Nos. 14-1499 and 14-1524

IN THE

Supreme Court of the United States

DIRECTV, LLC AND DISH NETWORK, L.L.C.,
PETITIONERS,

v.

COMMONWEALTH OF MASS. DEPT. OF REVENUE,
RESPONDENT.

DIRECTV, INC. AND ECHOSTAR SATELLITE L.L.C.,
NOW KNOWN AS DISH NETWORK L.L.C.,
PETITIONERS,

v.

RICHARD H. ROBERTS, COMM. OF REVENUE,
STATE OF TENNESSEE,
RESPONDENT.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS AND THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF *AMICI CURIAE* OF FORTY-SEVEN CONSTITUTIONAL LAW PROFESSORS SUPPORTING PETITIONERS

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I. INTRODUCTION AND STATEMENT OF AMICUS INTEREST

The amici are forty-seven professors at law schools across the Nation, including leading Commerce Clause and constitutional scholars.[1] Their teaching and research interests give them substantial expertise on the application of the Commerce Clause to various forms of state and local regulation.[2]

The amici have no direct stake in this litigation, nor do they take a position on the correct ultimate resolution of this matter. The amici, however, have an interest in seeing Commerce Clause jurisprudence develop in a rational manner. Failure to review and correct the analytical framework reflected in the recent decisions below from the Tennessee and Massachusetts courts threaten that development. Specifically, the amici are concerned that the Commerce Clause principles adopted in these decisions cannot be squared with the Court's existing dormant Commerce Clause anti-discrimination framework and contribute to growing confusion among the lower courts as to the appropriate mode of

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of amici's intention to file this brief, and they consented to the filing. Under the Court's Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the individual amici and their counsel made such monetary contribution to its preparation or submission.

[2] Appendix A sets forth a list of all the amici on whose behalf this brief is submitted.

dormant Commerce Clause analysis—in particular, what it means to be "similarly situated" for dormant Commerce Clause purposes.

Under this Court's precedent, the dormant Commerce Clause inquiry proceeds in two steps. First, a reviewing court determines whether discrimination has occurred, and second, it determines whether the state has a legitimate justification for that discrimination. The "similarly situated" analysis occurs in the first step—discrimination refers to disparate treatment of "similarly situated" entities. And, given the dormant Commerce Clause's underlying goal of preventing economic protectionism, two entities should be treated as "similarly situated" if they directly compete with one another in the relevant market. The courts below instead adopted a misguided understanding of "similarly situated" that muddies dormant Commerce Clause analysis by incorporating the State's *justifications* for the alleged differential treatment—a step-two issue—into the step-one analysis. This is a distinction that matters, as different burdens of proof apply at the different stages. Compounding the problem, the courts allowed the states to point to minor government-imposed regulatory differences as a justification to find that entities are not similarly situated.

As a result of this flawed approach to the "similarly situated" inquiry, states will have an easier time placing a thumb on the scale between direct competitors, and, as here, offering benefits to those who serve the market through *in-state* activities (e.g., as here, hiring local workers or building local facilities), to the detriment of those who seek to compete for those same customers, in the same in-state market, through out-of-state activities. Should these decisions stand, local legislators can be expected to exercise this newfound freedom to discriminate by extending protectionist regimes to many local markets beyond the pay-TV market at issue here, all at the expense of the uniform national market that the Commerce Clause is designed to protect.

II. STATEMENT OF FACTS

1. The facts are largely undisputed and virtually identical in both the Massachusetts and Tennessee cases. Petitioners DirecTV, Inc. ("DirecTV") and Dish Network, LLC ("Dish") are satellite television providers. As the Tennessee court explained, the petitioners "compete for subscribers with cable providers." (Pet. App. in Case No. 14-1524 ("Tenn. Pet. App.") at 3a). Moreover, satellite providers and cable providers "are similar in several respects," (id.):

> Satellite providers, like cable providers, secure television programming by negotiating with programmers to obtain the rights to distribute programming content. Both use retailers, websites, and call centers to sell their programming packages to customers. Both provide their subscribers with equipment that receives and converts programming signals into content that can be viewed at the subscriber's home and rely upon technicians to install and service the home equipment. Both

> satellite providers and cable providers offer an array of programming packages for which they bill their subscribers monthly.

