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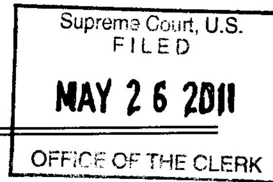

In The

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

---

BRIEF OF AMICUS CURIAE SPECIALTY WINE RETAILERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae Specialty Wine Retailers Association ("Amicus") is a nonprofit trade association that represents the interests of specialty wine retailers and the consumers they serve across the United States.[1] Its membership is diverse, spanning classic brick and mortar wine merchants, Internet-based wine retailers, wine cataloguers, auction retailers, mass-market merchants, and wine lovers who support and patronize these respective types of retailers. Amicus stands united in the view that national markets – whether they involve wine, liquor, or pay TV service – should be truly national in scope and operation. The goal of Amicus is to insure that the channels of commerce remain open, freed from protectionist tax burdens, so that consumers can choose for themselves from among all the available alternatives in the national market.

[1] Pursuant to Rule 37.6, Amicus certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Pursuant to Rule 37.3, the parties have consented to the filing of this brief. Counsel of Record for all parties received notice at least ten days prior to the due date of Amicus' intention to file this brief. Letters from the parties consenting to the filing of this brief are being filed simultaneously with this brief.

SUMMARY OF ARGUMENT

Through its decision to ignore decades of this Court's Commerce Clause jurisprudence, the Supreme Court of Ohio has provided much-needed assistance to state legislatures struggling with insurmountable budget deficits. In this case, the Supreme Court of Ohio avoided any consideration of the discriminatory purpose and effect for the offending state law and held that a more formalistic approach to Commerce Clause jurisprudence is required. Suffice it to say, the lower court's decision represents a course reversal when juxtaposed against the contemporary Commerce Clause jurisprudence of this Court. The benefits of the lower court's ruling will naturally accrue solely to intrastate businesses at the expense of the ever-growing number of businesses engaging in commerce across state lines. The decision of the Supreme Court of Ohio also has the clear and detrimental effect of both stifling business innovation and engendering uncertainty for interstate businesses at a most inopportune time in our Nation's economic history.

It is especially troubling for Amicus, whose members are routinely at the mercy of state legislatures advancing their own parochial interests at the expense of businesses who have operations outside of the state. The Supreme Court of Ohio's opinion will serve to erode many of the hard-fought Commerce Clause protections obtained by Amicus and innumerable other multistate businesses in the fight against protectionist state laws. The result: An unwanted

return to the days of textualism and/or formalism under the Commerce Clause as state legislatures employ legions of lawyers to craft laws in an effort to thinly-veil protectionist intent.

The Supreme Court of Ohio took the unwarranted step of limiting the application of the Commerce Clause to the increasingly rare instance in which the express language of a statute explicitly makes clear its preference for a business that is entirely in-state at the expense of an out-of-state business. This strained interpretation of the Commerce Clause relying wholly on a finding of facial discrimination– if replicated by other taxing jurisdictions – represents a clear and present danger to interstate businesses and our national economic union. Unable to effectively attack a facially neutral state law in the courts, interstate businesses will find themselves at the mercy of state legislatures – including those of our members who use the Internet to sell and ship wine to homes and businesses in towns across the Nation.

This Court has long since shunned a pure textual or formalistic approach to Commerce Clause jurisprudence. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 289 (1977) (stating that "formalism merely obscures the question whether the tax produces a forbidden effect") and *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959) (noting that formalism attributes constitutional significance to the use of "magic words or labels"). Specifically, this Court has looked beyond the words of a state law and made clear that the Commerce Clause applies

equally to statutes that distinguish between interstate businesses on the basis of whether one performs a specific economic activity in-state and the other performs the same activity more efficiently outside of the state. *See, e.g., Lewis v. BT Inv. Managers, Inc.* (1980), 447 U.S. 27, 42 n. 9 ("[D]iscrimination based on the extent of local operations is itself enough to establish the kind of local protectionism we have identified.").

