive or the effects because cable and satellite have "two very different means of delivering broadcasts." *Id.* In so ruling, the Sixth Circuit, too, seized upon *Exxon*'s observation about "methods of operation." *Id.* It interpreted that language to mean that all further analysis ends because of the mere "possibility" that Kentucky's legislature may have been "in some way motivated" by the operational differences. *Id.* at 481.

The North Carolina Court of Appeals, too, has followed this same analysis. *See DIRECTV, Inc. v. State*, 632 S.E.2d 543, 547, 549 (N.C. Ct. App. 2006).

Camp 2: "Methods of operation" as an irrelevancy. Diametrically opposed to Camp 1 is the dominant camp, consisting of the First, Fourth, Seventh, and Eleventh Circuits as well as the Florida Supreme Court. When the courts in Camp 2 confront a statutory distinction, they conduct the traditional "sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery*, 512 U.S. at 201. They do so whether or not the favored and disfavored businesses have different modes of business. These cases acknowledge *Exxon*, but do not read its reference to "methods of operation" as creating any sort of exception for distinctions based

on operational differences. In fact, they treat such differences as irrelevancies, so long as the businesses on either side of the statutory line directly compete for customers.

The First Circuit took this approach when it addressed a statute that distinguished between two different business models of wine production. *See Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010). The statute granted preferential treatment to "small" wineries (producing less than 30,000 gallons a year) over "large" ones. *Id.* at 4. Small wineries could ship wine directly to consumers, but large wineries could not (unless they forewent entirely selling through wholesalers—a choice small wineries were not required to make). *Id.* at 4-5, 13. The statutory distinction obviously revolved around a difference in "methods of operation": The state preferred small-batch wine production targeting connoisseurs over large-scale, mechanized production aimed at mass markets. A Camp 1 court applying the trump card approach would seize upon this distinction to bypass any inquiry into effects and purposes.

The First Circuit rejected any such talismanic approach in favor of the traditional focus on purposes and effects. It observed that *all* wineries in Massachusetts were "small." *Id.* at 4. It struck the statute because "the effect of [this] particular gallonage cap is to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors." *Id.* at 5. In so ruling, the court rejected the very

argument that the courts in Camp 1 make under *Exxon*: "*Exxon* is not apposite where, as here, there is an in-state market and the law operates to its competitive benefit." *Id.* at 13.

The Eleventh Circuit, too, put itself firmly in this camp when it struck an ordinance that banned chain restaurants with certain "formula" characteristics. *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008). Stand-alone restaurants and formulaic chains obviously employ different "methods of operation." Under Camp 1's trump-card approach, such a distinction would spell the end of the challenge, without any examination of purposes or effects. The Eleventh Circuit recognized that "*Exxon* rejected the notion 'that the Commerce Clause protects [a] particular structure or methods of operation in a retail market.'" *Id.* But the court concluded that insofar as the statute "serve[d] to exclude national chain restaurants from competition in the local market," it "ha[d] the practical effect of discriminating against interstate commerce." *Id.*; *see also Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-47 (11th Cir. 2008) (similar holding as to ordinance prohibiting "formula retail" establishments).

The Fourth and Seventh Circuits took the same approach when they confronted state statutes that distinguished between two different modes of waste disposal. *See Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1270-71 (7th Cir. 1992); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001). In the Seventh Circuit case, some businesses that hauled waste used trucks

that were dedicated to waste disposal. Other businesses used an alternative business model called "backhauling": They used their trucks to deliver products in one direction, and then filled their trucks with waste on the return trip. Indiana passed a statute prohibiting backhauling. *Gov't Suppliers*, 975 F.2d at 1270-71, 1279. The Fourth Circuit case involved a state law distinguishing haulers that used trucks with four or more axles from those using trucks with fewer axles. *Waste Mgmt.*, 252 F.3d at 324.

Under the Camp 1 trump-card approach, both statutes would automatically be sustained without regard to their purposes or effects. The Seventh Circuit even observed that businesses engaged in backhauling "will have to change drastically their *method of operation* or give up hauling waste into Indiana altogether." *Gov't Suppliers*, 975 F.2d at 1279 (emphasis added). But far from being a trump card, that was the reason that both courts (in the Fourth Circuit's case, without so much as mentioning *Exxon*) struck the statutes before them.