(Id.).

One way in which these competitors differ, however, is the level of in-state activity required to serve their respective customer bases. "Satellite providers collect and assemble program signals at uplink facilities located outside of the State." (Id. at 4a). "Satellites in geostationary orbits above the Earth receive the signals from the uplink facilities. From the satellites, the programming signals are beamed back down to Earth directly to customers." (Id. at 5a).

"In contrast to satellite providers, cable providers collect and assemble program signals at distribution points called 'headends.'" (Id. at 5a-6a). These headends are located in Massachusetts and Tennessee. From the local headends, the signals are transmitted through underground cables into distribution lines, all of which are physically located within the state.

"The different approaches to program assembly and distribution, besides demanding different levels of in-state infrastructure, produce differing in-state economic impacts." (Id. at 6a). Cable providers have invested over $1 billion in Tennessee, and employ more than 4,000 Tennessee residents. Satellite providers, by contrast, have very little by way of in-state employees or investment. (Id.).

Despite being in direct competition, satellite and cable providers are subject to differential sales taxes.

In Tennessee, the Legislature has exempted the first $15 of a cable bill from taxation, but has not provided the same exemption for satellite customers. (Id. at 7a-8a). Similarly, in Massachusetts, satellite providers are subject to an excise tax (which they pass on to their customers) that does not apply to cable providers. (Pet. App. in Case No. 14-1499 ("Mass. Pet. App.") at 7a). Under these tax structures, consumers who opt for satellite television pay a higher sales tax (or excise tax) than those who opt to receive their pay TV from cable providers.

2. Petitioners challenged these taxes on dormant Commerce Clause grounds. Both the Tennessee appeals court and the Massachusetts Supreme Judicial Court, applying similar analyses, rejected the challenges.

The Tennessee court began by noting that the "[n]egative Commerce Clause jurisprudence has never been a model of clarity or stability." (Tenn. Pet. App. at 12a). The court observed, however, that a "threshold question" is "whether satellite providers and cable providers are 'substantially similar entities.'" (Id. at 27a, quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)). According to the court, "DirecTV and Dish argue, not unconvincingly, that satellite providers and cable providers are substantially similar entities because consumers view satellite and cable as similar and substitutable." (Id.) Indeed, "[o]ne need look no further than his mailbox or television screens, where their commercials appear, for evidence that satellite providers and cable providers are ardent competitors for customers." (Id. at 27a-28a).

The court, however, *rejected* the argument that the similarly-situated inquiry turns on competition: "even where the entities are competitors, it does not necessarily follow that the entities are similarly situated." (Id. at 28a). Instead, the court concluded that the state could point to regulatory differences between the two entities to justify a conclusion that the entities are not similarly situated. (Id. at 29a ("Despite being competitors, satellite and cable providers do have an important distinction. Cable providers are heavily regulated by the federal government, while satellite providers are 'minimally' regulated.")). "The difference in regulatory treatment between satellite and cable and the resulting benefits inuring to cable customers mean that satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause." (Id. at 31a-32a).

The Tennessee Supreme Court denied review.

The Massachusetts Supreme Judicial Court likewise acknowledged that "[t]he satellite companies compete in the market for video programming services primarily with cable companies …." (Mass. Pet. App. at 3a). The court nonetheless concluded, like the Tennessee appeals court, that satellite and cable providers are not "similarly situated" for dormant Commerce Clause purposes. (Id. at 12a-13a). One of the factors underlying the court's conclusion was its determination that cable and satellite providers are subject to different regulatory obligations: "we therefore consider the fact that each of these types of company is subject to unique [statutorily-imposed] obligations in connection with the privilege of selling video programming services to Massachusetts consumers." (Id. at 17a). The court considered, for example, that cable is "a veteran industry with well-established methods of operation, [and] has long been subject to an extensive scheme of Federal regulation." (Id. at 23a). Based on the "divergent regulatory regimes that govern the cable and satellite companies' respective obligations," the court concluded that they were not similarly situated for Commerce Clause purposes, notwithstanding that they directly compete. (Id. at 24a-25a).