This Court should grant certiorari to repair the damage the Supreme Court of Ohio has done to the Commerce Clause through its interpretation of this Court's decisions in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dept. of Treasury*, 490 U.S. 66 (1989). These two cases stand for a simple and unremarkable proposition: A statute that discriminates between two types of businesses does not violate the Commerce Clause unless it discriminates on the basis of geography. The Supreme Court of Ohio, however, interpreted *Exxon* and *Amerada Hess* as prohibiting any consideration of the underlying discriminatory purpose or effect of a state law where it is clear from its statutory language that differential treatment is premised on a distinction in "methods of operation." Not only is this an improper reading of *Exxon* and *Amerada Hess*, but the judicial application of such an exception, if it indeed exists, would serve to encourage judicial activism regarding when and on what basis two competing businesses are in fact engaged in different "methods of operation." The resulting uncertainty from this approach would have

the unfortunate effect of bringing interstate commerce to a screeching halt as businesses focus on intrastate commerce as a way to avoid the unpredictability of engaging in commerce across state lines.

As discussed below, this exception articulated by the Supreme Court of Ohio cannot be found in either *Exxon* or *Amerada Hess*. By misinterpreting the basis for the holdings in *Exxon* and *Amerada Hess*, the Supreme Court of Ohio has wrought havoc with Commerce Clause jurisprudence, and given license to state legislatures to enact discriminatory statutes. At a time when state budgets are in need of comprehensive solutions to their fiscal woes, the grant of such a license would be a grave error. Buoyed by the decision of the lower court, state legislatures will be presented with countless options to protect local businesses at the expense of multistate enterprises. Almost any discriminatory statute or regulation can be recast as a difference in the "methods of operation" of the favored and disfavored entities. This is especially true given the knowledge that the courts will refuse to consider anything other than the plain language of the statute when determining whether the state legislature acted with a discriminatory purpose.

In its laser-like focus on this Court's decisions in *Exxon* and *Amerada Hess*, the Supreme Court of Ohio failed to recognize another doctrinal foundation of the Commerce Clause. In a recent case of great interest to Amicus and its members, this Court made clear that it was impermissible under the Commerce Clause for a state law to dichotomize tax benefits

between in-state and out-of-state businesses based on the nature and extent of in-state economic investments. *Granholm v. Heald*, 544 U.S. 460 (2005). The principles articulated in *Granholm* form the bedrock of this Court's Commerce Clause jurisprudence. By failing to properly consider the long line of decisions of this Court ending in *Granholm*, the Supreme Court of Ohio's decision puts their constitutional significance at risk thereby undercutting many of the protections historically afforded by the Commerce Clause. This Court must grant certiorari to ensure that these protections – which are essential to the Framers' intent of a unified system of interstate commerce – remain intact.

The issues presented in this case are not limited solely to the satellite TV industry. Our members have been and continue to be embroiled, both directly and indirectly, in scores of these types of Commerce Clause challenges.[2] If the lower court's decision is permitted to stand, the wine and satellite TV industry are just the tip of the iceberg. It is not an

[2] *See, e.g., Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 432 (6th Cir. 2008) (holding that Kentucky "on premises" requirement for direct shipment of wine violated Commerce Clause; *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 218-219 (D. Mass. 2006) (Massachusetts statute that barred out-of-state liquor retailers from obtaining package store license violated Commerce Clause); *Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d 848, 864-866 (N.D. Tex. 2008) (holding that while law that limited right to ship wine to in-state consumers to in-state retail stores violated Commerce Clause, other in-state discriminatory requirements applied).

overstatement to say that the reach of the concerns raised herein is only limited by the creativity and imagination of state legislators and the lawyers they employ to draft discriminatory state laws.

For the reasons set forth below, we urge this Court to grant certiorari and ensure the free flow of commerce across state borders.

ARGUMENT

I. The Supreme Court of Ohio's Interpretation of the Holdings in *Exxon* and *Amerada Hess* is Misguided and Ignores this Court's Contemporary Commerce Clause Jurisprudence

The starting point for any review under the Commerce Clause is met by this Court's recognition of its "[d]uty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940). In this regard, this Court has been steadfast in its admonition to the States that "[i]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 544 U.S. at 472 quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994).