Finally, the Supreme Court of Florida applied the same approach to a statute that treated entirely different products differently. The statute granted preferential tax treatment to wines and distilled spirits manufactured from citrus, sugar cane, and certain grape species—all of which were prevalent in Florida—over all other sorts of wines and spirits. *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1002 (Fla. 1988), *rev'd on other grounds*, 496 U.S. 18 (1990). Most any wine seller would deny that it is in the same business as

purveyors of citrus or sugarcane spirits. Nevertheless, while the court considered *Exxon*, *see* 524 So. 2d at 1006-07, it did not treat the case as adopting a "methods of operation" trump card. Instead, the court examined the law's effect—which was obviously to favor the local economy where citrus was king—and it struck the law. *Id.* at 1008.

Camp 3: "Methods of operation" considered in the "similarly situated" analysis. Camp 3—consisting of the Second, Fifth, and Ninth Circuits—takes an intermediate position between the two poles. The courts in Camp 3 do not treat the mode of business as a trump card (as Camp 1 does), but nor do they treat it as irrelevant (as Camp 2 does). Instead, these courts do assess a statute's effects and purposes. But in doing so they consider the different "methods of operation" as a crucial factor in determining whether a challenged statute differentiates between businesses that are "similarly situated," which is a separate Commerce Clause inquiry.

As this Court has explained, a law is not discriminatory under the Commerce Clause unless the business it disfavors is "similarly situated" to favored business. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). This Court has held that businesses can be "similarly situated" when there is "actual or prospective competition between the supposedly favored and disfavored entities in a single market," *id.* at 300, but it has never fully fleshed out the scope and meaning of "competition" or a "single" market in this context, or whether there is more to the analysis than direct competition.

The Ninth Circuit focused on this facet of the Commerce Clause analysis in a case concerning statutes that treated opticians differently from ophthalmologists and optometrists. *See Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521 (9th Cir. 2009). Businesses owned by ophthalmologists were permitted to use a business structure that was far more convenient to customers—offering eye exams and glasses from one location. *Id.* at 524. Optician-owned businesses were not allowed to provide eye exams. *Id.* Courts in Camp 1 would uphold this statute out of hand as a distinction in "methods of operation." Camp 2 would assess the law's effects—and almost certainly strike the law, since ophthalmologists, which are licensed by the state, were largely local businesses, while optometrists were mainly large out-of-state businesses. *Id.*

The Ninth Circuit split the difference. On the one hand, the court observed that "[i]n *Exxon*, the Court distinguished between the entities based on their business structures, holding that a state may prevent businesses with certain structures or methods of operation from participating in a retail market without violating the dormant Commerce Clause." *Id.* at 527 (citing *Exxon*, 437 U.S. at 127). On the other hand, the court concluded that, "[b]ecause states may legitimately distinguish between business structures in a retail market, a business entity's structure is a material characteristic for determining if entities are similarly situated." *Id.* The court found that "[b]ecause they have different responsibilities, different purposes, and different business structures,

opticians are not the same as optometrists or ophthalmologists." *Id.* The court therefore upheld the statutes, because, under its rationale, they "make no geographical distinctions between similarly situated entities." *Id.* at 527-28.

The Fifth Circuit took the same approach in two different cases. The first involved a Texas statute prohibiting a car manufacturer from operating a car dealership. *See Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498, 501-02 (5th Cir. 2001). Under this statute, Ford was not allowed to market used cars in Texas even by internet. This statute obviously favored local car dealers by shielding them from competition. The second case involved another Texas statute barring insurance companies from owning auto repair shops. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 154, 157 (5th Cir. 2007). This statute, too, had an obvious protectionist effect and purpose: The legislature passed the statute after insurance giant Allstate acquired a chain of in-state automotive body shops and began referring policyholders to its own shops in direct competition with local body shops. *Id.* at 156-57.

Despite the evident protectionist effects on the local economy, the Fifth Circuit upheld both statutes. It did not, however, do so on the ground that different "methods of operation" make the effects irrelevant as the courts in Camp 1 would have. Rather, it did so on the ground that the statutory schemes distinguished between entities that were not similarly situated. The restriction on car dealerships, the court held, did not discriminate "*among* in-state and out-of-state manufacturers, nor

... *among* in-state and out-of-state dealers." *Ford*, 264 F.3d at 502 (emphasis in original). Same for the body shop restriction: "[A]s with the provision upheld in *Exxon*, similarly situated in-state and out-of-state companies are treated identically" insofar as "[n]either in-state nor out-of-state insurers may acquire a body shop and the statute raises no barriers whatsoever to out-of-state body shops entering the Texas market so long as they are not owned by insurance companies." *Allstate*, 495 F.3d at 163.