III. SUMMARY OF ARGUMENT

Decisions like the two below here threaten to upset settled understandings regarding the scope of permissible state regulation under the dormant Commerce Clause. Dormant Commerce Clause analysis is supposed to proceed according to a two-step framework. First, a court must rigorously evaluate whether the challenged state law has the purpose or effect of discriminating against interstate commerce. Second, if so, the State must show that the discrimination is justified. The decisions below, however, adopt an understanding of "similarly situated"—a concept used in the first step of the analysis—under which the state's *justifications* for the discrimination become part of the threshold "similarly situated" inquiry. Moreover, they do so in a way that broadly insulates state laws from dormant Commerce Clause scrutiny—as long as the State can cite some small difference in the regulatory framework that governs the benefitted in-state parties and their burdened out-of-state competitors, the statute is *per se* non-discriminatory, thereby relieving the State of any burden to justify the differential treatment. As petitioners correctly note, this analytical framework reflects an ever-deepening split among the lower courts as to the contours of the "similarly situated" analysis. Even more importantly, this approach grants States broad new powers to shelter local markets from interstate competition, a result at odds with the doctrine's anti-protectionist roots, and contrary to consumers', and the nation's, interests.

IV. ARGUMENT

A. The Tennessee and Massachusetts decisions misread the Court's precedents in a way that increases the States' power to shield local markets from interstate competition.

1. The dormant Commerce Clause prohibits States from shielding local markets from interstate competition.

The Court has long recognized, and oft repeated, that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); see also, e.g., *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Baldwin*). Thus, the Court "has consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce … among the several States, Art. I, § 8, cl.3, contains, 'a further, negative command, known as the dormant Commerce Clause ….'" *Am. Trucking*, 545 U.S. at 433 (quoting *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995)).

This "negative command" is principally grounded in concerns about "economic Balkanization." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) ("Avoiding this sort of economic Balkanization and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence.") (citation and punctuation omitted). Stated alternatively, "[t]he point [of the dormant Commerce Clause doctrine] is to effectuate the Framers' purpose to prevent a State from retreating into the economic isolation that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (citations and punctuation omitted).

Consistent with its focus on preventing economic "Balkanization" and "isolation," the Court has held that the doctrine prohibits "economic protectionism." This prohibition is implemented through a strong anti-discrimination principle. States cannot seek to tip the competitive scales by discriminating in favor of in-state entities by burdening their interstate competitors:

> It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the

> States, but also directly limits the power of the States to discriminate against interstate commerce. This "negative" aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988) (citations omitted); see also, e.g., *Davis*, 553 U.S. at 337-38 (quoting *Limbach*).

So, for example, in *Limbach*, the Court struck a statute that provided fuel dealers a credit against the Ohio motor vehicle fuel sales tax for sales of ethanol that had been produced in-state, but lacked a similar tax credit for ethanol produced out-of-state, creating a competitive disadvantage for out-of-state ethanol producers. See *Limbach*, 486 U.S. at 272-73, 280. Similarly, in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the Court struck a Massachusetts statute whose "avowed purpose and … undisputed effect [were] to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States," which the statute accomplished by effectively imposing a tax on out-of-state milk that did not apply to in-state milk. Id. at 194-95. In both cases, the States violated the Commerce Clause by favoring in-state entities and burdening their out-of-state competitors.