Importantly, this Court has been careful to avoid confining its Commerce Clause inquiry to the text of the offending state law. *See, e.g.*, *Complete Auto,* 430 U.S. at 279 (insisting on an approach to the Commerce Clause based on "economic realities") and *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980) (looking to the "practical effect of a challenged tax"). Further, the Court has expressly "declined to attach any constitutional significance to . . . formal distinctions that lack economic substance" in scrutinizing challenges to discriminatory state tax laws. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 405 (1984). So long as the statute discriminates against a business – whether in purpose or effect – on the basis of geographic location, it is unconstitutional under the Commerce Clause. *See, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-271 (1984) (holding a state tax invalid under Commerce Clause based on external evidence showing that law was enacted to promote the local industry) and *Family Wineries of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010) (holding that facially-neutral statute imposing "gallonage cap" had the discriminatory purpose and effect of altering the competitive balance between in-state and out-of-state wineries in violation of the Commerce Clause).

The Supreme Court of Ohio overlooked these basic constitutional principles when it held that any disparity between the tax imposed on satellite TV and cable TV was permissible under the Commerce Clause because the face of the law evidenced

differential treatment premised on the dissimilarity in the nature of their respective businesses. *See DirecTV, Inc.*, 941 N.E.2d 1187, 1196 (Ohio 2010). The lower court's analysis is faulty on several levels not the least of which is that it missed the most important part of the Commerce Clause analysis as articulated time and again by this Court – i.e., does the statute discriminate, in either purpose or effect, against satellite TV on the basis of the location of a specified economic activity?

The Supreme Court of Ohio brushed aside foundational cases such as *Granholm* and *Bacchus* relying instead on its labored interpretation of isolated language found in this Court's decisions in *Exxon* and *Amerada Hess*. Employing the use of "constitutional blinders," the lower court took the unprecedented step of looking to *Exxon* and *Amerada Hess* as providing an exception to what would otherwise be a violation of the Commerce Clause where the express language of a statute purportedly distinguishes between two types of businesses on the basis of their "modes of operation." *DirecTV, Inc.*, 941 N.E.2d at 1196.

The Supreme Court of Ohio's interpretation of *Exxon* and *Amerada Hess* as requiring only a facial review of an offending state law cannot be squared with holdings in each of these cases. A careful review of *Exxon* and *Amerada Hess* makes clear that this Court looked outside the text of the statutes to evaluate the nature and extent of any Commerce Clause violation. That is not to say that in *Exxon* and *Amerada Hess* this Court did not undertake a facial

review of the challenged state laws. To the contrary, in each case this Court demonstrated a calculated awareness that the facial inquiry was merely the first step of a multi-step analysis under the Commerce Clause.

Citing *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court in *Exxon* stated that a state law will have a discriminatory effect on interstate commerce where it can be shown that the result is "to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *Exxon*, 437 U.S. at 126, n. 16. Likewise, in *Amerada Hess*, the Court stated that "in the absence of discriminatory intent or a statute directed specifically at economic activity that occurs only in a particular location (as in *Bacchus Imports*), a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing State." *Amerada Hess*, 490 U.S. at 78, n. 10. As can be seen, and contrary to the view taken by the lower court in this case, the holdings in *Exxon* and *Amerada Hess* instruct a court to look beyond the language of a facially neutral statute and analyze its discriminatory purpose and intent.

Exxon and *Amerada Hess* stand for nothing more remarkable than the following: Where a statute discriminates between two similar competing businesses on the basis of a difference in the nature of

their operations, and the distinction drawn has nothing whatever to do with where specified business activities are performed, then it falls outside the scope of the Commerce Clause. *Exxon* and *Amerada Hess* did not create an exception to the Commerce Clause; they simply explained why statutes that arguably discriminated against a particular business did not violate the Commerce Clause.

In *Exxon*, the Supreme Court upheld a Maryland statute that prohibited oil producers and refiners from owning gasoline stations in the state. 437 U.S. at 121. The oil companies challenged the statute, arguing that it discriminated against them in favor of independent retailers, many of which were local businesses, in violation of the Commerce Clause. Id. at 125. The Court rejected this contention out-of-hand, concluding that the statute served the legitimate state purpose of "controlling the gasoline retail market." Id. at 124-125.