The Second Circuit applied the same intermediate approach to a New York law that distinguished between different modes of delivering cigarettes. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 215-16 (2d Cir. 2003) (citing *Ford*, 264 F.3d at 500). The statute prohibited cigarette sellers and common or contact carriers from shipping or transporting cigarettes directly to New York consumers. *Id.* at 203. The statute allowed the direct delivery of four or fewer cartons of cigarettes by persons "other than" common or contact carriers. *Id.* at 204. Thus, the statute gave preferential treatment to on-site sales of cigarettes and small direct deliveries of cigarettes by a seller's own employees (in the seller's own van, for example). The court assumed for argument's sake that the statute would require an out-of-state seller to establish a brick-and-mortar outlet in New York in order to sell cigarettes to New York consumers, and that out-of-state sellers could not feasibly use their own trucks (rather than common or contract carriers) in order to take advantage of the small-delivery exception. *Id.* at 212-16. The court did not

limit its analysis merely to noting that the statute distinguished between different modes of delivery, as Camp 1 would (although the court did note that, *see id.* at 213). But nor did it ignore the differences in mode of delivery as Camp 2 would. Rather, the court found that the statute applied evenhandedly to the "similarly situated" entities with similar methods of operation—*i.e.*, in the court's view, in-state and out-of-state direct shippers (rather than in-state brick-and-mortar outlets and out-of-state sellers). *Id.* at 212-13, 215-16.

* * *

These three approaches are irreconcilable. A satellite-only tax like the one at issue here will be upheld without any inquiry into its effects or purposes, if passed in Ohio, Kentucky, or anywhere else in the Sixth Circuit, or in North Carolina. If Massachusetts, Virginia, Indiana, Florida, or another state in the First, Fourth, Seventh, or Eleventh Circuits passed the same statute, it would most assuredly be struck, because both the purposes and effects are so plainly protectionist. If New York, Texas, or California, or any state in the Second, Fifth, or Ninth Circuits, passed the same statute, it might or might not be upheld, depending upon some nebulous and unpredictable assessment of whether satellite and cable, which are plainly direct competitors, are similarly situated.

B. The Lower Courts Are Split Over How The Commerce Clause Applies Where Both The Victims And The Beneficiaries Of A Statutory Distinction Are Major Interstate Businesses.

Perhaps even more mischievous is the second split that has emerged, over whether the traditional Commerce Clause analysis—with the usual focus on purposes and effects—applies to protectionist legislation where the main beneficiaries are interstate businesses, some of them domiciled out-of-state, rather than purely local enterprises.

There was a time when Commerce Clause challenges were focused on schemes designed to promote purely local enterprises—local farmers or dairies, for example—at the expense of out-of-state competitors. In those days, this Court would dismiss a Commerce Clause challenge on the ground that "the stranger from afar is subject to no greater burdens ... than the dweller within the gates." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). But over the past three decades, this Court has also struck statutes that were designed to encourage businesses (regardless of their origins and reach) to perform various activities in-state. *See infra* at 25-26 (describing cases). This trend led this Court to hold in *Boston Stock Exchange* that it is "constitutionally impermissible" for a state to "discriminate[] between *two types of interstate transactions* in order to favor local commercial interests over out-of-state businesses." *Boston Stock Exch.*, 429 U.S. at 335 (emphasis added). But this Court has not yet explicitly stated that it is equally

impermissible to favor the local economy where the enterprises that are benefited are not themselves all local enterprises. Two diametrically opposite camps have emerged on this question.

The majority approach. At least four circuits have struck statutes as discriminatory against interstate commerce where some of the beneficiaries were themselves either major interstate enterprises or out-of-state enterprises.