2. The Court's jurisprudence implements this anti-protectionist mandate through a two-step analysis.

The dormant Commerce Clause's basic analytical framework is well settled. The anti-discrimination analysis (as opposed to the *Pike* balancing test) proceeds according to a two-step inquiry. The first step asks whether the statute discriminates, whether facially, in purpose or in effect, against interstate commerce. See, e.g., *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("[W]e have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'") (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). If it does, at the second stage, the state must justify that discrimination by showing that the discrimination is necessary to achieve a legitimate local purpose, and that there is no reasonable non-discriminatory means for accomplishing the same objective.[3] See, e.g.,

[3] If the state statute survives the two-step test, the challenger can still seek to invalidate the rule under the *Pike* balancing test. To succeed, the challenger must show that the burden the statute imposes on interstate commerce is clearly excessive compared to the local benefits that the State seeks to achieve. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* test is not demanding. As the Court has observed, "State laws frequently survive this *Pike* scrutiny." *Davis*, 553 U.S. at 339.

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338-39 (2007).

The two steps are necessarily separate inquiries. In determining whether discrimination *exists*, the State's purported *need* for the discrimination is irrelevant. Discrimination turns on the *fact* of the differential treatment or impact; while justification is the State's *explanation* of why that differential impact is acceptable. Consistent with that, the Court's cases look to the State's proffered reasons only *after* discrimination is established. See, e.g., *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977) (turning to justification after a finding of discrimination); *C&A Carbone v. Town of Clarkston*, 511 U.S. 383, 392-94 (1994) (same); cf. *Or. Waste*, 511 U.S. at 100 ("As we reiterated in *Chemical Waste*, the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.").

The Court has also made clear that not all differential treatment of in-state and interstate entities counts as "discrimination" for dormant Commerce Clause purposes. Rather, the challenger must show differential treatment among *substantially similar* entities: "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). If the entities are not "substantially similar," then the challenge fails at the first step, and the State is not required to justify its differential treatment.[4] The differential treatment is simply not "discriminatory" for dormant Commerce Clause purposes. See, e.g., *Davis*, 553 U.S. at 343.

It is the Tennessee and Massachusetts courts' formulation of "similarly situated" in the first step of the analysis that drives the need for review here.

3. Entities are "similarly situated" for Commerce Clause purposes if they compete against each other in the same market.

Given the focus in modern dormant Commerce Clause jurisprudence on prohibiting economic protectionism by preventing States from tipping the competitive scales in favor of local entities at the expense of interstate competitors, the Court's treatment of "similarly situated" directly incorporates notions of competition. In particular, because differential treatment is suspect when such treatment is directed at in-state and interstate *competitors*, the Court treats entities as "similarly situated" if the entities directly compete in a single market for the same consumers.

The focus on in-state and interstate *competitors* appears repeatedly throughout the Court's precedents. See *Davis*, 553 U.S. at 338 (doctrine directed at "regulatory measures designed to benefit in-state economic interests by burdening out-of-state *competitors*") (emphasis added); *United Haulers*, 550

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[4] As noted above, the challenger can still seek to show that the statute fails under *Pike*.

U.S. at 343 ("[W]hen a law favors in-state business over out-of-state *competition*, rigorous scrutiny is appropriate ….") (same); *Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("States may not enact laws that burden out-of-state producers simply to give a *competitive* advantage to in-state businesses.") (same). As Justice Jackson described it: "[E]very consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949).

Consistent with this emphasis on competition, in *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the Court struck a tax exemption for a liquor distilled from a native Hawaiian plant because the exemption created an advantage over competitors' liquors produced elsewhere. In doing so, the Court rejected Hawaii's argument that the local liquor did not compete with liquor coming from outside the State, concluding that even a small degree of competition between favored and disfavored entities creates a potential dormant Commerce Clause violation. Id. at 268–69.

Conversely, the Court has not hesitated to find discrimination lacking when the allegedly-benefitted and allegedly-burdened parties do not compete in the same market. As the Court explained in *Tracy*, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." 519 U.S. at 300. "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." Id. at 299.