But the Court did not stop there. It proceeded to hold that the statute could not discriminate against interstate oil producers in favor of in-state competitors because there were "no local producers or refiners." *Exxon*, 437 U.S. at 125. *See also Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1007 (Fla. 1989) ("'most critical factor'" in *Exxon* was "absence of discrimination between interstate and local producer-refiners because there were no local producer-refiners") (citation omitted). Turning to the retail market, the Court determined that the statute placed "no barriers whatsoever" on local

competition because interstate dealers not owned by oil companies could freely compete with local retailers. Id. at 125-126. As such, the statute did not give preferences to local retailers and Maryland consumers continued to have access to a wide range of gas stations, all of which were supplied by the same oil producers and refiners. In other words, and as this Court later explained in *Lewis v. BT Inv. Managers*, *Exxon* dealt simply with a "statute [that] discriminated against vertical organization in the petroleum industry," because of the dangers that form of ownership created for consumers. *Lewis*, 447 U.S. at 41. It had nothing to do with the extent of oil producers' contacts with Maryland or any other form of location-based discrimination. *See Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 502 (5th Cir. 2001) ("The significant point of distinction, and why *Exxon* did not control *Lewis*, was because . . . the Florida statute [in *Lewis*] . . . discriminate[d] against affected business entities . . . according to the extent of their contacts with the local economy.").

Amerada Hess also involved oil producers, this time challenging a New Jersey statute that prevented them from deducting a federal "windfall profit" tax from their state tax returns. 490 U.S. at 70-71. The companies argued that the state's decision not to offer such a deduction discriminated against interstate commerce because only oil producers – none of whom were located in New Jersey – were required to pay the "windfall profit tax." Id. at 75-76. In rejecting this argument, the Court explained that the statute was

not limited to the "windfall profit tax," but applied more generally to *any* federal tax on "income or profits." Id. at 76. Because every company, regardless of location, is subject to the federal income tax, the Court concluded that the challenged statute did not "*discriminate[] on the basis of geographic location.*" Id. at 77 (citing *Bacchus Imports*, 468 U.S. at 271; emphasis added).

Since the oil producers in *Amerada Hess* had already conceded that a discriminatory purpose claim did not exist, the Court had no choice but to conclude that the statute at issue was "solely" about the mode of business. In other words, the intent of the challenged statute was to prohibit businesses whose profits were taxed at the federal level from deducting those taxes at the state level – not to "discriminate on the basis of geographic location." *Amerada Hess*, 490 U.S. at 77. Indeed, the Court acknowledged that the outcome of the companies' dormant Commerce Clause challenge might have been different if there was evidence that the state "single[d] out for special tax burdens a form of business activity that is conducted only in other jurisdictions." Id. (citation omitted).

In reaching its decision in this case, the Supreme Court of Ohio ignored these significant aspects of the *Exxon* and *Amerada Hess* decisions. Instead of focusing on those parts of the opinions that evaluated whether the challenged statute discriminated on the basis of location, *Amerada Hess*, 490 U.S. at 77-78, *Exxon*, 437 U.S. at 124-126, the lower court instead seized on a single isolated strand from each decision.

The lower court's constitutional analysis embodies a dangerous precedent that – if followed – infuses additional unwanted confusion for taxpayers, states and courts in addressing the tax consequences associated with conducting interstate business.

This Court should grant certiorari to confirm that *Exxon* and *Amerada Hess* do not provide a "modes of operation" exception under the Commerce Clause in the absence of a more in-depth analysis into the discriminatory purpose and effect of the challenged state law.

II. The Decisions of this Court are Clear that State Laws Discriminating Based on the Quality and Quantity of In-State Economic Activity are Invalid Under the Commerce Clause

In reviewing Commerce Clause challenges this Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). This fundamental precept of this Court's Commerce Clause jurisprudence has been repeated many times in many ways. In *Tully*, this Court stated that "a state may not encourage the development of local industry by means of taxing measures that 'invite a multiplication of preferential trade areas' within the United States, in contravention of the Commerce Clause." 466 U.S. at 406, quoting

Dean Milk, 340 U.S. at 356. Likewise, in *Halliburton,* this Court held that a state cannot encourage an out-of-state firm to become an in-state resident in order to compete on equal terms with local interests. *See Halliburton Oil Well Cementing Corp. v. Reily*, 373 U.S. 64 (1963), accord *Fulton Corp. v. Faulkner,* 516 U.S. 325, 333 n. 3 (1996).