This Court is fully familiar with a prime example, where the Sixth Circuit struck an Ohio investment tax credit that favored businesses that installed new manufacturing equipment in the state. *See Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 741-42 (6th Cir. 2004), *vacated in part on other grounds*, 547 U.S. 332 (2006). The whole point of the statute was to appeal to interstate businesses—businesses that had the choice between locating their plants in Ohio or outside the state. So among the beneficiaries of the law were businesses that were quite clearly not local Ohio enterprises. But the nature or domicile of the beneficiaries did not matter to the Sixth Circuit; for Commerce Clause purposes, all that mattered were the effects the discrimination had on the local economy. *See id.* at 745-46.

Other illustrations abound. The First Circuit took the same approach in the case described above involving a statute that gave preferences to "small" wineries. *See supra* at 16-17. The court struck that statute even though many (almost certainly most) of the small wineries that benefited from the preference were from outside the state and engaged

in interstate commerce. *See Family Winemakers*, 592 F.3d at 4-5. Same for the Eleventh Circuit in the two *Islamorada* cases described above involving a prohibition against certain formulaic chain restaurants and retail stores. *See supra* at 17 (discussing *Cachia* and *Island Silver*). Some of the beneficiaries of those laws were major interstate companies (including certain chains) domiciled outside the state. But that did not stop the court from striking those statutes. Similarly, the Third Circuit invalidated a regulation that allowed large trucks to use local roads only if they began or ended their trips in New Jersey, even though some of the beneficiaries were obviously engaged in substantial interstate commerce. *See Am. Trucking Ass'ns. v. Whitman*, 437 F.3d 313, 315 (3d Cir. 2006); *see also Delta Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 317, 319-21 (Fla. 1984) (invalidating state tax that discriminated between huge interstate airlines on the basis of whether the airline built a corporate office in Florida and employed a specified number of Florida residents).

In each of these cases, the court did not even pause to assess the domicile or interstate footprint of the beneficiaries. That was irrelevant. The key was in the degree to which the statute had the effect of rewarding those who contributed most to the local economy.

The minority approach. A small, but growing minority takes the diametrically opposite position.

Perhaps the most dramatic illustration of the contrast lies in the opposite results that the Ninth

Circuit and the First Circuit have reached with respect to virtually identical statutes that give a preference to small wineries. As noted above, the First Circuit has struck such a statute, *see supra* at 16 & 25-26, but the Ninth Circuit has upheld a virtually identical statute. The difference lies in the legal consequence that the two courts have attached (or did not attach) to the domicile and interstate footprint of the beneficiaries. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227-28 (9th Cir. 2010). Unlike the First Circuit, the Ninth Circuit found it dispositive that the universe of beneficiaries—small wineries—encompassed both in-state and out-of-state enterprises. *Id.* at 1233.

The Ohio Supreme Court deepened the split when it adopted the same logic here. Like the Ninth Circuit, the court below believed that it simply did not matter how much the discriminatory scheme benefits the local economy, where the specific businesses that are favored do not fit the traditional mold. There can be no Commerce Clause violation, the court below held, simply because none of the "major" cable companies "is headquartered in Ohio or could otherwise be considered more local than any other." App. 17a; *see also DIRECTV, Inc. v. State*, 632 S.E.2d at 548 (reaching the same conclusion on the same logic with respect to North Carolina's satellite-only tax).

* * *

Once again, there is no way to reconcile these two lines of cases. They represent fundamentally different—indeed opposite—views of the Commerce

Clause, where the outcome depends not on the facts of the case, but on the state that passes the statute.

II. THIS CASE HAS IMPORTANT NATIONAL RAMIFICATIONS FOR MANY INDUSTRIES AND IS AN IDEAL VEHICLE FOR RESOLVING THEM.

Until recently, cable was the only option for viewers interested in subscriptions to a wide range of television programs. Free from competition, cable had no incentive to improve service, to innovate, or to keep prices down. In response to a bitter consumer uprising, Congress stepped in to foster competition from satellite TV. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 602, 110 Stat. 56, 144 (1996), *reprinted in* 47 U.S.C. § 152 note. Because satellite TV is a "national, interstate" service, Congress insisted on a "unified, national system of rules," including shielding the industry from state regulation and local taxes. H.R. Rep. No. 104-204, at 133 (1995); *see also, e.g.*, 47 U.S.C. § 303(v) (mandating that the FCC shall have "exclusive jurisdiction to regulate the provision of direct-to-home satellite services") (emphasis added); Telecommunications Act of 1996 § 602 (preempting local taxes on satellite TV service); 47 C.F.R. § 1.4000(a)(3) (prohibiting any governmental or nongovernmental restrictions that impair the installation, maintenance or use of antennas used to receive video programming).