In *Alaska v. Arctic Maid,* 366 U.S. 199 (1961), for example, operators of freezer ships that transported frozen Alaskan salmon out of state for canning challenged a tax that they were forced to pay, but which those ship operators who froze salmon for canning in Alaska did not pay. The Court rejected the challenge, finding that the former did not compete against the latter, but rather against the in-state canneries themselves. Thus, in assessing whether there was discrimination, the Court looked only to whether the allegedly favored and allegedly disfavored entities under the statute were *competitors*:

> The freezer ships do not *compete* with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their *competitors* are the Alaskan canners …. When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter.

Id. at 204 (emphasis added). In other words, the groups the Court compared for dormant Commerce Clause purposes were not defined by similarities in their methods of business operations (i.e., freezer ship operators who froze for out-of-state canneries and freezer ship operators who froze for in-state canneries), but rather by whether they *competed* with one another. Competition, not method of operation, was the key.

Similarly, in *Tracy*, where the market participants at issue competed in one market (the "noncaptive market" for unbundled natural gas), but did not compete in another (the "captive market" of residential users who purchased natural gas bundled with delivery services), the Court began its Commerce Clause analysis by determining which market predominated. "Should we accord controlling significance to the noncaptive market in which [the in-state and interstate entities] compete, or to the noncompetitive, captive market in which the local utilities alone operate?" *Tracy*, 519 U.S. at 303-04. For various reasons relating to the historical development of the captive market and the local utilities' role in that market, the Court concluded that it should give "greater weight to the captive market." Id. at 304. As the two entities did not compete or even seek to compete in *that* market, they were not "similarly situated" for dormant Commerce Clause purposes. See id. In short, the determination of whether two entities are similarly situated[5] for

[5] There is another strand of "substantial similarity" analysis in cases involving public (i.e., State-owned or State-operated) entities and private entities. The Court has recognized that State ownership of an entity may be sufficient to prevent a finding of substantial similarity, without reference to whether the public and private entities compete in the same market. See, e.g., *Davis*, 553 U.S. at 341; *United Haulers*, 550 U.S. at 343-344; cf. Norman R. Williams & Brannon P. Denning, *The "New Protectionism" and the American Common Market*, 85

dormant Commerce Clause purposes turns on whether the entities are properly characterized as competing in a single market.

4. The Tennessee and Massachusetts courts adopted a flawed understanding of "similarly situated."

The Tennessee and Massachusetts courts adopted a different understanding of "similarly situated." While acknowledging that "satellite providers and cable providers are ardent competitors for customers," the courts concluded that the providers are not similarly situated for Commerce Clause purposes. Instead of competition, the courts looked to whether the two entities are subject to different *regulation*. This approach turns Commerce Clause analysis on its head. Ex ante, one would imagine that differential regulatory treatment is a ground for *finding* unlawful discrimination, not conclusive proof that such discrimination has *not* occurred.

In their opinions, the courts here directly considered and rejected the principle that "similarly situated" should turn on whether the two entities compete in the same market. According to the Tennessee court, "even where the entities are competitors, it does not necessarily follow that the entities are similarly situated." (Tenn. Pet App. 28a).

(continued…)

NOTRE DAME L. REV. 247 (2009) (arguing that sovereign protection exemption to dormant Commerce Clause should be narrowly construed).

And the Massachusetts court likewise held that the two are not similarly situated, notwithstanding its finding that "[t]he satellite companies compete in the market for video programming services primarily with cable companies …." (Mass. Pet. App. 3a).

Instead of competition, the courts focused on the regulatory treatment afforded the two entities. In the words of the Tennessee court:

> The difference in regulatory treatment between satellite and cable and the resulting benefits inuring to cable customers mean that satellite providers and cable providers are not substantially similar entities for purposes of the Commerce Clause.

(Tenn. Pet. App. 31a-32a). The Massachusetts court likewise found that the entities were not similarly situated, pointing in part to the "divergent regulatory regimes that govern the cable and satellite companies' respective obligations." (Mass. Pet. App. 24a). The court explained, for example, that under federal law, "cable companies must comply with standards concerning the technical operation and signal quality of their programming." (Id. at 23a). Likewise, "[t]hey are subject to minimum standards for office hours, telephone availability, installations, outages, service calls and billing." (Id.).