To this day, the Commerce Clause doctrine articulated in *Halliburton* remains the touchstone of this Court. *See, e.g., Granholm*, 544 U.S. at 475 (citing *Halliburton*); *Fulton*, 516 U.S. 333, n. 3 (same); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 192 n. 6 (1995) (same); and *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 648 (1994) (same). As one would have it, the Court in *Amerada Hess* also reiterated the constitutional maxim found in *Halliburton*. In *Amerada Hess*, the Court outlined the foundational principles for reviewing challenges to state tax laws under the Commerce Clause and, citing *Halliburton*, observed that the Louisiana statute at issue in that case "had the discriminatory effect of imposing a greater tax on the same goods if they were manufactured outside Louisiana than if they were manufactured in the state, thereby creating an incentive to locate the manufacturing process within the state." *Amerada Hess*, 490 U.S. at 76. The same point applies in this case regarding the patent discriminatory effect of the Ohio law in penalizing out-of-state satellite TV businesses for their lack of in-state economic connections. Conversely, the Ohio law operates to subsidize cable companies doing

business in-state based on the nature of their in-state capital investments.

In perhaps this Court's most recent reaffirmation of the constitutional framework articulated in *Halliburton*, in *Granholm* this Court considered similar discriminatory statutes existing in both Michigan and New York. Michigan's statutory scheme banned out-of-state wineries from shipping directly to consumers while allowing in-state wineries to ship wine directly to consumers. On the other hand, New York did not expressly prohibit out-of-state wineries from the direct shipment of wine to consumers. However, New York's law required out-of-state wineries to have a physical presence in the state before they could make direct shipments of wine in the state. This physical presence requirement would make it prohibitively expensive for out-of-state wineries to compete with in-state wineries. This Court found that such marketing restrictions directed toward out-of-state manufacturers of wine were unconstitutional under the Commerce Clause. In striking down the New York law under the Commerce Clause as impermissibly penalizing out-of-state wineries for lacking a sufficient in-state economic presence, the Court in *Granholm* relied heavily on *Pike* and *Halliburton*. *See Granholm*, 544 U.S. at 475.

Almost without discussion, the Supreme Court of Ohio concluded that the principles articulated in cases such as *Granholm* were distinguishable. *DirecTV, Inc.*, 941 N.E.2d at 1196. The lower court took the tenuous position that unlike in cases such as

Granholm, "the Ohio tax does not protect local industries or treat in-state companies differently from out-of-state companies, nor does it provide a tax incentive for companies to move operations or direct business to Ohio." Id. By couching the analysis in such a manner, the lower court successfully avoided a head-on collision with the express holdings in *Halliburton* and *Granholm*. However, a fair reading of the Ohio law makes clear that it runs afoul of this Court's Commerce Clause decisions. Under the law, out-of-state satellite businesses are subject to a higher rate of tax in Ohio based solely on their lack of any economic investment in the state. On the other side of the coin, cable companies with substantial capital investments in Ohio benefit from an in-state tax subsidy. The end result of this taxing scheme is the promotion of unfair competition based entirely on the quality and quantity of the in-state investment. This Court's decisions in *Halliburton* and *Granholm* provide a sufficient basis for concluding that the Ohio law is invalid under the Commerce Clause.

III. The Supreme Court of Ohio's Decision Sets a Dangerous Precedent at a Perilous Time in Our Nation's Economic History

The financial health of the states is far from rosy. All 50 states are currently wrestling with record

declines in tax receipts.[3] Not surprisingly, states across the country are acting more aggressively in seeking new tax revenue streams. As the low hanging fruit is picked, state legislatures will need to be creative on how to close their intractable budget deficits. However, if history is a guide, certain of these strategies will not only be creative, but also constitutionally suspect.