Over the past few years, cable companies have leveraged their superior in-state presence to promote legislative proposals—like the one at issue in this

case—that threaten satellite's viability as a competitor. As cable knows, pay TV customers are supremely price sensitive. Cable stands a much better chance of defeating its new competitors if it can artificially inflate their prices by more than 5%, as Ohio did. Cable has managed to get these statutes passed in eight states, and its lobbyists have gotten such bills introduced in some two dozen states. If these statutes continue to proliferate, cable will undermine Congress's goal of fostering a viable competitor.

The stakes are equally high for numerous other industries across a wide spectrum. As the cases discussed above demonstrate, the answers to the questions presented in this case affect goods and services as varied as used cars, eyeglasses, auto repair, chain restaurants, wine, trash hauling, and cigarettes.

The uncertainty on both issues is paralyzing businesses that operate nationally. Businesses that find innovative ways to serve local customers from afar or to serve customers more efficiently (i.e., obviating an expensive infrastructure) have no way of knowing whether a state, at the behest of local interests, will be allowed to counter their innovation with special burdens. And they have no idea whether the Commerce Clause protects them from all efforts to advance the local economy or only from those efforts that favor Mom & Pop shops.

A wine producer cannot properly assess whether to choose to deliver its product by mail instead of in-store. A video retailer cannot adequately decide

whether to invest in delivering its product remotely—whether over the internet or by mail—or to use more conventional means. None of these businesses can plan national strategies when the answers to these fundamental questions vary from one state to the next. Indeed, the very variability from state to state undermines one of the Commerce Clause's central purposes. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (citing cases in support of the observation that "[t]his Court's recent Commerce Clause cases ... have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations").

The significance of both issues will soon be magnified with respect to state laws targeting e-commerce and other forms of digital distribution. Under the Ohio Supreme Court's rationale, states could freely discriminate against internet sales or downloads in favor of sales from brick-and-mortar vendors. At the moment, federal law prohibits such discrimination. *See* Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, § 2, 121 Stat. 1024, 1024 (2007), *reprinted in* 47 U.S.C. § 151 note. But that protection is due to expire soon, at which point, numerous states can be expected to protect local vendors from internet competition.

The uncertainty is bad for states too. They, too, need to know which burdens are permissible and which ones are impermissible. Clarity is especially crucial in the context of discriminatory taxes. A wrong guess can expose a state to hundreds of millions of dollars in retroactive liability for

collecting a tax that turns out to be unconstitutional. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (remedy for a discriminatory tax is to equalize).

The range and number of prominent trade and consumer associations, as well as eminent constitutional scholars, who submitted briefs as amici curiae to the Supreme Court of Ohio highlights the crucial importance and wide-reaching implications of the issues in this case. Several of these groups are expected to file amicus briefs in support of certiorari. At this stage, this Court is unlikely to hear from several other amici who also underscored the importance of these issues by filing briefs in support of the state. Among them were 15 state attorneys general, the National Governor's Association, the National Conference of State Legislators, and the Multistate Tax Commission.

Even the justices of the Ohio Supreme Court invited this Court's guidance. At oral argument four of the seven justices—including the authors of both the majority opinion and the dissent—inquired about the prospects for review by this Court, with one practically calling for this Court to resolve the uncertainty: "We should perhaps welcome further instruction from the U.S. Supreme Court." Transcript of Oral Argument at 34, *DIRECTV, Inc. v. Levin*, 941 N.E.2d 1187 (2010) (No. 2009-627) (Pfeifer, J.); *see also id.* at 20 (Lanzinger, J.) ("[T]his eventually may be a situation that reaches the [U.S.] Supreme Court."); *id.* at 21 (O'Donnell, J.) ("Are [the North Carolina and Sixth Circuit cases] on appeal to the U.S. Supreme Court ... ?"); *id.* at 33

(O'Connor, J.) (inquiring about "the potential for this case to go to [the] United States Supreme Court").

There is little reason to await further percolation, and good reason not to. *Exxon* is over 30 years old. Eight circuits addressing statutes alleged to have discriminatory effects have reached three different answers as to how different "methods of operation"—in *Exxon*'s cryptic reference—fit within a Commerce Clause analysis. Those answers are unlikely to change with further consideration. *Boston Stock Exchange* is even older, as are the principles that it stands for, and the lower courts have had more than ample opportunity to grapple with its meaning, as well. Only this Court's intervention will clear up the confusion.