Both courts pointed to *Tracy* as support for this focus on regulatory differences in assessing substantial similarity. In fact, though, *Tracy* provides no such support. Instead, *Tracy* holds that where the allegedly favored and allegedly disfavored entities compete in some markets but not others, and the statute at issue is not limited in effect to the non-competitive market, then the court must determine which market predominates for Commerce Clause purposes. Whatever the correct analytical framework for that assessment, it is not relevant here. The taxes here directly and solely impact the single market in which both the favored entities (cable providers) and the disfavored entities (satellite providers) seek to compete. Thus, unlike *Tracy*, there is no need to determine which market predominates.

B. The Tennessee and Massachusetts decisions contribute to growing confusion among the lower courts regarding the scope of permissible discrimination.

Not only are the decisions below difficult to square with the Court's precedent, but they also reflect increasing confusion among courts as to when competing entities are "similarly situated" for dormant Commerce Clause purposes.

1. As the petitioners note, the First, Seventh, and Eleventh Circuits, along with the highest courts of Kansas, New Hampshire and Florida, have concluded that the "similarly situated" inquiry turns solely on *competition*. In *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986), for example, the First Circuit struck a Rhode Island statute that defined debt collection as the practice of law, finding that the statute was an impermissible attempt to protect local law firms from competition by interstate debt collection agencies. Id. at 289-90. In language directly applicable here, the court held that:

> By defining all debt collection as the practice of law, and limiting this practice to members of the Rhode Island bar, Rhode Island effectively bars out-of-staters from offering a commercial service within its borders and confers the right to provide the service—and to reap the associated economic benefit—upon a class largely composed of Rhode Island citizens.

Id. at 290. Of course, it is beyond dispute that Rhode Island lawyers are subject to a different regulatory regime—different educational, professional licensing, continuing education, and ethical requirements—than non-lawyer debt collection companies. Thus, under the decisions below here, the courts would have found that no impermissible discrimination exists, and would not even have put the State to the burden of justifying the statute, let alone struck the statute as the First Circuit did. See also *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 5, 15-16 (1st Cir. 2010) (holding that large and small wineries were similarly situated for Commerce Clause purposes even though the federal government regulates wineries differently depending on size).

Similarly, in *Cachia v. Islamorada*, 542 F.3d 839, 843-44 (11th Cir. 2008), the court entertained a challenge to a local zoning ordinance banning chain restaurants from opening local franchises. In allowing that challenge to go forward, the court rejected the defendant's argument that operational differences between chain restaurants and local restaurants meant that they were not similarly situated. Rather, the court properly found that the two types of restaurants were in direct competition and that the town's "prohibition of restaurants operating under the same name, trademark, menu or style is not evenhanded in effect, and disproportionately targets restaurants operating in interstate commerce." Id. at 843.

Finally, in *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), the court determined that regulations that "rais[ed] the costs of doing business for out-of-state entities, while leaving those of their in-state counterparts unaffected," constituted discrimination under the first step of the dormant Commerce Clause analysis. Id. at 1279 (punctuation omitted). Only *after* that finding did the Court turn to the State's purported justification for the law, unlike the courts here, which imported the justification analysis into the "similarly situated" inquiry. See id.