States have a long and checkered history of intentionally using their tax systems to discriminate in favor of in-state businesses. To that end, the states have a menu of taxes with which to do their bidding.[4] Such discrimination has the unwanted effect of conferring an unfair competitive advantage on local businesses over out-of-state businesses. Over the last several years the states have interfered with free market competition in the alcoholic beverage industry,[5]

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[3] A Center on Budget and Policy Priorities Study shows that all 50 states had a budget gap in 2010. See Center on Budget and Policy Priorities, Recession Continues to Batter States' Budgets; State Responses Could Slow Recovery, Table 4 at p. 10, available at: http://www.cbpp.org/cms/?fa=view&id+711.

[4] For example, state and local governments have pursued discriminatory regimes with respect to sales and use tax, *Halliburton Oil Well Cementing Corp. v. Reily*, 373 U.S. 64 (1963); property tax, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); corporate income tax, *Hunt-Wesson, Inc. Franchise Tax Board*, 528 U.S. 458 (2000); and personal income tax, *Reich v. Collins*, 513 U.S. 106 (1994).

[5] *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

the meat industry,[6] the transportation industry,[7] the insurance industry[8] and the waste disposal industry.[9]

As the business community braces for what is sure to be an onslaught of constitutionally questionable state tax legislation, the *Amerada Hess* exception announced by the Supreme Court of Ohio threatens to eviscerate the primary defense employed by taxpayers is such conflicts – the Commerce Clause. Because the lower court's decision represents a clear roadmap for the unimpeded proliferation of discriminatory state tax legislation, it is critical that this Court grant certiorari before its effects spread to other states. Moreover, as more states latch on to the *Amerada Hess* exception articulated by the lower court, state courts across the Nation will be increasingly inundated with litigation seeking guidance regarding the application of this newly-created exception in the face of this Court's contemporary Commerce Clause jurisprudence to the contrary.

Any statute or regulation – including laws that are location-specific, as in this case – can be characterized as discriminating on the basis of "modes" of business or methods of operation. A prime example is the statute in *Granholm*, where the U.S. Supreme Court struck down a New York law prohibiting any

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[6] *Deukmejian v. Nat'l Meat Ass'n*, 469 U.S. 1100 (1985).

[7] *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987).

[8] *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

[9] *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992).

winery from directly shipping wine to New York customers, unless the winery had distribution operations in New York. 544 U.S. at 474. The statute there could easily have been characterized as being based on a difference in delivery models – in particular, the difference between direct shipment of wine from anywhere, on the one hand, and distribution of wine from brick-and-mortar in-state distribution centers, on the other. The *Granholm* court, however, had "no difficulty concluding that New York . . . discriminates against interstate commerce through its direct-shipping laws." 544 U.S. at 476.

The Supreme Court of Ohio's flawed interpretation of *Exxon* and *Amerada Hess* is deeply troubling for Amicus and its members. The wine industry has been and continues to be subject to a plethora of discriminatory statutes and regulations that limit, and in some cases outright prohibit, their sale of wine to out-of-state consumers. The Supreme Court of Ohio's Commerce Clause analysis leaves a shell of a constitutional doctrine, and exposes out-of-state manufacturers, distributors, and retailers – particularly those that operate primarily through the Internet – to the uncertainty of protectionist legislation in all 50 states. Its ruling will be the centerpiece of states' efforts to defend statutes and regulations that discriminate – both in purpose and effect – against out-of-state wine producers, merchants and retailers.

In sum, the Supreme Court of Ohio's opinion puts millions of Americans at risk of losing the wide selection of goods and services that they have become

accustomed to purchasing at the lowest possible price, by unconstitutionally discriminating against businesses on the basis of the location of their operations.

CONCLUSION

The decision of the Supreme Court of Ohio has fostered an area of legal uncertainty and instability as it pertains to the proper analysis under the Commerce Clause for evaluating interstate discrimination. Such legal uncertainty impacts businesses across the Nation and threatens the interest of the business community therein. Amicus believes that the Court's guidance and review is much needed in this case.

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

Respectfully submitted,

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May 26, 2011

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