Finally, this case provides a flawless vehicle for review of these important issues. It is a direct appeal from a final judgment of the highest court of a state. It was decided on an extensive summary judgment record amassed over the course of over three years of discovery. And the central facts on which the trial court originally granted summary judgment to Petitioners are largely undisputed. On the basis of these facts, the trial court and the intermediate appellate court reached diametrically different conclusions on purely legal issues, and the Ohio Supreme Court split on those same legal principles.

III. THE OHIO SUPREME COURT'S ANALYSIS IS WRONG.

A. The "Methods Of Operation" Trump Card Is Inconsistent With This Court's Precedents.

The "methods of operation" trump card adopted by the Ohio Supreme Court and other courts in Camp 1 is inconsistent with this Court's Commerce Clause jurisprudence. Time and again, this Court has emphasized that the Commerce Clause prohibits states from promoting businesses that perform specified economic activities or make significant investments in the state at the expense of businesses that do not. *See, e.g.*, *Westinghouse*, 466 U.S. at 406-07 (striking New York law that provided tax benefit to exporters that used docks in New York); *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (striking tax scheme that benefited businesses based on how much manufacturing they performed in state). With at least equal ardor, this Court has emphasized that a Commerce Clause challenge requires "a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery*, 512 U.S. at 201.

This Court has abided by the admonition to examine effects and purposes even in cases where the distinctions can be described as entailing differences in "methods of operation." *See, e.g., Granholm v. Heald*, 544 U.S. 460, 474-76 (2005) (invalidating state regulation distinguishing between wine producers that delivered their product in different ways); *Bacchus*, 468 U.S. at 271-72 (invalidating Hawaii law differentiating certain fruit

wine from other alcoholic beverages).

Exxon and *Amerada Hess* are no exception. In both cases this Court *did* scrutinize evidence of the statute's effects and purposes and sustained the statute only because, on the basis of that review, it found no burdens at all on interstate commerce.

At issue in *Exxon* was a Maryland law that prohibited oil producers and refiners from owning retail gas stations. Maryland had enacted the law in response to abuses during the oil shortage of 1973, when oil companies preferentially supplied gas to the gas stations they owned and discriminated against all other retailers. 437 U.S. at 119, 121. Oil companies challenged the prohibition on the ground that it burdened only out-of-state companies. *Id.* at 125. But this effect was an accident of geology: Maryland does not have any oil reserves, and therefore has no oil producers.

This Court rejected the discrimination claim after finding that the statute did not "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Id.* at 126. In response to the oil companies' claim that the statute would change the market structure by weakening independent refiners, the Court declined to "accept [the] underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." *Id.* at 127.

In *Amerada Hess*, large oil companies complained that New Jersey's tax code did not grant them a

special credit against federal taxes. 490 U.S. at 70-71. Specifically, their gripe was that they were paying a sizable federal "windfall profit" tax on the crude oil they sold, and they thought the state should allow them to deduct that tax payment for purposes of calculating their state taxes. *See id.* The New Jersey tax code provided generally that a corporation's "entire net income" must be calculated without deductions for federal taxes. The legislature had adopted this provision over 20 years before federal law imposed the windfall profit tax, so there was no argument that the tax policy was adopted in order to burden oil companies. *Id.*

Nevertheless, the oil companies argued that New Jersey's policy choice "discriminate[d] against *oil producers* who market[ed] their oil in favor of independent *retailers* who do not produce oil." *Id.* at 78 (emphasis added). This Court rejected that comparison. *Id.* It was in the context of rejecting that argument that the Court noted that the challenged distinction was permissible because it was based "*solely*" on a difference "between the nature of" the affected entities' "businesses, *not* ... the location of their activities." *Id.* (emphasis added; citing *Exxon*, 437 U.S. at 125-29).