The high courts of three States have likewise concluded that competition is the key to the similarly situated analysis. In *In re CIG Field Services Co.*, 112 P.3d 138, 146 (Kan. 2005), the Kansas Supreme Court held that the "essential" inquiry is whether the two entities "serve the same market." In *Smith v. New Hampshire Department of Revenue Administration*, 813 A.2d 372, 377 (N.H. 2002), the court stated that "[e]ntities are substantially similar' or 'similarly situated' … when they compete against one another in the same market." Finally, in *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp*, 524 So. 2d 1000 (Fla. 1988), rev'd on other grounds, 496 U.S. 18 (1990), the Florida Supreme Court found discrimination because the benefited and burdened manufacturers were all in "direct competition" with one another. Id. at 1008. And, more recently, a Florida appeals court, in a case involving a challenge by satellite providers to a differential taxing scheme, confirmed that competition controls the "similarly situated" inquiry: "mere differences in how a service is provided is not enough to overcome the fact that companies compete in the same market and sell virtually identical products at retail." *DirecTV, Inc. v. State*, Nos. 1D13-5444 & 1D14-0292, ___ So.3d __, 2015 WL 3622354, at *4 (Fla. Dist. Ct. App. June 11, 2015).

2. At least four other Circuits, by contrast, have adopted the same flawed view of "similarly situated" reflected in the decisions below, in which competition is not the touchstone. Most recently, in *National Association of Optometrists & Opticians LensCrafters, Inc. v Brown*, 567 F.3d 521 (9th Cir. 2009), the Ninth Circuit held that opticians are not similarly situated to optometrists and ophthalmologists, despite undisputed evidence that both of these groups directly compete for eyewear sales, because the two groups are subject to different regulatory regimes. Id. at 525. The Sixth Circuit reached the same conclusion in *LensCrafters v. Robinson*, 403 F.3d 798, 804 (6th Cir. 2005), holding that optical stores are not similarly situated to licensed optometrists for dormant Commerce Clause purposes, despite direct competition, as optometrists are "healthcare providers."

Similarly, in *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493, 498 (5th Cir. 2001), the Fifth Circuit upheld a statutory scheme that made it unlawful to act as an automobile dealer without a license, while simultaneously making automobile manufacturers ineligible to obtain a license. In response to Ford's Commerce Clause challenge, the court concluded that manufacturers are not "similarly situated" to dealers, as manufacturers make cars, notwithstanding that manufacturer-owned dealerships and other automotive dealerships would directly compete with one another. Id. at 502-03. And, in *Brown and Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 215-16 (2d Cir. 2003), the court found that out-of-state and in-state cigarette retailers were not similarly situated, despite the obvious head-to-head competition between the two.

These decisions, which rely, among other things, on difference in *operational form* rather than *competition* in assessing whether entities are "similarly situated," reflect a fundamentally different understanding of the dormant Commerce Clause, and in particular the "similarly situated" standard, than *National Revenue Corp.* and similar cases. The Court should accept this case to determine which of these irreconcilably divergent views is correct.

C. Under Tennessee and Massachusetts's definition of "similarly situated," States will have nearly unbridled power to shield local markets from interstate competition.

The difference between the two approaches is not merely academic. Under the decisions here, States have vastly greater power to protect local entities by burdening their interstate competitors. A state legislature need only create a narrowly-defined category that it is comprised exclusively, or almost exclusively, of the local competitors, and then impose some differential requirement on that category of business entities—for example, a public access requirement, or an educational programming requirement. (See, e.g., Tenn. Pet App. at 24a (pointing to fact that "cable companies are required to devote a greater percentage of their channel capacity to public, educational, and government programming than satellite companies are" as one of the regulatory differences precluding a finding that the two are similarly situated)). Under the decisions below, the State is then free to directly burden the local entities' interstate competitors, secure in the knowledge that any dormant Commerce Clause attack will founder on the inability to show "discrimination" under the first prong of the dormant Commerce Clause test. The regulatory difference, no matter how slight, and even if it is created by the State as a gateway to protectionism, insulates the differential treatment from review, meaning that the State need not even offer a justification for the disparity.

As the facts here indicate, concerns about the possibility of such protectionism are all too real. State legislatures can be subject to strong entreaties from local businesses to provide protection from the rigors of interstate competition. Indeed, the Massachusetts decision referred to a letter to the legislature from a cable lobbyist that included the following:

> "Satellite TV companies have long enjoyed a one-way relationship with Massachusetts, selling their service here but giving almost nothing back. … Nor do satellite companies make investments in the economy of community, as cable providers do. Comcast alone, for example, employs more than 5,000 people in Massachusetts who collect more than $336 million in salary and benefits."