As is evident from the context, the references to the "methods of operation" and "the nature of their businesses" did not trump the traditional analysis of purposes and effects. Rather, these were conclusions the Court reached only after conducting that analysis. Nor did those cases override the bedrock rule that "discrimination based on the extent of local operations is itself enough to establish the kind of

local protectionism" that violates the Commerce Clause. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980) (emphasis added). These cases simply articulated a corollary to that rule: There is no Commerce Clause violation where the tax has *nothing* whatever to do with "the location of [a business's] activities," but turns "solely" on differences in the very "nature" of two businesses. Or, as the dissent below put it, "these cases stand for the modest proposition that the Commerce Clause permits states to distinguish among differing kinds of businesses, so long as the distinctions do not favor local economic interests." App. 26-27a.

If, as the Ohio Supreme Court held, a court could bypass the analysis of purposes and effects simply because two businesses had different "methods of operation," the Commerce Clause would be sapped of most of its force. It does not take much creativity to recast virtually any impermissible discrimination as a distinction in "methods of operation." Indeed, the distinction on which the Ohio statute is based is inherently tied to location: It turns on whether or not the delivery method is rooted in the "ground" in Ohio. As the dissent explained: "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." App. 21-22a. The court thus ignored the direct link between the statute's basis for discrimination and the sharply varying local economic benefits at play. In so doing, the court departed from this Court's jurisprudence.

B. The Commerce Clause Applies With Equal Force Where Both The Beneficiaries And Victims Of A Statutory Distinction Are Major Interstate Businesses.

The Ohio Supreme Court also erred in holding that there can be no Commerce Clause violation just because the beneficiaries and the victims of discrimination both have extensive interstate operations. *See* App. 17a. This Court has explained that "discrimination based on the extent of local *operations* is itself enough to establish the kind of local protectionism" that violates the Commerce Clause. *Lewis*, 447 U.S. at 42 n.9 (emphasis added); *see Armco*, 467 U.S. at 642 (same for discrimination "between transactions on the basis of some interstate element" (quoting *Boston Stock Exch.*, 429 U.S. at 332 n.12)).

This Court has repeatedly applied these principles to strike laws that discriminated against interstate commerce even where the favored and burdened parties were all large interstate enterprises and not strictly "in-state" versus "out-of-state" businesses. In *Boston Stock Exchange*, this Court struck a tax that favored the New York Stock Exchange over other regional exchanges (such as the Boston Stock Exchange), even though the beneficiaries and the victims were all major players in global markets. *See* 429 U.S. at 334 ("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.")

(emphasis added; citation omitted). Similarly, in *Westinghouse*, this Court struck a statute granting preferential treatment to exporters that used New York ports over those that used ports outside the state, even though both the beneficiaries and victims of the discrimination were, by definition, engaged in significant interstate commerce: They were, after all, exporters. *See* 466 U.S. at 390-92.

As these cases confirm, the Commerce Clause does not just prohibit states from protecting commercial hermits who refrain from interstate commerce. In these and many other cases, this Court has not even paused to ask where the victims of the discrimination were domiciled or how much commerce they engaged in outside the state. The focus of these cases is on whether the state is favoring one party over another because the favored party is benefiting the local economy—for example, if a state is "discriminat[ing] *among* affected business entities according to the extent of their contacts with the local economy," *Lewis*, 447 U.S. at 42 (emphasis in original), or "impos[ing] greater burdens on economic activities taking place outside the State than ... on similar activities within the State," *Westinghouse*, 466 U.S. at 404-05. As the dissent below pointed out: "States have an economic interest not only in 'mom and pop' businesses, but in all forms of local investment. So it ignores economic reality to focus narrowly on the location of ownership or headquarters. ... For instance, one fairly suspects that the city of Marysville, if forced to choose, would take the Honda plant over any homegrown business, and perhaps any dozen." App. 22a.

The Ohio Supreme Court's approach would hack a gaping hole in Commerce Clause protection. It would mean that a state could establish a direct advantage to its local economy by imposing tax penalties and regulatory bans to force businesses of all sorts to make inefficient choices to the detriment of consumers but to the benefit of the state economy. The only constraint on the state would be to exercise the slightest modicum of caution in choosing winners and losers. The state would merely have to make sure that its statutory scheme advantaged at least one company that engaged in transactions that cross state lines, such as ordering raw materials from out of state or selling products outside the state. It is hard to imagine a protectionist measure that does *not* satisfy this test. The Ohio Supreme Court's standard is an open invitation to every state to do exactly what the Commerce Clause prohibits: to "'legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.'" *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 259 (4th ed. 1873)).

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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