(Mass. Pet. App. 26a). The Tennessee decision likewise noted comments from a deputy commissioner for the state department of revenue, to the effect that "[i]n … [the] original bill, satellite television customers got the same sales tax exemption that cable companies got, but by the time the cable people were through with it, they (satellite customers) got no exemption," and arguments from a cable lobbyist that "cable companies have millions of dollars invested in Tennessee." (Tenn. Pet. App. 23a (quotations omitted; alterations in original). Amici do not comment on whether this legislative and lobbying history shows unconstitutional favoritism for in-state activities at the expense of out-of-state competitors, but Amici do urge that the potential for such lobbying shows that the protections afforded by the dormant Commerce Clause should not be subject to easy manipulation at the hands of state legislatures.

* * *

The dormant Commerce Clause is designed to prevent economic protectionism. To achieve that goal, "similarly situated" must be understood in terms of competition. Where States enact laws that tip the competitive scales in favor of competitors engaged in in-state activities, that constitutes discrimination. It is only *after* that determination is made that the State's justification for the disparate treatment, including any claim that regulatory differences justify the differential treatment, becomes relevant.

V. CONCLUSION

For the foregoing reasons, the amici urge the Court to grant certiorari.

Respectfully submitted,

July 21, 2015

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Amici are constitutional law scholars from across the country with substantial expertise on the dormant Commerce Clause. These individual amici are listed below. Their institutional affiliations are listed for identification purposes only, and the views reflected herein do not reflect the views of the institution. The amici are:

- Lawrence A. Alexander, Warren Distinguished Professor of Law, University of San Diego School of Law
- William D. Araiza, Vice Dean and Professor of Law, Brooklyn Law School
- Larry Catá Backer, W. Richard and Mary Eshelman Faculty Scholar and Professor of Law, Professor of International Affairs, Pennsylvania State University
- Fletcher Baldwin, Jr., Chesterfield Smith Professor of Law Emeritus, University of Florida, Levin College of Law
- Loftus Becker, Professor of Law, University of Connecticut School of Law
- Erwin Chemerinsky, Founding Dean, University of California, Irvine School of Law
- Robert N. Clinton, Foundation Professor of Law, Sandra Day O'Connor College of Law, Arizona State University
- Richard B. Collins, Professor of Law, University of Colorado Law School

- Randall T. Coyne, Frank Elkouri and Edna Asper Elkouri Professor, The University of Oklahoma College of Law
- David R. Dow, Cullen Professor, University of Houston Law Center
- Melvyn R. Durchslag, Professor of Law, Case Western University School of Law
- Peter Edelman, Carmack Waterhouse Professor of Law and Public Policy, Georgetown University Law Center
- Jonathan Entin, David L. Brennan Professor of Law and Professor of Political Science, Case Western Reserve University
- Richard A. Epstein, Laurence A. Tisch Professor of Law, New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, The University of Chicago
- Jörg Fedtke, A.N. Yiannopoulos Professor in Comparative and International Law, Tulane University Law School
- Barry Friedman, Jacob D. Fuchsberg Professor of Law, New York University School of Law
- Stephen Gardbaum, MacArthur Foundation Professor of International Justice & Human Rights, UCLA School of Law
- David Goldberger, Professor Emeritus of Law, The Ohio State University–Moritz College of Law

- David Gray, Professor of Law, University of Maryland, Francis King Carey School of Law
- Lynne Henderson, Emeritus Professor of Law, UNLV–Boyd School of Law, Visiting Scholar, Stanford Law School
- L. Lynn Hogue, Professor of Law Emeritus, Georgia State University College of Law
- James Huffman, Dean Emeritus, Lewis & Clark Law School
- David Kairys, Professor of Law, Beasley Law School, Temple University
- Peter Linzer, Professor of Law, University of Houston Law Center
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